July 31, 2013

Mr. Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
White House Office of Management & Budget

Dear Mr. Shelanski:

The Natural Resources Defense Council (NRDC) respectfully submits the following comments in response to the Office of Management and Budget (OMB)'s request for comments on its *Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations*, 78 Fed. Reg. 29,780 (May 21, 2013) ("Draft Report"). The Draft Report discusses the costs and benefits of federal regulations and includes recommendations that, among other things, aim to facilitate "public participation and foster[] transparency."[1]

As the Draft Report acknowledges, the Environmental Protection Agency (EPA) is one of two agencies that issued the majority of the rules identified in the report. NRDC, as an international, non-profit organization of scientists, lawyers, economists and other environmental specialists dedicated to protecting public health and the environment, has participated in the rulemaking process for many of the EPA rules identified in the report. NRDC has more than 1 million members and activists nationwide. In its forty year history, NRDC has participated in numerous EPA rulemakings and, in particular, EPA Clean Air Act rulemakings.

Since the Draft Report identifies that EPA clean air rules make up a majority of both benefits and costs to the federal government, we submit these comments drawing especially upon our experiences with rulemakings under the Clean Air Act. First, we encourage OMB to adopt alternative approaches to traditional Cost-Benefit Analysis (CBA). Second, we provide a number of transparency and openness suggestions that will ensure more timely review of rules and allow for more effective public engagement. We

[1] OIRA, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT at 5 (2013) [hereinafter DRAFT REPORT].

have attached as an appendix to these comments a set of comments submitted to OMB by NRDC in 2009 addressing similar issues. Those comments, and the recommendations provided therein, remain relevant to the finalization of the 2013 Report to Congress.

I. The Clean Air Act and Cost-Benefit Analysis

The Draft Report finds that the aggregate benefits of federal regulation outweigh costs by at least 2.3:1, and could outweigh costs by as much as 14.1:1.[2] EPA clean air rulemakings play a central part in OMB's calculations regarding the costs and benefits of federal regulation. Specifically, the Draft Report notes that the "estimated benefits and costs associated with the [EPA] clean air rules provide a *majority of the total benefits and costs across the Federal Government*."[3]

EPA issued 32 of the 115 "Major Federal Rules" identified in the report within the ten year window of October 1, 2002 to September 30, 2012.[4] These 32 rules had benefits ranging from $112 to $637.6 billion with costs from $30.4 to $36.5 billion.[5] Taken as a whole, the benefits of all of EPA's standards outweighed the costs by at least 3:1, and by as much as 21:1. Further, 21 of these 32 rules were issued by the EPA Office of Air and Radiation.[6] According to OMB's estimates, EPA's clean air rules provided between 57 - 79% of the benefits of *all* federal regulation.[7]

A recent EPA report studying the Clean Air Act came to similar conclusions.[8] The report found that as of 2010, the Clean Air Act had produced annual benefits of $1.3 trillion, with compliance costs of only $53 billion. The report also projected future benefits and costs of Clean Air Act standards into 2020, finding that the benefits of the Act's standards at that time will be $2 trillion annually, with costs in 2020 of only $65 billion. The report's central estimate of the total annual benefits of clean air standards outweighed the costs by at least 31:1.

Moreover, these monetized costs and benefits are more than just dollars – they represent the hundreds of thousands of lives saved from reduced air pollution, the thousands fewer asthma attacks that children will suffer each year, and the millions fewer missed days of work and school that Americans will avoid each year due to improved air quality. EPA's report found that in 2010 alone, the Clean Air Act prevented

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[2] *Id.* at 11 (Table 1-1).
[3] *Id.* at 15 (emphasis added).
[4] *Id.* at 13 (Table 1-2).
[5] *Id.* at 11 (Table 1-1).
[6] *Id.* at 13 (Table 1-2).
[7] *Id.*
[8] *See* EPA, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, Rev. A (Apr. 2011), *available at* http://www.epa.gov/oar/sect812/feb11/fullreport_rev_a.pdf.

164,300 premature deaths, 13 million days of work loss and 3.2 million days of school loss due to pollution-related illnesses.[9] The Clean Air Act is one of the most successful pieces of public health legislation ever written. In addition to its highly favorable monetized benefit to cost ratios, the Act has driven real reductions in air pollution that save lives and make the air safer for our families to breathe.

However, traditional CBA is a blunt and at times affirmatively unlawful tool when applied to these life-saving standards. First and foremost, the Clean Air Act precludes the consideration of costs in certain regulatory contexts. For example, in *Whitman v. American Trucking Ass'ns., Inc.*, all nine Justices agreed that the Clean Air Act "unambiguously bars cost considerations from the [national ambient air quality standard]-setting process."[10] The Court ruled that the EPA Administrator must base national ambient air quality standards for pollutants such as particulate matter and ozone on health and scientific factors alone when determining what amounts of air pollution are harmful for humans to breathe. This ruling, along with others addressing other sections of the Act, speaks to the Act's goals of protecting health while cleaning the air.

Like the NAAQS' statutory directive to set standards "to protect the public health," "allowing an adequate margin of safety,"[11] some aspects of Clean Air Act rulemakings are simply incompatible with CBA. The Clean Air Act requires EPA to take into account certain unquantified and unquantifiable benefits (and costs) in order to comply with the letter and spirit of the Act as written by Congress.

What's more, even as an analytical tool, CBA consistently undervalues the benefits of clean air standards, while overestimating costs. For example, CBA employed by OIRA essentially never assigns monetized benefits to reductions in hazardous air pollutants, due not to an absence of benefits but due to the inadequacy of economic tools for calculating real health benefits. Further, the Clean Air Act itself is driven by statutory considerations distinct from monetized costs and benefits alone. These same concerns are equally true for CBA when applied to other health, safety, and environmental standards.

a. Monetization of Costs and Benefits

Using CBA to inform environmental decision-making is highly problematic. As such, it is important that CBA not replace or supplement the decisional criteria written into underlying statutory authorities. To the extent that CBA is merely used as an informational tool, OMB should work to reduce its inherent flaws.

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[9] *Id.* at 5-25.
[10] 531 U.S. 457, 471 (2001).
[11] 42 U.S.C. §7409.

The Draft Report itself notes the tensions inherent in applying CBA to certain rulemakings, concluding that:

> it is not always possible to quantify or monetize relevant benefits or costs of rules . . . . Some regulations have significant non-quantified or non-monetized benefits [. . .] and costs that are relevant under governing statutes and that may serve as a key factor in an agency's decision to promulgate a particular rule."[12]

Nowhere is this truer than in the Clean Air Act. Using this statute and its history as an example, the weaknesses of traditional CBA as applied to certain laws is manifest. With regards to environmental regulations, CBA tends to overestimate costs and underestimate benefits.

First, it has been found that cost estimates are inflated because they often fail to account for the efficiency of a market economy in responding to a new constraint. For example, in the 1990s the costs of the acid rain control program turned out to be far below government or industry estimates because the estimates did not properly account for innovation leading to lower costs over time.[13] These standards, once painted as crippling to industry, went on to be some of the agency's most successful, with some of the highest benefit to cost ratios.

On the other hand, despite the favorable net benefits OMB notes, the benefits of environmental regulation are often underestimated because they are too difficult to quantify or monetize. Taking EPA's recent Mercury and Air Toxics Standards (MATS) as an example, these embedded problems are evident.[14] This landmark clean air standard for the first time sets national standards to limit mercury, dioxin, acid gases, and more than 60 other toxic air pollutants emitted by power plants. These facilities are the nation's largest anthropogenic source of many of these pollutants, and it is entirely appropriate (and compelled by law) that they limit this deadly pollution.

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[12] DRAFT REPORT, *supra* note 1, at 9.
[13] Dallas Burtraw et al., *The Costs and Benefits of Reducing Acid Rain* (Res. for the Future, Discussion Paper 97-31-REV, 1997), *available at* http://www.rff.org/documents/RFF-DP-97-31-REV.pdf.
[14] National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 *et seq*. (Feb. 16, 2012)

Due simply to methodology limitations EPA is unable monetize the benefits of reducing toxic air pollution in these air toxic standards.[15]. The agency noted that

> [t]here are some costs and important benefits that EPA could not monetize, such as other mercury reduction benefits and those for the [hazardous air pollutants] other than mercury being reduced by this final rule.[16]

Although the agency has tools that enable it to roughly monetize some benefits from reducing mercury emissions, the same tools do not exist to monetize benefits from the more than 60 other air toxins that power plants release. Though these benefits are not monetized, they are certainly valuable. Eliminating known carcinogens and deadly toxins from the air we breathe is a highly beneficial goal.

In fact, the great importance of these "unquantifiable" benefits can be seen in the 1990 Amendments to the Clean Air Act themselves. Faced with slow progress setting toxic air pollution standards for air pollution, in 1990 Congress created the Clean Air Act's Maximum Achievable Control Technology (MACT) program. It requires the most protective, rigorous standards for controlling toxic air pollution, out of recognition that Americans were being exposed to neurotoxins, carcinogens and other deadly pollutants.

The approach taken in the 1990 Amendments to the Clean Air Act suggests the importance of the so-called "precautionary principle." The precautionary principle formalizes the common sense notion that it is better to be safe than sorry, and abiding by it often means taking protective action before there is complete information. While CBA works best when there is certain and comprehensive information, the National Academy of Sciences has spoken to the importance of a precautionary approach with respect to air pollution regulation, recognizing that:

> Even great uncertainty does not imply that action to promote or protect public health should be delayed. Decisions about whether to act, when to act, and how aggressively to act can only be made with some understanding of the likelihood and consequences of alternative courses of action. The potential for improving decisions through research must be balanced against the public health costs incurred because of a delay in the implementation of controls. Complete certainty is an unattainable ideal.[17]

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[15] U.S. EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-452/R-11-011 December 2011, at ES-1 *available at* http://www.epa.gov/mats/pdfs/20111221MATSfinalRIA.pdf.

[16] *Id.*

[17] NAT'L RESEARCH COUNCIL, ESTIMATING THE PUBLIC BENEFITS OF PROPOSED AIR POLLUTION REGULATIONS 126 (2002).

For these reasons CBA can be a defective tool in the realm of environmental regulation in general, and clean air regulation in particular. Nonetheless, since CBA will likely be used as an analytical tool to assess certain EPA rulemakings, we address some clean air-related CBA concerns often brought up by industry.

i. Inclusion of Co-benefits in Clean Air Benefits Calculations

OMB states that "consideration of co-benefits, including the co-benefits associated with reduction of particulate matter, is consistent with standard accounting practices and has long been required under OMB Circular A-4."[18] In recent statements, industry lobbyists have attempted to argue against this proposition.[19] They assert that it is somehow untoward for EPA to consider the co-benefits of its regulations.

However, as OMB correctly notes, this practice has been followed by not just the Obama Administration, but the Clinton and Bush Administrations before it. Not only is the consideration of co-benefits a longstanding practice,[20] but it is also entirely appropriate. When attaining a health-based standard or technology-based hazardous air pollutant standard, for example, has the collateral benefit of reducing other types of dangerous air pollution, there is no defensible reason to ignore or hide these reductions. These particulate matter (so-called "$PM_{2.5}$") reductions happen because of the chemical makeup of the pollutants at issue. $PM_{2.5}$ pollution is necessarily and unavoidably reduced by the implementation of control devices aimed at limiting other pollutants like mercury. Further, $PM_{2.5}$ reductions lead to real and substantial health benefits. Recognizing and taking into account these benefits simply affirms the science behind air pollution and the reality of pollution control device operations, and EPA should be commended for responsibly recognizing the full range of benefits flowing from their regulations.

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[18] DRAFT REPORT, supra note 1, at 15.

[19] *See*, *e.g.*, Statement of Jeffery R. Holmstead, Counsel to Electric Reliability Coordinating Council, to U.S. Subcommittee on Environment and Public Works, Review of Mercury Pollution's Impacts to Public Health and the Environment (Apr. 17, 2012), at 3–4, *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=66318c87-2b64-4c85-9a57-c569c6b61a5a.

[20] *See*, *e.g.*, these regulatory impact analyses by the Bush administration EPA calculating the co-benefits from reducing $PM_{2.5}$ and NO_x emissions under Clean Air Act section 112 standards covering hazardous air pollutants:
http://www.epa.gov/ttnecas1/regdata/RIAs/RICERIA-finalrule.pdf (ch.8);
http://www.epa.gov/ttnecas1/regdata/RIAs/indboilprocheatfinalruleRIA.pdf (ch.10);
http://www.epa.gov/ttnecas1/regdata/RIAs/pcwp-finalruleRIA.pdf (ch.3); &
http://www.epa.gov/ttnecas1/regdata/RIAs/stationary_si.pdf (ch.6).

ii. Regulation and Jobs

A traditional line of attack used to disparage regulation as a whole is that regulation, in whatever form, kills jobs. Instead, numerous studies have shown that the opposite is true. In the context of environmental regulation, we note the Draft Report's citation to a Kahn study concluding that "it appears that regulation under the Clean Air Act has helped, and not economically harmed, the 'have nots.'"[21] Numerous other studies come to similar conclusions, finding there is evidence to suggest that regulation, and in particular environmental regulation, actually has a *positive* impact on jobs.

To name a few, a 2008 study by Bezdek et al. found that while environmental protection both creates and displaces jobs, the net effect on employment is positive.[22] Further, a recent 2013 study by the Natural Resources Defense Council found that implementing carbon standards would have a positive national impact on jobs.[23] The Economic Policy Institute recently published a study reviewing a wide swath of data and concluded that public protections "do not tend to significantly impede job creation."[24] In particular, studies on the economy-wide impacts of environmental regulations have "consistently failed to find significant negative employment effects"[25]

II. Transparency, Timelines, and Eliminating Delay

Executive Order (EO) 12,866[26] provides clear deadlines for OMB reviews. Section 6(b) of EO 12,866 states that:

> OIRA shall, to the extent permitted by law, adhere to the following guidelines:
>
> (1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.
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> (2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

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[21] DRAFT REPORT, *supra* note 1, at 51.
[22] Roger H. Bezdek et al., *Environmental Protection, the Economy, and Jobs: National and Regional Analyses*, 86 J. ENVTL. MGMT. 63 (2008).
[23] Laurie T. Johnson & Dan Lashof, *Less Carbon, More Jobs, Lower Bills: Protecting Future Generations from Climate Change, Starting with Power Plants* (Natural Res. Defense Council, Issue Brief 13-07-A, 2013), *available at* http://www.nrdc.org/globalwarming/files/less-carbon-more-jobs-IB.pdf.
[24] Issac Shapiro & John Irons, *Regulation, Employment, & the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011), *available at* http://www.epi.org/publication/regulation_employment_and_the_economy_fears_of_job_loss_are_overblown/.
[25] *Id.*
[26] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

> (A) For any notices of inquiry, advance notices of proposed rule-making, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;
> (B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and
> (C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.[27]

In practice, the aims of Section 6(b) are rarely met. A recent report by the Center for Progressive Reform found that 12% of *completed* reviews violated EO 12,866.[28] Even more alarming are the statistics on those reviews that are not yet complete; as of April 26, 2013, 24 of the 149 rules under review had been at OIRA since 2011 and three had been there since 2010.[29] NRDC urges OMB to abide by the timetable provided in EO 12,866 and reduce these unnecessary and burdensome delays.

In addition to these lengthy delays, too much of what goes on at OMB is kept hidden from the public. A general principle of our regulatory system is that it "allows for public participation and an open exchange of ideas."[30] OMB needs to remain committed to the values of transparency and disclosure as outlined in EO 12,866 and affirmed by President Obama.

The consequences of a system lacking transparency and disclosure were clearly on display during the 2011 ozone NAAQS review. In 2011, EPA submitted its final NAAQS for ozone pollution to OMB for review, at which point the rule – like all Clean Air Act Rules – should have been made publicly available. In this way the public can see the before-and-after versions of clean air rules to clearly see any changes wrought by

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[27] Exec. Order No. 12,866, at § 6(b)(1)–(2) (issued by President Clinton) (Affirmed by President Obama in Exec. Order No. 13,563 (Jan. 18, 2011)).
[28] Center for Progressive Reform, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (White Paper #1111ES, Nov. 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111es.pdf.
[29] Lisa Heinzerling, *Who is Running OIRA?*, UNIV. OF PA.: REGBLOG, (Apr. 29, 2013), https://www.law.upenn.edu/blogs/regblog/2013/04/29-heinzerling-oira-review.html.
[30] Exec. Order No. 13,563, 78 Fed. Reg. 3821 (Jan. 18, 2011).

OMB and reach their own conclusions as informed citizens about potential political interference.

However, not long after submittal, President Obama asked the then-EPA Administrator, Lisa Jackson, to withdraw the rule.[31] The President cited the "importance of reducing regulatory burdens and regulatory uncertainty as our economy continues to recover."[32] As noted above, the Supreme Court, in a 2001 decision unanimously held that precisely these types of economic considerations were prohibited when reviewing or setting NAAQS. The ozone NAAQS were nonetheless ultimately withdrawn based on unlawful economic considerations.

Violations of transparency and disclosure safeguards like this should not be permitted to recur. President Obama specifically directed the federal government that "[n]ondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve."[33] Both OMB and the public at large would be well-served if OMB more closely complied with EO 12,866 and the President's memorandum.

Below, please find a list of recommendations in line with these comments. We thank you for the opportunity to provide input on your Draft Report.

III. Recommendations

1. It is the view of NRDC that OMB should respect the statutory authority of the federal agencies and their issue expertise during the rulemaking process.

2. NRDC strongly supports the principles of transparency and disclosure in government. Executive branch input on proposed agency regulations should be included in the administrative record for judicial review of final agency rules, except where prohibited by law.

3. NRDC strongly supports increased public participation in the decision making process, an important component to democracy.

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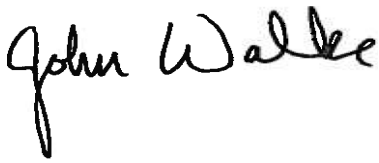
[31] Press Release, Statement by the President on the Ozone National Ambient Air Quality Standards, (Sept. 2, 2001), http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards.
[32] *Id.*
[33] Office of the President, Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

4. NRDC strongly recommends that CBA not replace or supplement the decisional criteria of the underlying statutory authority, and that to the extent it is used as an informational tool, the administration should work to reduce its serious flaws.

5. NRDC strongly recommends that OMB do all it can to reduce unnecessary and burdensome delays in the review process, and that the agency comply with Executive Order 12,866 and its timelines for review.

6. NRDC strongly supports OMB's commitment to moving toward more transparency and disclosure in the rulemaking process.

Sincerely,



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