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By Electronic Submission to [www.regulations.gov](http://www.regulations.gov)

Administrator Andrew Wheeler  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW Washington D.C. 20460  
Docket ID No. EPA-HQ-OAR-2020-0044

**Re: COMMENTS ON PROPOSED RULE: “INCREASING CONSISTENCY AND  
TRANSPARENCY IN CONSIDERING BENEFITS AND COSTS IN THE CLEAN AIR  
ACT RULEMAKING PROCESS,” 85 Fed. Reg 35,612 (June 11, 2020)**

Administrator Wheeler:

On behalf of the Chesapeake Bay Foundation and the National Parks Conservation Association, the Emmett Environmental Law & Policy Clinic at Harvard Law School respectfully submits these comments on the Proposed Rule “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,” 85 Fed. Reg. 35,612 (June 11, 2020) (the “Proposed Regulation or “Proposal”). Including for the reasons discussed herein, we urge the Environmental Protection Agency (“EPA”) to withdraw the Proposed Regulation.

While there are many problems with the Proposal, these comments focus on the lack of authority for the Proposed Regulations. The Proposal’s cited source of authority, 42 U.S.C. § 7601(a)(1) (“Section 301”), provides only limited rulemaking authority for administrative matters that does not extend to rulemakings, such as this, that are not necessary and that would affect the rights or obligations of outside parties. As discussed further below, not only does the Proposal fail to provide evidence that it is responsive to any real problem or is otherwise necessary, it would also be duplicative of existing EPA guidance documents.

In addition to failing the necessity text of Section 301, the Proposed Regulation is substantive and would have concrete negative effects on public and private parties, including by encoding substantive value judgements regarding false dichotomies between targeted and ancillary benefits, that could influence future decision-making under the Clean Air Act (the “CAA”). By disregarding the complex ways in which pollutants interact within and across environmental media, the Proposed Regulation would undermine environmental protections and the existing regulatory programs that are essential to public health, protection of ecosystems and wildlife, and local economies. In some instances, the Proposal could push additional compliance obligations onto states and private parties. The Proposal fails to identify or assess how these impacts would affect environmental health and safety risks in vulnerable populations.

Given the significant and substantive impacts of the Proposed Regulation on both public and private entities, the Proposal cannot be issued pursuant to Section 301’s narrow rulemaking power nor forego compliance with the notice-and-comment procedures of the Administrative Procedure Act (the “APA”).<sup>1</sup>

## **I. Background on Signatories**

The Chesapeake Bay Foundation (“CBF”) is a 501(c)(3) non-profit organization, founded in 1967. The organization’s mission – carried out from offices in Maryland, Virginia, Pennsylvania and the District of Columbia – is to restore and protect the ecological health of the Chesapeake Bay, the nation’s largest and one of its most vital estuaries. As such, and on behalf of our 300,000 members and e-subscribers across the United States, we are very interested in matters that will impact the health of the Chesapeake Bay, the waters that feed into it, and the health of those who live and work within the Bay watershed.

The National Parks Conservation Association (“NPCA”) has been the leading voice of American people in protecting and enhancing national parks since 1919. NPCA is a nonpartisan, nonprofit organization dedicated to preserving America’s natural, historical, and cultural heritage for present and future generations. The National Park System includes some of the most diverse and iconic ecosystems and species in the nation and plays a vital role in conserving natural resources essential to millions of residents and neighboring communities. In 2019 alone the National Park System hosted over 327.5 million visitors, supporting over 340,500 jobs and contributing over \$21 billion to local economies.<sup>2</sup> NPCA and its 1.3 million members and supporters use, enjoy, and work to conserve Parks, including through engagement in the laws and policies necessary for their preservation.

Both CBF and NPCA advocate in support of major environmental clean-up efforts that include federal, state, and local partners; involve decades of planning, collaboration, and investment; and rely on the full implementation of strong and protective environmental programs, including the Clean Air Act. Both organizations rely on science to direct policies aimed at reducing pollution and appreciate the complex ways in which pollutants interact, both within and across environmental media, and the inter-relationship of government actions to address these harms.

## **II. EPA Does Not Have Authority To Promulgate the Proposed Rule: Housekeeping Provisions like Clean Air Act Section 301(a)(1) Provide Limited Rulemaking Authority for Administrative Matters.**

“[I]t is ‘axiomatic’ that ‘administrative agencies may act only pursuant to authority delegated to them by Congress.’” *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (internal citations omitted). The Proposal’s reliance on 42 U.S.C. § 7601(a)(1) (“Section 301”), often referred to as the Housekeeping Provision, is misplaced; the provision provides only limited

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<sup>1</sup> See 5 U.S.C. § 553.

<sup>2</sup> NAT’L PARK SERV., 2019 NATIONAL PARK VISITOR SPENDING EFFECTS REPORT 18–448 (2020), <https://www.nps.gov/subjects/socialscience/vse.htm>.

rulemaking authority for regulations that are “necessary” to the “administration” of the Clean Air Act and does not extend to substantive rules, including those that would affect the rights or obligations of outside parties.<sup>3</sup>

a. The Proposed Regulation Is Not “Necessary” Within the Meaning of Section 301.

Section 301(a)(1) of the Clean Air Act only grants EPA the authority “to prescribe such regulations as are necessary to carry out [its] functions.” 42 U.S.C. § 7601(a)(1). This general rulemaking authority is not boundless; it does not enable EPA to undertake any expedient or useful regulatory actions in the name of administration of the Clean Air Act. *See Citizens to Save Spencer Cnty. v. U.S. Envtl. Prot. Agency*, 600 F.2d 844, 873 (D.C. Cir. 1979). By the terms of the provision itself, rules promulgated under this authority must be “necessary” to EPA’s effective administration of the Clean Air Act. *See Merck & Co. v. U.S. Dep’t of Health & Human Servs.*, 962 F.3d 531, 537–38 (D.C. Cir. 2020) (noting the limiting role of key phrases in general rulemaking provisions).

For a rule to be “necessary” it must be more than “simply useful.” *See Chamber of Com. of U.S. v. NLRB*, 856 F. Supp. 2d 778, 789 (D.S.C. 2012), *aff’d*, 721 F.3d 152 (4th Cir. 2013).<sup>4</sup> Rather, courts suggest that Housekeeping Provisions such as Section 301 serve a gap-filling function whereby an agency can facilitate administrative solutions to existing regulatory problems. *See, e.g., Merck*, 962 F.3d at 537–38; *Spencer Cnty.*, 600 F.2d at 983. This narrow authority does not displace limits on EPA’s regulatory authority, nor does it give the agency authority to promulgate “useful” rules whenever it so chooses. *See e.g., N.Y. Stock Exch. LLC v. Sec. & Exch. Comm’n*, 962 F.3d 541, 554–55 (D.C. Cir. 2020) (explaining that “[m]erely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation,” and requiring agency to “explain[] what problems with the existing regulatory requirements it meant for the Rule to correct”).

In this instance, as opposed to filling a gap, the Proposed Regulation replicates EPA’s existing Guidelines for Preparing Economic Analyses.<sup>5</sup> These guidelines are periodically updated and, according to Administrator Wheeler, the current iteration of revisions “will help clarify best practices for how to conduct benefit-cost analysis, including guidance on key methodological and modeling choices, assumptions, uncertainties and context around benefits and costs.”<sup>6</sup>

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<sup>3</sup> Broad “catch-all” provisions do not justify any exercise of purportedly procedural authority; “the further a regulation strays from truly facilitating the ‘administration’ of the Secretary’s duties, the less likely it is to fall within the statutory grant of authority.” *Merck & Co. v. U.S. Dep’t of Health & Human Servs.*, 962 F.3d 531, at 538 (D.C. Cir. 2020).

<sup>4</sup> Nor does a “necessary or appropriate” provision in an agency’s authorizing statute “necessarily empower the agency to pursue rulemaking that is not otherwise authorized.” *N.Y. Stock Exch. LLC v. Sec. & Exch. Comm’n*, 962 F.3d 541, 556 (D.C. Cir. 2020).

<sup>5</sup> EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (May 2014), <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>.

<sup>6</sup> Andrew R. Wheeler, Memorandum, *Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process* (May 13, 2019), <https://www.epa.gov/sites/production/files/2019->

Such duplicative efforts cannot be “necessary,” and EPA has not demonstrated that they are “useful.”

*i. EPA Has Not Demonstrated a Need for the Proposed Regulation.*

Not only is the rule unnecessary for purposes of Section 301, there is also no clear problem that the Proposed Regulation seeks to redress. An agency’s rulemaking authority is bounded by need: “[r]ules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address.” *N.Y. Stock Exch. LLC v. Sec. & Exch. Comm’n*, 962 F.3d 541, 556–57 (D.C. Cir. 2020). An agency’s desire to inform future rulemaking efforts is not sufficient to merit a burdensome, unnecessary rule, even if such a rule would be convenient for the agency. *See id.* at 554–55.

Over the last 48 years, EPA’s regulation of environmental pollution has achieved significant benefits for the American people—benefits that have substantially outweighed the costs imposed by those regulations. For example, the White House Office of Management and Budget (“OMB”) estimated that the total benefits of EPA major rules between 2006 and 2016 totaled between \$196 billion and \$706 billion, while imposing total costs of just \$54 billion to \$65 billion.<sup>7</sup> In other words, the overall benefits of these rules were between three and thirteen times greater than their costs. Similarly, another report a decade earlier estimated that the total benefits between 1997 and 2007 totaled \$83 billion to \$593 billion with costs of just \$32 billion to \$35 billion.<sup>8</sup>

These benefits are not only a matter of dollars and cents; EPA regulations promulgated prior to 2017 save lives. As an example, between 1970 and 2015 emissions of the six criteria air pollutants declined by an average of 70 percent, resulting in 160,000 fewer premature deaths per year, even as gross domestic product increased by 246 percent.<sup>9</sup> Regulations under the CAA have also achieved significant reductions in emissions of hazardous air pollutants and acid rain, and have helped reverse the destruction of the ozone layer.<sup>10</sup>

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05/documents/memorandum\_05\_13\_2019\_increasing\_consistency\_and\_transparency\_in\_considering\_benefits\_and\_costs\_in\_rulemaking\_process.pdf.

<sup>7</sup> OMB, 2017 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 10 tbl. 1-1 (2017), [https://www.whitehouse.gov/wp-content/uploads/2017/12/draft\\_2017\\_cost\\_benefit\\_report.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf).

<sup>8</sup> OMB, 2008 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 5 tbl. 1-1 (2008), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/information\\_and\\_regulatory\\_affairs/2008\\_cb\\_fin\\_al.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/information_and_regulatory_affairs/2008_cb_fin_al.pdf).

<sup>9</sup> *Progress Cleaning the Air and Improving People’s Health*, EPA, <https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health> (last visited Jul. 27, 2020).

<sup>10</sup> Jonathan M. Samet, et al., *The Trump Administration and the Environment—Heed the Science*, 376 NEW ENG. J. MED. 1182, 1184 (2017).

These substantial benefits have historically been offset by lower than anticipated costs. *Ex ante* cost-benefit analyses conducted before the introduction of a new regulation tend to systematically *overestimate* the costs that the regulation will impose. For example, the Edison Electric Institute predicted that the acid rain provisions in the 1990 Clean Air Act Amendments would cost the electric utility industry between \$5.0 billion and \$7.1 billion per year by 2010.<sup>11</sup> In fact, the costs of compliance ended up being far lower than these predictions, and EPA subsequently estimated that the benefits of the 1990 amendments were 30 times greater than the costs of compliance.<sup>12</sup>

This example is far from the only one. The same phenomenon has occurred again and again, from the regulation of asbestos and benzene in the 1970s, through chlorofluorocarbons and acid rain in the 1990s, to the Mercury and Air Toxics Standards (“MATS”) for power plants.<sup>13</sup> With regard to the MATS rule, EPA estimated in its 2011 Regulatory Impact Analysis that the power industry’s *annual* compliance costs would be \$9.4 billion in 2015.<sup>14</sup> Yet in a recent letter to EPA, a coalition of power industry trade groups estimated that the *total* compliance costs from 2012 to 2018 had only been “more than \$18 billion”<sup>15</sup>—an average of \$3 billion per year over six years.

The Proposed Regulation would interfere with the continued efficacy of Clean Air Act regulations, including by creating duplicative, time-consuming review criteria for EPA that will lengthen the rulemaking process without any demonstrated need for doing so. Section 301 requires that rules serve the “functions” of the statute, whose purposes include (i) protecting and enhancing “the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population” and (ii) assisting “the development and operation of regional air pollution prevention and control programs.” 42 USC § 7401(b). Because the Proposal would circumvent these purposes, it is not an appropriate use of the agency’s housekeeping authority.

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<sup>11</sup> II Comm. on Environment and Public Works, Legislative History of the Clean Air Act Amendments of 1990, at 2553 (Cong. Info. Serv. 1993) (statement of Rep. Waxman, House Debate, May 21, 1990).

<sup>12</sup> EPA, Office of Air and Radiation, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, SUMMARY REPORT 2 (2011).

<sup>13</sup> Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, AMERICAN PROSPECT 64 (Nov./ Dec. 1997); Mandy Warner, *The Cost to Meet Clean Air and Environmental Standards Comes Down (Again)*, CLIMATE 411 (June 11, 2013), <http://blogs.edf.org/climate411/2013/06/11/the-cost-to-meet-clean-air-and-environmental-standards-comes-down-again> (summarizing several companies’ declining estimates of their costs of complying with Mercury and Air Toxics standards).

<sup>14</sup> EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL MERCURY AND AIR TOXICS STANDARDS 3-13 (2011), <https://www.epa.gov/sites/production/files/2015-11/documents/matsriafinal.pdf>.

<sup>15</sup> Letter from Edison Electric Institute, et al., to William Wehrum, Assistant Administrator, Office of Air and Radiation, EPA (July 10, 2018), <http://src.bna.com/Ajk>.

b. The Proposed Regulation Is Substantive and Will Have Concrete Negative Effects on Public and Private Parties.

Statutory housekeeping provisions were never intended to authorize substantive rules with external consequences. As Congress made clear when amending the more general Housekeeping Statute in 1958, regulations prescribed under the statute are limited to “day-to-day business” and recordkeeping.<sup>16</sup> The Housekeeping Statute was never intended to be used as an authority to promulgate substantive rules with external legal consequences. Rather, the Housekeeping Statute only authorizes what the Administrative Procedure Act “terms ‘rules of agency organization, procedure, or practice.’”<sup>17</sup> As delineated by the Supreme Court, a rule is substantive if it affects “individual rights and obligations.”<sup>18</sup> In coming to this definition, the Court relied heavily on the Attorney General’s Manual on the Administrative Procedure Act, which in turn describes “substantive” rules as those rules “other than organizational or procedural,” “issued by an agency pursuant to statutory authority and which implement the statute,” and having “the force and effect of law.”<sup>19</sup>

Pursuant to this framework, courts have consistently forbidden agencies from using housekeeping authorities, either that in the Housekeeping Statute or in specific statutory provisions such as Section 301 of the Clean Air Act, to implement regulations that are even partially substantive in nature.<sup>20</sup> As described by the D.C. Circuit Court of Appeals, its analysis of exemptions for procedural rules “has gradually shifted focus from asking whether a given procedure has a ‘substantial impact’ on parties to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.” *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

i. *The Proposed Regulation Encodes Value Judgements that Courts Deem Substantive.*

The Proposed Regulation would create the type of value judgment that courts find substantive rather than procedural in nature. The D.C. Circuit Court of Appeal’s finding that a parole board’s selection of parole eligibility guidelines had the intent and effect of changing substantive outcomes is illustrative. Under review in that case were parole guidelines that consisted of nine general categories of factors broken into 32 sub-categories often with specificity. *See Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112–13 (D.C. Cir. 1974). The court found that:

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<sup>16</sup> H.R. REP. NO. 85-1461, 1958 U.S.C.C.A.N. 3352, 3352 (Mar. 6, 1958).

<sup>17</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979); *see also* 5 U.S.C. § 553(b)(A) (defining “interpretative rules,” commonly known as “interpretive rules,” as “general statements of policy, or rules of agency organization, procedure, or practice”).

<sup>18</sup> *Id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974)).

<sup>19</sup> Tom C. Clark, U.S. Dep’t of the Attorney General, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947), <https://www.regulationwriters.com/downloads/AttorneyGeneralsManual.pdf>.

<sup>20</sup> *See, e.g., Chrysler Corp.*, 441 U.S. at 310 (“[T]here is nothing in the legislative history of § 301 to indicate it is a substantive grant of legislative power to promulgate rules authorizing the release of trade secrets or confidential business information.”).

Although [the guidelines] provide no formula for parole determination, they cannot help but focus the decision-maker’s attention on the Board-approved criteria. They thus narrow his field of vision, minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated had [the APA’s notice-and-comment provisions] been followed.

*Id.* (finding that “matter[s] ‘relating to practice or procedure’ . . . do[] not include formalized criteria adopted by an agency to determine whether claims for relief are meritorious.”) As described by another court, an agency action cannot be “mere housekeeping” if the rule “relocates the metes and bounds – the who, what, when, where, and how” of the application of a federal law. *New York v. United States Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475, 516 (S.D.N.Y. 2019).

As cases like these illustrate, courts are concerned not only with the direct implications of a proposed rule, but also with the use of general rulemaking authority to change the calculus more broadly in agency decision-making (*e.g.*, deciding which factors are more or less important). With respect to the Proposed Regulation, even if the preparation of a benefit cost analysis does not directly affect the development of an emissions standard, it will affect the evaluation of such standard. Like the parole board guidance criteria, the Proposal’s valuation, or de-valuation, of factors like co-benefits would influence EPA’s decision-making on substantive matters under the Clean Air Act.<sup>21</sup>

ii. *The Proposed Regulation Would Negatively Affect Private and Public Parties Outside of EPA.*

Contrary to the assertion in the Proposal that it “would not regulate any person or entity outside the EPA and would not affect the rights or obligations of outside parties,” 85 Fed. Reg. 35,613, the Proposed Regulation would substantively affect the required actions of third parties. This section provides two examples of how the Proposed Regulation would have substantive impacts on parties outside the EPA. These examples focus on just one aspect of the Proposal that would affect third parties— the treatment of co-benefits. Whether co-benefits are not considered at all or are distinguished from “direct” benefits in a way that would lead to a different weighting in a benefit-cost analysis, the Proposed Regulation would substantively affect the rights of parties outside of EPA.

The Proposed Regulation Could Undermine the Efforts and Interfere with the Ability of Government Agencies and Private Parties To Fulfill Their Obligations Under the Chesapeake Bay Total Maximum Daily Load and Bay Watershed Agreement.

As brief background, the Chesapeake Bay is the nation's largest estuary, supporting vibrant commercial fishing and tourism industries. However, the Bay suffers from too much nitrogen. Air pollution contributes about one-third of the total nitrogen load delivered to the Bay— at 570,000 square miles, the Bay airshed is roughly nine times the size of the Bay watershed. Sources of nitrogen oxide (“NOx”) in this expansive airshed contribute nitrogen to the Bay and

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<sup>21</sup> Just as Section 301 does not give EPA authority to adopt a regulation that would influence EPA’s decisions on substantive matters, it cannot direct EPA to use benefit cost analyses as a decision-making tool.

its tributaries, with about half of the deposition loads of nitrogen coming from outside of the watershed.<sup>22</sup> All of this nitrogen causes algae blooms that, when they die, consume oxygen. A reduction in or lack of dissolved oxygen harms benthic organisms, oysters as well as fish and blue crabs. These fisheries are immensely important to the economy and culture of the Bay region and the economic benefits of cleaning up the Bay to those living and working within the watershed is valued at nearly \$130 billion annually.<sup>23</sup>

To combat this problem, EPA issued a Total Maximum Daily Load (TMDL or “the Bay TMDL”) for the Chesapeake Bay in 2010. This complex TMDL sets Bay watershed limits for nitrogen, phosphorous and sediment, requiring reductions of 25 percent, 24 percent and 20 percent respectively.<sup>24</sup> As EPA recognized, the Bay TMDL will have co-benefits “for water quality in tens of thousands of streams, creeks, lakes and rivers throughout the region” associated with the installation of pollution controls designed to meet the TMDL.<sup>25</sup> The implementation of the Bay TMDL and the development of the Bay jurisdiction’s Watershed Implementation Plans (WIPs), known collectively as the Chesapeake Clean Water Blueprint, are ongoing.<sup>26</sup>

The Bay TMDL is part of a larger commitment to address the health of the Chesapeake Bay Watershed. Beginning in 1983, the states of Virginia, Maryland, Pennsylvania, the District of Columbia, and the EPA signed historic interstate compacts<sup>27</sup>—the Chesapeake Bay Watershed Agreements—to protect and restore the Chesapeake Bay’s ecosystem.<sup>28</sup> In 2000, Congress codified the importance of the 2000 Chesapeake Bay Agreement by adding section 117(g) to the Clean Water Act, which directed the EPA Administrator to, among other things, “ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve and maintain” the water quality, habitat, and restoration goals of the Chesapeake Bay Agreement. 33 U.S.C. § 1267(g)(C).

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<sup>22</sup> Lewis C. Linker, et. al, *Computing Atmospheric Nutrient Loads to the Chesapeake Bay Watershed and Tidal Waters*, J. AM. WATER RES. ASS’N 1-17, (2013).

<sup>23</sup> See generally CBF, *The Economic Benefits of Cleaning Up the Chesapeake: A Valuation of the Natural Benefits Gained by Implementing the Chesapeake Clean Water Blueprint* (Oct. 2014), <https://www.cbf.org/document-library/cbf-reports/the-economic-benefits-of-cleaning-up-the-chesapeake.pdf>.

<sup>24</sup> EPA, CHESAPEAKE BAY TOTAL MAXIMUM LOAD FOR NITROGEN, PHOSPHOROUS AND SEDIMENT ES-1 (2010), <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document> [hereinafter CHESAPEAKE BAY TMDL DOCUMENT].

<sup>25</sup> *Id.* at ES-3.

<sup>26</sup> See *id.* at ES-13.

<sup>27</sup> The Chesapeake Bay Agreements are interstate compacts as Congress developed and authorized the joint state-federal action. See *Cuyler v. Adams*, 449 U.S. 433 (1981); *Seattle Master Builders Ass’n v. Pac. Northwest Elec. Power & Conservation Plan. Council*, 786 F.2d 1359 (9th Cir. 1986).

<sup>28</sup> See EPA Chesapeake Bay Program, *Bay Program History*, [https://www.chesapeakebay.net/who/bay\\_program\\_history](https://www.chesapeakebay.net/who/bay_program_history) (last visited Jul. 27, 2020) (describing 1983, 1987, and 2000 Agreements).



The goals of the Bay Watershed Agreement are wide-ranging and cover many aspects of the Chesapeake Bay ecosystem and human communities. The Agreement required the development of Management Strategies to outline the means for accomplishing each goal.<sup>29</sup> Among these Strategies are the Bay TMDL Watershed Implementation Plans and Federal Two-Year Milestones.<sup>30</sup> In the Federal Two-Year Milestone document, EPA tracks its commitment to reduce the atmospheric deposition of nitrogen through implementation of the Clean Air Act's federal and state programs, including development of regional haze state implementation plans (a program discussed in more detail below).<sup>31</sup> Thus, EPA is relying on a wide range of CAA programs to achieve its commitments under both the Bay Watershed Agreement and the Bay TMDL.<sup>32</sup> Two examples are provided below:

1. The Bay TMDL's atmospheric deposition allocation for nitrogen relies on CAA programs, including programs focused on other pollutants (e.g., NAAQS, greenhouse gas regulations, etc.). Failure to account for the co-benefit of reducing nitrogen deposition to the Bay undermines the TMDL's strategy, and CAA programs that are weakened because their co-benefits go unrecognized will threaten progress towards reducing atmospheric nitrogen and meeting TMDL goals.

EPA is relying on the implementation of various federal regulations to achieve the reductions required by the Chesapeake Bay TMDL,<sup>33</sup> some of which will be achieved as co-benefits. For example, in a presentation to the Water Quality Goal Implementation Team on February 12, 2018,<sup>34</sup> EPA referenced an additional 1.6 million pounds of nitrogen reductions (almost entirely from nitrogen oxide air pollution reductions) that are projected to be available by 2030. These modeled reductions are based on expected benefits from the implementation of state and federal

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<sup>29</sup> CHESAPEAKE BAY WATERSHED AGREEMENT 15 (2014), [https://www.chesapeakebay.net/documents/FINAL\\_Ches\\_Bay\\_Watershed\\_Agreement.withsignatures-HIres.pdf](https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf) [hereinafter CHESAPEAKE BAY WATERSHED AGREEMENT].

<sup>30</sup> EPA Chesapeake Bay Program, 2017 WIP, 2025 WIP AND WATER QUALITY STANDARDS ATTAINMENT & MONITORING OUTCOMES MANAGEMENT STRATEGY, 2015-2025, v.2 23, [https://www.chesapeakebay.net/documents/22045/2018-2019\\_wq\\_final-ms\\_05-01-19\\_clean.pdf](https://www.chesapeakebay.net/documents/22045/2018-2019_wq_final-ms_05-01-19_clean.pdf).

<sup>31</sup> See, e.g., *Restore Clean Water Actions: Federal Water Quality Two-Year Milestones for 2020-2021*, at 1, 6, <https://federalleadership.chesapeakebay.net/file.axd?file=2020%2f6%2f2020-2021-Federal-Programmatic-WQ-Milestones+V3.pdf> (“The list below presents milestones for the...EPA...and nine other federal agencies...that support the water quality goals and outcomes in the Chesapeake Bay Watershed Agreement.”).

<sup>32</sup> CHESAPEAKE BAY WATERSHED AGREEMENT, *supra*, at 6 (listing relevant rules and EPA actions pursuant to the Clean Air Act).

<sup>33</sup> See CHESAPEAKE BAY TMDL DOCUMENT, *Appendix L, Setting the Chesapeake Bay Atmospheric Nitrogen Deposition Allocations*, [https://www.epa.gov/sites/production/files/2015-02/documents/appendix\\_l\\_atmos\\_n\\_deposition\\_allocations\\_final.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/appendix_l_atmos_n_deposition_allocations_final.pdf).

<sup>34</sup> Rich Batiuk, Chesapeake Bay Program, *Adjustments to the Bay's Assimilative Capacity and Determination of Additional Nitrogen and Phosphorous Loads* (Mar. 2, 2018), [https://www.chesapeakebay.net/channel\\_files/25896/sources\\_of\\_additional\\_loads\\_provided\\_to\\_ny\\_and\\_wv\\_presentation-march\\_2\\_2018\\_psc\\_mtg\\_presentation\\_2.pdf](https://www.chesapeakebay.net/channel_files/25896/sources_of_additional_loads_provided_to_ny_and_wv_presentation-march_2_2018_psc_mtg_presentation_2.pdf).

Clean Air Act regulatory programs even though those programs are primarily health-based programs.<sup>35</sup>

If Clean Air Act programs are made less effective at reducing the atmospheric deposition of nitrogen to the Bay watershed, it will undermine the investments and commitments made by states and private parties to reduce their own nitrogen loads, and may require further reductions from certain sectors to account for any shortfall.

2. Regulations that reduce greenhouse gas (“GHG”) emissions also reduce NOx and other pollution to the Bay watershed. Any weakening of these climate-focused CAA programs will exacerbate the already devastating climate impacts in the Bay region and undermine Bay restoration.

The Chesapeake Bay and the activities it supports, including commercial fishing and tourism and ecosystem services such as flood management, are negatively impacted by the effects of climate change including sea-level rise, warming temperatures, extreme weather, and ocean acidification.<sup>36</sup> For instance:

- Sea level rise threatens to inundate small coastal communities and major cities alike in the Chesapeake Bay region. In Maryland alone, it threatens to flood over 61,000 homes by 2100, valued at \$19 billion.<sup>37</sup> Entire previously inhabited islands are now underwater in the Chesapeake Bay;<sup>38</sup> the CBF recently had to close down its Fox Island Environmental Education Program, located on Fox Island in Virginia, because land loss has made the center unsafe.<sup>39</sup> Likewise, in Hampton Roads/Norfolk, Virginia, sea level rise poses significant risk to the public and military infrastructure and operations.<sup>40</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> EPA, Chesapeake Bay Program, *Climate Change*, [https://www.chesapeakebay.net/issues/climate\\_change](https://www.chesapeakebay.net/issues/climate_change) (last visited Jul. 27, 2020).

<sup>37</sup> Catherine Rentz, *Rising sea levels threaten \$19 billion in real estate across Maryland, study says*, THE BALTIMORE SUN (Oct. 28, 2017), <http://www.baltimoresun.com/news/maryland/investigations/bsmd-suninvestigates-sea-level-20171026-story.html>.

<sup>38</sup> Erik Ortiz, *How to Save A Sinking Island*, NBC NEWS (Nov. 13, 2017), <https://www.nbcnews.com/specials/deal-island>; David Fahrenthold, *Last house on sinking Chesapeake Bay island collapses*, WASHINGTON POST (Oct. 26, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/10/24/AR2010102402996.html>; Jon Gertner, *Should the United States Save Tangier Island From Oblivion?*, NEW YORK TIMES MAGAZINE (Jul. 6, 2016), <https://www.nytimes.com/2016/07/10/magazine/should-the-united-states-save-tangier-island-from-oblivion.html>.

<sup>39</sup> A 1773 land survey of Fox Island documented 426 acres, in 2019 only 34 acres remain. Tamara Ward, *Going, Gone: Rising Seas Drown Island Center*, E&E NEWS (Nov. 18, 2019), <https://www.eenews.net/greenwire/2019/11/18/stories/1061539807>.

<sup>40</sup> “Sea level rise at just one site can have a significant impact on [both military policy and] strategy. Hampton Roads, Virginia, dubbed ‘the greatest concentration of military might in the world’ for former Secretary of Defense Leon Panetta, is by itself an invaluable operational and strategic hub for both the United States and its allies. It ... is the backbone of the U.S. Atlantic Fleet. It is also a low-lying site and very exposed to sea level rise and storm surge. If significant portions of the Hampton Roads infrastructure were regularly inundated, as is projected under a number of scenarios for the years 2023-2100, the impediment to force deployments for critical Atlantic,

- Wetlands are also threatened by sea level rise. These important filters reduce the level of pollutants entering the Bay<sup>41</sup> and protect coastal communities from storm surge and erosion.<sup>42</sup> Wetlands inundated with saltwater from sea level rise, however, cannot provide the same water quality and habitat benefits as healthy wetlands.<sup>43</sup> In addition, forested buffers along creeks, tidal rivers, and the Bay are also impacted by sea level rise as saltwater seeps into the soil, killing trees and creating “ghost forests.”<sup>44</sup>
- Warming waters - that have already been recorded in 92 percent of the Bay - deplete the level of available oxygen in the Bay.<sup>45</sup> This will have major repercussions as the Bay already struggles with dead zones of hypoxic water from nitrogen and phosphorus pollution.<sup>46</sup> Warming ocean temperatures will only exacerbate the dead zone in the Bay.<sup>47</sup>
- Average U.S. precipitation has increased since the 1990s, and the frequency and intensity of heavy precipitation events is increasing due to climate change.<sup>48</sup> Increased scouring and runoff from more intense rain events carry significantly higher loads of nitrogen, phosphorous, and sediment into the Bay’s tributaries.
- GHG emissions cause ocean waters to acidify, which in turn negatively affects calcifying species by impairing their shell making ability. Ocean acidification threatens the growth

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Mediterranean and Pacific war-fighting and humanitarian operations – many of which are tied to core strategic goals of the United States – would be significant.” The Center for Climate and Security, *Military Expert Panel Report: Sea Level Rise and the U.S. Military’s Missions*, 23–24 (2016), [https://climateandsecurity.files.wordpress.com/2016/09/center-for-climate-and-security\\_military-expert-panel-report2.pdf](https://climateandsecurity.files.wordpress.com/2016/09/center-for-climate-and-security_military-expert-panel-report2.pdf).

<sup>41</sup> Chesapeake Bay Program, *Wetlands*, <https://www.chesapeakebay.net/issues/wetlands> (last visited Jul. 27, 2020).

<sup>42</sup> *Id.*

<sup>43</sup> Joseph Kurt and Victor Unnone, *Climate Change and the Chesapeake Bay Total Maximum Daily Load: Policy Priorities and Options*, VA. COASTAL POLICY CENTER, 4 (2016).

<sup>44</sup> *Id.* See also John Upton, ‘Ghost Forests’ Appear as Rising Seas Kill Trees, *Climate Central* (Sep. 15, 2016), <http://www.climatecentral.org/news/ghost-forests-appear-as-rising-tides-kill-trees-20701>.

<sup>45</sup> See Army Corps of Engineers and City of Norfolk Draft *Integrated City of Norfolk Coastal Storm Risk Management Feasibility Study/Environmental Impact Statement* (Oct. 2017), <https://www.norfolk.gov/DocumentCenter/View/32546/Draft-Norfolk-CSR-Feasibility-Report-Title-and-Executive-Summary?bidId=>.

<sup>46</sup> EPA, Chesapeake Bay Program, *The Dead Zone*, [https://www.chesapeakebay.net/state/dead\\_zone](https://www.chesapeakebay.net/state/dead_zone) (last visited Jul. 27, 2020).

<sup>47</sup> Chris Mooney, *Global warming could deplete the oceans’ oxygen – with severe consequences*, WASHINGTON POST (Apr. 28, 2016), [https://www.washingtonpost.com/news/energyenvironment/wp/2016/04/28/global-warming-could-deplete-the-oceans-oxygen-levels-with-severeconsequences/?utm\\_term=.9c3333011616](https://www.washingtonpost.com/news/energyenvironment/wp/2016/04/28/global-warming-could-deplete-the-oceans-oxygen-levels-with-severeconsequences/?utm_term=.9c3333011616).

<sup>48</sup> U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment*, 19, 20 (2017).

and reproduction of oysters, clams, and other creatures with calcium shells.<sup>49</sup> The Chesapeake Bay blue crab, which may be particularly susceptible to acidification, is a particularly important commercial species in the region’s multi-billion-dollar seafood industry.<sup>50</sup>

To the extent the Proposed Regulation undermines the consideration of co-benefits when developing CAA rules, it arbitrarily ignores the complex and interconnected way CAA programs provide benefits for ecosystems, including the collaborative Chesapeake Bay restoration effort.

The Proposed Regulation Undermine the Efforts and Interfere with the Protection of National Parks and State Implementation of the Regional Haze Rule

As brief background, regional haze is “visibility impairment that is caused by the emission of air pollutants from numerous anthropogenic sources located over a wide geographic area.” 40 CFR 51.301. Regional haze is one example of an environmental impact at national parks that is directly affected by air pollution and climate change and thus by regulations under the Clean Air Act. Haze obscures views across national parks and wilderness areas and can, as demonstrated in a National Park Service survey, deter visitors and result in them spending less time in national parks.<sup>51</sup> “Clean, clear air” is consistently one of the top four features visitors at every park mention as a reason for their trip.<sup>52</sup> The collective effects of regional haze on ecosystems and on the experience of visitors to natural areas are extensive and deeply problematic for the health and public enjoyment of national parks and the associated economic benefits to surrounding communities.

Pollutants that cause visibility impairment also harm public health. Haze pollutants include nitrogen oxide (“NO<sub>x</sub>”), sulfur dioxide (“SO<sub>2</sub>”), particulate matter (“PM”), ammonia, and sulfuric acid. NO<sub>x</sub> is a precursor to ground level ozone, which is associated with respiratory diseases, asthma attacks, and decreased lung function. In addition, NO<sub>x</sub> reacts with ammonia, moisture, and other compounds to form particulates that can cause and worsen respiratory diseases, aggravate heart disease, and lead to premature death.<sup>53</sup>

EPA estimated that in 2015, full implementation of the Regional Haze Rule nationally will prevent 1,600 premature deaths, 2,200 non-fatal heart attacks, 960 hospital admissions, and over

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<sup>49</sup> Sarah M. Giltz & Caz M. Taylor, *Reduced Growth and Survival in the Larval Blue Crab *Callinectes sapidus* Under Predicted Ocean Acidification*, 36 J. OF SHELLFISH RSCH. 481, 481 (2017).

<sup>50</sup> CBF, *The Economic Importance of the Bay*, <https://www.cbf.org/issues/what-we-have-to-lose/economic-importance-of-the-bay/>.

<sup>51</sup> Nat’l Park Serv. & U.S. Dep’t of Int., NATIONAL PARK SERVICE VISITOR VALUES & PERCEPTIONS OF CLEAN AIR, SCENIC VIEWS & DARK NIGHT SKIES 1988–2011 (2013), <http://npshistory.com/publications/air-quality/nrr-2013-632.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> EPA, *Basic Information about NO<sub>2</sub>*, <https://www.epa.gov/no2-pollution/basic-information-about-no2> (last visited Jul. 27, 2020).

1 million lost school and workdays.<sup>54</sup> The Regional Haze Rule was projected to result in health benefits valued at \$8.4 to \$9.8 billion annually.<sup>55</sup>

These same haze-causing emissions also harm terrestrial and aquatic plants and animals, soil health, and moving and stationary waterbodies—entire ecosystems—by contributing to acid rain, ozone formation, and nitrogen deposition. Ground-level ozone formation, for which haze pollutants are precursors, impacts plants and ecosystems by: “interfering with the ability of sensitive plants to produce and store food, making them more susceptible to diseases, insects, other pollutants, competition and harsh weather; damaging the leaves of trees and other plants, negatively impacting the appearance of urban vegetation, as well as vegetation in national parks and recreation areas; and reducing forest growth and crop yields, potentially impacting species diversity in ecosystems.”<sup>56</sup>

To reduce the harm from air pollution at Class I areas – the country’s largest and most iconic natural landscapes – Congress set a national goal of remedying existing impairment and preventing future impairment caused by human activities. As a step toward achieving this goal, EPA in 1999 issued the Regional Haze Rule requiring state and federal agencies to work together to improve visibility in 156 national parks and wilderness areas. Specifically, states are required to develop and implement air quality protection plans, taking “all measures necessary,” to reduce the pollution that causes visibility impairment.<sup>57</sup> Since 1999 the Regional Haze Rule has been amended several times, most recently in 2017. Despite progress in reducing haze causing pollution, not a single one of the 156 designated “Class I” areas have achieved the statutory goal of natural visibility conditions. Each state haze plan due to EPA by 2021 for the second round of regional haze must contain emission reducing measures to achieve reasonable progress towards the national goal of restoring natural air quality to all Class I areas.

The Proposed Regulation’s attempt to disentangle benefits and co-benefits does not recognize the complex ways in which pollutants interact, both within and across environmental media, and the inter-relationship of government actions to address these harms. Taking regional haze as an example, addressing fine particulate matter (“PM” or “PM<sub>2.5</sub>”) in a regulation generates not only visibility benefits, but health and wildlife protection benefits as well. For instance, in addition to well-documented impacts on human health:

- PM<sub>2.5</sub> can be directly deposited on land and in the water, causing damage from acidification, eutrophication, deposition of toxic metals and organic compounds, and changes in soil and water chemistry. When deposited on plants, it can affect their ability

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<sup>54</sup> EPA, *Fact Sheet – Final Amendments to the Regional Haze Rule and Guidelines for Best Available Retrofit Technology (BART) Determinations* (2005), [https://www.epa.gov/sites/production/files/2016-02/documents/fs\\_2005\\_6\\_15.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/fs_2005_6_15.pdf).

<sup>55</sup> *Id.*

<sup>56</sup> EPA, *Ground-level Ozone Basics*, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> (last visited Jul. 27, 2020).

<sup>57</sup> *Regional Haze Regulations*, 40 C.F.R. § 51.308(d)(3)(iii).

to metabolize and photosynthesize correctly. Fine particles entering aquatic ecosystems can affect all organisms both directly and through bioaccumulation. Similar to mercury, fish, frogs, snails, and other aquatic life can absorb PM, and as these animals are consumed the particulate matter travels up the food chain.<sup>58</sup> With each step up, the PM concentration increases, ultimately to fish-eating predators including eagles, osprey, otters, pelicans, and grizzly bears. Those concentrations of PM have harmful health effects on our wildlife.

- PM<sub>2.5</sub> is a significant component of acid rain. When nitrogen and sulfur secondary particles dissolve in rain and cloud water they contribute to the devastating effects of acid rain on our ecosystems, particularly in the eastern United States. and in the Rocky Mountains at high elevations where ecosystems are more fragile and acidic cloud water can be more prevalent. There are numerous negative ecosystem effects of acid deposition, like depletion of soil nutrients, aluminum mobilization, and acidification in waters, that lead to accelerated plant die-off and depletion of oxygen, slower plant growth and damage to leaves and overall decreases in species diversity.
- PM<sub>2.5</sub> plays an important role in longer-distance pollution transport. The formation of secondary PM<sub>2.5</sub> from gaseous precursors like sulfur dioxide, nitric acid and ammonia helps transport these sulfur and nitrogen pollutants and deposit them far from their sources. Deposition of nitrogen contributes to eutrophication of waterbodies, including the Chesapeake Bay. If emissions of any of these reactive gaseous precursors were decreased, local concentrations of PM<sub>2.5</sub> would decrease, and downwind deposition of sulfur and nitrogen would also decrease.

Forcing regulators to develop a bright-line distinction between “targeted” and “ancillary” benefits that accurately captures these complex dynamics is inefficient and could arbitrarily result in ignoring or significantly undervaluing benefits as compared to regulatory costs. Altering this benefits calculus could have dramatic regulatory implications that substantively impact the interests of outside parties. Using the Regional Haze Rule as an example, a discounting of benefits of national air standards would misconstrue the real world benefit of reducing fine particles for purposes of visibility, in part by pretending that other benefits are not of value to the regional haze program or, conversely, that benefits of reducing haze causing pollution do not hold value for national air standards. This in turn would place a greater burden on states, industry and the public to evaluate emission reduction options and achieve needed air quality improvements.

In developing their regional haze plans, states consider and incorporate the reductions of visibility impairing pollution benefits of other air regulations. This makes sense for many reasons, including reducing compliance costs for regulated entities by giving credit for emission

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<sup>58</sup> Danny Hartono et al., *Impacts of Particulate Matter (PM<sub>2.5</sub>) on the Behavior of Freshwater Snail Parafossarulus Striatulus*, 7 SCIENTIFIC REPORTS 644 (2017), <https://doi.org/10.1038/s41598-017-00449-5> (suggesting that high PM<sub>2.5</sub> deposition in water bodies, associated with acidification and some metals, can have an adverse effect on aquatic organisms).

reductions from other requirements.<sup>59</sup> For example, coal-fired power plants are significant contributors to visibility impairment, and reducing emissions from these sources is key to achieving natural visibility in Class I areas. Coal-fired power plants are the largest point sources of sulfur dioxide, nitrogen oxides, and GHGs in the United States. In addition to reducing visibility, these emissions cause or contribute to climate change and negative impacts to public health and ecosystems. As such, power plants are regulated under a number of existing or proposed CAA regulations. A regulation targeting SO<sub>2</sub> emissions at coal-fired units cannot ignore the accompanying visibility benefits if natural visibility is to be achieved. Thus, consideration of what the Proposal might deem an “ancillary benefit” is a critical component of achieving the visibility goals of the Regional Haze Rule.<sup>60</sup> By changing the way in which co-benefits are considered, the Proposal would substantively impact state interests under the regional haze program. To the extent that the Proposal would be used to try to justify a less stringent air emission standard, or a less stringent state haze plan, this would shift a greater burden of meeting the Regional Haze Rule or other CAA programmatic requirements to states.

Improved visibility is tied to greater public enjoyment of National Parks and increased tourism,<sup>61</sup> and reductions in pollutants that improve visibility also directly related to public health, ecosystem and wildlife protection.<sup>62</sup> Every single one of our 419 national park units suffer from harms to their air, land, water and wildlife from air pollution and the effects of climate change. This Proposal wrongly weights the costs of regulation over the benefits and would arbitrarily drown out the practical results of Clean Air Act implementation across National Park values that demand, warrant and are owed protection. Such benefits must be fully accounted for in evaluating proposed regulations.

### **III. Because the Proposed Regulation is Not Merely a Rule of Agency Procedure the Environmental Protection Agency Must Comply with the Administrative Procedure Act’s Notice and Comment Requirements**

EPA is subject to the APA’s notice and comment requirements when promulgating rules pursuant to Section 301, unless a Proposed Rule falls within an exception to these requirements under APA Section 553(b). *See Citizens to Save Spencer Cty. v. U.S. Env’tl. Prot. Agency*, 600 F.2d 844, 874–75, 877 (D.C. Cir. 1979) (requiring notice-and-comment procedures where a rule

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<sup>59</sup> Because most sources that impair Class I air quality also contribute to other air quality issues, the Regional Haze Rule can also play a valuable role in supporting the objectives of other clean air regulations.

<sup>60</sup> This is not to suggest that co-benefits of non-visibility related CAA regulations will be sufficient to meet the Regional Haze Rule’s standards; under existing regulations, 86 – 88% of coal-fired units continue to have visibility impacts at Class I areas. NPCA, *The Role of the Regional Haze Rule in Restoring Clean Air at National Parks and Wilderness Areas: Exploring the Impact of Regulatory Interaction on Power Plant Emissions and Visibility in Class I Areas*, 3 (Jan. 2016).

<sup>61</sup> A 2018 study at 33 National Parks found that each increase of 1 ppb in ozone concentration (which harms human health and visibility) is associated with a 2 percent decrease in monthly visitation during peak summer period). David Keiser, Gabriel Lade & Ivan Rudik, *Air Pollution and Visitation at U.S. National Parks*, SCIENCE ADVANCES (2018).

<sup>62</sup> *See, e.g.,* Danny Hartono et al., *Impacts of Particulate Matter (PM<sub>2.5</sub>) on the Behavior of Freshwater Snail Parafossarulus Striatulus*, 7 SCIENTIFIC REPORTS 644 (2017), <https://doi.org/10.1038/s41598-017-00449-5>.

authorized by Section 301 was not interpretive within the meaning of Section 553(b)); *see also Sierra Club v. U.S. Env'tl. Prot. Agency*, 762 F.3d 971, 982 (9th Cir. 2014).

5 U.S.C. § 553(b)(A) creates exemptions from notice-and-comment requirements for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” However, these exemptions “must be narrowly construed.” *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989). An agency rule that has a significant impact on substantive rights and interests falls outside the narrow scope of the Agency Procedure exception. *See, e.g., U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984); *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974). Courts have repeatedly emphasized that a rule’s “effect on those within its regulatory scope” is the critical factor, not an agency’s categorization of a rule as either procedural or substantive. *See Kast Metals*, 744 F.2d at 1153.

As discussed above, the Proposal would substantively affect the rights of parties outside of EPA; courts are unwilling to allow agencies to circumvent notice-and-comment procedures in such situations. Where an agency does not properly rely on an exception, it “must conform to the APA's notice and comment requirements when engaging in any informal agency rulemaking procedures.” *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989). Moreover, while Section 307(d)(1) exempts certain CAA rulemakings from the APA’s notice-and-comment requirements, this section does not apply to Section 301 and still requires “a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.” 42 U.S.C. § 7607(d)(6)(B).

#### **IV. By Failing to Appropriately Interpret and Apply Executive Orders Applicable to Rulemaking Proceedings EPA Has Not Evaluated the Proposed Regulation’s Impacts on Vulnerable Populations**

Certain rulemaking procedures, while often described as “procedural” in nature, assure that agencies reach substantively valid and informed outcomes. These rulemaking procedures were put in place for a reason; failing to follow them suggests a lack of informed analysis and, without an authorized basis for foregoing the process, an agency decision cannot be upheld. Thus, while lack of compliance with required procedures is itself a fatal flaw in the Proposal, it also undermines the basis of and credibility for the substance of the Proposed Regulation. Here, the proposal violates multiple procedural requirements, including failing to comply with Executive Orders regarding the Protection of Children from Environmental Health Risks and Safety Risks and Environmental Justice in Minority Populations and Low-Income Populations.

Executive Order 13,045: Protection of Children from Environmental Health Risks and Safety Risks, directs agencies to “make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children.” Exec. Order No. 13,045, 62 Fed. Reg. 19,885, at § 1-101(a)–(b) (1997). Agencies proposing regulatory actions subject to Executive Order 13,045 must develop, and provide to the Office of Information and Regulatory Affairs (“OIRA”), (a) an evaluation of the environmental health or safety effects of the planned regulation on children; and (b) an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. *Id.* at 19,887, § 5-501(a)-(b); *see also* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (describing



which regulatory actions must be submitted to OIRA). Covered regulatory actions include those that are likely to be “economically significant” under Executive Order 12,866 and concern “an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children.” 62 Fed. Reg. at 19,885, § 2-202(a)-(b).

Although EPA acknowledges that the Proposal is a “significant regulatory action,” it asserts that the Proposed Regulation is not subject to Executive Order 13045 “because it does not concern an environmental health risk or safety risk.” 85 Fed. Reg. 35,624-25. However, as discussed above, the Proposed Regulation would encode substantive value judgments that could impact the evaluation and development of regulations under the Clean Air Act that can significantly affect health risks to children from environmental conditions. The health risks from air emissions, such as asthma from exposure to particulate matter and neurological damage from exposure to lead, often disproportionately effect young children. Thus, the Proposal itself should be construed as an action subject to the review requirements of Executive Order 13,045.

EPA’s characterization of the Proposal as not establishing any environmental health or safety standards is similarly flawed with respect to determining application of Executive Order 12,898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which requires agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their programs, policies and activities on minority and low-income populations. Exec. Order No. 12,898, 59 Fed. Reg. 7,629, at § 1-101 (1994). For example, the negative impacts from mercury emissions disproportionately hurt children and significant sources, like coal-fueled power plants, are often located in environmental justice communities, where populations frequently have worse baseline health conditions and are therefore more impacted by emissions.<sup>63</sup>

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In summary, EPA does not have authority to adopt the Proposed Regulation and should withdraw the Proposal. Thank you for your attention to these comments.

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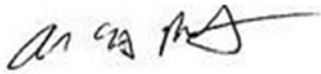
<sup>63</sup> See, e.g., Ihab Mikati, et. al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018); Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53 (2011).

Respectfully submitted,



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/s/ Stephanie Kodish  
Stephanie Kodish  
Senior Director & Counsel, Clean Air Program  
National Parks Conservation Association

## APPENDIX I

### List of Attachments

CHESAPEAKE BAY TMDL DOCUMENT, *Appendix L, Setting the Chesapeake Bay Atmospheric Nitrogen Deposition Allocations* (Dec. 2010), [https://www.epa.gov/sites/production/files/2015-02/documents/appendix\\_1\\_atmos\\_n\\_deposition\\_allocations\\_final.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/appendix_1_atmos_n_deposition_allocations_final.pdf).

David Keiser, Gabriel Lade & Ivan Rudik, *Air Pollution and Visitation at U.S. National Parks*, SCIENCE ADVANCES (2018).

Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, AMERICAN PROSPECT (Nov./Dec. 1997).

Mandy Warner, *The Cost to Meet Clean Air and Environmental Standards Comes Down (Again)*, CLIMATE 411 (June 11, 2013), <http://blogs.edf.org/climate411/2013/06/11/the-cost-to-meet-clean-air-and-environmental-standards-comes-down-again>.

NPCA, *The Role of the Regional Haze Rule in Restoring Clean Air at National Parks and Wilderness Areas: Exploring the Impact of Regulatory Interaction on Power Plant Emissions and Visibility in Class I Areas* (Jan. 2016).

Rich Batiuk, Chesapeake Bay Program, *Adjustments to the Bay's Assimilative Capacity and Determination of Additional Nitrogen and Phosphorous Loads* (Mar. 2, 2018), [https://www.chesapeakebay.net/channel\\_files/25896/sources\\_of\\_additional\\_loads\\_provided\\_to\\_ny\\_and\\_wv\\_presentation-march\\_2\\_2018\\_psc\\_mtg\\_presentation\\_2.pdf](https://www.chesapeakebay.net/channel_files/25896/sources_of_additional_loads_provided_to_ny_and_wv_presentation-march_2_2018_psc_mtg_presentation_2.pdf).

Spencer Phillips & Beth McGee, CBF, *The Economic Benefits of Cleaning Up the Chesapeake: A Valuation of the Natural Benefits Gained by Implementing the Chesapeake Clean Water Blueprint* (Oct. 2014), <https://www.cbf.org/document-library/cbf-reports/the-economic-benefits-of-cleaning-up-the-chesapeake.pdf>.