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

Re: COMMENTS ON RESCINDING THE RULE ON "INCREASING CONSISTENCY AND TRANSPARENCY IN CONSIDERING BENEFITS AND COSTS IN THE CLEAN AIR ACT RULEMAKING PROCESS," 86 Fed. Reg 26,406 (May 14, 2021)

Administrator Regan:

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 Environmental Protection Agency's ("EPA") decision to rescind the rule "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process," 86 Fed. Reg. 26,406 (May 14, 2021) (the "Rule"). Including for the reasons discussed herein, we support EPA's decision to rescind the Rule.

While there were many problems with the Rule, these comments focus on EPA's lack of authority to promulgate it. The Rule's cited source of authority, 42 U.S.C. § 7601(a)(1) ("Section 301"), provides only limited rulemaking authority for administrative matters and does not extend to rulemakings, such as this, that are not necessary to the administration of the Clean Air Act. As discussed further below, not only was the Rule unnecessary, it was also unresponsive to any real problem and duplicative of existing EPA guidance documents.

In addition to failing the necessity requirement of Section 301, the Rule's disregard of the complex ways in which pollutants interact within and across environmental media would undermine environmental protections and the existing regulatory programs that are essential to public health, protection of ecosystems and wildlife, and local economies. Rescinding the Rule reduces this risk and associated negative environmental health and safety risks that often disproportionately affect children and residents of environmental justice communities.

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 their 300,000 members across the United States, CBF is 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.[1] NPCA and its 1.4 million members and supporters use, enjoy, and work to conserve the parks in the National Park System, including through engaging in the development and implementation of 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. The Rule is Not Necessary within the Meaning of Clean Air Act Section 301(a)(1)

To the extent that EPA has authority to take action pursuant to 42 U.S.C. § 7601(a)(1) ("Section 301"), often referred to as the Housekeeping Provision, this authority is limited to regulations that are "necessary" to the "administration" of the Clean Air Act.[2] The Rule was not necessary because EPA already performs benefit-cost analyses when appropriate, *e.g.* when required by Congress to do so, and has well-established guidance for doing so. In fact, several retrospective analyses have shown that EPA's Clean Air Act rulemakings produce more benefits than costs, suggesting there is no problem with EPA's rulemaking processes that would justify the Rule. Rather, the Rule could have hampered EPA's ability to conduct benefit-cost analyses by imposing unnecessary uniformity in situations where flexibility is needed.

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[1] NAT'L PARK SERV., 2019 NATIONAL PARK VISITOR SPENDING EFFECTS REPORT 18–448 (2020), https://www.nps.gov/subjects/socialscience/vse.htm.

[2] Courts have consistently forbidden agencies from using housekeeping authorities, either in the Housekeeping Statute (5 U.S.C. § 301) or in specific statutory provisions such as Section 301 of the Clean Air Act, to implement regulations that are even partially substantive in nature. 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).

Section 301 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. 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).[3] 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; *Citizens to Save Spencer Cnty. v. U.S. Envtl. Prot. Agency*, 600 F.2d 844, 873 (D.C. Cir. 1979) (holding that Section 301 of the Clean Air Act "does not provide the Administrator with Carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes."). This narrow authority does not displace limits on EPA's regulatory authority. *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 Rule replicated existing protocols and guidance documents, including ones like EPA's Guidelines for Preparing Economic Analyses, that are periodically updated to reflect best available science.[4] Such duplicative efforts cannot be "necessary," and EPA has not demonstrated that they are "useful."

i. *There Was no Need for the Rule*

There was no clear problem that the Rule sought 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

[3] 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).

[4] EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSES, https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.

billion.[5] 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.[6]

These benefits are not only a matter of dollars and cents; EPA regulations save lives. As an example, between 1970 and 2017 emissions of the six criteria air pollutants declined by an average of 73 percent, resulting in 160,000 fewer premature deaths per year, even as gross domestic product increased by 324 percent.[7] Regulations under the Clean Air Act have also achieved significant reductions in emissions of hazardous air pollutants and acid rain, and have helped reverse the destruction of the ozone layer.[8]

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.[9] 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.[10]

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 in the 1990s, to the Mercury and Air Toxics Standards ("MATS") for power plants.[11] With regard to

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[5] 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.

[6] 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_final.pdf.

[7] *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 June 9, 2021).

[8] Jonathan M. Samet, et al., *The Trump Administration and the Environment–Heed the Science*, 376 NEW ENG. J. MED. 1182, 1184 (2017).

[9] 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).

[10] EPA, Office of Air and Radiation, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, SUMMARY REPORT 2 (2011).

[11] 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).

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.[12] Yet, in a 2018 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"[13]—an average of $3 billion per year over six years.

The Rule would have interfered with the continued efficacy of Clean Air Act regulations, including by creating duplicative, time-consuming review criteria for EPA that would lengthen the rulemaking process without any demonstrated need for doing so.

ii. *Adopting Static and Universal Mechanisms for Benefit-Cost Analyses Prevents EPA from Using the Best Available Science and Adhering to Substantive Mandates under the Clean Air Act*

The Rule's attempt to standardize mechanisms for conducting benefit-cost analyses was not only unnecessary but also inappropriately hampered EPA's ability to determine and use the best processes for conducting benefit-cost analyses. Some level of flexibility is required in conducting benefit-cost analyses. For instance, the Science Advisory Board's comments on the Rule included the recommendation to avoid taking a "one size fits all" approach to causality.[14]

Moreover, as EPA noted, the Clean Air Act "contains a vast array of instructions about whether and how the EPA may consider benefits, costs, or other economic factors, and discerning Congress' intent with respect to those instructions requires analysis of statutory context." 86 Fed. Reg. 26,415. With these variations in mind, it is often appropriate to interpret the same term differently even in different sections of a single statute. For example, the U.S. Supreme Court explained that the:

> natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

[12] 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.

[13] 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.

[14] U.S. EPA SAB, 2020, *Science Advisory Board (SAB) Consideration of the Scientific and Technical Basis of EPA's Proposed Rule titled "Increasing Consistency and Transparency in Considering Benefits and Cots in the Clean Air Act Rulemaking Process,"* EPA-sAB-20-012, September 30 at pg. 7, *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/0A312659C8AC185D852585F80049803C/$File/EPA-SAB-20-012.pdf.

Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 574 (2007). The Rule's universal requirement to perform a benefit-cost analysis would have countered EPA's statutory obligations.[15]

III. The Rule's Attempt to Create Different Categories of Benefits Would Skew Net Benefit Calculations, Disregard the Interconnectedness of Emissions, and Undermine Regulatory Protection of Public Health and the Environment

The Rule's attempt to disentangle benefits and co-benefits did 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 ("$PM_{2.5}$") in a regulation generates not only visibility benefits, but health and wildlife protection benefits as well. For instance, in addition to well-documented negative effects on visibility and human health:

- $PM_{2.5}$ 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 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.[16] 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.

- $PM_{2.5}$ 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.

- $PM_{2.5}$ plays an important role in longer-distance pollution transport. The formation of secondary $PM_{2.5}$ from gaseous precursors like sulfur dioxide, nitric acid and ammonia

[15] *See e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (requiring EPA to consider costs in deciding whether it is "appropriate and necessary" to regulate power plant emissions of hazardous air pollutants, but emphasizing that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost.").

[16] Danny Hartono et al., *Impacts of Particulate Matter (PM2.5) 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 $PM_{2.5}$ deposition in water bodies, associated with acidification and some metals, can have an adverse effect on aquatic organisms).

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 $PM_{2.5}$ 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 the 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 the 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 reductions from other requirements.[17] 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 (national parks and wilderness areas). Coal-fired power plants are the largest point sources of sulfur dioxide, nitrogen oxides, and greenhouse gas emissions 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 Clean Air Act regulations. A regulation targeting sulfur dioxide emissions at coal-fired units cannot ignore the accompanying visibility benefits if natural visibility is to be achieved. Thus, consideration of what the Rule might deem an "ancillary benefit" is a critical component of achieving the visibility goals of the Regional Haze Rule.[18] By changing the way in which co-benefits are considered, the Rule would have substantively affected state interests under the regional haze program. To the extent that the Rule 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 Clean Air Act programmatic requirements to states.

[17] 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.

[18] 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).

IV. Rescinding the Rule Will Reduce the Risk of Harm to Vulnerable Populations

The Rule would have encoded value judgments that could impact the evaluation and development of regulations that can significantly affect health risks to children and the pollution burdens on environmental justice communities. The health risks from air emissions, such as asthma from exposure to particulate matter and neurological damage from exposure to lead, often disproportionately affect young children. For example, the negative impacts from mercury emissions are particularly harmful to children and significant sources of emissions, 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.[19] The importance of considering the impacts of rulemakings on these populations and communities is exemplified by Executive Order 13,045: Protection of Children from Environmental Health Risks and Safety Risks, which directs agencies to "make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children"[20] and 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.[21] EPA's initial development of the Rule did not adequately reflect the mandates of these executive orders or comply with the required analysis. This failure is another reason to rescind the Rule.

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In summary, EPA's decision to rescind the Rule is required and appropriate, from a legal, policy and scientific perspective. Rescinding the Rule will remove an inappropriate barrier to EPA's ability to fulfill its Congressional mandate to protect and enhance "the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b). Thank you for your attention to these comments.

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[19] *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), https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304297; Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53 (2011), https://ajph.aphapublications.org/doi/10.2105/AJPH.2011.300121.

[20] Exec. Order No. 13,045, 62 Fed. Reg. 19,885, at § 1-101(a)–(b) (1997).

[21] Exec. Order No. 12,898, 59 Fed. Reg. 7,629, at § 1-101 (1994).

Respectfully submitted,

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