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Docket No. EPA-HQ-OA-2018-0107

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COMMENTS

of

**WASHINGTON LEGAL FOUNDATION**

to the

**ENVIRONMENTAL PROTECTION AGENCY**

on

**Increasing Consistency and Transparency in Considering  
Costs and Benefits in the Rulemaking Process;  
Advanced Notice of Proposed Rulemaking**

**IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED  
AT 83 FED. REG 27524 (June 13, 2018)**

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July 20, 2018

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July 20, 2018

**Submitted Electronically** ([www.regulations.gov](http://www.regulations.gov))

Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
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**Re: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process; Advanced Notice of Proposed Rulemaking; Docket No. EPA-HQ-OA-2018-0107, 83 Fed. Reg. 27524 (June 13, 2018)**

Acting Administrator Wheeler:

Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Environmental Protection Agency's (EPA) advance notice of proposed rulemaking (ANPRM) seeking comment on whether and how EPA should promulgate regulations to provide a consistent and transparent means for weighing the costs and benefits of regulatory decisions, consistent with applicable statutes.

WLF's comments focus on EPA's consideration of costs and benefits in the rulemaking process. We conclude that, before promulgating any new regulation, EPA should conduct quantitative cost-benefit analyses of pollution standards, consistent with statute. If quantifying costs and benefits is not feasible, the agency should clearly explain its analysis and justify the regulation, if possible. If the regulation cannot be justified, it should not be promulgated.

As the ANPRM recognizes, virtually all environmental statutes leave the specifics of how to measure costs and benefits to EPA. This lack of guidance has produced disparate, inconsistent approaches to weighing costs and benefits, resulting in a lack of transparency in the rulemaking process. As shown below, establishing an agency-wide standard for all future regulations will increase consistency and transparency. By requiring EPA to consider costs and benefits in setting pollution standards, such a reform will ensure that any new regulation is truly justified.

## I. Interests of WLF

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes much of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal courts to urge that judicial interpretations of environmental laws strike a proper balance between environmental safety and economic well-being. *See, e.g. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA’s expansion of greenhouse-gas regulation likely to impact the entire economy); *Am. Farm Bureau Found. v. EPA*, 792 F.3d 281 (3d Cir. 2015) (challenging EPA’s TMDL for the Chesapeake Bay watershed). Likewise, WLF regularly submits comments to federal regulatory agencies, including EPA, on proposed rulemaking. *See, e.g. WLF Comment, In re Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water*, Docket ID No. EPA-HQ-OW-2018-0063-0001 (May 21, 2018); *WLF Comment, In re Definition of “Waters of the United States”—Recodification of Pre-existing Rules*, Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017).

In addition, WLF’s Legal Studies Division, the publishing arm of WLF, often produces and distributes articles on a wide array of legal issues related to EPA regulation. *See, e.g., Samuel B. Boxerman & Ben Tannen, EPA Seeks Stakeholder Comments On Reforming Existing Regulations*, WLF COUNSEL’S ADVISORY (Apr. 21, 2017); Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF LEGAL BACKGROUNDER (June 6, 2014); Richard Alonso & Sandra Y. Snyder, *Source “Aggregation”: Federal Appeals Court Reverses 30 Years of Faulty EPA Precedent*, WLF LEGAL BACKGROUNDER (Nov. 16, 2012).

WLF believes that EPA’s recent experiment with “social” harms and benefits paved the way for arbitrary regulation. If EPA can consider such social factors to the exclusion of economic impact, feasibility, or the significance of risks, then the only acceptable level for any “pollutant” will be that which eliminates *all* health risks. By injecting these subjective “measures” into cost-benefit analysis, EPA was able to justify pushing the acceptable level of pollution closer to zero-tolerance (which no statute advocates). As a result, any point short of zero-tolerance that EPA chooses results from agency whim rather than the rational application of a statutory standard. As shown below, only a return to hard, quantifiable costs and benefits will prevent arbitrary agency rulemaking.

## **II. Federal Courts Have Stressed the Importance of Considering Costs when Enacting Regulations**

Cost-benefit analysis offers a way for agency decision-makers to translate the relevant policy considerations into a usable form and quantitatively evaluate the net benefit of any proposed action. Valuation is at times difficult and, if not closely monitored, susceptible to manipulation, but agencies have utilized the practice in a wide range of contexts for nearly four decades. While it would be foolish to reduce all human values to figures in an equation, cost-benefit analysis promotes transparency and objectivity in regulatory rulemaking.

Federal courts, including the U.S. Supreme Court, have consistently recognized the importance of conducting a cost-benefit analysis before promulgating new regulations. In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Supreme Court considered whether a statute mandating “appropriate and necessary” regulations requires EPA to analyze costs. The Court found that statutory context supports the notion that regulatory benefits must be weighed against costs when EPA seeks to enact a new regulation. In reaching this conclusion, the Court observed, “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” *Id.* at 2707. While the Court did not limit its discussion solely to economic costs, the court made clear that some meaningful consideration of costs is vital.

Under the previous administration, EPA seemingly ignored best practices from the Office of Management and Budget (OMB), pushing through regulations “justified” by scientifically imprecise calculations. The jettisoning of OMB’s best practices was at odds with *Michigan*. Cost is a “centrally relevant factor when deciding whether to regulate.” *Id.* at 2707-08 (citing *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J. concurring in part and dissenting in part)). Failing to consider and quantify the monetary costs and benefits of a proposed regulation leads to overregulation and wasteful expenditures in the name of attenuated “social benefits.” That approach can cause EPA to neglect more serious problems in favor of those that are politically expedient. *Id.*

The D.C. Circuit has gone further than the Supreme Court, holding that an agency statutorily authorized to conduct a cost-benefit analysis *must* quantify costs and benefits. In *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), the court held that the SEC failed to quantify costs when promulgating a rule requiring public companies to provide shareholders with information about shareholder-nominated board candidates. In holding for Business Roundtable, the court found that the SEC “failed adequately to quantify the certain costs or to explain why those costs could not be quantified” and “neglected to support its predictive judgments.” *Id.* at 1148-49.

Because the goal of EPA's proposed rule is to provide clarity to stakeholders who must comply with the agency's regulations, it should require those regulations to include a quantified cost-benefit analysis. "[A]ssessment of benefits and costs remains, at the present time, the most administrable way of capturing the welfare effects of regulations." Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 10 (2017). Though it is the best approach, "[s]pecification of costs and benefits can be exceedingly challenging, not least in the environmental setting, and in some contexts, it is not possible." *Id.* at 9. When that is the case, failure to quantify requires a non-arbitrary justification.

### **III. EPA Can Best Roll Back Overregulation by Taking an Objective Approach to Cost-Benefit Analysis**

Under the previous administration, this agency considered the "social costs" and "social benefits" rather than the monetary costs and benefits of proposed regulations. "EPA began factoring in speculation about how regulatory inaction would affect everything from rising sea levels to pediatric asthma ...[and] even included their guesses about how domestic regulations could have a global impact." *Cost-Benefit Reform at the EPA*, THE WALL STREET JOURNAL (June 6, 2018), <https://www.wsj.com/articles/cost-benefit-reform-at-the-epa-1528326402>. Under the current administration, EPA wisely seeks to roll back much of this unjustified overregulation. While EPA previously focused on the social benefits of proposed regulations, the agency should be economically prudent while still striving to protect the environment. A standard requiring the agency to quantify costs and benefits to the greatest extent possible, weighing them against each other, will help EPA achieve these goals.

Several problems exist with a cost-benefit analysis that focuses primarily on social costs and benefits rather than on economic realities. It is virtually impossible to place an objective monetary value on social costs and benefits, leading agencies like EPA to overvalue the potential social benefits (as well as the social costs of "harmful" agents like carbon) and undervalue the economic impact of environmental regulations. *See* Julian Morris, *Assessing the Social Costs and Benefits of Regulating Carbon Emissions*, REASON FOUNDATION, Policy Study No. 445 (August 2015). For example, in 2010, the U.S. government Interagency Working Group (IWG) attempted to estimate the social cost of carbon, yet the IWG's estimates turned out to be deeply flawed. *Id.* at 38. Rather than following OMB's 7% discount for future costs and benefits as recommended for all U.S. government estimates, the IWG used "a range of lower *and variable* discount rates (these averaged 2.5%, 3% and 5%)." *Id.* at 2. Even after updating its estimates, the IWG relied on still-flawed assumptions.

These “pessimistic assumptions” not only overvalued the social costs of carbon, but they failed to account for the ability of “humanity’s future adaptive capacity” to develop products that will benefit humans. *Id.* While it is impossible to know exactly what new technologies will exist in the future, “it seems bizarre to assume that none of the innovation that is expected to take place will result in enhanced adaptive capacity. Historically, there has been a strong relationship between general innovation and increases in adaptive capacity.” *Id.* at 32. Relying on false assumptions not only wastes government resources, but it also harms businesses forced to comply with ambiguous regulations.

Because evaluating social costs and benefits inherently involves making subjective value judgments, EPA should adopt an approach that requires it to quantify both costs and benefits of every new regulation and demonstrate how the benefits justify the costs. The first step the agency should take is a return to OMB’s “best practices” as described in OMB Circular A-4. Any analysis of a proposed regulation should (1) clearly state the need for the proposed action, (2) show that the agency considered alternative approaches (including no regulation), and (3) weigh the costs and benefits of the proposed regulation. *See* Maeve P. Carey, *Cost-Benefit and Other Analysis Requirement in the Rulemaking Process*, CRS Report R41974 at 6 (December 9, 2014) (examining Executive Order 12866 and OMB Circular A-4). To the greatest extent feasible, the agency’s analysis must provide a detailed accounting of the expected costs and benefits of the action and plainly demonstrate that the benefits justify the costs. *Id.* at 10.

Future regulations should rely on scientific and economic analyses, rather than politically fashionable “ideals.” While Circular A-4 acknowledges that quantified cost-benefit analysis may not be useful in every situation, quantified cost-benefit analyses often reveal the most efficient approach to regulation in terms of net benefits. *Id.* at 6. Only after clearly explaining why a cost-benefit analysis is impossible should EPA explore non-quantifiable factors that are important enough to warrant consideration. By clearly justifying any departure from a true cost-benefit analysis, the agency can better avoid the appearance of arbitrary decision-making.

A quantitative cost-benefit analysis eliminates the capriciousness with which the government too often enacts regulations. In enacting an objective agency-wide cost-benefit analysis standard, EPA should promote replicability, workability, and economic efficiency. *See Using Cost-Benefit Analysis to Craft Smart Regulation*, Business Roundtable (December 2014), <https://www.businessroundtable.org/sites/default/files/reports/BRT%20Cost-Benefit%20Analysis.pdf>. Quantified analyses that emphasize monetary costs and economic consequences will better enable third parties to review proposed rules and re-create the analyses under alternate scenarios, leading to improved feedback on proposed rules. *Id.* at 28. “Increasing the ability of credible third parties to

review agency [cost-benefit analyses] for major proposed rules will lead to more reliable estimates and, in turn, smarter regulations.” *Id.*

Also, “cost-benefit analysis can operate as a valuable check” on the “characteristic maladies of the modern administrative state,” countering those special interest groups that push regulations based on “behavioral biases, and (most generally and importantly) inadequate attention to likely consequences.” Sunstein, *supra*, at 10. With more efficient regulations backed by objective analyses, EPA can likely limit the overall number of regulations promulgated in the future, rolling back overregulation.

#### **IV. Conclusion**

During the previous administration, EPA enacted hundreds of new rules each year in the name of promoting nebulous social benefits. The agency’s desire to enact reform will help ensure that future regulation is based on sound scientific analysis. This is a positive step to rolling back overregulation. The best way to provide clarity in the regulatory process is to require a quantifiable cost-benefit analysis, demonstrating that the benefits justify the costs. In those situations where quantification is neither feasible nor possible, EPA should justify its proposal to show it has not acted arbitrarily. If the agency cannot justify its actions, it should not promulgate the regulation.

Sincerely,

/s/ Marc B. Robertson

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/s/ Cory L. Andrews

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