Comments of David R. Hill on EPA's Notice of Proposed Rulemaking:

"Increasing Consistency and Transparency in Considering
Benefits and Costs in the Clean Air Act Rulemaking Process"
EPA-HQ-OAR-2020-00044

August 3, 2020

I am submitting these comments concerning EPA's notice of proposed rulemaking (NOPR), "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process," Docket EPA-HQ-OAR-2020-00044. These comments address four points. They:

(1) support the legal and policy soundness of using benefit-cost analysis in evaluating the legality and appropriateness of significant Clean Air Act rulemakings;
(2) support the NOPR's proposal that the benefits and co-benefits of a proposed significant Clean Air Act rulemaking be segregated and separately identified;
(3) support the overall regulatory mandate that benefit-cost analysis must be presented "in a manner designed to be objective, comprehensive, reproducible to the extent reasonably possible, and easily understood by the public"; and
(4) encourage EPA to consider how the mandates of the rule can best be put in place and enforced while at the same time not becoming a source of extensive new litigation that results in Clean Air Act requirements becoming even more uncertain and expensive for the regulated community.

Background. I am an attorney with more than 30 years of legal practice experience. I served as General Counsel of the U.S. Department of Energy from 2005 2009, and prior to that was DOE's Deputy General Counsel for Energy Policy from 2002 - 2005. As DOE's general counsel, I was responsible for the Department's own rulemaking activity. In addition, as DOE's general counsel and also while serving as deputy general counsel for energy policy I participated in the interagency review process administered by the Office of Information and Regulatory Affairs and the Council on Environmental Quality concerning a number of significant EPA Clean Air Act rulemakings.

From 2012 2018, I served as executive vice president and general counsel and on the senior management team of NRG Energy, Inc., a Fortune 500 company and one of the nation's largest generators and sellers of electric energy. The company's portfolio of electric generating facilities included natural gas and coal-fired power plants, large

wind and solar generating facilities, and part ownership of a nuclear power plant. As the company's general counsel, I was responsible for its legal, regulatory, environmental and policy matters. I am familiar with how a company in the electric power industry is affected in significant ways by EPA Clean Air Act regulations and takes environmental obligations and other regulatory requirements into account when formulating business plans and managing operations.

In offering these comments, I note first what the proposed rule does and does not do. It does propose to regularize and codify certain practices by which benefit-cost analyses are prepared and considered as EPA formulates and promulgates significant Clean Air Act regulations. It does seek to promote greater clarity in the presentation of benefit-cost analyses. It does seek to make public as much information as possible about the benefit-cost analyses that have been conducted by the agency and that may inform its rulemaking activity.

However, the proposed rule does not seek to place requirements on how EPA actually uses benefit-cost analysis in individual rulemakings. EPA "is not proposing to specify how or whether the results of the BCA should inform significant CAA regulatory decisions." And further, "EPA is not proposing to mandate that a significant CAA regulation be promulgated only when the benefits of the intended action justify its costs." 85 F.R. at 35623. Indeed, as the NOPR preamble makes clear, the EPA is legally barred from considering the costs of compliance in some rulemaking activity, such as when setting the national ambient air quality standards. 85 F.R. at 35623.

It is with these purposes and limitations of the proposed rule in mind that I offer the comments below.

First. The NOPR makes clear, and I agree, that there is strong policy and legal support for using benefit-cost analysis when promulgating significant regulations, both under the Clean Air Act and other laws. Its use has been widely recognized at least since the 1970s. *See* 85 F.R. at 35614. President Clinton's Executive Order 12866 issued in 1993, which governed rulemaking while I was an official at DOE and which still is in effect today, requires agencies to prepare "an assessment of the potential costs and benefits" of significant regulatory actions. *Id.*

Some statutory authorizations for federal regulations contain an explicit requirement that the regulations be cost-justified. For example, the legal authority for certain energy efficiency standards promulgated by the U.S. Department of Energy requires those standards to be "technically feasible and economically justified." But even where the statute does not require the consideration of costs in issuing regulations or setting standards, the Supreme Court has held that agencies generally may do so and, in some cases, it would be irrational for them not to. *See Entergy Corp. v. Riverkeeper,*

Inc., 556 U.S. 208, 222 (2009); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015); 85 F.R. at 35616.

I believe many people would think it self-evident that an agency should consider the costs and benefits of its proposed action, and whether the benefits outweigh the costs, when promulgating a significant rule. They would wonder — and not without reason — why any significant rulemaking would ever be issued without considering both its benefits and costs, and why the government would ever be inclined to impose a regulatory mandate when the costs of the mandate exceeded its benefits. It is how people conduct their everyday lives — when making decisions, they implicitly or explicitly consider whether the benefits of a particular action or decision will exceed its costs. Basically, they evaluate whether a particular course of action is "worth it." I think they also might wonder why it should be controversial that benefit-cost analysis be required to be transparent and explained in readily understandable terms.

Indeed, why *is* any of that controversial? It really shouldn't be. The outcome of any particular benefit-cost analysis might be controversial and debatable. But there ought to be general support for at least trying to do benefit-cost analysis, doing it in a rigorous way, and fully informing the public about its results. The general purpose of solid, transparent benefit-cost analysis — and a rule mandating that analysis — is not and should not be to promote or defeat any particular regulation, regulatory approach, or level of pollution control. Instead, it is to ensure policymakers can be well-informed about the choices presented to them and their decisions — and that members of the public, who after all will pay the costs of any regulation and also receive its benefits, know what their payment is buying. Rigorous, transparent benefit-cost analysis allows the general public and the regulated community to form better informed views about proposed regulations and about the policymakers making the decisions. In a democratic capitalist society like the United States there is nothing wrong with that.

At the same time, the public deserves a regulatory process that is reasonably expeditious and provides certainty to the regulated community and the general public. It of course is extremely difficult to properly balance the need for rigorous analysis and an appropriate opportunity for public input with the need to actually make decisions and bring about the public benefits that good rulemaking and regulatory certainty can bring. But difficulty is not an excuse for dispensing with either necessary requirements or necessary rulemakings. Not unlike guiding a car through heavy traffic on a busy interstate highway, it requires constant attention and adjustment, but it can be done.

In that regard, I note that in recent months DOE finalized revisions to its "Process Rule" for the promulgation of energy efficiency standards for certain consumer

appliances. This rule was first put in place in the 1990s to establish procedures for the development and promulgation of these standards. From my years being involved in DOE's energy efficiency rulemaking process, I know both the benefits and the burdens of complying with the Process Rule.

Over the years, a number of deficiencies and difficulties with that rule had been identified, and so recently DOE revised it. One of the primary arguments against the revisions, however, was that they would lengthen the rulemaking process and make the promulgation of energy efficiency standards more difficult. Commenters opposing the revisions said that DOE's process should be transparent, predictable and flexible, but asserted that the revisions did not advance those goals and in fact might put DOE further behind in meeting statutory deadlines that already had proved to be difficult or impossible for DOE to meet.

I won't address here whether I believe any of those arguments are legitimate criticisms of DOE's Process Rule or the revisions to it. But they certainly are legitimate general concerns for any rulemaking process, including under the Clean Air Act — and must be considered when evaluating new rulemaking process requirements. In promulgating requirements for benefit-cost analysis, EPA should consider the effect such requirements may have on delaying or impeding necessary rulemaking. It should consider — and make explicit in both the preamble and the text of its final regulations — how it has tailored the requirements to appropriately balance the policy of ensuring significant rules are informed by rigorous and replicable cost-benefit analysis with the policy of ensuring important rulemakings can proceed reasonably expeditiously.

Second. In the interest of making it clear to the public what EPA is doing and why, it is highly desirable that the benefits and co-benefits of a proposed significant Clean Air Act rulemaking be segregated and separately identified. Given the choice between clarity and muddiness in a rule's explanation, EPA should choose — and the public deserves — clarity.

The NOPR in Section 83.4 proposes to require that EPA, in the preamble for significant Clean Air Act rulemakings, present the health and welfare benefits "that pertain to the specific objective . . . of the CAA provision or provisions under which the rule is promulgated." 85 F.R. at 35627. It further proposes some specific requirements for this presentation of benefits. *See also* 85 F.R. at 35622.

Segregating and separately identifying benefits and co-benefits allows the public to be better informed about what the EPA is doing and why. It also allows the EPA's authorizers and appropriators to evaluate whether the EPA is acting in a manner consistent with Congressional intent and statutory authorizations. And, it would

allow the regulated community to offer comments better designed to help the agency issue regulations that meet the purposes of the particular statutory authorization while minimizing costs.

One of the more controversial cases involving the relative benefits and co-benefits of a major EPA Clean Air Act regulation involved EPA's regulation of mercury from power plants. EPA estimated that its Mercury and Air Toxics rule would impose annual social costs of $9.6 billion in order to gain $4 million to $6 million in direct annual monetizable benefits from reduced mercury emissions. That's a cost of about $1,900 for each dollar of benefit from reduced emissions of mercury, the pollutant statutorily authorized to be regulated and at which the rule was directly targeted.

Based on that data alone, the cost of the regulation would appear to be wildly out of proportion to its benefits — and likely irrational. Few people would argue that EPA should issue a regulation that cost Americans almost $2,000 for each dollar of benefit they would receive.

In the case of the Mercury and Air Toxics rule, however, if the value of co-benefits is considered — that is, the benefits to be gained by reducing emissions of other pollutants that would be controlled as a result of mercury emission controls — the rule's benefits were estimated to significantly exceed its costs. EPA calculated the estimated annual co-benefits of reducing power plant mercury emissions to be $37 billion to $90 billion, largely from the 4,200 to 11,000 fewer PM2.5-related premature mortalities.

So, is it better to look at this regulation as having costs that exceed benefits by a factor of almost 2,000 to 1? Or to look at it as a rule with benefits anywhere from 3 to 9 times as great as its costs? Both views would be technically correct. And yet, viewed in one way the rule looks to be sound policy and viewed in the other way it clearly is not.

The decision about how to proceed in some cases boils down to a question of whether it is good policy and legally defensible for the EPA to use a Clean Air Act provision authorizing regulation of one pollutant to impose a regulation far more costly than regulation of that pollutant would justify, but which will result in the public receiving other quantifiable benefits that result in the rule's benefits exceeding its costs. Arguments can be made both ways.

This proposed rule doesn't seek to resolve that question. It doesn't even propose to place any requirements on how or whether the results of benefit-cost analysis should inform significant Clean Air Act regulatory decisions. *See* 85 F.R. at 35623. Instead, what the NOPR does, among other things, is require that EPA say — and that the public be informed — about what benefits will be derived from regulating the pollutant

at which the rule is targeted and statutorily authorized, and what benefits are "co-benefits" or by-products of the regulation.

This requirement is good policy. It would promote transparency in the federal rulemaking process. It would lead to a better-informed public and to better rulemaking.

I do believe the text of Section 83.4 could be made clearer. The preamble language at 85 F.R. 35622 is in some respects clearer than the proposed rule text in section 83.4. The regulatory text could be improved by including words almost verbatim from what is at 85 F.R. 35622, specifically that benefit cost analysis must "clearly distinguish between the social benefits attributable to the specific pollution reductions or other environmental quality goals that are targeted by the statutory provisions that give rise to the regulation, and other welfare effects." The text should make clear that benefit-cost analysis should delineate between health benefits and non-health welfare benefits, and that it should do that for both benefits of the reduced emissions targeted by the statutory provision giving rise to the regulation, and the co-benefits.

Third. I support the regulatory mandate requiring that benefit-cost analysis must be presented "in a manner designed to be objective, comprehensive, reproducible to the extent reasonably possible, and easily understood by the public," and that EPA must describe "how the benefits and costs were estimated in the BCA, including the assumptions made for the analysis." *See* Section 83.3(a)(11)(i) & (ii); 85 FR at 35627. For a significant Clean Air Act rulemaking, with potentially tens or hundreds of billions of dollars in benefits and costs and with potentially major implications for American health, jobs and the economy, this is not asking too much.

Again, it seems hard to argue that any of these objectives are bad policy or bad ideas. The arguments against these requirements likely are more in the nature of "the devil is in the details" and that complying with the new rule will be difficult and time-consuming.

Yet it is not really a persuasive argument against a sound regulatory requirement that compliance with it will be hard so long as the degree of difficulty in meeting the regulatory requirements is carefully considered and balanced against the benefits to be derived from imposing the requirement. Just as President Clinton's Executive Order 12866 imposed the requirement on EPA (and other agencies) that they assess the costs and benefits of significant regulations, it is a good thing for EPA to clarify and make mandatory the requirement that significant Clean Air Act rulemakings be supported by benefit-cost analysis that is "objective, comprehensive, reproducible to the extent reasonably possible, and easily understood by the public," and that its assumptions be clearly specified.

In considering and promulgating a final benefit-cost analysis rule, the agency should consider and explain how it has balanced the potential burdens of the new rule with its potential benefits. The purpose of this rule is to ensure that rigorous benefit-cost analysis is performed and, where appropriate, inform the public and EPA in connection with significant Clean Air Act rulemakings. Particularly with a rule that has this purpose, EPA should consider and clearly explain both the benefits and burdens of imposing these requirements, and explain how it has balanced those factors in formulating its final rule.

Fourth. In today's regulatory and litigation environment, it is virtually certain that significant Clean Air Act rulemakings (and for that matter significant regulations promulgated under other statutory authorities) are going to be challenged in court. Considering the complexity of major rulemakings, both in their requirements and in the analyses offered in support and opposition to them, there are almost always grounds upon which parties can attempt to mount legal challenges.

It is possible if not likely that the NOPR's requirements could expose EPA to more grounds for challenging significant Clean Air Act rulemakings. This is concerning because capital intensive industries like the electric power generation business already are faced with very difficult and complex decisions when evaluating regulatory risk and uncertainty. EPA should do what it can to ensure these decisions are not made even more difficult.

That said, the fact rigorous benefit-cost analysis is hard to do and can be complex to explain is no reason not to do it. Indeed, as noted above and in the NOPR preamble, there are compelling justifications for regularizing rigorous requirements for benefit-cost analysis, informing the public about it, and considering it in the rulemaking process where legally permitted. The fact that good rulemaking is difficult and may lead to litigation is not a reason to be satisfied with faulty Clean Air Act regulations or an uninformed public.

I do think EPA should consider whether it is possible or advisable to make certain elements of this regulation less likely to be a source of significant litigation. This might be done, for example, by making certain requirements explicitly subject to feasibility, as the NOPR does with respect to the requirements in Section 83.3(a)(10)(iv). With a provision such as this, presumably EPA could explain why complying with the regulatory requirement is not feasible in a particular case, and therefore would not have to comply with the specific requirement. EPA should carefully consider and explain which requirements should be subject to such a "feasibility" or "appropriateness in the discretion of the Administrator" test, and which provisions of the rule should be clearly and in all cases mandatory.

Again, the overall purpose of benefit-cost analysis should be to reasonably inform policymakers and the public about the potential benefits and costs of a proposed or final regulation, and to result in better rulemaking. The purpose is not to create new grounds for litigation. Of course the requirements of the Administrative Procedure Act and relevant judicial precedents will apply to this rulemaking and to EPA's administration of the new regulatory requirements. And so EPA will at all times need to act in a manner in accordance with law. EPA can help itself do that in future significant Clean Air Act rulemakings by seeking to be clear in the final benefit-cost analysis rule about what is clearly mandatory, and what provisions may be subject to a feasibility, discretion, or appropriateness test that EPA can address in the context of an individual rulemaking.