



April 4, 2011

Improving Regulations Docket  
Environmental Protection Agency  
EPA Docket Center, Mailcode 2822T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

RE: Request for comment on retrospective review of rules, 76 Fed. Reg. 9988  
(Feb. 23, 2011).

We appreciate the opportunity to offer the following comments on EPA's plans for implementing the President's Executive Order 13563, "Improving Regulation and Regulatory Review." EPA has specifically sought public input on the design of a plan to use for periodic retrospective review of its regulations."

**1. EPA must complete long overdue actions required to protect public health and the environment before diverting resources to retrospective reviews for other purposes**

Any plan for retrospective reviews must give highest priority to carrying out EPA's legal duties to protect public health and the environment. The agency does not have discretion to delay or shortchange performance of these duties to facilitate discretionary reviews of rules for other purposes. EPA is currently legally delinquent in adopting or reviewing a long list of rules and rulemaking actions that are critically important for protection of public health and the environment, including:

- \* "residual risk" standards for toxic emissions from 48 major industrial source categories
- \* review of technology-based ("MACT") standards for toxic emissions from the same 48 source categories
- \* approval, disapproval and/or promulgation of total maximum daily loads for hundreds of rivers, lakes, and streams throughout the nation that violate clean water standards

- \* approval, disapproval, and/or promulgation of dozens of overdue state implementation plans to attain and maintain clean air standards throughout the nation
- \* approving, disapproving, and/or promulgating plans to cleanup haze pollution in national parks and wilderness areas - action that is years overdue for every state in the nation.
- \* updating emission standards for major polluting industries like steel mills and pulp & paper mills

EPA has also yet to complete (or in some cases even commence) actions required to comply with court decisions or respond to rulemaking petitions, including rulemakings and other actions to:

- \* comply with court remands of toxic emission rules for 12 major source categories, including hazardous waste combusters, large municipal waste combusters, solvent plants, dry cleaners, PVC plants, and steel mills.
- \* respond to court decision rejecting EPA's 2006 rationale for refusing to adopt stronger national ambient air quality standards for fine particle pollution, pollution responsible for tens of thousands of premature deaths each year.
- \* respond to court remands holding that existing rules illegally waive strong pollution control requirements for major factories and power plants in cities with unsafe air quality
- \* respond to a petition to revoke illegal "startup, shutdown & malfunction" exemption for dozens of categories of major industries that can emit dangerous levels of toxic pollutants during such "SSM" events.
- \* respond to a petition filed more than twelve years ago to revoke the exemption of wastewater treatment units from RCRA regulation, an exemption that leaves an estimated 1 billion tons of hazardous waste without meaningful regulatory safeguards
- \* respond to a court decision holding that operating permits under the Clean Air Act must require emissions monitoring adequate to ensure

compliance with pollution limits - monitoring that is crucial to ensuring protection of public health and the environment from illegal emissions

There are numerous other key EPA actions needed to provide critically important public health and environmental protections including, for example:

- \* Eliminating the huge gaps in EPA's IRIS database of risk information on chemicals to which the public is exposed. For example, according to a 2009 analysis by the Center for Progressive Reform, 17% of hazardous air pollutants listed in the Clean Air Act are not addressed in IRIS at all, and IRIS has no inhalation criteria at all for two-thirds of all CAA HAPs. [http://www.progressivereform.org/articles/cpr\\_iris\\_904.pdf](http://www.progressivereform.org/articles/cpr_iris_904.pdf)

- \* Developing the tools urgently needed to address cumulative impacts of the multiple toxins and other pollutants to which people are routinely exposed, a shortcoming that disproportionately impacts low income and minority communities.

- \* Updating EPA's water quality criteria documents under section 304 of the Clean Water Act, some of which have not been reviewed for decades, and adding criteria documents for the large number of pollutants not currently addressed at all.

- \* Restoring the prohibition, repealed by the prior Administration, on treating wastes as fill material for purposes of Clean Water Act section 404.

- \* Adopting clear rules prohibiting the obliteration of rivers and streams by valley fills from mountaintop removal mining

- \* Adopting strong safeguards against water pollution, air pollution, and environmental damage from extraction of natural gas, including "hydro-fracking."

- \* Completion of guidance on identifying "waters of the United States" covered by the Clean Water Act. The lack of such guidance is undermining clean water protection for numerous waters throughout the nation.

- \* Following through on adoption of numeric nutrients limits in Florida to stop toxic green slime algae outbreaks, and adoption of overdue numeric nutrient limits in other states as well.

- \* Requiring continuous emissions monitoring at significant industrial sources so that emission limits can be effectively enforced and people in neighboring communities can find out the level of pollution they are being exposed to.

\* Requiring disclosure of “inert” (though sometimes hazardous) ingredients in pesticides so pesticide users and the public can make informed decisions about pesticide use, and to facilitate effective medical treatment when people suffer adverse health effects from pesticide exposure.

\* Research and (where warranted) regulation to address adverse impacts of endocrine disruptors on human health and wildlife.

The matters listed above are by no means an exclusive list of EPA rulemakings and other actions needed to comply with legal requirements and/or provide critically needed environmental protections. They are cited only as examples of the long list of unfinished business that EPA faces to meet its basic duty to safeguard people’s health and the nation’s ecosystems. EPA must ensure that it is fully meeting that duty before it diverts limited resources to addressing claims that pre-existing rules are “burdensome” or warrant “streamlining.” Moreover, completion of the overdue actions listed above is particularly important to the protection of children’s health, as most of the contaminants required to be addressed by those actions disproportionately impact children.

## **2. EPA must ensure compliance with the Environmental Justice Executive Order**

In deciding on its course of action for reviewing rules, EPA must take seriously its duties under the 1994 Executive Order on Environmental Justice (“EJ EO”). A number of the overdue rules and other action cited above are particularly critical to protection of people living in minority communities, and thus warrant priority attention under the EJ EO. Likewise, EPA must carefully weigh and address potential impacts on minority communities before revisiting and revising rules based on claims of undue cost or burden to regulated parties.

## **3. EPA must ensure that regulatory reviews fully account for health and environmental benefits of rules, and do not overstate compliance costs**

Where the relevant statutes provide for weighing environmental benefits and costs in deciding whether and how to review rules, EPA must consider the full scope of a rule’s public health and environmental benefits before making any decisions. EPA must continue to abide by the criteria that have historically driven the agency’s decisionmaking: public health and welfare, environmental preservation, environmental justice, citizens’ right to know, sound science, and statutory intent. At the same time, EPA must ensure that costs of compliance with its rules are not overstated.

To date, EPA standards have yielded extraordinary health benefits that far exceed costs, as the agency's recent report on the Clean Air Act shows: "In 2010 alone, the reductions in fine particle and ozone pollution from the 1990 Clean Air Act amendments prevented more than: 160,000 cases of premature mortality; 130,000 heart attacks; 13 million lost work days; [and] 1.7 million asthma attacks."<sup>1</sup> The same report says, in 2010, benefits totaled approximately \$1.3 trillion while compliance costs were approximately \$53 billion. The value of annual benefits could reach an estimated \$2 trillion in 2020, the report says. In addition, the annual cost-benefit reports prepared by the Office of Management and Budget (OMB) for Congress continue to show that EPA's major rules provide the majority of the total benefits to society from all the rules reviewed by OMB.

EPA rules also provide major benefits in protecting other environmental values. For example, EPA found that its 2001 emission standards for diesel trucks would substantially cut air pollution throughout the nation responsible for regional haze, acidification of rivers and lakes, and eutrophication of estuaries. 66 Fed. Reg. 5008, 5025-27 (2001).

Unfortunately, EPA and OMB analyses of proposed EPA rules often fail to fully capture these kinds of net positive benefits. That can be due to an understatement of benefits, an overstatement of costs, or both. For example, EPA typically refuses to attribute any unique benefit at all to reductions in toxic emissions required by its air toxics rules because the agency claims insufficient information to quantify the precise benefit. Thus, EPA cost-benefit analyses typically fail to account for any of the benefit from reducing exposure of people to dangerous pollutants like arsenic, mercury, and cyanide. Likewise, EPA and OMB cost-benefit analyses often overstate costs by, for example, presuming a static business model; but regulated entities adapt, and regulation often compels innovation and gains in efficiency and productivity.

EPA and OMB economic analyses also typically fail to account for the economic disincentives for environmental protection that weak environmental rules entail. Weak health and environmental safeguards create unfair competition, favoring those firms who fail to internalize costs (e.g., coal imposes extraction impacts such as mountaintop removal mining, and combustion impacts such as death, illness and ecological damage) over those who either use inherently cleaner processes (e.g., wind or solar) or who spend money on preventing and controlling pollution. In turn, this unfair competition

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<sup>1</sup> "EPA Report Underscores Clean Air Act's Successful Public Health Protections/Landmark law saved 160,000 lives in 2010 alone," U.S. Environmental Protection Agency, March 1, 2011, <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/f8ad3485e788be5a8525784600540649!OpenDocument> (accessed March 25, 2011).

harms states, which cannot effectively prevent it, given that sources can relocate in other, laxer states--thus pointing up the need for strong federal floors. Failure to address the unfair competition created by weak federal environmental standards undermines Congressional intent. See, e.g., Senate Committee on Public Works, A Legislative History of the Clean Water Act of 1977 at 920-21 (1978)(Statement of Senator Baker).

One example of flawed cost-benefit analysis (“CBA”) is the coal ash rule. There, the CBA was grossly inaccurate, resulting in a cost figure more than 20 times the actual number (\$23 billion vs. \$1.5 billion). The inaccuracies included double counting of pollution reductions that the EPA has already claimed would occur separately under Clean Air Act rules adopted in August 2010, unreasonable predictions regarding behavior of the recycling market and unrealistic assumptions about potential energy savings. The findings are detailed in the recent report "Re-evaluation of Estimates in USEPA Regulatory Impact Analysis" by Earthjustice, Environmental Integrity Project and Stockholm Environment Institute’s U.S. Center (based at Tufts University).<sup>2</sup> As for benefits, the coal ash CBA failed to fully consider health costs from multiple pollutants and non-cancer impacts. Such analysis doesn’t do justice to the countless communities drinking from arsenic-laden wells everyday, breathing toxic dust blowing off uncovered ash dump sites, and future generations who will have to clean up the mess we make.

#### **4. EPA can simplify many rules by eliminating unwarranted loopholes and exemption provisions**

Much of the complexity in EPA rules stems from inclusion of lengthy provisions authorizing regulated parties to avoid compliance with safeguards that would otherwise apply. For example, EPA’s NSR rules contain substantial provisions that enable major sources to evade the Clean Air Act’s NSR requirements for a variety of significant facility modifications. Many of the agency’s emission standards under sections 111 and 112 of the Clean Air Act are riddled with illegal “SSM” exemption provisions. EPA could do much toward simplifying its rules and making them more effective by eliminating or substantially curtailing these kinds of loopholes, which are often contrary to law or inconsistent with achieving statutory goals for protecting health and the environment.

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<sup>2</sup> “Re-evaluation of Estimates in USEPA Regulatory Impact Analysis.” <http://earthjustice.org/sites/default/files/EIP-coal-ash-rule-analysis.pdf>. November 16, 2010.

These comments are submitted on behalf of the following organizations:

Center for Biological Diversity  
San Francisco, CA

Healthy Child Healthy World  
Los Angeles, CA

Center for International Environmental  
Law  
Washington, DC

NY Lawyers for the Public Interest  
New York, NY

Clean New York  
Albany, NY

OMB Watch  
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Clean Water Action  
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Earthjustice  
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Public Citizen  
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Boston, MA

Safe Climate Campaign  
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Greenpeace  
Washington, DC

Women's Voices for the Earth  
Missoula, MT

Sincerely,

*/s/ David S. Baron*

David S. Baron  
Attorney  
Earthjustice