

Common Nonsense: Who’s Regulating the Regulators?

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In White Stallion Energy Center, LLC v. Environmental Protection Agency, the D.C. Circuit upheld the long-delayed Utility Maximum Achievable Control Technology rule against allegations that the U.S. Environmental Protection Agency had impermissibly failed to consider costs before deciding that regulating hazardous air pollutants, including mercury, from power plants was “appropriate and necessary.” The court held that the Clean Air Act did not require the Environmental Protection Agency to consider costs, but executive orders on centralized regulatory review require that all new and proposed rules pass a cost-benefit analysis before taking effect. This Note examines the intertwined histories of environmental regulation and centralized regulatory review, which show that regulatory review began as a deregulatory project in response to industry complaints about environmental regulation and only later was rebranded as an objective tool for effective regulation. This Note surveys criticisms of the Office of Information and Regulatory Affairs, the agency responsible for vetting cost-benefit analyses of new rules, and concludes by exploring whether the Office of Information and Regulatory Affairs is necessary, and what reforms might be desirable.

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INTRODUCTION

At first glance, cleaner air seems like a political slam dunk. Common sense tells us that soccer moms, NASCAR dads, “job creators,” and boomeranging millennials all have a deeply personal interest in breathing. However, this interest is difficult to express in dollar terms. In America, air is free. At least for now.

Hypothetically, though, how much would you pay to breathe? How much more for air with a reduced risk of cancer from lead? From mercury? How big a surcharge for helping out with global warming? Are you sure you can afford that? More importantly, are these questions you want to have to answer? Questions you think your government should ask when determining how much of a hazardous substance a polluter can emit?

White Stallion Energy Center, LLC v. Environmental Protection Agency combined several challenges to the Environmental Protection Agency’s (EPA) long-delayed rule limiting emissions of mercury and other toxic air pollutants from coal- and oil-fired power plants.¹ The rule, known as the Utility Maximum Achievable Control Technology (MACT), was issued pursuant to the 1990 amendments to the Clean Air Act² (CAA or the Act) and was the most

1. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014), *cert. granted in part*, 135 S. Ct. 703 (2014).

2. *Id.* at 1230–31.

expensive rule promulgated in fiscal year 2013, with costs estimated around \$8.4 billion per year.³ In *White Stallion*, the D.C. Circuit considered whether CAA section 122(n)(1)(A) requires EPA to consider costs when determining whether emissions of hazardous air pollutants (HAPs) from power plants pose a danger to public health or the environment.⁴ The court deferred to EPA's discretion, holding that the agency's interpretation of section 112(n)(1)(A) as not requiring consideration of costs was permissible.⁵ The court refused to read a cost-consideration requirement into section 112(n)(1)(A), given that other subsections of section 112 mention costs explicitly.⁶ The court also noted that EPA had already prepared a cost-benefit analysis (CBA) for the purpose of Office of Information and Regulatory Affairs (OIRA or the Office) review that estimated the benefits of the rule "outweigh[ed] its costs by between 3 to 1 or 9 to 1."⁷

The consideration of costs under the CAA in the absence of congressional guidance has been controversial for many years. Some courts maintain that when Congress has intended that an agency engage in CBA, it has clearly indicated such intent on the face of the statute.⁸ Congressional silence on costs in the CAA has been held to preclude cost consideration given the explicit directive to consider costs in other provisions of the Act.⁹ No court has interpreted congressional silences in the CAA to contain an implicit *requirement* to consider costs,¹⁰ although the Supreme Court has agreed to hear *White Stallion* to resolve the question of whether EPA "unreasonably refused to consider costs" when it decided that it was appropriate to regulate HAPs from power plants.¹¹ However, since the early days of environmental legislation, EPA has been subject to additional scrutiny of the costs of its regulations on business.

While the CAA and other environmental laws were broadly successful at improving environmental quality, they inspired a backlash by polluting industries that objected to rules they found onerous and costly.¹² This wave of resentment peaked with the election of President Ronald Reagan, who declared

3. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2014 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 13 (2014) [hereinafter 2014 DRAFT REPORT].

4. *White Stallion*, 748 F.3d at 1240.

5. *Id.* at 1238.

6. *Id.* at 1237.

7. *Id.* at 1240.

8. See, e.g., *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981); *Se. Queens Concerned Neighbors, Inc. v. Fed. Aviation Admin.*, 229 F.3d 387, 393 (2d Cir. 2000).

9. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001).

10. *White Stallion*, 748 F.3d at 1238.

11. 135 S. Ct. 703 (2014); see also Patrick Ambrosio, *Supreme Court Agrees to Hear Challenges to EPA's Mercury Standards for Power Plants*, BLOOMBERG BNA (Nov. 26, 2014), <http://www.bna.com/supreme-court-agrees-n17179913353>.

12. See Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 44 (2011).

that all new rules must produce benefits in excess of their costs and created OIRA to serve as an agency with the power to override the EPA's and other regulatory agencies' rule-making decisions.¹³ Centralized review gave presidents unprecedented power over the details of agency rule makings,¹⁴ leading presidents of both parties to embrace the practice.¹⁵ The effect has been that OIRA, a secretive office few Americans have ever heard of, holds veto power over the decisions of regulatory agencies. Moreover, OIRA functionally ensures that the concerns of industry take precedence over the health, safety, and environmental problems Congress chose to address by statute.

This Note will use *White Stallion* to explain the role of OIRA review in approving new environmental regulations and show why *White Stallion* is the exception that proves the rule. This Note will argue that the history of the Office indicates that centralized regulatory review began as an instrument to weaken environmental regulations that impose costs on businesses, and that the Office's current practice and continued secrecy give credence to the hypothesis that it remains a backdoor for industry to kill or weaken rules, especially environmental rules, that it disapproves of. This Note surveys criticisms of OIRA and concludes by suggesting that eliminating OIRA review might better help achieve goals of transparency, predictability, and effective regulation.

I. COST-BENEFIT ANALYSIS AND OIRA

Because portions of the CAA explicitly require the EPA administrator to consider costs when setting standards,¹⁶ the Supreme Court has so far refused to infer permission to consider costs where the statute is silent or ambiguous.¹⁷ Despite this distinction, by executive order, each new proposed and final rule must pass through a parallel system of CBA before taking effect.¹⁸ OIRA conducts centralized review of all "significant" proposed rules across the universe of federal administrative agencies known as the regulatory state.¹⁹ OIRA is intended to use its centralized supervisory powers to act as a neutral second opinion and ensure that regulations are both effective and carefully considered.²⁰ OIRA is also responsible for collecting information from

13. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001).

14. See Robert V. Percival, *Who's In Charge? Does The President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2505 (2011).

15. See *infra* notes 62–76 and accompanying text.

16. For example, the CAA explicitly requires that costs be taken into consideration when determining the standard of emission reduction for heavy-duty vehicles. 42 U.S.C. § 7521(a)(3)(A)(i) (2012).

17. See *Whitman*, 531 U.S. at 457–58.

18. See generally Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (subjecting all rules enacted by federal agencies to OIRA review and delineating the procedures for such review).

19. CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE 3 (2014).

20. Cass R. Sunstein, Robert Walmsley University Professor, Harvard Law Sch., Keynote Address at the University of Pennsylvania Law School Penn Program on Regulation (Sept. 13, 2013).

disparate government sources and ensuring interagency coordination, but dedicates the bulk of its resources to regulatory review.²¹

Agencies are required to report their regulatory plans to OIRA and obtain OIRA approval before issuing proposed or final regulations.²² The agency, which employs a staff of about forty-four people,²³ has been called the “cockpit of the regulatory state”²⁴ and “the most powerful regulatory agency in Washington.”²⁵ It has also been described as a “fix-it shop for special interests,”²⁶ a “regulatory black hole,”²⁷ and where environmental and health regulations “go to die.”²⁸ OIRA’s main focus and expertise is in CBA,²⁹ and it is tasked with both assuring that new regulations justify their costs³⁰ and with overseeing agency efforts to review old regulations for cost-benefit soundness.³¹

A. What is Cost-Benefit Analysis?

CBA has been the dominant method of regulatory review since Reagan mandated its use by executive order in 1981.³² Since then, presidents have modified the scope and requirements of regulatory CBA through their own executive orders.³³ In 2011, President Barack Obama issued Executive Order 13,563, which has been described as the “mini-Constitution of the regulatory state” and, like its predecessors, requires executive agencies to conduct a CBA

21. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840–41 (2013).

22. Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 484 (2011).

23. Robin Bravender & Emily Yehle, *Wonks in Embattled Regulatory Office Are Mysterious—but ‘Not Nefarious’*, GREENWIRE (Feb. 18, 2014), <http://www.eenews.net/stories/1059994711>.

24. CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 1 (2013).

25. Jim Abrams, *House Balks at Bush Order for New Powers*, WASH. POST (July 4, 2007, 8:16 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/03/AR2007070301245.html>.

26. RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 15 (2011).

27. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, INST. FOR POLICY INTEGRITY, N.Y. UNIV. SCH. OF LAW, FIXING REGULATORY REVIEW: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION 3 (2008), available at <http://policyintegrity.org/publications/detail/fixing-regulatory-review/>.

28. Rebekah Wilce, *Death by Delay: Obama Team Stalls on Chemical Regulation*, CTR. FOR MEDIA & DEMOCRACY’S PRWATCH (Mar. 26, 2012), <http://www.prwatch.org/news/2012/03/11363/death-delay-obama-team-stalls-chemical-regulation>.

29. Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1014–15 (2011).

30. Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993).

31. Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011); Memorandum from Cass Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Heads of Executive Departments and Agencies 1 (Oct. 26, 2011), available at <https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/implementation-of-retrospective-review-plans.pdf>.

32. See REVESZ & LIVERMORE, *supra* note 27, at 3.

33. See *infra* notes 62–76 and accompanying text.

before issuing new proposed regulations.³⁴ The purpose of a CBA is to ensure that a rule's net benefits to society outweigh or justify the rule's costs.³⁵ While some argue that CBA is a conceptually neutral tool to achieve a more rational system of regulation, it has often been used to further an ideologically driven, anti-regulatory agenda.³⁶ Additionally, many have criticized the role and the methodology of CBA in regulatory review,³⁷ and have suggested that under a CBA framework, existing environmental regulations would never have been enacted.³⁸

B. Cost-Benefit Analysis and the EPA: A Historical Context

According to the Office of Management and Budget's (OMB) calculations, EPA-issued rules are responsible for both the greatest costs and greatest benefits to society.³⁹ Since the creation of the EPA, regulatory review has been used to rein in the perceived excesses of environmental regulators.⁴⁰ Today, EPA's rules make up only 11 percent of rules OIRA reviews, but account for 41 percent of OIRA's total meetings.⁴¹ Eighty-four percent of EPA's rules change during the OIRA review process, compared to 65 percent of other agencies' rules.⁴²

The tension between environmental regulation and powerful industry interests has been apparent from the beginning. In creating the EPA, President Richard Nixon sought to create a strong, single-mission agency that could serve as an independent and objective source of policy.⁴³ However, from its inception, EPA has been plagued by allegations that its rules are too costly, and efforts by the president to rein in the power it was granted by Congress.⁴⁴ Although OIRA did not exist until the Reagan administration, the process of centralized regulatory review emerged during the Nixon administration, almost

34. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1846 (2013).

35. See Exec. Order No. 13,563, 76 Fed. Reg. at 3821.

36. REVESZ & LIVERMORE, *supra* note 27, at 5.

37. See, e.g., Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064–65 (1986); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191, 240–41 (2004); Gregory N. Mandel & James Thuo Gathii, *Cost-Benefit Analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Laws of Fear*, 2006 U. ILL. L. REV. 1037, 1052 (book review).

38. See Ackerman et al., *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 158–59 (2005).

39. 2014 DRAFT REPORT, *supra* note 3, at 13.

40. See STEINZOR ET AL., *supra* note 26, at 29.

41. *Id.* at 30.

42. *Id.* at 9.

43. Jack Lewis, *The Birth of EPA*, EPA J., Nov. 1985, available at <http://www2.epa.gov/aboutepa/birth-epa>.

44. See Tozzi, *supra* note 12, at 44.

immediately after the advent of the EPA, CAA, Clean Water Act, and the National Environmental Policy Act.⁴⁵

Shortly after the CAA was passed, Nixon unsuccessfully attempted to veto the Clean Water Act, warning Congress that it was, “simplicistic to seek ecological perfection at the cost of bankrupting the very taxpaying enterprises which must pay for the social advances the nation seeks.”⁴⁶ OIRA’s earliest precursor explicitly solicited the input of business leaders, and was targeted solely at EPA,⁴⁷ which was required to submit draft regulations with potentially significant costs to the OMB for approval.⁴⁸ This EPA-specific review process provided the framework for Nixon’s Quality of Life Review (QLR) across agencies.⁴⁹ Like the earlier OIRA-precursor review process, QLR was a response to industry concerns about the cost of environmental and other regulations.⁵⁰ Critics alleged that the QLR process set up OMB as a “super environmental manager” over EPA,⁵¹ and as early as 1976, EPA officials believed that OMB review tended to weaken environmental regulations, and that their agency was unfairly singled out for QLR review.⁵²

While the Nixon, Carter, and Ford administrations all engaged in some form of centralized regulatory review, Reagan’s Executive Order 12,291 gave OMB the task of ensuring that new rules had benefits that outweighed their costs.⁵³ Now, “to the extent permitted by law,” an agency could regulate only if the benefits of doing so exceeded the cost, and the option chosen from available alternatives presented the “least net cost to society.”⁵⁴ When it was created by the Paperwork Reduction Act of 1980, OIRA, a suboffice of OMB, was responsible for evaluating and approving or disapproving of information collection requests from federal agencies.⁵⁵ However, after Executive Order 12,291, OIRA was given the additional role of reviewing the CBAs prepared by agencies.⁵⁶ Under Reagan, “cost-benefit analysis” was understood as a tool for deregulation,⁵⁷ and OIRA was often used as a conduit for the views of industry on particular regulatory actions.⁵⁸

45. *Id.*

46. J. GUSTAVE SPETH ET AL., NAT. RES. DEF. COUNCIL, OMB AND EPA: WHO SETS ENVIRONMENTAL POLICY? 3 (1976), available at <http://www.thecre.com/pdf/QualLifeReview6.PDF>.

47. STEINZOR ET AL., *supra* note 26, at 29.

48. Tozzi, *supra* note 12, at 44.

49. *Id.*

50. *Id.*

51. SPETH ET AL., *supra* note 46, at 6.

52. *Id.* at 4.

53. Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 327 (2014).

54. Kagan, *supra* note 13, at 2277–78.

55. SUNSTEIN, *supra* note 19, at 11.

56. *Id.*

57. REVESZ & LIVERMORE, *supra* note 27, at 4.

58. Heinzerling, *supra* note 53, at 328–29.

From the beginning, there was concern that the CBA requirement could conflict with other statutory mandates. When Reagan's Office of Legal Counsel reviewed the order for legal soundness, it claimed that the order empowered OMB only to supervise, not to "displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions."⁵⁹ However, the Reagan executive order was criticized for opacity, displacing the statutory responsibilities of agencies, and its tendency to lead to lengthy delays.⁶⁰

During the 1992 presidential elections, congressional leaders threatened to defund OIRA due to a lack of transparency and a perception that it favored business interests.⁶¹ Within a few months of taking office, President Bill Clinton issued a new executive order (Executive Order 12,866) on regulatory review.⁶² President Clinton's executive order was seen by many as moderating Reagan excesses and reduced the controversy surrounding OIRA.⁶³ However, the order also cemented CBA as the dominant method of regulatory review, rebranding Reagan's deregulatory tactic as a neutral tool of good governance.

Clinton's executive order aimed to increase transparency by requiring OIRA to produce written explanations for rule returns and softened the cost-benefit language, providing that CBAs should consider "qualitative measures of costs and benefits that are difficult to quantify," such as distributive impacts, equity, and enhancement of health and safety and protection of the natural environment.⁶⁴ Clinton's executive order also limited the range of rules that could be reviewed by OIRA, mandating review only for "significant regulatory action[s]."⁶⁵ However, that category is quite broad. Along with those rules estimated to have an effect on the economy of \$100 million or more, significant regulatory actions include those that "may . . . adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities," as well as those that create "a serious inconsistency" with another agency's plans, "materially alter the budgetary impact of entitlement programs," or "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in [the] Executive order."⁶⁶ The OIRA administrator was given final say as to which regulatory actions are

59. *Id.* at 328. Although Executive Order 12,291 was subject to several legal challenges early on, *Sierra Club v. Costle* established its legality. 657 F.2d 298, 405 (D.C. Cir. 1981).

60. Heinzerling, *supra* note 53, at 328–29.

61. Nina Hart, *Profile on Sally Katzen: Former Head of OIRA*, NOTICE & COMMENT (Apr. 24, 2014), <http://regulatorypractice.blogspot.com/2014/04/profile-on-sally-katzen-former-head-of.html>.

62. Heinzerling, *supra* note 53, at 329.

63. Kagan, *supra* note 13, at 2247–48.

64. Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

65. *Id.*

66. *Id.*

“significant” and worthy of OIRA review,⁶⁷ but most decisions about a particular rule’s “significance” are made by OIRA career staffers.⁶⁸ Particular interest in a rule by members of Congress or the president’s cabinet can also trigger OIRA review.⁶⁹ To prevent the delays that had been common since the Reagan era, Executive Order 12,866 placed stringent deadlines on the regulatory review process, limiting the time a rule spends at OIRA to ninety days with a one-time possible extension of thirty days.⁷⁰ However, these deadlines are routinely ignored.⁷¹

While the Clinton administration’s OIRA acted more as a regulatory “facilitator,” the second Bush administration returned OIRA to a “gatekeeper” role, aggressively imposing its will even when contrary to science and reasoned analysis.⁷² OIRA under the Bush administration applied regulatory review selectively, applying greater scrutiny to environmental, health, and safety rules than to homeland security rules, even when those rules had significant economic consequences.⁷³ The Bush administration used OIRA to stifle rules it disapproved of, delaying the EPA greenhouse gas emissions rule mandated by *Massachusetts v. EPA* for two years just by refusing to upload the document with the proposed regulation onto OIRA’s system.⁷⁴ President George Bush’s executive orders on regulatory review expanded OIRA review to cover “guidance” (agency statements of policy or interpretation that do not have the legal effect of rules) as well as proposed rules.⁷⁵ The Bush administration also expanded and augmented the informal review process in order to circumvent the transparency and reporting requirements triggered by formal review.⁷⁶ Because OIRA is only required to comply with the transparency requirements of Executive Order 12,866 once an agency formally sends a regulatory action to OIRA, such informal interactions between OIRA and the agency remain off the record.⁷⁷

When he took office, President Barack Obama sought to change the regulatory review process in several ways. In January 2009, Obama directed the head of OMB to consult with representatives of regulatory agencies and make recommendations for a new executive order on regulatory review.⁷⁸ Obama requested suggestions for improvement in several areas, including the

67. Heinzerling, *supra* note 53, at 331.

68. SUNSTEIN, *supra* note 19, at 22.

69. *Id.* at 23.

70. Heinzerling, *supra* note 53, at 330.

71. *Id.* at 369.

72. REVESZ & LIVERMORE, *supra* note 27, at 9.

73. *Id.* at 10.

74. Heinzerling, *supra* note 53, at 336–37.

75. *Id.* at 334.

76. REVESZ & LIVERMORE, *supra* note 27, at 4.

77. Heinzerling, *supra* note 53, at 335.

78. Memorandum from Barack Obama, U.S. President, to Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977 (Jan. 30, 2009); *see also* Heinzerling, *supra* note 53, at 338.

relationship between OIRA and other agencies, public participation, transparency, the role of CBA, distributional concerns, fairness, concern for future generations, prevention of delays, and clarification of the role of behavioral sciences in “formulating regulatory policy.”⁷⁹

However, Obama’s Executive Order 13,563, issued in 2011, reinforced the Clinton executive order and made very few substantive changes to the regulatory review process.⁸⁰ Despite Obama’s promises to reform regulatory review, many features of the pre-existing regulatory review model remain in place. “Fairness” and “human dignity” were added to lists of hard-to-monetize concerns, and a reference to “appropriate default rules” was added,⁸¹ referring to the practice of interpreting statutes to allow CBA as long as they do not explicitly forbid it. If OIRA thinks Congress was ambiguous as to the permissibility of CBA in a particular statutory section, it can pressure agencies to go with OIRA’s interpretation.⁸² The basic assumption, that we have more regulation than is necessary, remains unchanged.

In a *Wall Street Journal* op-ed that accompanied Executive Order 13,563, President Obama simultaneously laments the lack of prudent regulation that led to the financial crisis and assumes that excess regulation is to blame for the sluggish economy.⁸³ While he states that he is certain of his administration’s ability to find the right regulatory “balance,” he implies that a central reason for the executive order is to deal with regulations that have gotten “out of balance,” imposing “unreasonable” costs on businesses that have a “chilling effect on jobs and the economy.”⁸⁴ Obama refers to the CAA in the same breath as child labor laws, describing it as a “common-sense rule of the road.”⁸⁵ Yet the effect of the order he promotes is to put the fate of clean air rules squarely in the hands of a secretive agency with a track record of stalling and weakening environmental protections. With his executive order, President Obama signaled that the most central criticisms of CBA had gone unheard, and that his administration would reinforce and celebrate a method of regulatory review that serves chiefly to rescue polluting industries from statutes aimed at curbing their behavior.

Although the current administration is not as openly hostile to environmental regulation as the previous one, EPA remains a target of Obama’s OIRA. OIRA’s press releases bill the agency as a neutral “information

79. Heinzerling, *supra* note 53, at 339.

80. See Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Heinzerling, *supra* note 53, at 340–41.

81. Heinzerling, *supra* note 53, at 341.

82. *Id.* at 350.

83. Barack Obama, Op-Ed, *Toward a 21st-Century Regulatory System*, WALL ST. J. (Jan. 18, 2011), <http://www.wsj.com/articles/SB10001424052748703396604576088272112103698>.

84. *Id.*

85. *Id.*

aggregator”⁸⁶ but the questions the Senate posed to the man applying to lead “the heart of the government” illuminate the Office’s role in government and its biases. In current OIRA Administrator Howard Shelansky’s confirmation hearing, senators emphasized OIRA’s role in applying “common sense” and “balance” to the regulatory state while asking questions that showed that they interpret those concepts to mean reducing burdens on industry, rather than ensuring the effective issuance of health, safety, and environmental regulations. Senator Tom Coburn described OIRA as “the business community’s last hope” to avoid costly regulations,⁸⁷ while Senator Ron Johnson suggested that EPA’s plan to lower ozone levels was a cynical scheme by EPA’s Office of Ozone to keep themselves employed.⁸⁸

EPA rules are subject to intense scrutiny regardless of the degree of their economic impact. In the Obama administration so far, 80 percent of EPA’s OIRA-reviewed rules have not been economically significant.⁸⁹ This scrutiny attaches even to EPA pronouncements that do not have the force of rules. One of Obama’s first actions in office was to repeal Bush’s executive orders on regulatory review, which had subjected agency guidance documents to OIRA review.⁹⁰ However, two months later, his repeal of the “guidance” rule was revoked in a memorandum by OIRA director Peter Orszag, stating that because OIRA had reviewed agency guidance for many years, it would continue to do so.⁹¹ The practice of reviewing agency guidance is designed to help avoid costly “mistakes” and problems that could arise when one agency makes a statement about their policy intentions that has not been vetted by other agencies.⁹² Although agency guidance does not have the force of rules, it is reviewed by OIRA, because guidance itself can potentially be economically significant, pique interagency interest, or raise novel issues of law or policy.⁹³ However, forbidding EPA and other agencies from even making statements about their policy goals without OIRA review almost certainly leads to additional delays.

C. Are EPA Regulations Worth the Cost?

For the period from October 1, 2002, through September 30, 2012, EPA regulations were estimated to cost \$30.4 to \$36.5 billion and provide \$112 to

86. SUNSTEIN, *supra* note 19, at 12.

87. *Nomination of Howard A. Shelanski to Be Administrator, Office of Information and Regulatory Affairs, Office of Management of Budget: Hearing before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 113th Cong. (June 12, 2013) [hereinafter *Nomination of Howard A. Shelanski to Be Administrator*], available at <http://www.hsgac.senate.gov/hearings/nomination-of-howard-a-shelanski>.

88. *Id.*

89. Heinzerling, *supra* note 53, at 338.

90. *Id.*

91. *Id.*

92. SUNSTEIN, *supra* note 19, at 24–25.

93. *Id.* at 24.

\$637.5 billion in benefits.⁹⁴ Some federal agencies that promulgated rules during the same period, such as the Departments of Agriculture and Homeland Security, had cost estimates that overlapped with benefit estimates, and others did not provide information.⁹⁵ There is evidence that under Obama, the CBAs of agencies such as the Departments of Labor and Health and Human Services passed OIRA review despite lower-quality analyses, much like the Departments of Defense and Homeland Security under Bush.⁹⁶ However, EPA CBAs have been subject to stringent review under both administrations. EPA rules account for 58 to 80 percent of the estimated benefits of federal regulation overall, and 44 to 54 percent of the monetized costs.⁹⁷ EPA air quality rules account for 98 to 99 percent of the monetized benefits of EPA rules, and those benefits are largely due to reductions in particulate matter, whether from intentional reductions in particulate matter emissions or from the ancillary benefits of reducing other pollutants.⁹⁸

II. CRITICISMS OF COST-BENEFIT ANALYSIS IN THE CONTEXT OF ENVIRONMENTAL REGULATIONS

CBA in the environmental context has been criticized both for painting an inaccurate picture of the consequences of environmental regulation and for providing regulated industries with a tool to help them ward off burdensome new rules. Perhaps more than anything, OIRA has been criticized for undermining the clear congressional intent that rule-making decisions be made by the specialized experts of the relevant agency.⁹⁹

A. *The Problem of Monetizing Benefits*

The central problem with CBA in the environmental context is the difficulty of calculating a benefit in dollar terms for goods such as clean air or a reduced risk of cancer.¹⁰⁰ Critics have attacked the legitimacy of CBA's attempt to measure diverse goods along a single monetary metric, as well as the impossibility of accurately calculating the myriad consequences of any significant regulatory decision.¹⁰¹ Regulatory costs are estimated based on data

94. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 11 (2013) [hereinafter 2013 DRAFT REPORT].

95. *Id.*

96. *Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform, Hearing before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 65 (Sept. 30, 2013) (statement of John F. Morrall III, Affiliated Senior Scholar, Mercatus Center, George Mason University).

97. 2013 DRAFT REPORT, *supra* note 94, at 14.

98. *Id.*

99. See STEINZOR ET AL., *supra* note 26, at 7.

100. LISA HEINZERLING & FRANK ACKERMAN, GEORGETOWN ENVTL. LAW & POLICY INST., PRICING THE PRICELESS: COST-BENEFIT ANALYSIS OF ENVIRONMENTAL PROTECTION 5 (2002).

101. Sinden, *supra* note 37, at 201–03.

provided by regulated industries themselves,¹⁰² but benefits are harder to calculate.¹⁰³ While the market is capable of providing up-to-date information on the cost of a smokestack scrubber, estimates of the value of the device's benefits rely on expensive experts and studies paid for by taxpayers.¹⁰⁴ Cost determinations developed through interagency processes, such as the social cost of carbon or the price of lives saved due to particulate matter reductions, reflect the official position of the U.S. government and are binding until changed through a formal interagency process, even if new scientific information has arisen in the meantime.¹⁰⁵ The effort required to monetize new benefits leads to arbitrary results under real-world time and budget constraints, such as the EPA's use of the previously determined valuation of chronic bronchitis as a stand-in for nonfatal bladder cancer when doing a CBA,¹⁰⁶ or the agency's failure to calculate benefits at all for the actual intended consequences of the Utility MACT rule, instead using a secondary benefit with a well-established monetary value to overcome the OIRA hurdle.¹⁰⁷

1. Cost-Benefit Analysis Undervalues Environmental Rules

CBA tends to undervalue environmental rules because the benefits of reducing harmful environmental practices occur mostly in the future and are therefore discounted.¹⁰⁸ Agencies calculate the benefits of regulations using the "value of a statistical life."¹⁰⁹ The value of a statistical life is generally based upon employment studies showing how much workers are willing to pay to avoid fatal risks and how willing they are to accept those risks in exchange for money.¹¹⁰ Currently, EPA values a statistical life at around \$7.4 million.¹¹¹ However, that is the value of a life saved today. Lives saved in the future, for instance, as a result of climate change mitigation, are considered to be worth far less.¹¹² Depending on the discount rate used, an action taken today that saves 1

102. Daniel Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1372 (2009) (reviewing RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008)).

103. HEINZERLING & ACKERMAN, *supra* note 100, at 5.

104. *See id.* at 15.

105. SUNSTEIN, *supra* note 19, at 61.

106. HEINZERLING & ACKERMAN, *supra* note 100, at 15.

107. *See* 2014 DRAFT REPORT, *supra* note 3, at 13–14; Marlo Lewis, Op-Ed, *Big Costs, Illusory Benefits: Why Congress Should Nix the Utility MACT*, FORBES (June 12, 2012), <http://www.forbes.com/sites/realspin/2012/06/12/big-costs-illusory-benefits-why-congress-should-nix-the-utility-mact/>.

108. Heinzerling, *supra* note 53, at 329.

109. Ben Trachtenberg, *Tinkering with the Machinery of Life*, 59 UCLA L. REV. DISCOURSE 128, 130 (2012).

110. *Id.*

111. *Frequently Asked Questions on Mortality Risk Valuation*, EPA, <http://yosemite.epa.gov/EE%5Cepa%5Ceed.nsf/webpages/MortalityRiskValuation.html#whatvalue> (last updated Mar. 28, 2015).

112. Heinzerling, *supra* note 53, at 329.

million lives 150 years in the future could be valued at \$6 trillion in benefits today (with no discount rate) or \$6 million (with a 10 percent discount rate).¹¹³ OIRA officially endorses a discount rate of 1 to 3 percent.¹¹⁴ However, the Obama administration approved a discount rate of 3 to 5 percent for determining the social cost of carbon.¹¹⁵ Inconsistent methodologies and the inherent uncertainty associated with predicting future environmental outcomes make it difficult to justify OIRA's use of CBA as a rule of decision.

2. *Cost-Benefit Analysis Creates a False Impression of Objectivity*

CBA has been criticized for creating a false impression of accuracy that obscures the real issues and value choices behind regulatory decisions.¹¹⁶ The difficulty of accurately calculating costs and benefits, the uncertainty inherent in prospective analyses of proposed rules, and the problems of extrapolating those values over time have led some to declare CBA meaningless as a decision-making tool.¹¹⁷ While proponents argue that CBA leads to more objective and transparent government decision making by exposing the underlying assumptions and methods behind regulatory decisions,¹¹⁸ OIRA's own reports to Congress are highly qualified regarding the accuracy, or lack thereof, of the agency's predictions, stating:

For comparisons or aggregations to be meaningful, benefit and cost estimates should correctly account for all substantial effects of regulatory actions, some of which may not be reflected in the available data. In addition to unquantified benefits and costs, agency estimates reflect the uncertainties associated with the agency's assumptions and other analytic choices.¹¹⁹

Despite these uncertainties, proposed rules (even court-ordered ones) must still pass through the cost-benefit gatekeeper before taking effect.

B. Regulatory Capture

OIRA has often been criticized for enabling regulatory capture.¹²⁰ However, "capture" may not be the right word to describe the workings of an

113. Mandel & Gathii, *supra* note 37, at 1048.

114. Heinzerling, *supra* note 53, at 354.

115. *Id.*

116. See Sinden, *supra* note 37, at 241.

117. See Mandel & Gathii, *supra* note 37, at 1045–48.

118. HEINZERLING & ACKERMAN, *supra* note 100, at 10.

119. 2014 DRAFT REPORT, *supra* note 3, at 6.

120. For the purposes of this Note, regulatory capture is defined as "industry pressure to reduce the scope of regulation." See David A. Moss & Daniel Carpenter, *Conclusion: A Focus on Evidence and Prevention*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 451, 452 (David A. Moss & Daniel Carpenter eds., 2013); see also Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 n.16 (2013)

agency that was founded at least in part in response to industry concerns about costly regulations.¹²¹ Since the agency's beginnings, critics have described OIRA as providing an official channel for regulated entities to attack rules that adversely affect them.¹²² Although some suggest that OIRA is less prone to capture than specialized agencies and that a "properly understood and reformed" OIRA could push regulatory decision making in a more public-interested direction,¹²³ critics and supporters alike view OIRA as the last opportunity for businesses to protest costly regulations before they take effect.¹²⁴

1. Disproportionate Industry Participation in OIRA Review Process

Corporations and trade associations are intimately involved in the development of nearly every rule proposed by EPA.¹²⁵ While OIRA's policy is to meet with anyone who requests a meeting, the data shows that regulated industries are the agency's most frequent caller, likely because regulated industries have a strong incentive to invest effort into influencing rules that may affect them down the road.¹²⁶ OIRA also holds meetings with industry actors before proposed rules are made public, raising the question of how the informal review process serves the goal of giving average Americans greater input into the rule-making process.¹²⁷ In a study of EPA rules on HAPs, industry groups communicated informally with the agency (through meetings, phone calls, and letters) 170 times as much as public interest groups.¹²⁸ In other words, there were about 84 industry communications per rule compared to 0.7 communications per rule from public interest groups.¹²⁹ This imbalance persisted after the proposed rules were made public: the same study showed that 81 percent of comments on EPA rules during the formal notice-and-comment period came from industry, while 4 percent came from public interest groups.¹³⁰ While OIRA claims that more communications do not equal more influence, all rules that were the subject of meetings were 29 percent more likely to be changed during the review process than those that were not the

[hereinafter *Regulatory Review, Capture, and Agency Inaction*] (providing varying definitions of capture).

121. Tozzi, *supra* note 12, at 44.

122. Steven J. Balla et al., *Outside Communications and OIRA Review of Agency Regulations*, 63 ADMIN. L. REV. 149, 150 (2011).

123. *Regulatory Review, Capture, and Agency Inaction*, *supra* note 120, at 1361–62.

124. See *Nomination of Howard A. Shelanski to Be Administrator*, *supra* note 87; STEINZOR ET AL., *supra* note 26, at 14.

125. STEINZOR ET AL., *supra* note 26, at 14.

126. See *id.* at 15.

127. *Id.* at 10, 41.

128. *Id.* at 14.

129. *Id.*

130. *Id.*

subject of meetings.¹³¹ Even if OIRA is not unduly influenced by these communications with industry, the process at least appears to give regulated actors a significant advantage in lobbying for their favored rule changes.

2. *Industry Sets Cost Amounts*

The inherent malleability of CBA increases its susceptibility to agency capture. While CBA is based on the belief that numbers can be attached to the probabilities and magnitudes of various possible outcomes, these numbers are rarely available, so OIRA often uses numbers that are assumed or invented.¹³² Regulated industries are often the source of empirical data on how much regulations are going to cost them.¹³³ Compared to public interest groups, regulated industries have significant resources and incentive to bombard OIRA with information that supports their position on adopting a particular rule or value.¹³⁴ Additionally, agencies often overestimate the cost of a regulation by failing to account for changes in technology that might lower the cost of compliance.¹³⁵ Because OIRA's determinations are not judicially reviewable, however speculative these calculations are, they are still used as a yardstick to measure whether a regulation will be allowed to take effect.¹³⁶

3. *Regulated Industries Benefit from Additional Delays*

Regulated industries benefit from delays caused by the regulatory review process because they can postpone any compliance activities while rules are held up at OIRA. While Clinton's executive order limited OIRA review to ninety days with a possible extension to 120 days, rules, especially controversial rules, often languish longer.¹³⁷ According to OIRA's own calculations, each year that the Utility MACT rule was delayed resulted in between 4300 and 11,000 premature deaths, as well as savings to industry of around \$9 billion.¹³⁸

C. *Transparency Concerns*

OIRA is often described as "secretive" and only publicly discloses the names of the top two officials.¹³⁹ Additionally, the agency is not subject to

131. *Id.* at 9.

132. *Id.* at 62.

133. Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 *FORDHAM URB. L.J.* 1071, 1084 (2006).

134. STEINZOR ET AL., *supra* note 26, at 22–23.

135. Ackerman, *supra* note 133, at 1083.

136. See REVESZ & LIVERMORE, *supra* note 27, at 1339.

137. See STEINZOR ET AL., *supra* note 26, at 7.

138. 2013 DRAFT REPORT, *supra* note 94, at 29.

139. See Heather Rogers, *Lobbyists Bidding to Block Government Regs Set Sights on Secretive White House Office*, *PROPUBLICA* (July 31, 2014, 11:36 AM),

most Freedom of Information Act requests.¹⁴⁰ While many have criticized the agency for a lack of transparency,¹⁴¹ these criticisms have gone largely unanswered. The Government Accountability Office made eight transparency recommendations to OIRA in 2003.¹⁴² As of 2014, only one—listing who meets with OIRA—had been followed, and what is said in those meetings is still not disclosed.¹⁴³

1. Informal Review

OIRA says it has the most significant impact on agency rules before proposed rules have been submitted to the public,¹⁴⁴ but this informal review is not subject to any transparency requirements.¹⁴⁵ Early interagency coordination is supposed to ensure that multiple and diverse perspectives are taken into account from the very beginning,¹⁴⁶ but OIRA has been criticized for using informal review to influence rule making off the record, before the executive order's transparency requirements are triggered.¹⁴⁷ Most informal comments are issued orally and are rarely transcribed, leaving no record of what those perspectives were or what changes they might have inspired.¹⁴⁸ Additionally, the informal review process may discourage EPA at the outset from proposing rules that will have high costs relative to monetizable benefits, thereby narrowing the scope of regulatory measures that the agency considers.¹⁴⁹

2. Specific Rule Changes Not Disclosed

OIRA's documentation practices have long been criticized for making it difficult for the public to understand the effects of OIRA review.¹⁵⁰ OIRA describes the outcome of its reviews by applying a label to each completed action, such as "consistent without change," "consistent with change,"

<http://www.propublica.org/article/lobbyists-bidding-block-government-regs-sights-set-secretive-white-house>.

140. *Id.*

141. *See, e.g., id.*; AMIT NARANG, PUB. CITIZEN, THE PERILS OF OIRA REGULATORY REVIEW: REFORMS NEEDED TO ADDRESS RAMPANT DELAYS AND SECRECY 9–11 (2013), available at <http://www.citizen.org/documents/oira-delays-regulatory-reform-report.pdf>.

142. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 14–16 (2003).

143. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-423T, REGULATORY REVIEW PROCESS COULD BE ENHANCED 9 (2014) [hereinafter GAO-14-423T] (statement of Michelle Sager, Director).

144. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 35 (2009).

145. STEINZOR ET AL., *supra* note 26, at 14.

146. SUNSTEIN, *supra* note 19, at 20.

147. *See* REVESZ & LIVERMORE, *supra* note 27, at 8.

148. *Id.*

149. SUNSTEIN, *supra* note 19, at 21; Heinzerling, *supra* note 53, at 352.

150. *See* GAO-14-423T, *supra* note 143, at 8.

“withdrawn,” and “returned.”¹⁵¹ “Consistent with change” means that the final document is in compliance with Executive Order 12,866.¹⁵² OIRA does not disclose which rules in the “consistent with change” category have been changed substantively rather than in other ways, nor whether any changes were made at OIRA’s suggestion.¹⁵³ While the transparency requirements of Executive Order 12,866 require agencies to provide clear and complete documentation of the changes made during OIRA review or at OIRA’s suggestion, agencies do not have clear guidance as to what constitutes a substantive change that must be disclosed.¹⁵⁴ When a rule is withdrawn, neither OIRA nor the agency is required to provide an explanation.¹⁵⁵ When OIRA returns a rule to EPA, it must accompany it with a “Return Letter” detailing why the rule did not pass muster.¹⁵⁶ However, it has been suggested that OIRA often pressures agencies to withdraw rules it does not agree with, in order to avoid making those objections public.¹⁵⁷ Possibly supporting this allegation is the fact that Obama’s OIRA had sent only one return letter as of 2013.¹⁵⁸

III. WHITE STALLION ENERGY CENTER, LLC v. EPA

In 2012, EPA issued a final rule setting emission standards for a number of listed HAPs emitted by coal- and oil-fired power plants. The rule making followed a 2008 D.C. Circuit ruling invalidating EPA’s decision to remove coal- and oil-fired electric generating units from the list of stationary sources of HAPs regulated under section 112 of the CAA.¹⁵⁹

A. Regulation of Hazardous Air Pollutants under the CAA

The 1970 CAA required the EPA to “identify and list those air pollutants that ‘cause or contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating, reversible illness’” and then to establish emissions standards with an “ample margin of safety to protect the public health.”¹⁶⁰ Because many HAPs are carcinogenic, and any exposure could lead to an increase in cancer, this standard arguably mandated that emissions levels

151. STEINZOR ET AL., *supra* note 26, at 54.

152. *Id.*

153. *Id.* at 46.

154. GAO-14-423T, *supra* note 143, at 8.

155. *Id.*

156. STEINZOR ET AL., *supra* note 26, at 46; *OIRA Return Letters*, OFF. MGMT. & BUDGET, <http://www.reginfo.gov/public/do/eoReturnLetters> (last visited Mar. 29, 2015).

157. STEINZOR ET AL., *supra* note 26, at 48.

158. Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. 39, 41 (2013).

159. JAMES E. MCCARTHY, CONG. RESEARCH SERV., R42144, EPA’S UTILITY MACT: WILL THE LIGHTS GO OUT? 3 (Jan. 9, 2012), *available at* http://www.eenews.net/assets/2012/01/19/document_gw_03.pdf; *see* *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

160. Brief for Institute for Policy Integrity et al. as Amici Curiae Supporting Respondents at 23, *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (No. 12-1100).

be set at zero for several pollutants.¹⁶¹ Unwilling to write rules that could shut down entire industries, EPA managed to regulate only seven HAPs before the CAA was amended in 1990 to address this delay.¹⁶² The 1990 revisions required EPA to research and evaluate 189 HAPs and to identify any source that emitted more than ten tons of any individual HAP or twenty-five tons of any combination.¹⁶³ The risk-based “adequate margin of safety” standard from the 1970 Act was replaced by a “maximum available control technology” standard, or MACT.¹⁶⁴ Instead of weighing the harms of each substance individually, the emissions standards for all hazardous pollutants would now be based on an objective assessment of available control technologies.¹⁶⁵

While Congress was aware in 1990 that power plants were significant sources of HAPs, especially mercury, there was disagreement about the best way to regulate under CAA section 112.¹⁶⁶ As a compromise, Congress delayed regulation of power plant HAP emissions in 1990 to allow time for study of the impact of other parts of the 1990 CAA amendments on those emissions.¹⁶⁷ If EPA were to find, after considering the study, that regulation of HAP emissions from power plants was “appropriate and necessary,” it would then be required to regulate.¹⁶⁸

B. EPA’s Cost-Benefit Analysis

Although coal- and oil-fired power plants emit many different HAPs, the EPA was primarily concerned with mercury when it determined that it would be “appropriate and necessary” to regulate emissions.¹⁶⁹ Mercury is a neurotoxin that is harmful at low concentrations and can cause birth defects and lowered IQ in children.¹⁷⁰ When combined, coal- and oil-fired power plants are the largest source of man-made mercury emissions in the United States.¹⁷¹ However, due to scientific uncertainty,¹⁷² EPA’s OIRA-mandated CBA for the

161. *Id.*

162. *Id.* at 23–24.

163. MCCARTHY, *supra* note 159, at 1.

164. Brief for Institute for Policy Integrity et al., *supra* note 160, at 24.

165. *Id.* at 25.

166. *Id.*

167. *Id.*

168. *Id.* at 26.

169. MCCARTHY, *supra* note 159, at 2.

170. A 2005 study in *Environmental Health Perspectives* looked at the effects of mercury poisoning on the brains of fetuses. Leonardo Trasande et al., *Public Health and Economic Consequences of Methyl Mercury Toxicity to the Developing Brain*, 113 ENVTL. HEALTH PERSP. 590, 590 (2005). It found that between 316,588 and 637,233 babies were born each year with bloodstream mercury levels greater than or equal to that associated with IQ loss. *Id.* The authors estimated that the lost economic productivity due to decreased intelligence came to about \$8.7 billion per year, with \$1.3 billion of that attributable to power plants. *Id.*; see also MCCARTHY, *supra* note 159, at 2.

171. EPA, R-97-003, *Mercury Study Report to Congress, Volume 1: Executive Summary* 3–6 (1997).

172. SUNSTEIN, *supra* note 19, at 55–56.

Utility MACT rule did not attempt to monetize most of the effects of mercury exposure.¹⁷³ In the final accounting, mercury reduction accounted for only \$4 million in benefits, based only on lost wages calculated for a small subset of persons eating contaminated fish.¹⁷⁴

Rather, the majority of the monetized benefits of the Utility MACT rule were calculated based on the assumption that the inhalation of fine particles at levels experienced by most Americans on a daily basis has a causal relationship with premature death.¹⁷⁵ Thus, OIRA deemed the Utility MACT rule worthy of its cost not because of the reductions in HAPs that EPA had determined were hazardous to human health, but because of the incidental reduction of particulate matter that occurred alongside. When there is the question of whether a shortfall between costs and benefits can be made up by referencing nonquantifiable values, agencies use a technique called “breakeven analysis.”¹⁷⁶ Breakeven analysis refers to a kind of conditional CBA, using the cost of a regulation as a measure of what the lower bound of estimated benefits must be.¹⁷⁷ Thus, OIRA approved the Utility MACT rule despite the fact that the benefits of HAP reductions could not be satisfactorily quantified, because the lower bound of the estimated monetary benefits of secondary particulate matter reductions alone outweighed the cost of the rule. However, because the analysis stops at the breakeven point, the perceived benefits of the rule are minimized, which is problematic because benefit amounts, once established, can be used as a basis for decisions going forward.¹⁷⁸

Yet, what would have been the outcome if the Utility MACT rule reduced HAPs without also reducing particulate matter? In that instance, the purpose of the statute would have been served, but most of its monetizable benefits would evaporate.¹⁷⁹ OIRA would never approve such a rule, but EPA would still be under a statutory duty to regulate HAPs.

C. CAA Gives EPA Discretion as to Whether to Consider Costs

In *White Stallion*, the D.C. Circuit denied challenges that alleged that EPA failed to consider costs when issuing the Utility MACT rule.¹⁸⁰ Although the EPA had conducted a CBA under Executive Order 13,563, it did not explicitly

173. Brad Plumer, *How to Tally Up the Benefits from EPA's Mercury Rule*, WASH. POST (Dec. 22, 2011, 3:41 PM), http://www.washingtonpost.com/blogs/wonkblog/post/how-to-tally-up-the-benefits-from-epas-mercury-rule/2011/12/22/gIQAvnLzBP_blog.html.

174. *Id.*

175. 2014 DRAFT REPORT, *supra* note 3, at 15.

176. SUNSTEIN, *supra* note 19, at 65.

177. *Id.* at 66.

178. *Id.*; see also Daniel Farber, *Breaking Bad? The Uneasy Case for Regulatory Breakeven Analysis*, 102 CALIF. L. REV. 1469 (2014) (discussing additional concerns regarding breakeven analysis).

179. 2014 DRAFT REPORT, *supra* note 3, at 13.

180. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1239 (D.C. Cir. 2014), *cert. granted in part*, 135 S. Ct. 703 (2014).

consider costs when making the initial determination that regulating HAPs from power plants was “appropriate.”¹⁸¹ Ultimately, the court held that section 112 of the CAA does not require EPA to consider costs when determining whether to regulate a source of HAPs.¹⁸² Nevertheless, the court bolstered its opinion by noting that EPA’s CBA indicated the rule’s benefits far outweighed its costs.¹⁸³ The petitioners and the dissent in *White Stallion* suggested that EPA’s interpretation was unreasonable because Congress would not have intended EPA to have blanket authority to regulate without any consideration of costs, but the majority pointed to the statute’s many provisions explicitly providing for the consideration of costs as well as the results of EPA’s CBA.¹⁸⁴ The court held that the purpose of CAA section 112(n)(1)(A) was to make EPA confirm the nature of public health hazards from power plant emissions, and that after such hazards had been assessed, Congress had left it up to EPA’s judgment whether or not to regulate.¹⁸⁵ Therefore, EPA’s decision not to consider costs when determining whether HAP emissions from power plants pose a hazard to public health or the environment was a reasonable interpretation of section 112(n)(1)(A), especially because Congress did not authorize the consideration of costs in listing any other source categories for regulation under section 112.¹⁸⁶

OIRA review subverts the purpose of environmental statutes by focusing on a rule’s CBA rather than on whether the rule helps achieve the goals of a statute. The *White Stallion* case is deceptive because it shows the OIRA review process approving a controversial EPA regulation and providing support for the rule against legal challenge. In their 2014 report to Congress, OIRA appears to be bending over backward to accommodate environmental concerns and defend the Utility MACT rule. The use of co-benefits like particulate matter reduction to justify an expensive rule might seem to show that OIRA represents an environmental safeguard rather than a threat.¹⁸⁷ However, EPA’s use of reductions in particulate matter to justify regulating mercury emissions demonstrates how the goals of the OIRA review process sharply diverge from the goals of the CAA. Once EPA had determined that HAP emissions from power plants posed a hazard to public health or the environment, it was obliged to regulate under the CAA. Whether something is hazardous to human health would seem to be a different question than whether regulating the substance will save anybody money in the long run. However, EPA cannot promulgate even a court-ordered rule like the Utility MACT without first showing that the rule passes a CBA. Under the executive orders, OIRA must act “consistent with

181. *Id.* at 1236, 1240.

182. *Id.* at 1239.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* 2014 DRAFT REPORT, *supra* note 3, at 13.

existing law,” but where a statute is silent or ambiguous and agencies have rule-making deference under the decision in *Chevron*, OIRA steps in to demand that agencies change their interpretation of the statute to allow for OIRA’s CBA requirements.¹⁸⁸

While Executive Order 13,563 mentions the potential importance of “values that are difficult or impossible to quantify,”¹⁸⁹ the fact remains that the Utility MACT rule would never have been possible were it not for the lucky coincidence of incidental particulate matter reduction. OIRA’s supporters insist that CBA is a “tool, not a straitjacket,”¹⁹⁰ and that regulatory review is flexible enough to accommodate worthy but unquantifiable values. However, the question of for whom the rules bend lies entirely at the discretion of OIRA. While OIRA in its current iteration appears to believe that reductions in particulate matter lead to huge benefits, fluctuations in “presidential priorities” could impact the agency’s position. These shifts in the administration can lead to unpredictability for agencies and dangerous delays of necessary and statutorily mandated rules. What if we got rid of OIRA? Would the sky fall? Or would the air be cleaner?

Sally Katzen, Administrator of OIRA under President Clinton, once said, “I believe in OIRA . . . [i]f OIRA did not exist, any sensible president, Republican or Democrat, would have to invent it.”¹⁹¹ In that view, CBA is necessary to temper EPA’s “laser-like focus” on environmental issues with OIRA’s “broader view,” which emphasizes the economic impact of rules.¹⁹²

Another major justification for CBA is that people just do not know what is good for them.¹⁹³ That is, due to their human cognitive and emotional limitations, people make well-meaning regulations to deal with things they fear, while ignoring lesser-known dangers and the unintended consequences of regulation.¹⁹⁴ This argument rests on a false equivalency between “the public” and the regulated industry actors who participate in the vast majority of OIRA meetings. While OIRA is said to “value the input of all stakeholders,”¹⁹⁵ the loudest voices OIRA hears are from regulated industries that stand to gain from weakening proposed regulations.¹⁹⁶ This imbalance in access to OIRA allows industry to weaken environmental regulations even though the public interest would be better gauged through a broad survey of public opinion on

188. Heinzerling, *supra* note 53, at 349–50.

189. Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).

190. *Nomination of Howard A. Shelanski to Be Administrator*, *supra* note 87.

191. Hart, *supra* note 61.

192. STEINZOR ET AL., *supra* note 26, at 25.

193. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1502 (2002).

194. *Id.*

195. *Nomination of Howard A. Shelanski to Be Administrator*, *supra* note 87.

196. See *supra* note 126 and accompanying text.

environmental regulation.¹⁹⁷ While EPA may inadvertently miscalculate risks, it does not have the incentive that industry does to purposefully distort them. It has been suggested that, absent OIRA's venue to air grievances and steer the direction of regulation, powerful industries would bring their influence to bear to destroy agencies like EPA.¹⁹⁸ Therefore, it might be helpful to look to agencies like the Consumer Financial Protection Bureau that are not subject to OIRA review to see whether they are able to function in the absence of mandatory CBA.¹⁹⁹

The executive orders on regulatory review could be repealed with the stroke of a pen. However, it is unlikely that any administration will be willing to relinquish the increased control that OIRA review gives presidents over rule-making details. Therefore, this Note offers suggestions for how the Office could better facilitate the rule-making process.

IV. RECOMMENDATIONS

OIRA was built as a weapon in Reagan's crusade against regulation, and it serves an anti-regulatory function today by default if nothing else. Despite its central role within the regulatory state, OIRA itself is a small office with funding and staffing problems that may greatly compromise the organization's ability to do timely analysis.²⁰⁰ OIRA staffers have been described as "almost overwhelmed" by the amount of regulatory actions they must review.²⁰¹ The actual work of CBA is left to the agencies, which must devote scarce resources to fund analyses of the monetary value of benefits.²⁰² In order to prevent it from acting as a barrier to regulations, OIRA must grow or shrink. One option would be to keep the agency the same size, while taking away its CBA and gatekeeper functions. Interagency communication on rules is important, and it would be beneficial for agencies to maintain a venue to voice their concerns about potential rules and conflicts. Yet, if OIRA is to continue the practice of reviewing and editing rules, it must specify which changes were made, and why. OIRA must also increase transparency by ending the process of informal review. If a communication between OIRA and the agency is important enough

197. See STEINZOR ET AL., *supra* note 26, at 2.

198. Tozzi, *supra* note 12, at 66.

199. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 343 tbl.1 (2012–2013) (listing that the Consumer Financial Protection Bureau is not subject to OIRA review for economically significant regulations).

200. See Robin Bravender & Emily Yehle, *Wombs in Embattled Regulatory Office Are Mysterious—but 'Not Nefarious'*, GREENWIRE (Feb. 18, 2014), <http://www.eenews.net/stories/1059994711>.

201. *OIRA Avoidance*, *supra* note 29, at 1015.

202. See HEINZERLING & ACKERMAN, *supra* note 100, at 5. EPA spends about \$120 million per year on regulatory impact analyses, including CBA. FEDERAL REGULATORY DIRECTORY 32 (16th ed. 2013).

to take place and has the potential to change a rule, it is important enough to be recorded.

Another idea is to strengthen CBA within agencies in order to reduce the arbitrariness of OIRA's decisions. While the petitioners in *White Stallion* attacked the use of particulate matter data as proof that EPA's CBA was inadequate, it more likely shows that many of the rule's benefits went uncounted, if the benefits of a secondary effect alone were enough to justify the costs. If the real point of OIRA is to make compliance with environmental regulations cheaper and less burdensome, this could perhaps be done more effectively within agencies like EPA that can dedicate scientific expertise and resources to determining the most cost-effective ways to attack problems like climate change, without being required to determine what the monetary benefits of regulation are. Alternative standards like feasibility and qualitative cost-benefit balancing, which attempt to find the cheapest way of achieving a regulatory goal without sacrificing the goal itself, provide potential methods of comparing regulatory alternatives without making net benefit the sole criterion.²⁰³

Given adequate time and funding, it is possible that EPA would have been able to devise a more comprehensive dollar estimate of the damage done by mercury and other HAPs. In this situation, EPA and other agencies might start coming up with benefit estimates, especially in the area of global warming, that dwarf cost estimates, which are, if not inflated, certainly already near their higher bounds. A greater focus on the national security implications of climate change, for example, would both increase the amount of expected benefits and potentially move regulations aimed at curbing climate change into another category of review, one that bears enormous costs in pursuit of benefits that are often illusory.

CONCLUSION

The OIRA review process, in which environmental rules sink or swim based on haphazard calculations of (some) benefits, sets a dangerously high bar for new regulations to meet. CBA as currently practiced privileges quantifiable costs to existing industries, while discounting unquantifiable future benefits both to society as a whole and to emerging clean energy industries. Many key benefits of the CAA, such as the reductions in overall mortality from particulate matter, were not envisioned at the time the statute was enacted, and a statute of similar scope would never pass the CBA required of all new regulation. The "balance" that OIRA seeks to strike is more in favor of

203. Sinden, *supra* note 37, at 226–27.

polluters than the people. While additional resources to help agencies identify and monetize benefits could help illuminate the true value of environmental regulation, no amount of funding can remove the uncertainty inherent in CBA, or the absurdity of applying a CBA litmus test to rules aimed at protecting the priceless.

