Reforming the Federal Regulatory Review Process

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I. INTRODUCTION

The last four decades have made clear that the modern federal regulatory review process very often undermines and undersells the core environmental values that Congress has enshrined in statutory law. The time is ripe for the Office of Information and Regulatory Affairs (OIRA)—the powerful division of the Office of Management and Budget (OMB) that oversees all federal rulemaking activities—to fundamentally reevaluate its standard operating procedures, in particular its long-time reliance on benefit-cost analysis to score environmental regulations. In this Article, we offer suggestions for improving regulatory review based on the goals of that review and its historical and economic context.

Despite its apparent conceptual appeal, benefit-cost analysis fails to adequately capture the benefits that environmental and public health-oriented regulations provide to society. One specific aspect of benefit-cost analysis—the practice of discounting future costs and benefits—provides a particularly compelling case for why the OIRA should reorient its approach toward reviewing environmental policies. Furthermore, traditional benefit-cost analysis fails to account for distributional disparities in environmental outcomes and cumulative impacts that many communities face. Fortunately, several avenues are available to the OIRA and federal agencies to better
address these concerns. From a process standpoint, the OIRA should also initiate key reforms with regard to both its public engagement efforts and internal operations. These steps, if implemented, could help the OIRA, as well as the agencies it oversees, better serve the needs of the public, particularly those communities most vulnerable to environmental degradation.

Recently, the OIRA finalized a set of substantial revisions to OMB Circular A-4,1 an internal executive branch document that has for the last two decades2 steered federal agencies’ (as well as the OIRA’s) regulatory reviews. The OIRA overhauled this guidance document in response to a concurrent executive order from President Biden titled “Modernizing Regulatory Review,”3 which seeks to improve both the substance and process of how the executive branch develops and evaluates its regulatory policies. While the OIRA’s revision does not implement any truly radical changes—it does not, for instance, fundamentally displace the role of benefit-cost analysis in regulatory review, or eliminate discounting for benefits that reflect non-market goods—it nonetheless represents a significant improvement over the status quo. If federal agencies faithfully adhere to this updated guidance, the Circular A-4 revision could help usher in a considerably more environmentally responsive regulatory culture than we have seen in decades. While a full discussion of the updated A-4 is beyond the scope of this Article, we will address the effect of some of the OIRA’s recent changes to the document in the sections that follow.

II. RETHINKING THE ROLE OF BENEFIT-COST ANALYSIS IN ASSESSING ENVIRONMENTAL POLICY

On its surface, benefit-cost analysis (BCA) holds intuitive appeal as a tool for helping to shape government regulatory policy. Why, after all, would anyone want regulations that do more harm than good? If we demand no less than $100 worth of groceries when we pay $100 at the grocery store, why would we want anything else from the federal agencies overseeing the public’s health, safety, and welfare? And why have environmental advocates

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historically had such a contentious relationship with this regulatory mechanism? It’s certainly true that those of us who have dedicated our careers to fighting for cleaner air, safer water, and a healthier climate (as well as those academics who support our cause) have been among the most vociferous critics of BCA, or at least of the manner in which federal agencies in general, and the OIRA in particular, have wielded it in the past. Why would we react skeptically toward a decision-making tool so sleek and elegant as BCA?

The simple answer is that the last forty-plus years have taught us that elisions and assumptions that are inherent in BCA nearly always shortchange critical environmental values. To understand why this is, it is helpful to first place the environmental legal movement in its proper historical context. We often think of the early-to-mid 1970s as a kind of halcyon days for environmental protection, when huge bipartisan majorities of Congress enacted the nation’s signature environmental statutes like the Clean Air Act, Clean Water Act, and the National Environmental Policy Act. Under the

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leadership of both Republican and Democratic administrators, the newly-formed EPA pursued its mission with admirable tenacity. And federal judges often (although not always) interpreted federal environmental statutes expansively, recognizing that Congress intended to give executive branch agencies powerful new tools to remedy the environmental crises that had reached a breaking point in the prior decade. In a 1972 dissent reveried by many environmentalists, Justice William O. Douglas of the Supreme Court even pondered whether to recognize Article III legal standing for natural objects—such as valleys, rivers, lakes, wildlife, or even airsheds—at risk of despoliation.

Very soon thereafter, though, things began to change. Starting in the Carter Administration, the federal government shifted toward a deregulatory posture. Initially, these efforts were directed primarily at reforming purely economic regulations, such as price controls, for industries such as airlines, petroleum, trucking, railways, telecommunications, and finance. The Reagan Administration, however, vastly expanded the scope of this deregulatory initiative and kicked it into overdrive. In the first month of his presidency, President Reagan issued Executive Order (EO) 12,291, which, among other things, required “every major rule” issued by an executive branch agency to include a regulatory impact analysis (RIA) weighing its benefits against its costs. No less important, the Order granted the OMB unanimously and the House by a margin of 372–15. 115 CONG. REC. 19013, 26590 (1969) (enacted). After both houses approved the final bill’s Conference Report without objection, President Nixon signed NEPA into law on January 1, 1970. Id. at 40427, 40928.

8 See, e.g., Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (emphasis added) (holding that “[t]he plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost”); Union Elec. Co. v. EPA, 427 U.S. 246, 254 (1976) (holding that the EPA may not disapprove state implementation plans under the Clean Air Act’s national ambient air quality standards program on reasons of economic or technological infeasibility); Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) (recognizing that “aesthetic, conservational, and recreational” interests may supply a basis for Article III standing (quoting Scenic Hudson Pres. Conf. v. Fed. Power Comm’n, 354 F.2d 608, 616 (2d Cir. 1965))); Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (holding that federal agencies may not sidestep NEPA’s procedural requirements and that the statute’s “high standard . . . must be rigorously enforced by the reviewing courts”).


centralized authority over agency regulations, tasking it with closely scrutinizing agencies’ RIAs and ensuring consistency with the administration’s policies. The centralized review function was then housed within the OIRA (which had actually been created by the Paperwork Reduction Act in the waning days of the Carter Presidency), where it remains to this day.

Thus, BCA became the central tool by which the Reagan Administration policed regulations issued by federal agencies, both through the RIA requirement and via the OIRA’s review of those RIAs. In the ensuing years, presidents of both parties have kept these basic requirements intact. In 1993, the Clinton Administration issued EO 12,866, which largely reiterated the underlying policies of EO 12,291 and even doubled down on the principle of BCA, offering more prescriptive requirements for how agencies should develop their RIAs and how the OIRA review process should function. And while Presidents Obama and Biden adopted regulatory policies that evinced more concern such values such as equity, public participation, and distributive justice, each “reaffirm[ed]” the basic principles and policies of EO 12,866—thus continuing the primacy of BCA as the lodestar of agency rulemaking.

During this time, the rift between the BCA process and environmental values has become increasingly clear. Most fundamentally, BCA requires regulators to monetize goods that are inherently noneconomic. Environmental regulations protect our air and water, safeguard wetlands and other sensitive ecosystems, preserve endangered animal species, reduce illnesses, prevent birth defects, and save human lives (among many other things). How does one put a price tag on these benefits? In a fundamental sense, one simply can’t. To be sure, economists have long deployed various heuristics to monetize nontangible assets. For instance, a “willingness-to-pay” approach would, in this context, estimate how much money people will pay in order to avoid some environmental harm, such as unclean air, while a “willingness-to-accept” approach would instead calculate how much money people would demand in order to forgo an environmental benefit, such as clean air. But the process of converting a non-market good into a monetary price necessarily erases some critical component of that good. This problem

13 Id.
17 See Elizabeth Hoffman & Matthew L. Spitzer, Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications, 71 WASH. UNIV. L.Q. 59, 64, 66 (1993); see also 2023 CIRCULAR A-4, supra note 1, at 28–31, 36–36, 44–45.
is made more acute still by the typical practice of discounting all future costs and benefits regardless of whether they are market or non-market in nature, which we describe in more Section III.

This basic flaw does not mean that regulatory authorities should simply decline to monetize environmental and health benefits altogether. Indeed, when agencies fail to monetize the environmental and public health impacts of their actions, all too often they end up shortchanging those impacts even more. For this reason, environmental groups have strongly supported the federal Interagency Working Group’s efforts to calculate the social cost of greenhouse gases,¹⁸ and have on multiple occasions sued government agencies for not using this metric in their environmental review processes.¹⁹ It does mean, though, that a tool as blunt as a formal BCA, in which regulations can only be justified if the left side of the ledger exceeds the right side, should play much less of a role in agency decision-making than it has for the last forty-plus years.

A second problem is that BCA often ignores considerations of environmental justice (EJ), which refers to the ways in which people of color and low-income communities bear a disproportionate burden of environmental harms and are disproportionately excluded from environmental amenities. Whereas EJ is concerned with how environmental impacts and goods are unfairly distributed, BCA—at least in its most typical application—almost entirely eschews questions of distribution, focusing instead on aggregate-level costs and benefits. As a result, BCA all too frequently fails to address the problems suffered by EJ communities, and can even exacerbate those distributional inequities. This remains true today despite decades of work by EJ advocates to foreground these concerns, and despite the White House’s periodic efforts to inject a greater emphasis on EJ.


in the regulatory review process. We address this topic in detail in Section V below.

Third, BCA very often understates the benefits of reducing environmental harm while overstating the compliance costs needed to achieve those reductions. Even assuming that a given BCA relies on the most recent available science—which is not always the case—it frequently happens that updated research reveals more severe harms related to a given environmental pollutant than was previously understood. For example, a 2020 study from Duke University and NASA concluded that the premature deaths resulting from the combined effects of air pollution and greenhouse gas-driven heat waves were “roughly double those that would have been obtained using older evidence.” 20 Similarly, in 2021, the EPA determined that safe levels of exposure to per- and polyfluoroalkyl substances, or PFAS, were thousands of times lower than limits it had proposed only five years earlier. 21

BCAs also frequently rely on quantitative estimates of pollution that undercount the true extent of the problem. For instance, studies have repeatedly shown that the EPA’s official projections of methane emissions from oil and gas development are far lower than the actual emissions from that sector, 22 with one geologic basin showing up to nine times more methane emitted than the agency’s tallies would suggest. 23 Relatedly, research indicates that state regulators often strategically place air pollution monitors so as to avoid areas of high pollutant concentration—unless those areas’

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21 In 2016, the EPA set a health advisory level of 70 parts per trillion for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), the two most dangerous PFAS. Lifetime Health Advisories and Health Effects Support Documents for Perfluorooctanoic Acid and Perfluorooctane Sulfonate, 81 Fed. Reg. 33250 (May 25, 2016) (notice from the EPA). In 2022, the agency revised these advisory levels on an interim basis to .004 parts per trillion for PFOA (17,500 times lower than the 2016 level) and .02 parts per trillion for PFOS (3,500 times lower than the 2016 level). Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances, 87 Fed. Reg. 36848 (June 21, 2022) (notice from the EPA).

22 E.g., Jeffrey S. Rutherford et al., Closing the Methane Gap in US Oil and Natural Gas Production Emissions Inventories, NATURE COMM’NS, Aug. 2021, at 1, 1 (finding that top-down studies show that oil and gas-related methane emissions are 1.5 to 2 times higher than official estimates suggest); Ramón A. Alvarez et al., Assessment of Methane Emissions from the U.S. Oil and Gas Supply Chain, 361 SCI. 186, 186 (2018) (indicating that sector-wide methane emissions are approximately 60 percent higher than the EPA’s GHG Inventory reflects).

residents are disproportionately white or wealthy. As a result, ambient air pollution levels are likely higher than is typically reported, particularly in EJ communities.

On the other hand, many studies have shown that agencies on average overestimate the compliance costs of environmental regulations and other measures meant to protect public health and welfare. For instance, in 2011, the EPA published a report that evaluated various domestic and international studies comparing projected \((ex \ ante)\) regulatory costs with actual \((ex \ post)\) costs. The study concluded that the literature “uniformly [showed] that regulators overestimate the costs of regulatory compliance more often than they underestimate them, and that the ratio of \(ex \ ante\) to \(ex \ post\) compliance cost estimates is, on average, considerably greater than one.” In defending agencies against the potential charge of having a pro-industry slant, the study offered that “[t]he problem with existing \(ex \ ante\) cost estimates may not be that they are biased so much as that they are bad.” “Bad” but not “biased” arithmetic is cold comfort indeed.

A fourth problem with benefit-cost analysis for environmental regulations is that it may, in some circumstances, pressure agencies into deviating from their own governing statutes. Multiple provisions of federal law prohibit EPA from taking costs or technical feasibility into account when taking some action. For instance, the Supreme Court has held that the agency may not consider costs when issuing national ambient air quality standards under section 109 of the Clean Air Act, nor when approving or disapproving state plans to implement those standards under section 110.

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25 Id.


27 Id. at 6.

28 Id. at 3.

29 A 2017 review of nine case studies of environmental and public health regulations concluded that federal agencies tend to show “slight tendency to overestimate both benefits and costs.” Richard Morgenstern, Retrospective Analysis of U.S. Federal Environmental Regulation, 9 J. BENEFIT COST ANALYSIS 285, 287 (2018). However, the paper acknowledged “considerable variation across the cases” and conceded that “[i]n light of the relatively small number of cases and the diversity of methods and baselines in the underlying studies[,] it is not possible to draw statistical inferences from these results.” Id. at 296. The much broader scope of the EPA analysis cited in note 26, as well as the fact that it cross-checked its results against multiple international studies, persuade us that agencies’ \(ex \ ante\) overestimations of regulatory costs are greater and more widespread than the Morgenstern report concluded. Simpson, supra note 26, at 1.


must also disregard costs when determining the level of air toxic emissions that it considers “safe” under section 112 of the statute and when conducting risk evaluations of chemicals under the Toxic Substances Control Act. Similarly, the D.C. Circuit has held that economic feasibility is not a factor Congress intended the EPA to consider in setting toxic effluent standards under section 307 of the Clean Water Act.

Yet under the OIRA’s protocols, the EPA must still undertake a full BCA for any “significant regulatory action,” regardless of whether the relevant statute even permits costs to play a role in the agency’s decision-making. One former OIRA Administrator lamented this state of affairs, calling it a “bizarre world where the EPA staff is doing analysis of the costs and benefits of regulation, but the Administrator of the EPA cannot look at that analysis when he makes his decision. He has to make his decision purely on health factors.” Yet even this “bizarre world”—in which final policy outcomes are truly insulated from staff’s BCA forecasts—presumes good faith by all parties involved in the decision-making process and strict adherence to statutory dictates. It is unlikely that this always occurs.

One particular example from 2011 is instructive. That summer, the EPA was reportedly preparing to issue a draft final rule that would have established a stringent new ambient air quality standard for ozone of 65 parts per billion. In a move that badly stung both the environmental community and the EPA Administrator Lisa Jackson herself, President Obama’s OIRA chief—Cass Sunstein—directed the agency to withdraw the rule. While Sunstein’s letter to Jackson vaguely referred to factors such as a need to “reduce [regulatory] uncertainty,” “promote predictability,” and avoid . . .

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34 Hercules, Inc. v. EPA, 598 F.2d 91, 112, 114 (D.C. Cir. 1978). But see Nat. Res. Def. Council, 824 F.2d at 1159 n.6 (suggesting in dicta that “Hercules merely stands for the proposition that the [language in section 307] does not require economic and technological considerations; the case says nothing about what such language may permit”).
38 See, e.g., Walke, supra note 37.
“duplicative[ness],” it left little doubt that the OIRA’s fundamental concern was “minimiz[ing] regulatory costs and burdens . . . in this economically challenging time . . . [by] giv[ing] careful scrutiny to all regulations that impose significant costs on the private sector or on state, local, or tribal governments.”40 Indeed, subsequent reporting (including an article published by Sunstein himself) revealed that Sunstein’s primary objection to the 65 parts per billion standard was an unfavorable benefit-cost calculus.41 The OIRA thus commanded the EPA to nix its ozone rule on grounds that Congress prohibited the agency from considering in the first place.

We have thus far discussed four major shortcomings of BCA from an environmental advocate’s perspective. To reiterate, in doing so, we do not mean to imply that BCAs are inherently and in all instances meritless, or that any economic cost (no matter how large) would justify any degree of environmental protection (no matter how small). Indeed, even while some federal statutory provisions prohibit economic considerations when addressing particular environmental issues (as noted above), a great many of them require the EPA and other agencies to take costs into account. The shortcomings do, though, mean that federal agencies—and the OIRA as an administrative referee—should no longer treat BCA as a hegemon dominating the sphere of regulatory review, as it has for the last four decades, and change. Instead, a less rigid and more holistic set of tools should be given at least as much priority as BCA as government officials determine the proper level of intervention to safeguard the environment and the public health, safety, and welfare.

III. DISCOUNTING THE DISCOUNT

The standard economic practice of discounting future regulatory costs and benefits when conducting a BCA serves as a helpful case study of the misalignment between current regulatory review protocols (on the one hand) and environmental and public health realities (on the other). First, though,

41 See John M. Broder, Re-election Strategy Is Tied to a Shift on Smog, N.Y. TIMES (Nov. 16, 2011), https://www.nytimes.com/2011/11/17/science/earth/policy-and-politics-collide-as-obama-enters-campaign-mode.html (describing Sunstein’s concern “that in nearly half of the E.P.A.’s own case studies, the cost of the new rule would outweigh the benefits, raising additional alarms”); Cass R. Sunstein, The Backstory of Obama’s Ozone Rules, BLOOMBERG OP. (Dec. 3, 2014, 4:00 PM), https://www.bloomberg.com/opinion/articles/2014-12-03/the-backstory-of-obamas-ozonerules#xj4y7vzkg (noting the “EPA estimated that at 65 ppb, the annual cost of a new ozone regulation could have been as high as $44 billion—by far the most expensive on record” and comparing these costs to the rule’s anticipated benefits).
let’s begin with some humor: Two economists are stranded on a desert island. One asks, “How are we going to get out of here?” The other responds, “Well, first, assume a lifeboat . . . .” A silly joke, perhaps, but one that conveys an occasional (if not frequent) tendency of economists to subjugate on-the-ground reality to abstract theoretical precepts. Of the many flaws associated with BCA, perhaps none reflect this tendency more than the practice of discounting future regulatory benefits that are not inherently economic (such as lives saved due to reduced air pollution). A close interrogation of this practice and the rationales behind it reveal that, if BCA is to play any substantial role in evaluating future environmental regulations, the OMB must revise it so as to avoid discounting non-market benefits that accrue in the future.

On its most basic level, discounting is meant to reflect the fact that the real value of a fixed quantity of money is not static, but tends to decline over time for a number of reasons we will discuss below. The key concept at issue here is the utility of a given quantity of money: that is, the comparative value or satisfaction people derive from it. Assuming that the real value of money does continually depreciate, it is (theoretically, at least) rational to discount both costs and benefits that will be accrued in the future.

Suppose, for instance, that a regulation will cost $100 two years from now while providing $120 in benefits six years from now. Suppose as well that money declines at a rate of 3% per year in terms of how much utility it may bring society. We find, then, that the rule’s costs are equivalent to $94.26 in today’s money and its benefits $100.50, so under a BCA, the regulation is still justified. But if the benefits only amounted to $110 in six years instead of $120, it would equal to just $92.12 in today’s money—not justified (under formal BCA logic) when compared against costs of $94.26. Now let’s run that last calculation again, but this time with discount rates of 2% rather than 3%. In this case, $100 in costs two years from now is equivalent to $96.12 today while $110 six years from now is worth $97.68. Thus, small changes in the selection of a discount rate can determine whether a regulation passes or flunks a BCA. The longer the period of time for deferred costs or benefits, the more the discount rate will matter.

Economists have offered multiple rationales for discounting future costs and benefits. Insofar as regulations affect private capital formation, discounting is intended to reflect the lost opportunity to invest money and receive a return on that investment over time.42 Under this view, $100 in benefits six years from now is not as valuable as $100 today because the recipient loses those six intervening years in which to have invested and received interest on those funds. Conversely, $100 in costs that will not

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42 See, e.g., DRAFT 2023 CIRCULAR A-4 PREAMBLE, supra note 1, at 24.
become due for six years represent less of a loss than if they had been due today because the recipient will have those six additional years to invest the money and accumulate returns before having to tender the payment.

Insofar as regulations affect the public’s consumption of goods and services, the rationale for discounting is somewhat more abstract. Here, discounting reflects two considerations: the “pure time preference rate” of consumers and the “elasticity of marginal utility of consumption.” Consumers’ pure rate time preference refers to the principle that, as a matter of human psychology, people generally like to receive goods and services sooner rather than later. The elasticity of the marginal utility of consumption, in turn, describes how a given unit of consumption provides more value if it represents a larger share of one’s overall consumption. In other words, the richer a person or a society is, the less overall value they will derive from a given good or service. For example, receiving a week’s worth of groceries or a $300 check will make a much bigger economic difference to a low- or middle-income person than to a very wealthy person, for whom it would reflect a mere drop in the bucket. The general assumption of discounting is that as time progresses, the economy grows and society as a whole will become richer, so the marginal utility of any fixed quantity of money will be less and less as time goes on. Taken together, consumers’ pure time preference rate and the elasticity of the marginal utility of consumption are referred to as the “social rate of time preference.”

Because BCA usually calls for an equal treatment of costs and benefits, analysts generally discount at equal rates both the monetized costs and monetized benefits of a regulation. This requires discounting not only future expenditures that must be made to comply with a regulation, but also any future benefits once they have been converted into dollar figures. For instance, suppose an environmental regulation will reduce air pollution so as to prevent 10 peoples’ premature deaths 10 years from now. Using $10 million as the statistical value of human life (selected here for illustrative purposes only), a BCA analyst therefore calculates that the regulation will yield $100 million in monetized benefits in 10 years by saving those 10 lives. Using a discount rate of 3% (again, selected for illustrative purposes), she

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43 Id. at 22–23.
44 See id. at 22.
45 See id.
46 Id.
47 Id.
48 See, e.g., EPA, Guidelines for Preparing Economic Analyses, 6-2 (Dec. 2010), https://www.epa.gov/sites/default/files/2017-09/documents/ee-0568-06.pdf (“It is important that the same discount rate be used for both benefits and costs because nearly any policy can be justified by choosing a sufficiently low discount rate for benefits, by choosing sufficiently high discount rates for costs, or by choosing a sufficiently long time horizon.”).
determines that the rule’s $100 million in monetized benefits 10 years from now are only worth $74 million in today’s money. Thus, the analyst effectively concludes that the rule will not, in fact, save 10 peoples’ lives, but will only save 7.4 peoples’ lives from today’s perspective.

Converting human lives to naked dollar figures is awkward enough. Mathematically erasing a significant number of those lives because money loses value over time is an outright sordid business. Even with respect to money itself, the three rationales for discounting discussed above are already on somewhat shaky ground. Capital investments don’t always generate positive returns, and certainly not ones that are easy to predict. The “pure time preference rate” for consumption may be relevant when considering each individual’s spending choices but not necessarily for decisions affecting all of society. And the economy does not grow in a linear and predictable fashion such that a pre-selected discount rate accurately represents the declining marginal utility of a fixed sum of money. This is especially true in light of the fact that climate change will, in the next several decades and beyond, pose severe challenges to both the domestic and global economies.49 Thus, considering purely monetary impacts, the value of discounting is debatable.

What should not be debatable is this: The rationales for discounting carry no weight with respect to non-market goods such as cleaner air and water, species and tracts of nature preserved, asthma attacks reduced, and premature deaths avoided. Consider again the example above of an environmental regulation that avoids 10 premature deaths 10 years in the future. Are those lives somehow less valuable because they occurred 10 years off rather than today? Can a human being be invested in a securities market and generate interest, as would a federal treasury bond? Is it legitimate to honor a “pure preference” for the lives of those today compared to those living in a decade? And does a human being whose life is saved ten years from now have less “marginal utility” to society than people living today because of the economic growth that has occurred in the interim (or for any other reason, for that matter)?

49 The Swiss Re Institute projects that “[t]he world stands to lose close to 10% of total economic value by mid-century if climate change stays on the currently-anticipated trajectory, and the Paris Agreement and 2050 net-zero emissions targets are not met.” JESSIE GUO ET AL., SWISS RE INST., THE ECONOMICS OF CLIMATE CHANGE: NO ACTION NOT AN OPTION 1 (Paul Ronke ed., 2021). Similarly, the Fourth National Climate Assessment projected the impact of climate change on the U.S. domestic economy and found that “[w]ith continued growth in [greenhouse gas] emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century—more than the current gross domestic product (GDP) of many U.S. states.” U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NAT’L CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 13 (2019).
The answer to each of these questions is obviously “no.” Despite this, BCAs nevertheless generally discount non-market goods like cleaner air or lives saved after monetizing them to satisfy the principle that all costs and all benefits must be treated equally. The fundamental error here is to assume that once a non-market good has been assigned a monetary value as part of the BCA process, it can be treated exactly as if it were money for any subsequent operation. But in doing so, the BCA analyst conjures the perfect lifeboat: it would transport the stranded individuals off the island safe and sound, if only it actually existed. Despite economists’ preference for tidy symmetry, the inexorable differences between (on the one hand) literal money and (on the other) non-market goods such as environmental and health benefits—even when monetized—demands asymmetrical treatment. It may in some cases be appropriate to discount the former; it should never be acceptable to discount the latter.

Our goal in laying this all out is not necessarily to call for the wholesale banishment of BCA as a regulatory tool. Instead, we seek here to expose the inherent limits of BCA and describe flaws in its common application. In light of these critical shortcomings, the OIRA and regulatory agencies must demote BCA from its pedestal and incorporate other evaluative tools into the regulatory review process. For instance, Professor Amy Sinden of Temple University’s Beasley School of Law has highlighted a number of “scappy, street-smart tools of regulatory decision-making, like feasibility analysis, cost-effectiveness analysis, and multi-factor balancing” that may lack the “theoretical elegance” of BCA but far outstrip it in terms of “pure pragmatic effectiveness.” Insofar as BCA continues to play a role in shaping regulatory policy, though, federal agencies and the OIRA must cease discounting non-market benefits, lest they continue embarking on a vaporous lifeboat.

IV. A GREEN(ER) LIFEBOAT?

Although the OIRA’s recent revisions to Circular A-4 do not go nearly this far, they nevertheless reflect substantial improvements over the pre-existing set of policies. The prior version of Circular A-4, issued in 2003, directed agencies to use discount rates of 3 percent (for policies primarily

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50 See, e.g., EPA, supra note 48, at 6-1 (“Discounting renders benefits and costs that occur in different time periods comparable by expressing their values in present terms. In practice, it is accomplished by multiplying the changes in future consumption (broadly defined, including market and non-market goods and services) caused by a policy by a discount factor.” (emphasis added)).

affecting consumption) and 7 percent (for policies primarily affecting capital).52 Those rates were based on both macroeconomic conditions and analytic techniques that were markedly outdated by the time the Office issued its revised document in November 2023. The 3 percent value corresponded to the average real rate of return on 10-year U.S. Treasury Notes between 1973 and 2003, when inflation-adjusted interest rates were far higher than they are today and are expected to be in the future.53 And the 7 percent value, which corresponded to average rates of return on capital investments as of 2003, supposed “very restrictive and unrealistic conditions that are almost never satisfied” in practice by regulatory policies, according to one analysis.54 Environmental economists and commenters in the NGO sphere had been particularly critical of the use of high discount rates in the context of policies with long-term, intergenerational impacts, such as those pertaining to climate change.55

The revised Circular A-4 instead directs agencies to use a discount rate of 2.0 percent, which corresponds to a regulation’s effects on consumption patterns and approximately reflects the average real rate of return on 10-year U.S. Treasury Notes over the last 30 years.56 To account for the potential impacts of a policy on capital investments, the document directs agencies to use a “shadow price of capital” for regulations that are expected to have capital effects, rather than a wholly separate discount rate.57 Under this approach, the analyst multiplies the policy’s costs and benefits by a factor of 1.0 to 1.2 before applying the 2.0 percent discount rate.58 Here, the 1.0 lower bound represents “an economy with perfect capital mobility,” while the 1.2 upper bound represents “a closed economy estimate with no foreign capital flows.”59 Furthermore, to establish proper bookends that describe the full range of potential capital effects, the OMB recommends that agencies run at

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52 See 2003 CIRCULAR A-4, supra note 2, at 11.
56 2023 CIRCULAR A-4, supra note 1, at 76–77.
57 Id. at 77–80.
58 Id. at 78–80.
59 Id. at 78–79.
least two scenarios: one that assumes that a regulation’s capital effects fall entirely on its costs and not at all on its benefits, and one that assumes the opposite.60

These are highly technical issues, and it is not our intention to provide a detailed analysis of them here. We can, though, safely say that these revisions will significantly affect the outcomes of BCAs undertaken for environmental policies, in which compliance costs are often front-loaded while health and environmental benefits are often deferred. Consider an EPA public health regulation that imposed $100 million in costs in Year 1 and provided $200 million in benefits in Year 10 through improved health outcomes. This policy would yield $100 million in net benefits under a no-discounting approach (or slightly higher if the rule’s compliance costs were discounted but not its non-market health benefits). Under the current OMB guidance calling for discount rates of 7 and 3 percent, the net benefits pencil out at $8 million at the lower end and $52 million at the higher end, respectively. Under the updated guidance, however, the regulation would yield between approximately $51 million at the lower end and $104 million at the higher end in net benefits.

This is a clear win for environmental and public health protection. Our hypothetical presents a particularly stark example: environmental policies with less of a temporal gap between the accrual of costs and benefits, as well as those with shorter timeframes more generally, would yield less disparate BCA results between the 2003 and 2023 policies. By and large, though, we expect to see more favorable outcomes—and thus more compelling cases for environmental and public health protection—under the OIRA’s revised discounting approach. We maintain our normative objections to discounting non-market goods at all, but the overhauled approach to discounting that the OIRA has adopted in its updated Circular A-4 is a clear improvement over the 2003 guidance.

IV. ADDRESSING DISTRIBUTIONAL JUSTICE AND CUMULATIVE IMPACTS IN THE REGULATORY PROCESS

The OIRA’s regulatory review process not only shortchanges values like environmental protection and improved public health at a macro level, it also fails to properly account for the site- and community-level inequities that have long plagued vulnerable populations. In the past, BCAs have not addressed the unequal distribution of environmental harms and benefits across populations. Yet, decades of evidence have shown that people of color and low-income communities suffer disproportionate harm from

60 Id. at 79–80.
environmental problems while lacking equal access to environmental amenities. Federal agencies and the OIRA must take environmental justice, or EJ, much more seriously as they look for ways to improve regulatory review.

Efforts at the federal level to better achieve EJ goals are not new. In 1994, the Clinton Administration issued EO 12,898, titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” The EPA has characterized this order as directing federal agencies to:

- [I]dentify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law;
- [D]evelop a strategy for implementing environmental justice; and
- [P]romote nondiscrimination in federal programs that affect human health and the environment, as well as provide minority and low-income communities access to public information and public participation.

The executive branch has undertaken many other environmental justice initiatives during the last thirty years. In 1993, the Clinton Administration established the Office of Environmental Justice (OEJ) at the EPA (which it soon thereafter tasked with administering EO 12,898) as well as the National Environmental Justice Advisory Council (NEJAC), which works to “provide[] a crucial forum for the discussion and elevation of issues critical to the environmental justice movement and the integration and consideration of environmental justice within the work of the EPA and the larger Federal family.” In 1997, the Council on Environmental Quality (CEQ) published high-level guidance on incorporating EJ principles into the National Environmental Policy Act process for federal agencies, and in 2016, the
EPA issued much more detailed guidance for assessing EJ in its own regulatory impact analyses.65 Since taking office, the Biden Administration has made EJ a considerably bigger part of its policy agenda compared to previous administrations. In his first week in office, the president issued an executive order establishing both a White House Interagency Environmental Justice Council—consisting of senior administration officials and tasked with developing and overseeing the government’s EJ strategy—66 and the White House Environmental Justice Advisory Council, which “shall provide recommendations to the [Interagency Council] on how to increase the Federal Government’s efforts to address current and historic environmental injustice.”67 The administration’s ambitious, whole-of-government Justice 40 Initiative, which aims to steer “40 percent of the overall benefits of certain Federal investments [toward] disadvantaged communities[,]” is largely geared toward EJ concerns, focusing on “climate change, clean energy and energy efficiency, clean transit, affordable and sustainable housing, training and workforce development, remediation and reduction of legacy pollution, and the development of critical clean water and wastewater infrastructure.”68

Furthermore, in 2022, the EPA reorganized and revamped the OEJ into the Office of Environmental Justice and External Civil Rights,69 while other federal agencies, including the Department of Justice70 and Department of Health and Human Services,71 recently created their own dedicated EJ offices. And just last April, President Biden signed EO 14,096: “Revitalizing Our Nation’s Commitment to Environmental Justice for All.”72 Among other things, this EO directs federal agencies to redouble their EJ efforts with regard to both process and substantive outcomes; tasks agencies with developing and periodically updating “strategic plans” for achieving those goals; creates protocols to enhance “research, data collection, and analysis.”

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67 Id. at 7630 (section 221(b)).
relating to EJ; gives clearer direction and additional responsibilities to the Interagency Council; and establishes a White House Office of Environmental Justice.73

The Biden Administration has certainly laid out a broad vision for a “whole-of-government approach” toward EJ.74 Yet one critical piece of the puzzle remains missing: the OIRA. Ambitious as it appears to be, EO 14,096 specifically provides that “[n]othing in this order shall be construed to impair or otherwise affect . . . the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals,”75 an exception that clearly encompasses the OIRA and the interagency review process. Given that the OMB Director is still a member of the Interagency Council,76 the order’s general directives on EJ matters may still influence the regulatory review process, but direct reforms at the OIRA are necessary to start ameliorating the vast environmental disparities that linger across racial, ethnic, and socioeconomic lines despite three decades’ worth of federal EJ initiatives.

The data documenting these disparities is overwhelming. To cite just a few notable statistics, one report found that “African Americans are exposed to 38 percent more polluted air than Caucasian Americans, and they are 75 percent more likely to live in fence-line communities than the average American.”77 Black individuals are “30 percent more likely to have asthma than non-Hispanic whites” and “almost three times more likely to die from [it].”78 On average, “people of color make up 56% of the population living in neighborhoods with . . . facilities [with toxic releases], compared to 30% elsewhere.”79 White populations “experience [approximately] 17% less air pollution exposure than is caused by their consumption,” while Black and Hispanic/Latino populations experience “56% and 63%” more pollution,

73 Id. at 25253–60.
76 Id. at 25259.
respectively, than their consumption causes. And in multiple oil- and gas-producing states, Native Americans are much more likely than the general population to live in close proximity to polluting infrastructure.

If past experience is any guide, deep interventions in the market are badly needed to disrupt the problems that EJ confronts. Given its central role in the federal regulatory process, the OIRA cannot sit on the sidelines if we are to make any progress toward achieving more equitable outcomes. As a starting point, the federal regulatory review process must address two concerns that go to the heart of EJ: distributional justice and cumulative impacts. The distributional component is fairly self-explanatory, as we have already discussed: environmental harms and benefits are meted out unevenly in a way that tends to harm vulnerable populations, and so regulatory policy should strive to reduce those inequities by prioritizing the harms that befall communities that have historically suffered the most from environmental degradation. Cumulative impacts, for its part, refers to the fact that EJ communities frequently suffer from multiple and overlapping forms of environmental harm that cumulatively do more damage than would appear to be the case if each individual harm were considered separately. For example, Black and Hispanic/Latino communities in heavily industrialized areas along the Texas Gulf Coast experience the compounding and interacting effects of


water pollution, high carcinogen exposure, elevated levels of ground-level ozone, and climate-related disasters.

How, then, can regulatory policy and the regulatory review process account for distributional injustices and cumulative impacts? To answer this, we must consider a somewhat vexing question: Should the OIRA and regulatory agencies work to develop ways of quantifying distributional and cumulative effects so as to better integrate them into the arithmetic methods (like BCA) that underscore so much of the regulatory review process? Or should they focus instead on qualitative analyses and work to revise the regulatory review process itself to more fully accommodate qualitative concerns? We propose that the answer must be both. As we have discussed, efforts to quantify (and monetize) non-market values like environmental protection and improved health necessarily strip away some fundamental essence of those things, often leading regulators to consider them in an erroneous or incomplete fashion. Nevertheless, given that regulatory development and review is a necessarily quantitative process, not to quantify environmental considerations where possible—including EJ issues like


distribution and cumulative effects—would, as a practical matter, likely end up marginalizing them even more.

At the same time, agency regulators and the OIRA must do far more to take qualitative outcomes seriously. Even if values of environmental protection, public health, and racial and economic justice must be rendered numerically to fully analyze regulations, they are not sheer numbers. Real people’s lives, health, and wellbeing are at stake. Regulatory analysis should not ignore quantitative outcomes, but must make more room for qualitative realities in a manner that is more broadly deliberative and less coldly arithmetic.

Regarding distributional impact analyses, the OIRA’s update to Circular A-4 moves in a positive direction. In the April 2023 preamble to the draft revision, the Office acknowledged that EO 12,866 has done little to improve agencies’ consideration of distributional effects in their regulatory analyses. It observed that “recent studies of agencies’ regulatory impact analyses have found that most contain little analysis of regulations’ effects on particular groups, aside from analysis of effects on small businesses,” and notes that one study of twenty-four economically significant rulemakings found that “none provided a distributional analysis of net benefits.”87 To help remedy these shortcomings, the final revision provides more detailed guidance on how agencies can better account for distributional effects, including discussions of when agencies should conduct distributional analyses, how to identify affected groups and sub-populations, methods for conducting a distributional analyses, and proposals for weighting costs and benefits.88

These are welcome developments that indicate the OIRA’s current leadership is serious about improving agencies’ analyses of the distributional effects (and thus the EJ impacts) of their regulatory proposals. Yet, apart from its discussion of distributional weights (discussed below), the revision offers fairly little in the way of specific implementation tools for agencies to use in their distributional analyses, nor does it provide much input on addressing cumulative impacts. Simply put, more concrete guidance is needed.

Fortunately, valuable analytic resources already exist, and federal agencies can use these as a starting point for improving the EJ outcomes of their regulations. Doing so will require a greater emphasis on geographic specificity; rather than evaluating environmental regulations solely at the national, regional, or state levels, analysts must also consider the extent to which agency actions specifically affect EJ communities. The starting point for that analysis is to define EJ communities, which some states have already done. For example, Pennsylvania, through its Department of Environmental

87 Draft 2023 Circular A-4 Preamble, supra note 1, at 11.
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Protection (PADEP), has identified and defined “EJ areas” as “any census tract where 20 percent or more individuals live at or below the federal poverty line, and/or 30 percent or more of the population identifies as a non-white minority, based on data from the U.S. Census Bureau and the federal guidelines for poverty.” Alternatively, New Jersey has, by statute, defined an “overburdened community” as any census block in which “(1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.

While the OIRA need not necessarily be bound by these precise definitions of EJ or equivalent communities, it should look to the precedent set by PADEP, New Jersey, and other states that have addressed this issue directly. It is also worth noting that the CEQ has developed as part of President Biden’s Justice40 Initiative a “Climate and Economic Justice Screening Tool,” which identifies census tract-based communities that have experienced burdens in eight categories: “climate change, energy, health, housing, legacy pollution, transportation, water and wastewater, and workforce development.” However, unlike PADEP and New Jersey, the CEQ accounts for race-based differences only indirectly in its screening tool.

Another powerful model is the EPA’s “Environmental Justice Screening and Mapping Tool,” or EJScreen. This interactive visual tool provides values for a dozen “environmental justice indexes”—including (among others) “Ozone,” “Particulate Matter 2.5,” “Wastewater Discharge,” “Air Toxics Cancer Risk,” and “Superfund Proximity”—for each census tract in

the country.\textsuperscript{94} It also depicts data for “Pollution and Sources,” “Socioeconomic Indicators,” “Health Disparities,” “Climate Change Data,” “Critical Service Gaps,” and comprehensive demographic data for each tract, allowing viewers to compare each area’s values in any given indicator to the state and national percentiles.\textsuperscript{95} EJScreen thus addresses both the distributional concerns and cumulative impacts component that should inform any proper EJ analysis. Similarly, California’s Office of Environmental Health Hazard Assessment (OEHHA) has developed CalEnviroScreen 4.0 Data Dashboard,\textsuperscript{96} which allows users to “analyze[] data on environmental, public health and socioeconomic conditions in California’s 8,000 census tracts,”\textsuperscript{97} with an option of viewing the race/ethnic compositions of each tract. And the New Jersey Department of Environmental Protection’s EJMAP tool allows users to locate overburdened communities along with polluting facilities situated near them.\textsuperscript{98}

The CEQ, the EPA, and states like Pennsylvania, New Jersey, and California have all made progress in developing frameworks to help target EJ hotspots and, hopefully, steer decisionmakers toward more equitable environmental outcomes. The problem is, these efforts have not been incorporated into the OIRA’s or most agencies’ regulatory development and review process—including (ironically) the EPA’s. It is now time for the broader regulatory sphere to catch up. One possible approach would work as follows: the OIRA could use the existing tools discussed previously to develop comprehensive EJ metrics for each census tract, accounting for the same dozen environmental indicators included in EJScreen, plus additional ones such as access to green spaces and proximity to pollution sources such as highways, heavy industry, and oil and gas infrastructure. Using the cumulative results of these environmental indicators as well as the demographic characteristics of each census tract, the OIRA would then assign an “EJ score” or something similar to each area, including qualitative descriptions for areas that are especially overburdened. Agencies, as well as the OIRA itself in its review process, would then analyze whether the extent to which their regulatory proposals would ameliorate, leave unchanged, or

\begin{footnotesize}
\textsuperscript{95} \textit{Id}.
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exacerbate the inequities suffered by census tracts with high EJ scores. Positive outcomes from this analysis would weigh heavily in favor of finalizing the regulation at issue, while negative outcomes would direct agencies back to the drawing board.

This is simply one way that distributional and cumulative impacts could be more fully addressed in the regulatory development and review process, and could be combined with other approaches. For instance, Professor Zachary Liscow of Yale Law School has suggested a strategy of “cleansing” measures of costs and benefits to ensure that poorer communities are not effectively penalized in the regulatory process simply because certain monetized impacts appear nominally lower for those populations than they would for wealthier communities. 99 For instance, suppose that an agency decision approving the construction of a new chemical plant in a poorer area appeared to affect property values less than in if it were built in a richer area, solely because the home values in the poorer area were already much lower to begin with (e.g., a 10 percent reduction in value for a $100,000 home is, in dollar figures, five times less than for a $500,000 home). By “cleansing” these figures, the monetary impacts on home values would appear equal regardless of the baseline level of wealth in the affected community.

Professor Liscow also discusses an even more ameliorative approach, which would assign “explicit distributional weights” to costs and benefits based on the level of wealth in the underlying community. 100 This technique accounts for the fact that the marginal utility of consumption (discussed in the previous section) declines as income increases. Under this rubric, the same quantity of benefits is actually worth more if it accrues to a disadvantaged community than to a more privileged community. In fact, as Professor Liscow notes, the United Kingdom already uses a weighting process along these lines in its regulatory process. 101 To its credit, the OIRA directly addresses this issue in its revised Circular A-4, advising that “[a]gencies may choose to conduct a benefit-cost analysis that applies weights to the benefits and costs accruing to different groups in order to account for the diminishing marginal utility of goods when aggregating those benefits and costs.” 102 The OIRA also provides a number of technical guidelines that agencies may follow in assigning such weights to costs and benefits. 103 Still, the document appears to treat income-adjusted weighting as

100 Id. (internal quotations omitted).
101 Id.
102 2023 CIRCULAR A-4, supra note 1, at 65.
103 Id. at 65–67; see also DRAFT 2023 CIRCULAR A-4 PREAMBLE, supra note 1, at 12–16.
a discretionary option; there is no reason it cannot be adopted as formal policy for agencies’ regulatory reviews.

V. AIRING OUT AND OPENING UP THE OIRA’S INTERAGENCY REVIEW PROCEDURES

Aligning substantive regulatory outcomes with the needs of EJ communities is essential. But EJ is actually no less concerned with process than with substance. Indeed, EJ leaders have long argued that positive substantive outcomes for EJ communities are impossible without their active participation in the regulatory decision-making process. Yet for decades, disadvantaged communities were systemically shut out of this process at nearly every level, and not just by the government, but by influential environmental groups as well. While significant improvements have been made on this front, much more work still needs to be done to better engage disadvantaged communities in the regulatory deliberations that affect them. This is especially true at the OIRA. We therefore propose both external and internal reforms, which we believe will reduce some of the barriers that currently impede a more equitable process.

Critics of the federal regulatory process often characterize it as theoretically open to the entire public but in practice accessible only by well-funded, well-lawyered insiders who understand the legal complexities at issue, know the agency staff, and represent stakeholders with substantial influence. This is certainly a pertinent critique, but some credit is due to agencies like the EPA, which has made real progress in conducting outreach to a broader set of communities, including members of frontline communities, indigenous tribes, and other stakeholders often ignored in the past. The same cannot be said of the OIRA, which remains a nearly impenetrable fortress for those not already well-schooled in its operations.

When an agency sends a rule over to the OIRA for its review, notice is posted on the website regulations.gov, but generally no notice is made to the broader public in an accessible forum. To schedule a meeting with the OIRA staff (known informally as “12,866 meetings”), interested parties must obtain the necessary paperwork and know the correct scheduling official to email. Meetings tend to be extremely time-constrained, generally limited to thirty minutes on the dot. OIRA officials rarely ask questions of the presenters, and are forbidden from revealing any information about the regulatory materials under review. When they do ask questions, they are often geared toward technical issues raised by presenters or issues that

directly implicate a formal benefit-cost analysis. And while interagency review documents are later posted online as part of the administrative docket, only those with substantial experience in agency rulemakings can find and parse through these documents in order to extrapolate a coherent back-and-forth between the OIRA and the agency.

The OIRA’s general lack of transparency, and the steep hurdles it places in the way of public participation, are antithetical to the procedural goals of the EJ movement. The Office must take affirmative steps to foster a culture of greater accessibility and openness. Just as the EPA now typically does, the OIRA should engage in active outreach to stakeholders affected by regulations subject to its review, particularly disadvantaged communities that might not have the same resources, connections, or background knowledge that more well-funded and well-lawyered stakeholders do. The OMB does have a Public Liaison, but that official’s duties appear geared mostly toward Freedom of Information Act (FOIA) requests. The Office could hire a small number of additional staff working under the Public Liaison whose responsibilities would include working to identify and communicate with stakeholder representatives—including EJ community members—with a goal of bringing their voices and views into the deliberative process.

In addition, the OIRA should simplify the process for requesting meetings and work to make those meetings more of an open exchange between the parties rather than the somewhat stiff, one-sided affairs that they often are. Even if the OIRA insists on keeping secret the specific details of whatever pending rule or regulation is the subject of the meeting, it should explain to meeting participants—and to the public more broadly—the factors it will be prioritizing over the course of the review, including efforts to address questions of distributional justice and cumulative impacts. Finally, once review is complete and a rule is published, the OIRA should transmit to any meeting participants, and post on a publicly accessible website, a clear and digestible description of interagency review process. This would avoid the need for interested parties to trawl through documents on regulations.gov trying to piece together a narrative thread of the OIRA-agency deliberations, or—more cumbersome still—uncover such a thread via FOIA requests. All of this would help empower stakeholders, and especially disadvantaged communities, to more effectively shape the regulatory policies that affect their lives.

There is some reason for optimism on these fronts. The Biden Administration’s Modernizing Regulatory Review order (noted above) includes a section on the “Affirmative Promotion of Inclusive Regulatory Policy and Public Participation,”105 which addresses many of these very

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concerns. This order not only calls on the OIRA to work with government agencies to improve the notice-and-comment rulemaking process, but directs the OIRA itself to foster greater and more inclusive participation in 12,866 meetings, including working “to ensure access for meeting requesters who have not historically requested such meetings” and “to better facilitate transparency and analysis” of the nature and substance of these meetings.106

Consistent with this executive order, the OIRA recently issued guidance material to implement its directive.107 In this document, the OIRA outlines a number of modest steps it plans to take to facilitate broader participation in EO 12,866 meetings and improve outreach to underserved communities. The office solicits feedback on various strategies to achieve these goals, with a particular focus on improving outreach to underserved communities. These strategies include, for example: “providing detailed written step-by-step instructions, as well as a video (also translated into Spanish), on its website RegInfo.gov on how to schedule a meeting[,]” “[m]aking the E.O. 12866 meeting request button available in additional areas of the OIRA’s website, making it easier to request a meeting[,]” “[o]ffer[ing] periodic and accessible trainings to the public on effective participation in E.O. 12866 meetings;” and “prioritiz[ing] the scheduling of requests that come from those who have not historically requested meetings[.]”108 Incremental as they are, these measures reflect some positive movement forward. As always, however, how they are actually put into practice will make all the difference, and it will likely be some time before we can truly gauge the Office’s success at adopting a more open and transparent bureaucratic culture.

In addition to reforming its approach to public engagement, the OIRA must also revise its internal operations to better account for EJ concerns. It can begin by considering options to diversify the professional staff who conduct regulatory reviews. These individuals—economists, lawyers, statisticians, and others with a high degree of technical expertise109—are unquestionably talented and dedicated public servants, but their portfolios do not cover the full panoply of interests that the OIRA should address in its reviews. Professors Sidney Shapiro (of Wake Forest University School of Law) and Melissa Luttrell (of the University of Tulsa College of Law) have wisely suggested that the Office “add career staffers whose expertise lie[] in

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106 Id. at 21879–80 (sections (2)(e)(ii)(A), (D)).


108 Id. at 3–4, 6.

109 Information and Regulatory Affairs, WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs/ (last visited Jan. 3, 2024) (“All OIRA career staff possess graduate level degrees and have historically come from backgrounds in economics, law, policy analysis, statistics, and information technology.”).
racial justice, law, public health, environmental policy and . . . other [such areas],” as “[regulatory] analysis requires the consideration and evaluation of multiple perspectives if it is to effectively predict regulatory impacts.”

In addition, even within the Executive Office of the President, the OIRA need not monopolize the regulatory review process, at least with respect to factors that are not (currently) within its core competency. Other White House offices could potentially lend their knowledge and perspectives to this process regarding issues that are not purely economic, including EJ considerations. The CEQ helps coordinate executive branch policy on, among other things, EJ policy, and, as discussed earlier, is advised by the White House Environmental Justice Advisory Council. Similarly, the Domestic Policy Council may provide valuable insight on EJ matters relevant to pending regulations before the OMB. Finally, to reiterate, President Biden established a White House Environmental Justice Interagency Council early in his administration, which he tasked with developing “a strategy to address current and historic environmental injustice by consulting with the White House Environmental Justice Advisory Council and with local environmental justice leaders.” While the formal members of this Council are cabinet members and other senior administration officials (including the OMB director), it also has a professional staff who could assist the OIRA in addressing EJ considerations during its review process.

It is critical, though, that consultations with other White House offices on EJ matters not in any way end up delaying the issuance of the rules and regulations in question. To those affected by environmental and public health crises—particularly frontline and overburdened communities—the pace of government action can already feel glacial. It would be unfortunate indeed if efforts to better foreground EJ concerns were to slow things down even further. What we are calling for, then, is not necessarily more internal process, but better process. An optimal approach may be one in which the OIRA regularly solicits input and assistance from other White House offices on EJ issues without adding more formal steps to interagency review. In other words, the OIRA should work to nurture a more communicative and collaborative culture, particularly with regard to EJ.

The OIRA has historically been seen as a kind of inquisitor presiding over the agencies’ efforts to rein in harmful industry practices and thereby protect the public health, safety, and welfare. It is not for nothing, after all, that the OIRA Administrator is often referred to as the President’s

“regulatory czar.” \footnote{See, e.g., Jonathan H. Adler, The Biden Administration Finally Taps a Regulatory Czar, \textit{VOLOKH CONSPIRACY}, https://reason.com/volokh/2022/09/03/the-biden-administration-finally-taps-a-regulatory-czar/ (Sept. 3, 2022, 10:08 AM).} Yet a more constructive approach is in reach. Many analytic, informational, and administrative resources already exist that could, if seized and implemented, transform the OIRA’s role from one of inquisitor to one of facilitator. Other agencies, both federal and state, have taken marked steps toward a more flexible and responsive regulatory approach, one more attuned to the all-too-often-neglected needs of EJ communities. The OIRA can and must do the same. By considering the suggestions we have raised in this Article—or developing other creative and effective strategies that could achieve the same goals—the OIRA can be a better servant of \textit{all} of the country’s people. We encourage the Office, and the federal regulatory apparatus more broadly, to strive toward that goal.