Vadinho@aol.com
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To: Lorraine D. Hunt OIRA ECON GUIDE/OMB/EOP@EOP

cc:
Subject: Comments on Draft Guidelines, 68 Fed. Reg. 5492 (Feb. 3, 2003), by Earthjustice

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- Earthjustice comments on OMB Feb 3 2003 FedReg notice.doc

EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAI'I
JUNEAU, ALASKA OAKLAND, CALIFORNIA SEATTLE, WASHINGTON
TALLAHASSEE, FLORIDA WASHINGTON, DC

Comments on Office of Management and Budget, "Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations," 68 Fed. Reg. 5492 (Feb. 3, 2003).

These comments are submitted on the above document, which among other topics addresses how to value human life, and the shortening of that life. Among the approaches discussed involve valuation of life differently, depending on the number of years remaining to the victim. 68 Fed. Reg. 5521 (under value of statistical life approach, "[s]tudies aimed at deriving VSL values for middle-aged populations are not necessarily applicable to rules that address lifesaving among children or the elderly"); *id.* (under value of statistical life year approach, "[t]he assumption is that the public is willing to pay more money for a rule that saves an average of 10 life years per person than a rule that saves one life year per person.").

Conspicuous by its absence from the February 3 notice is any discussion of the moral issues raised by an approach that assigns a lower value to those who are expected to die sooner (*e.g.*, the elderly and those suffering from potentially life-shortening health impairments). These moral issues are illustrated by a 1997 Supreme Court case addressing a State of Washington statute banning assisted suicide. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The Court unanimously upheld the Washington statute against constitutional challenge. Chief Justice Rehnquist, writing for himself and Justices Scalia, Thomas, O'Connor and Kennedy, stressed the American legal system's long history of prohibiting both the commission of suicide and the facilitation of it. Interestingly, he noted:

> [T]he prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "the life of those to whom life had become a burden--of those who were hopelessly diseased or fatally wounded--nay, even the lives of criminals condemned to death, were under the protection of the law, equally as the lives of those who were in the full tide of life's enjoyment, and anxious to continue to live." *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); see [*Commonwealth v. Bowen*, 13 Mass. 356, 360 (1816)] (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

521 U.S. at 714-15 (Supreme Court's brackets omitted).

The Supreme Court also rejected the lower court's adoption of a "sliding-scale" approach, under which the State's interest in preserving life "depends on the medical condition and the wishes of the person whose life is at stake." *Id.* 729 (citation and internal quotations omitted). Chief Justice Rehnquist ruled:

> Washington ... has rejected this sliding-scale approach and, through its assisted suicide-ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. *See United States v. Rutherford*, 442 U.S. 544, 558, 99 S. Ct. 2470, 2478-79, 61 L. Ed. 2d 68

> (1979) (". . . Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise"). As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy," *Cruzan [v. Director, Mo. Dept. of Health]*, 497 U. S. [261], 282 [1990]. This remains true, as Cruzan makes clear, even for those who are near death.

Id. 729-30.

Likewise, the Chief Justice ruled that "[t]he State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.'" *Id.* 732 (citation omitted). Thus, "[t]he State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy." *Id.*

Interestingly, the four justices who did not join Chief Justice Rehnquist's opinion did not dispute the foregoing points. For example, Justice Souter's decision to uphold the ban reflected his concern that caregivers would face financial incentives to cut costs by ending their patients' lives early: "Physicians, and their hospitals, have their own financial incentives, too, in this new age of managed care." *Id.* 784.

And Justice Stevens, in arguing that individuals might in some circumstances have the right to choose to end life, did not dispute the State's "unqualified interest in the preservation of human life, which is equated with the sanctity of life." *Id.* 746 (citations and internal quotations omitted). Indeed, "[t]hat interest not only justifies -- it commands -- maximum protection of every individual's interest in remaining alive." *Id.*

Instead of being based on a lower valuation of the old or sick, Justice Stevens' approach rested on notions of individual autonomy fully consistent with assigning equal worth to all human life: "Allowing the individual, rather than the State, to make judgments about the quality of life that a particular individual may enjoy does not mean that the lives of terminally ill, disabled people have less value than the lives of those who are healthy." *Id.* 746 (citations and internal quotations omitted). Rather, it simply "gives proper recognition to the individual's interest in choosing a final chapter that accords with her life story, rather than one that demeans her values and poisons memories of her." *Id.* 746-47 (citation omitted). This individual choice rationale offers no support for the notion that one person (a polluter) can choose death for another (a breather).

The approaches proposed by OMB's notice are impossible to square with the equal reverence for life so cogently expressed in *Glucksberg* -- in particular, with the principles that "all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law;" that "the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy;" that disabled and terminally ill people must be protected "from prejudice, negative and inaccurate stereotypes, and 'societal

indifference'"; and that "financial incentives" must not be allowed to militate in favor of premature termination of the lives of the elderly and ill.

Far from respecting these principles, OMB's proposed approach openly flouts them, by allowing (indeed, recommending) that those advanced in years or suffering from potentially life-threatening illnesses be accorded less value than younger and healthier people -- and that these lower valuations then be used to decide how much protection to afford from pollution and other life-threatening conditions. In OMB's approach, the elderly and the ill draw the short straw, becoming the preferential victims of polluters' zeal to evade cleanup costs, and OMB's eagerness to assist them in that evasion.

Instead of expressly confronting these moral issues, OMB attempts to dodge them with the dehumanizing concept of a "statistical life:" "Statistical lives that are lost are real people but, given the background rate of fatal events in the population, it is not feasible to determine which actual lives will be saved or lost by a specific rule." 68 Fed. Reg. 5521 (emphasis added). OMB does not (and could not) explain why killing people is any more acceptable, and the lives of the victims any less deserving of protection, when the killing is done anonymously. Certainly our criminal laws draw no such distinction.

It is also worth noting that nowadays, extensive scientific evidence is available linking pollution to premature death. *See*, *e.g.*, 62 Fed. Reg. 38652 (July 18, 1997) (based on extensive scientific evidence linking particulates to premature mortality, EPA promulgated strengthened air quality standards for that pollutant); *American Trucking Assns. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002) (affirming those standards). In light of this information, polluters who send contaminants into the environment are aware that people will die as result -- and under basic criminal law standards, can be considered to intend that outcome. *See*, *e.g.*, *United States v. Salamanca*, 990 F.2d 629, 636 n.2 (D.C. Cir. 1993) ("it may be inferred that a person intends the natural and probable consequences of his acts") (citation omitted). The anonymity of the victims in no way reduces the gravity of the act of ending human life.

Equally unpersuasive is OMB's suggestion that lesser protection is due to human life "where a rule changes small probabilities of death faced by the public." 68 Fed. Reg. 5521 (emphasis added). As OMB itself recognizes, however, "[s]tatistical lives that are lost are real people," *id.*, and for those people whose lives are lost, the probability is not "small," it is 100%. As indicated above, the mere inability *ex ante* to predict exactly whose lives will be lost does not warrant reducing the protection afforded each and every human life.

Thank you for the opportunity to comment.

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Howard I. Fox
Earthjustice
1625 Massachusetts Ave., N.W., Suite 702
Washington, D.C. 20036-2212
(202) 667-4500