PUBLIC COMMENTS

August 10, 2018

Comments to the US EPA on "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process"

Alan Krupnick, Arthur Fraas, Richard Morgenstern (RFF); Nathan Richardson, University of South Carolina Law School and RFF University Fellow

1616 P St. NW
Washington, DC 20036
202-328-5000 www.rff.org

RESOURCES FOR THE FUTURE

RESOURCES
FOR THE FUTURE

Richard G. Newell
President & CEO

August 10, 2018

US Environmental Protection Agency
EPA Docket Center (EPA/DC), Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OA- 2018-0107

On behalf of Resources for the Future (RFF), I am pleased to share the accompanying comments to the United States Environmental Protection Agency (EPA) on its Advance Notice of Proposed Rulemaking requesting comment on "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process."

RFF is an independent, nonprofit research institution in Washington, DC. Its mission is to improve environmental, energy, and natural resource decisions through impartial economic research and policy engagement. RFF is committed to being the most widely trusted source of research insights and policy solutions leading to a healthy environment and a thriving economy.

While RFF researchers are encouraged to offer their expertise to inform policy decisions, the views expressed here are those of the individual authors and may differ from those of other RFF experts, its officers, or its directors. RFF does not take positions on specific legislative proposals.

The authors of these comments include RFF Senior Fellows Alan Krupnick and Richard Morgenstern, Visiting Fellow Arthur Fraas, and University of South Carolina law professor/RFF University Fellow Nathan Richardson. The views presented here are based on decades of experience in economics, law, and government service with EPA, OIRA, and the President's Council of Economic Advisers under presidential administrations of both parties.

If you have any questions or would like additional information, please contact my colleague Dr. Alan Krupnick at krupnick@rff.org.

Sincerely,

cc: Alan Krupnick

Comments on "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process"

On June 13, 2018, the United States Environmental Protection Agency (EPA) issued an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on "Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process".[1] We should begin by making it clear that we agree with the overall view presented in the ANPRM that benefit-cost analysis is an important tool for EPA decisionmaking, as the government-wide policy of every president since Ronald Reagan has required it (at least when consistent with statute). We further applaud efforts to improve the quality, consistency, and transparency of that analysis. However, some suggested policy changes in the ANPRM are, in our view, contrary to best economic practice, to existing law, or both, and therefore will not further the ANPRM's stated objectives. Other proposals in the ANPRM, while not counterproductive, appear to have little discernible benefit.

I. Interagency Coordination and Legal Constraints

The ANPRM envisions a new notice-and-comment rulemaking, limited in scope to EPA's use of benefit-cost analysis. We see no reason why this ANPRM should apply only to EPA. Currently, use of benefit-cost analysis at EPA is shaped by underlying statutes and by interagency guidance documents, such as executive orders and OMB Circular A-4. To the extent the ANPRM has identified areas where use of benefit-cost analysis can be improved at EPA, the same issues are likely present in other agencies. We strongly urge that any further guidance or rulemaking affirm that EPA should continue to adhere to current peer-reviewed guidance in estimating the costs and benefits of its rules, i.e., Circular A-4 and EPA's own Regulatory Impact Analysis (RIA) guidance document. To the extent either of these guidance documents need to be improved or updated, a formal, interagency review process should be used.

EPA's use of benefit-cost analysis is constrained, sometimes sharply, by the requirements of environmental statutes. Many statutes say nothing about consideration of costs. Others require the agency to consider costs, but only among multiple factors. Courts have also wrestled with the role of benefit-cost analysis under these statutes for decades, creating a complex set of precedents governing whether, when, and how EPA may consider costs in policymaking. To be sure, this body of law does not create a complete or at times even clear set of rules for EPA use of benefit-cost analysis. Nevertheless, it is detailed and extensive, substantially and sometimes sharply constraining agency discretion.

It is therefore unclear what additional value new EPA-wide (as opposed to statute- or program-specific or cross agency) guidance or regulation would provide. Detailed agency-wide guidelines for use of cost-benefit analysis are likely to be inconsistent with at least some statutory mandates and legal precedents. But if kept in relatively general terms, such guidelines seem unlikely to offer much value above the considerable detail already provided by interagency guidance, such as OMB circular A-4.

II. What Should the Scope of Benefit-Cost Analysis Be?

The ANPRM invites comment on the scope of benefit-cost analysis, on both the benefits and costs side. We agree that greater transparency and consistency in this area would be a welcome development. Benefit-cost analysis requires a full presentation of the benefits and costs (including unquantified

[1] 83 FR 27524

effects), the full range of regulatory alternatives, ancillary benefits, and a full discussion of the uncertainties in the analysis. We therefore urge consideration by decisionmakers of all information in the RIA and its conclusions regarding net benefits, as well as quantitative or qualitative conclusions regarding uncertainties, and any discussion of lack of information and non-quantified effects.

In particular, we stress that a decision to neglect ancillary benefits is contrary to the existing peer-reviewed guidance in OMB Circular A-4. In turn, the existing guidance reflects the broad consensus within the economics community regarding the consideration of ancillary benefits within the RIA and for their use in decisionmaking. Existing OMB guidance states that "analytic priority should be given to those ancillary benefits and countervailing risks that are important enough to potentially change the rank ordering of the main alternatives in the analysis. . . Like other benefits and costs, an effort should be made to quantify and monetize ancillary benefits and countervailing risks."[2] We feel strongly that Circular A-4 should continue to guide EPA in its consideration of ancillary benefits.[3]

In addition, there are other factors that the administrator should likely consider that are outside the scope of a benefit-cost analysis, including distributional, ethical, and legal issues. Also, employment or economic growth effects are separate factors that might be considered in making a decision. However, these factors should be considered separately from costs. This is appropriate and technically correct because these factors are not commensurable, additive, or directly related in any mathematical way to costs.

More broadly, the ANPRM states that "in most provisions, costs, economic factors and similar terms remain undefined and are included as one item of unspecified weight among a list of multiple factors EPA is required to consider." While it is true that statutory commands to EPA may be complex, incomplete, or inconsistent, we disagree that "costs" are inadequately defined in practice. "Costs" in the context of benefit-cost analysis are social welfare costs, including direct costs (opportunity costs), losses in producer and consumer surplus, and external costs, etc. External costs in the rulemaking context are often negative costs, i.e., benefits of a rule not experienced through the market, such as a reduction in health or environmental damages. Cost does not need to be re-defined in the rule or guidance as it is already captured in OMB Circular A-4 and EPA's existing RIA guidance.[4]

The ANPRM also requests comment on the appropriate definitions of reasonable/unreasonable risks. EPA has in the past interpreted "unreasonable risk" language in TSCA and FIFRA to involve a balancing of the adverse health and environmental effects of the activity with the benefits of the activity and the reasonably ascertainable economic consequences of prohibiting the activity. We urge EPA to continue to use this approach in interpreting reasonable/unreasonable risk language.

III. Rulemaking vs. Guidance

The ANPRM envisions proceeding via notice-and-comment rulemaking, but we are unconvinced that this is a better method for achieving the ANPRM's goals than past practice driven by guidance documents (as

[2] U.S. Office of Management & Budget, Circular A-4, September 17, 2003, p. 26. https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/regulatory_matters_pdf/a-4.pdf

[3] See also U.S. EPA, Guidelines for Preparing Economic Analyses, December 2010 (Updated May 2014), p. 11-2. https://www.epa.gov/sites/production/files/2017-09/documents/ee-0568-52.pdf

[4] ibid. pp. 8-1 – 8.2. U.S. Office of Management & Budget, Circular A-4, September 17, 2003, pp. 18-20. https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/regulatory_matters_pdf/a-4.pdf

exemplified by OMB Circular A-4). Clearly, a rulemaking could be more administratively costly. A less-formal guidance document would give agency flexibility in seeking public comment and peer review without the relatively costly requirements of APA rules. In addition, the criticism of agencies issuing rules in the guise of guidance documents to evade notice and comment obligations doesn't apply here. Any revision of EPA policies with respect to cost-benefit analysis would, by definition, affect only the agency's internal policy decisionmaking. No new legal obligations on parties outside the government would be created.

It is true that a rule would be more difficult than guidance to revise or withdraw when subsequent administrations or agency administrators come into power, but it is hard to see how this is an advantage. It would only slow, not stop, a future shift in policy. Advocates suggest that a rule would also allow courts to examine agency benefit-cost analysis or reject new substantive rules that, in the court's view, failed to follow the agency's self-imposed cost-benefit rule. Existing cases suggest that such court involvement in policy decisions may or may not be valuable. But in any case, an EPA rulemaking cannot durably create such an outcome because a future administrator or administration could simply withdraw or revise such a rule. Only new legislation can durably give courts a role in examining cost-benefit analysis in the rulemaking process.

What is the benefit of adding administrative burden and wasting taxpayer resources on a rulemaking that could not meaningfully bind the agency in the future? We see none.

IV. Retrospective Regulatory Review

The ANPRM suggests the use of retrospective analysis for insights into future rulemaking. Retrospective analysis would also support an evidence-based decision process in the revision, modification, and even repeal of existing rules. We agree with EPA that retrospective analysis would inform agency efforts to address key issues in developing RIA cost and/or benefit estimates, including uncertainties in risks and innovation. Retrospective review should be bidirectional, i.e. not biased toward less (or more) regulation. Identifying opportunities for achieving benefits at low cost should be as important as identifying wasteful or poorly designed regulations. More detailed comments on methods, data needs, potential changes in rule design, and the actual conduct of retrospective analyses are offered in an Appendix below.

V. RIAs for Repeal or Modification of Regulation

Because of the emphasis of the Trump administration on repealing and modifying regulations, new guidance is needed on how to conduct RIAs for these purposes. While RIAs for repeal share most methods with RIAs for new regulations, there are some additional issues that need to be covered for the former, such as the treatment of sunk costs and benefits. More importantly, there is a need for data collection efforts after a rule is implemented to help determine what costs are sunk and to what extent non-compliance is occurring.

Authors: Alan Krupnick, Arthur Fraas, Richard Morgenstern (RFF); Nathan Richardson, University of South Carolina Law School and RFF University Fellow

Appendix A: Retrospective Regulatory Analysis

Retrospective analysis is valuable for several reasons. First, it is important to investigate whether a regulation had the intended impact on emissions and environmental outcomes. Establishing a causal impact on environmental outcomes is a necessary condition for ensuring a regulation is achieving its desired objectives. If a regulation was not fully effective in achieving its intended objectives, retrospective analysis can help to reveal the factors that were responsible for the regulation's failure. This information can be used to improve both the design of future regulations and ex ante RIAs. Second, it is important to measure the actual costs of a regulation. Actual costs may differ from ex ante estimates because of unforeseen behavioral adaptations by consumers or firms, shifts in government policy, and other exogenous changes (e.g., changes in energy prices). Recognizing the effect of these changes can improve the design of future regulations and ex ante RIAs. Third, retrospective analysis may make it possible to obtain causal estimates of a regulation's benefits or its effects on outcomes other than economic efficiency—for example, the impacts of the regulation on employment. Fourth, retrospective analysis can generate data that are useful for estimating the cost savings and foregone benefits of repealing a regulation. For instance, if the costs of the regulation since its implementation are known, they can help in estimating the remaining costs of the rule, which in repeal terms would be the cost savings of repeal. Finally, over the long term, retrospective analysis can support the type of institutional learning needed to sustain agency legitimacy.

The biggest challenges for conducting retrospective analyses of regulations are the choice of an appropriate control group and the difficulty of obtaining the data required to conduct the study. (Cropper et al., 2017; Cropper et al., 2018, Kopits et al., 2014) While these situations are uncommon in federal rulemakings, the identification of control groups is relatively straightforward in cases where regulations are implemented with different stringencies in different geographic regions, at different times of the year, or when they are keyed to the different standards across facilities within the same industry. At the same time, quasi-experimental methods can be applied when there is no natural control group. For example, it may be possible to use facilities in an industry or region that are not subject to the regulation as a control group, provided they follow trends similar to those of regulated facilities in terms of key outcome variables before implementation of the regulation.

The choice of control group—and the ability to conduct a retrospective analysis —also depends on data availability at the micro and/or more aggregate levels. Retrospective studies are hampered by a lack of cost and emissions data on both regulated and control plants. The availability of such data both before and after a rule is promulgated is critical to understanding the true benefits of a regulation.

To improve access to the key data, the government simply needs to continue existing data collection efforts in many cases. In many other cases, however, new data are required. The Office of Management and Budget could streamline data collection under the Paperwork Reduction Act, as it has already been done for research-related information.

In an effort to further institutionalize retrospective analyses of environmental regulations, we believe it is critical that the EPA adopt specific guidance to incorporate a retrospective analysis process within a selected set of new rules. The criterion for selecting the set of rules to be studied should be specified in the guidance. This process would assure at the outset a rule design that facilitates such analyses and a suitable set of rules to be included. The plan for ex post review should identify at the time of rulemaking the measurable outcomes to be chosen for retrospective analysis. It should also stipulate the relevant

control group, the associated data requirements to measure both compliance costs and environmental impacts, a power calculation of a minimum sample size necessary to identify regulatory outcomes, and the time period for the evaluation. In some cases, this might involve coordinating data collection with other agencies or entities.

Ideally, EPA would devote resources to both conducting high quality studies and to assuring independent peer review. In fact, EPA has already started moving in this direction in the ex post analysis of regulatory costs (EPA, 2011; Kopits et al., 2014). At the same time, academic research has an important role to play in this area. Thus, although obtaining funding is always an issue, academic research could clearly enhance and/or substitute for government agency analyses.

References

Cropper M., Fraas A., Morgenstern R. 2017. “Looking backward to move regulations forward.” *Science* 3556332:1375–76.

Cropper M., Morgenstern R, Rivers N. Facilitating Retrospective Analysis of Environmental Regulations. Review of Environmental Economics and Policy, rey011, https://doi.org/10.1093/reep/rey011

Kopits, Elizabeth, Al McGartland, Cynthia Morgan, Carl Pasurka, Ron Shadbegian, Nathalie B. Simon, David Simpson, and Ann Wolverton. 2014. "Retrospective Cost Analyses of EPA Regulations: A Case Study Approach." *Journal of Benefit-Cost Analysis* 5 (2): 173-193.

US Environmental Protection Agency (EPA). 2011. “Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations.”