



Richard G. Newell
President and CEO

July 28, 2020

US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OAR-2020-00044

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 Benefits and Costs in the Clean Air Act 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 policy 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, the Office of Information and Regulatory Affairs, 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 Art Fraas at fraas@rff.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard G. Newell", with a horizontal line underneath.

Richard G. Newell

Comments on “Increasing Consistency and Transparency in Considering Costs and Benefits in the Clean Air Act Rulemaking Process”

Alan Krupnick, Richard Morgenstern, Arthur Fraas, and Nathan Richardson

On June 11, 2020, the United States Environmental Protection Agency (EPA) issued a Notice of Proposed Rulemaking (NPRM) requesting comment on “Increasing Consistency and Transparency in Considering Costs and Benefits in the Clean Air Act Rulemaking Process” (85 FR 35612). We begin by noting we agree with the overall view presented in the NPRM 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 (when consistent with statute). We applaud efforts to improve the quality, consistency, and transparency of that analysis. However, some suggested policy changes in the NPRM are, in our view, contrary to best economic practice, existing law, or both, and therefore will not further the NPRM’s stated objectives. Other proposals in the NPRM, while not directly counterproductive, appear to have little discernible benefit and simply constitute a waste of government resources. Further, we support adding to this document specific provisions establishing requirements for the selection and conduct of retrospective analyses.

Benefit-Cost Analysis as a Decision Criterion

EPA is proposing that the Agency undertake a benefit-cost analysis (BCA) for significant regulations, but it is not specifying how or whether the results of the BCA should inform significant Clean Air Act (CAA) regulatory decisions. For example, the EPA is not proposing to mandate that a significant CAA regulation be promulgated only when the benefits of the intended action justify its costs.

We agree with EPA’s decision to endorse BCA as an important tool but would not agree that BCA should be established as the sole basis for decisions. In most RIAs, the BCA often includes benefit and cost categories that cannot be quantified or, if quantified, cannot be monetized. We are concerned that these categories will be given short shrift in a hard benefit-cost calculation. In addition, we believe that there are other important considerations that also need to be factored into the decision including distributional, ethical, and legal issues. Also, employment or economic growth effects are separate factors that might be considered in making a decision. These factors should be considered separately from benefits and costs. This is appropriate and technically correct because these factors are not commensurable, additive, or directly related in any mathematical way to costs.

Ancillary Benefits

EPA solicits comment on whether, instead of, or in addition to, the presentational requirements proposed in Section IV.C of this preamble, the EPA should require a detailed disaggregation of both benefit and cost categories within the table that summarizes the overall results of the BCA in the preamble of future significant CAA rulemakings. The goal of this disaggregation would be to clarify what public health and welfare benefits pertain to the specific statutory objective, or objectives, of the CAA provision, or provisions, under which the rule is promulgated, but would allow the reader to see this information in the same location as the estimates of all the other welfare effects, both positive and negative, resulting from the regulation. In addition, the EPA solicits comment on whether the EPA should require a separate presentation of all factors (e.g., particular benefit or cost categories, or other impacts) that are specifically listed as factors that the Administrator must

consider in making a regulatory decision pursuant to the statutory provision(s) under which the regulation is being promulgated. This presentation would include a presentation of quantitative results for those factors that have been quantitatively assessed, and a qualitative discussion of any factors that were not quantified.

We support an option that provides a detailed disaggregation of all benefit & cost categories so as to place all categories on an equal footing. This option is similar to current practice and we believe is superior to the proposed approach that would subordinate benefit and cost categories that the agency considered to be ancillary to the basic purpose of the rule.

We also reiterate our strongly held professional judgment that ancillary benefits must be counted in a benefit-cost analysis, irrespective of the intent of the regulation. Of course, the Agency should take great pains to ensure that such benefits are not counted twice when considering other regulations. But to the extent benefits not intended by the rule are joint products of that rule with the intended improvements, they must be counted to fully capture the benefits of the rule.

In short, being clear about where benefits come from is laudable, but disregarding whole categories is not.

Rulemaking vs. Guidance

The ANPRM envisioned proceeding via notice-and-comment rulemaking, and the NPRM continues down that road. However, we remain unconvinced that this is a better method for achieving the NPRM's goals than past practice driven by guidance documents (as 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 APA requirements. 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. Some may be inclined to view this as an advantage, in that it could make it more likely that future rulemakings do BCA as the NPRM envisions rather than go through the process of repealing a finalized rule. A final BCA rule is unlikely to have such an effect on future substantive rules, however, even temporarily. In our view, any substantive rule could adopt different BCA methodology (or, if consistent with the statute, eschew BCA entirely). All that would be necessary to comply with the APA (and defeat any claims of arbitrary and capricious action) is to acknowledge and explain the change in agency policy, just as the agency is required to do in any new rulemaking

Some scholars have argued that courts should apply BCA as a background principle in APA arbitrary and capricious review.¹ Regardless of whether one views such a doctrinal change as a positive development, a BCA rulemaking does not, in our view, provide a basis for doing so if (again) a subsequent rulemaking adopts a different approach and explains the change in policy. Only new legislation can durably give courts a role in examining benefit-cost analysis in the rulemaking process.

Moreover, no rulemaking can durably create a commitment to BCA any more than an EPA rulemaking can etch in stone a substantive policy (e.g. a given stringency of emissions standards). A future administrator or administration could simply withdraw or revise any rule (except to the extent such a withdrawal contradicts

¹ See Jonathan Masur and Eric Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 University of Chicago Law Review 935 (2018).

statutory authority, which a withdrawal or revision of a BCA rule would not). In short, the agency cannot tie its own hands. A rulemaking today cannot be elevated in legal rank above a future rulemaking, at least unless existing legal precedent is changed so as to apply increased scrutiny² when agencies change their policy positions. 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.

Retrospective Analysis

In the NPRM, EPA requests comment on whether it should include a requirement for conducting retrospective analysis of significant CAA rulemakings. We agree with EPA that retrospective analysis would inform agency efforts to address key issues in developing RIA cost and/or benefit estimates. In addition, retrospective analyses should be a key part of an initiative to revise or withdraw an existing rule. For example, there is a need for data collection efforts after a rule is implemented to help determine the effectiveness of the rule, the costs incurred (including sunk costs), and to what extent non-compliance is occurring.

Overall, we believe retrospective analysis 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.

EPA reports that it received a number of comment letters on the ANPRM voicing support for increased retrospective review of Agency rules or programs to be able to evaluate the effectiveness of regulations and to design future improvements to increase efficiency. In this NPRM, EPA requests more specific comments on this issue.

Should the requirement pertain to analysis of an individual rule or a review of the cumulative burden of a set of rules regulating the same or related entities?

We would encourage EPA to focus on individual major, economically significant rules. Examining the cumulative benefits and costs of a set of rules or a broader program invites the bundling of a variety of provisions in a way that obscures the opportunity to obtain cost savings or additional benefits at a low additional cost from specific rule requirements.

What are the advantages and disadvantages of such a requirement?

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

² Note that a final BCA rulemaking *would* constrain the agency's ability to adopt new BCA policy in a future adjudication, but this NPRM does not purport to apply to adjudications, and the EPA does not use adjudication as its primary form of policy development.

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. Over the long term, retrospective analysis can support the type of institutional learning needed to sustain agency legitimacy.

How can the Agency overcome the challenges conducting retrospective analysis in cases where the EPA's ability to collect information about the costs of compliance is limited or otherwise influenced by other statutes?

The ability to conduct a retrospective analysis 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, EPA should continue to assure existing data collection efforts within the agency and by other Federal government agencies (e.g., EIA, DOE, and USDA). In a number of 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 establishing a retrospective analysis process within its rulemaking procedures. This guidance should include criteria for selecting the set of rules to be studied and establishing at the outset a rule design that facilitates such analyses. 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. This approach would set out and justify a specific plan for data collection.

Should it be applicable to all parts of CAA or just some provisions?

If EPA adopts specific criteria for selecting a high priority set of retrospective analyses as recommended above, it does not seem necessary to restrict the scope in this rulemaking to specific provisions of the CAA.