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RE: Docket ID No. EPA-HQ-OAR-2020-0044

Mr. Hockstad:

I appreciate this opportunity to provide comments[1] to the Environmental Protection Agency (EPA) on the proposed rule "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process."

The consideration of costs and benefits are critical when deciding whether to promulgate air regulations. Congress recognized this by including language throughout the Clean Air Act (CAA) that requires such considerations. In *Michigan v. EPA*, the U.S. Supreme Court, when discussing agency regulatory practice in general, explained "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions."[2] The importance that benefit-cost analysis (BCA) plays within the CAA and in general agency regulatory practice makes this proposed rule way past due.

There are many issues that are rightfully covered in the proposed rule. However, this comment will focus on a specific issue: to what extent should ancillary benefits be considered when the EPA is deciding whether to promulgate a regulation? The EPA has long improperly used ancillary benefits to justify some of the costliest regulations in U.S. history, sometimes without even attempting to quantify direct benefits. To have consistency and transparency, which is a central theme of this proposed rule, there must be clear requirements (or prohibitions) when it comes to how ancillary benefits are applied in BCA. This comment will provide various options to achieve that objective.

The Proper Definition of Ancillary Benefits

In discussing the application of ancillary benefits, it is important to define the term. The word "ancillary" is defined as being less important than something else, secondary, or

[1] The views I have expressed in this comment are my own, and should not be construed as representing any official position of The Heritage Foundation.
[2] *Michigan v. EPA*, 135 S. Ct. 2699 (2015), https://www.scotusblog.com/case-files/cases/michigan-v-environmental-protection-agency/

subordinate.[3] In OMB Circular A-4, "[a]n ancillary benefit is a favorable impact of the rule that is typically unrelated or *secondary* to the statutory purpose of the rulemaking." [Emphasis added].[4]

In other words, ancillary benefits are of lesser weight than direct benefits, certainly as it relates to the statutory purpose of a regulation, and the EPA should treat them accordingly. When the term "co-benefits" is used as a synonym to describe ancillary benefits, this is misleading. "Co-benefits" suggests that direct benefits are equal to ancillary benefits, but this is not the case.

Further, when considering ancillary benefits, the EPA should not ignore the countervailing risks (i.e. indirect costs).[5] OMB has explained, "Consistency should also be kept in mind when assessing ancillary effects of a rule; estimating indirect benefits without attempting to estimate indirect costs, or estimating indirect costs without attempting to estimate indirect benefits, can yield very misleading results as regards rule-induced net benefits."[6]

The Problem of Ancillary Benefits Abuse

The question of how to properly evaluate ancillary benefits is not some mere academic exercise. There is a specific history of the EPA abusing ancillary benefits. There is of course the Mercury and Air Toxics Standards (MATS rule) that has become the prime example of ancillary benefits abuse. For that rule, the non-hazardous air pollutants (HAP) ancillary benefits accounted for about 99.9 percent of all monetized benefits.[7] The costs were as much as 2,400 times greater than the benefits.[8] While the MATS rule receives significant attention, it is far from an aberration.

According to NERA Consulting data, in just the two-year period from 2009-2011, the EPA did not quantify *any* direct benefits for six major Clean Air Act rules. The quantified benefits were

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[3] *See e.g.* the definition of "ancillary," *Merriam-Webster.com*, (2019), https://www.merriam-webster.com/dictionary/ancillary; *Black's Law Dictionary* 101 (9th ed. 2009); and *American Heritage Dictionary*, (2020), https://ahdictionary.com/word/search.html?q=ancillary

[4] Office of Management and Budget, Circular A-4, (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/

[5] Unlike ancillary benefits that can be attributed to the non-targeted pollutants, indirect costs are not capable of being categorized in this manner. The costs (direct and indirect) are connected to whatever is the regulatory requirement that has been imposed. The EPA should properly count indirect costs without conflating them with direct costs (e.g. compliance costs are direct costs).

[6] Office of Management and Budget, 2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, (2015), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2015_cb/2015-cost-benefit-report.pdf

[7] Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," Final Rule, *Federal Register*, Vol. 85, No. 100 (May 22, 2020), pp. 31286-31320, https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf

[8] Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," Final Rule, *Federal Register*, Vol. 85, No. 100 (May 22, 2020), pp. 31286-31320, https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf

exclusively from the ancillary benefits.[9] Of the 26 major non-PM rulemakings analyzed from 1997-2011, PM ancillary benefits accounted for all of the quantified benefits in eight of the rulemakings.[10] In an astonishing 21 of the 26 rulemakings, the PM ancillary benefits accounted for more than half of the total benefits.[11]

There are many reasons why this overreliance on ancillary benefits is a major problem:

1. The EPA does not have to justify the purpose of the rule. This overreliance on ancillary benefits can allow the EPA to regulate a pollutant without ever making the case that reducing emissions of the targeted pollutant is even warranted. In fact, this is exactly what has happened.

2. The EPA can ignore basic regulatory analysis requirements. Identifying the specific problem that is being addressed is a first step in proper regulatory analysis.[12] Only from understanding the purpose of the rule can various regulatory alternatives be properly evaluated. For a rule like the MATS rule, where PM2.5 ancillary benefits are so much greater than the direct benefits from HAP reductions, the rule can hardly be considered to be a HAP rule; it is in effect a PM2.5 rule. Therefore the problem that was actually trying to be solved is PM2.5-related, and the regulatory analysis (including consideration of alternatives) should be analyzed from that perspective.

3. The EPA can do end-runs around legal requirements. When the regulation of a targeted pollutant is authorized under a specific statutory section, it makes no sense to justify that rule based on ancillary benefits that have nothing to do with the targeted pollutant or that statutory section. Even worse, if the ancillary benefits come from reductions in a pollutant that is prohibited from being regulated under the specific statutory section, these ancillary benefits should certainly not justify the rule.

The EPA articulated this line of argument well in the "MATS reconsideration" final rule, explaining:

> The EPA believes that it cannot answer this question [whether regulating power plant HAP emissions is warranted] by pointing to benefits that are overwhelmingly attributable to reductions in an entirely different set of pollutants not targeted by CAA section 112.
>
> The EPA believes that it is illogical for the Agency to make a determination, informed by a study of what hazards remain after implementation of other CAA programs, that

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[9] Anne E. Smith, "An Evaluation of the $PM_{2.5}$ Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations," *NERA Economic Consulting* (December 2011), https://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf

[10] The PM ancillary benefits accounted for 99.9 percent or more of all quantified benefits for 10 of the 26 rulemakings (in eight of them, the ancillary benefits were the only quantified benefits).

[11] Anne E. Smith, "An Evaluation of the $PM_{2.5}$ Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations," *NERA Economic Consulting* (December 2011), https://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf

[12] *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf

> regulation under CAA section 112, which is expressly designed to deal with HAP emissions, is ‘‘appropriate’’ principally on the basis of criteria pollutant impacts.
>
> The EPA believes that relying almost exclusively on benefits accredited to reductions in pollutants not targeted by CAA section 112 is particularly inappropriate given that those other pollutants are already comprehensively regulated under other CAA provisions, such as those applying to the NAAQS.[13]

Congress was directing the EPA to consider whether it should regulate HAP emissions from power plants. When the EPA made a decision to regulate these HAP emissions based on completely unrelated pollutants, it was in effect rendering the HAP power plant statutory section superfluous and ignoring the plain language of the statute and the will of Congress. The agency was also doing an end-run[14] around any statutory limitations placed on PM2.5 regulation;[15] the EPA was using the HAP section to improperly regulate PM2.5.[16]

Unless limits are placed on this overreliance on ancillary benefits, the EPA could use a statutory section to regulate one pollutant as a pretext to regulate another pollutant it otherwise may not regulate beyond what is specifically authorized under the CAA. This entire issue about ancillary benefits abuse is really about respecting the rule of law. Just as an agency can interpret a statutory section too broadly to give it power beyond what Congress intended, so too can an agency improperly use ancillary benefits as a way to regulate in a manner inconsistent with the statute.

The Role of Ancillary Benefits When the EPA is Deciding Whether to Promulgate a Rule

From a transparency perspective, the proposed rule would help some by "disaggregating benefits into those targeted and ancillary to the statutory objective of the regulation." However, by itself, this does not help promote transparency in terms of allowing the public to know how ancillary benefits play into regulatory decisions. It also does nothing to develop consistency in how ancillary benefits will be applied across the CAA. Fortunately, the proposed rule does appear to be soliciting comments on issues such as how ancillary benefits should be considered when the EPA is deciding whether to promulgate a rule.

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[13] Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," Final Rule, *Federal Register*, Vol. 85, No. 100 (May 22, 2020), pp. 31286-31320, https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf

[14] For a discussion of this end-run problem with the MATS rule, *see, e.g.*, Brief of Amicus Curiae Cato Institute In Support of Petitioners, *Murray Energy Corporation v. U.S. EPA*, No 16-1127 (D.C. Cir.) https://www.edf.org/sites/default/files/content/murray_energy_v_epa_-_cato_amicus.pdf

[15] In the oral arguments for *Michigan v. EPA*, Justice Roberts asked questions about the end-run problem, https://protect-us.mimecast.com/s/fKZbCrkM4ruD6ZrzTz-Em3?domain=supremecourt.gov

[16] We do not know the intent of the EPA with MATS and are unlikely to truly know the intent for other regulations. We can objectively observe though that the HAP section was being used to improperly regulate PM2.5. However, the intent of such an action could really be two-fold, both of which are improper. The HAP section may be a pretext for being able to improperly regulate PM2.5. The MATS rule could also have been intended to regulate HAPs and because there was no basis for doing so since regulating the targeted pollutants did so much more harm than good, the PM2.5 ancillary benefits were a way for the EPA to justify a rule that it otherwise could not and should not have promulgated.

This entire question would likely not even be an issue had the EPA not abused ancillary benefits for so many years. But the EPA has abused ancillary benefits. The agency has acted in an arbitrary and capricious manner to justify rules based solely on ancillary benefits or when the ancillary benefits account for extreme percentages of the total benefits, such as 99.9 percent. It also has acted in an arbitrary and capricious manner to justify rules when a majority of the total benefits to justify a rule are ancillary benefits.

The question though is what would be an appropriate use of ancillary benefits when deciding whether to promulgate a rule? There are various options that the EPA could consider that are reasonable and defensible. The standard should not simply be a vague prohibition against the agency acting in the most extreme manner. It fails to solve the types of problems caused by ancillary benefits abuse, as previous described. The EPA should be ensuring that:

- The agency has to justify the purpose of an air rule (i.e. regulating the targeted pollutant);
- The agency properly identifies the problem being addressed and conducts regulatory analysis in connection with that problem; and
- The agency may not do legal end-runs around the law, such as by, in effect, creating a regulation of a pollutant that is prohibited from being regulated under the statutory section authorizing the rule, or ignoring what is required to justify a rule under that statutory section. In general, the agency needs to develop a standard to ensure that regulatory analysis cannot serve as a means to ignore the plain language of the CAA and the intent of Congress.

The following are just three possible options that would help to address these problems that are caused by ancillary benefits abuse. They cover a wide spectrum of approaches to address this abuse and articulate what is required to justify promulgating a rule:

Option 1: The majority of total benefits should not be ancillary benefits. At a minimum, a majority of the total benefits considered in light of the costs should not be ancillary benefits.[17] It is arbitrary and capricious, as has been stated, to justify a rule based on benefits that have nothing to do with the targeted pollutant and statutory section authoring the rule. Unless this minimal requirement were adopted, ancillary benefits could not be considered secondary to the statutory purpose of the rulemaking (as they are supposed to be); after all, if ancillary benefits are the *primary* justification for the statutory purpose of the rulemaking, they cannot also be the *secondary* justification.

This option is the simplest and most modest approach to prohibit ancillary benefits abuse. Another way to look at this requirement: direct benefits should exceed ancillary benefits.[18]

Option 2: Ancillary benefits may not constitute more than a marginal amount of the total benefits. One of the problems with the first option is that it gives too much weight to ancillary benefits. It treats direct benefits and ancillary benefits as close to being equal as possible without

[17] They should not be equal to direct benefits either.

[18] This comment is not arguing that direct benefits must exceed ancillary benefits even when direct benefits, by themselves, exceed costs.

actually requiring ancillary benefits and direct benefits to each represent 50 percent of total benefits. Ancillary benefits should not be remotely close to direct benefits within the total benefits used to compare against the costs. This is especially true since benefits and costs can easily be "fudged," especially to make such a small adjustment that can lead to a desired result.

The specific percentage of ancillary benefits that could meet the requirements of this option could vary widely. The central point is that it should be far less than 49.99 percent. In this situation, stating that the ancillary benefits can only constitute a marginal amount of the total benefits could suffice. This also affords some flexibility to the agency.

This "marginal" requirement is even more appropriate when the unrelated pollutant cannot be regulated under the statutory section authoring the regulation of the targeted pollutant. This would mirror preamble language in the "MATS reconsideration" rule, in which the EPA explains:

> While the Administrator could consider air quality benefits other than HAP-specific benefits in the CAA section 112(n)(1)(A) context, consideration of these co-benefits could permissibly play only, at most, a *marginal role* in that determination, given that the CAA has assigned regulation of criteria pollutants to other provisions in title I of the CAA, specifically the NAAQS regime pursuant to CAA sections 107–110,… [Emphasis added].[19]

Option 3: Direct benefits should exceed costs. There is a compelling argument that the benefits from regulating a targeted pollutant should by itself exceed the costs (excluding indirect costs). After all, to justify the rule, shouldn't the agency be able to show that the whole purpose of the rule has benefits that exceed the costs?

Ancillary benefits could still play a significant role in determining whether to move forward with a rule. If direct benefits exceed costs among different regulatory options, the ancillary benefits can help to inform the best regulatory alternative.

Conclusion

I commend the EPA for trying to promote consistency and transparency in BCA across the CAA. When the EPA "plays" around with ancillary benefits to improperly justify a rule, it is undermining BCA, and worse, it is ignoring the specific requirements of the CAA.

Ancillary benefits are not only secondary benefits, but they are also benefits that are subordinate to direct benefits. Allowing ancillary benefits to serve as the justification of a rule disregards these facts and actually treats them in the exact opposite manner; they would be the primary benefits and superior to direct benefits.

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[19] Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," Final Rule, *Federal Register*, Vol. 85, No. 100 (May 22, 2020), pp. 31286-31320, https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf

I strongly urge the EPA to finalize a rule that includes a clear standard that prevents the agency in the future from, at a minimum, using ancillary benefits as the primary means of justifying the regulation of a targeted pollutant.

Sincerely,

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