July 27, 2020

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue NW,
Washington, DC 20460

RE: AXPC Comments on Docket ID Number EPA-HQ-OAR-2020-00044

The American Exploration and Production Council (AXPC) appreciates the opportunity to comment on the United States Environmental Protection Agency's (EPA or the Agency) proposed rule *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 Fed. Reg. 35,612 (June 11, 2020). AXPC strongly supports the proposal.

AXPC is a national trade association representing the largest independent oil and natural gas exploration and production companies in the United States. Our association works with regulators and policymakers to better educate them on our operations so that they will be able to create sound fact-based public policies that result in the safe, responsible exploration and production of America's vast oil and natural gas resources. Our goal is to provide technical and regulatory knowledge, making AXPC a rich repository of resources on the industry and the science behind our operations.

AXPC appreciates that this proposal is the first of a series of statute-specific rulemakings that EPA intends to undertake to increase consistency and transparency in the Agency's consideration of costs and benefits across the EPA. AXPC believes that Administrator Wheeler has identified appropriate criteria to inform these rulemakings and the agency's consideration of costs and benefits generally: consistency, transparency, and adherence to best practices and sound economic and scientific principles. AXPC looks forward to the opportunity to participate in those future rulemakings.[1]

EPA's mission of protecting human health and the environment is an important one. Its regulations can confer great benefits, but they can also have large and far-reaching costs and economic impacts. Controversy has long surrounded EPA's estimates of the costs and benefits of its actions, particularly those under the Clean Air Act (CAA).[2] EPA's estimates for the benefits of its actions run to as much as five times the estimated benefits from all other major rulemakings combined.[3] Much of these

[1] Memorandum, Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process, Andrew R. Wheeler, Administrator (E.P.A. May 13, 2019).
[2] *See, e.g.*, Cost and Benefit Considerations in Clean Air Act Regulations, Congressional Research Service Report R44840 (May 5, 2017). *See also* Garrett A. Vaughn, Regulatory Sleight of Hand: How the EPA's Benefit-Cost Analyses Promote More Regulation and Burden Manufacturers (Manufacturers Alliance for Productivity and Innovation, April 2006).
[3] *See* Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (Office of Management and Budget – Office of Information and Regulatory Affairs 2017) at 10, Table 1-1.

enormous claimed benefits are attributable to reduction in particulate matter.[4] These claimed benefits can massively outweigh benefits from the pollutant actually being targeted for reduction under a particular rulemaking. This occurred most notoriously in the 2012 MATS rule, where EPA determined monetized benefits from targeted pollutant between $4 and $6 million whereas "ancillary benefits," including particulate matter, were estimated at between $37 and $90 billion.[5]

EPA's rules are also responsible for a wildly disproportionate share of the costs imposed by all federal regulation. Between 2000 and 2016, EPA issued more regulations with costs over $1 billion than all other agencies combined, at a cumulative cost of some $104 billion compared to all other agencies' $34 billion. EPA's billion-dollar rules are therefore more than *three times* more expensive than those of the entire rest of the government.[6] Where the actions of one agency under one statute are responsible for such a large share of total estimated benefits and costs, it is imperative that that agency hold itself to the highest standard of consistency, transparency, and accuracy. This proposed rule will help the EPA do so.

Below APXC offers specific comments, including responses to EPA's requests for comment in the proposal.

<u>Authority for the rulemaking</u>

The Supreme Court and lower courts have repeatedly held that, unless a particular statute precludes an agency to consider cost (either explicitly or by providing decisional criteria so rigid and exhaustive as to leave no room for cost analysis), agencies are generally free to do so. In fact, it may be irrational for agencies *not* to consider cost where they have the statutory authority to do so. This is not a controversial proposition of administrative law. "[A]gencies are ordinarily required to consider the relative costs and benefits of a regulation as part of reasoned decision making."[7]

AXPC agrees that EPA is authorized to issue this rule under Clean Air Act Section 301(a), 42 U.S.C. § 7601(a), which authorizes the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter."[8]

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[4] *I See id.* at 13
[5] *See Michigan v. EPA*, 135 S. Ct. 2699, 2705-2706 (2015).
[6] The Most Costly Federal Rules: Billion Dollar Regulations (United States Chamber of Commerce) (*available at* https://www.uschamber.com/the-most-costly-federal-rules-billion-dollar-regulations) (last visited July 15, 2020).
[7] *Cooling Water Intake Structure Coal.*, 905 F.3d 49, 67 (2d Cir. 2018) (Lohier, J.) (citing *Michigan*, 135 S. Ct. at 2707).
[8] *See, e.g.*, *WildEarth Guardians v. EPA*, 830 F.3d 529, 539 (D.C. Cir. 2016); *NRDC v. EPA*, 22 F.3d 1135, 1148 (D.C. Cir. 1994); *Specialty Equip. Market Ass'n v. Ruckelshaus*, 720 F.2d 124, 138 (D.C. Cir. 1983); *Kennecott Corp. v. EPA*,.684 F.2d 1007, 1014 n.18 (D.C. Cir. 1982).

AXPC notes that other provisions of the Clean Air Act confirm that Congress thought it was of central importance that EPA consider the costs and benefits of its actions and that it do so thoroughly, consistently, and based on the best information. For example:

- CAA §§ 312, 42 U.S.C. § 7612 - directs EPA to undertake "a comprehensive analysis of the impact of this chapter on the public health, economy, and environment of the United States," to include both "economic, public health, and environmental benefits" and "effects . . . on employment, productivity, cost of living, economic growth, and the overall economy of the United States."
- CAA §§ 317, 42 U.S.C. § 7617 - directs economic impact assessments for seven enumerated types of rulemaking under the Act.
- CAA §§ 321, 42 U.S.C. § 7621 - directs "continuing evaluations of potential loss or shifts of employment" resulting from CAA implementation.
- CAA §§ 302(h), 42 U.S.C. § 7602(h) (general definitions provision) - "All language referring to effects on welfare includes, but is not limited to, . . . effects on economic values . . . ."

<u>Applicability of the rule</u>

AXPC believes that this rule should apply to all significant EPA regulations, not only those deemed significant for their economic impact. The correct approach is the one reflected in the preamble and the definition of "significant regulation" at proposed 40 CFR 83.1, under which this rule would apply to any regulation that is significant under the criteria of Executive Order 12,866, or as otherwise deemed significant by the Administrator. Particularly because, as the proposal compellingly explains, it is not always possible to monetize all relevant costs and benefits , a robust analysis of benefits and costs is also important for rules that are significant for some reason other than monetized economic impact—for example, because they raise novel policy issues.

The rule should not contain an automatic mechanism for adjustment for inflation of the $100MM economic significance threshold. EPA can adjust the threshold through future rulemakings if appropriate. The proposal should not "consider resource constraints" once a rulemaking is otherwise applicable. EPA should allocate its resources appropriately so that all significant rulemakings receive full and robust benefit-cost analysis.

<u>Content and presentation of benefit-cost analysis</u>

As a general matter, AXPC believes EPA should codify the best practices for benefit-cost rulemaking that it sets forth, rather than merely discuss them in the preamble of the final rule. As the preamble to the proposal reflects, the federal government has multiple documents in the nature of guidance that articulate best practices—for instance, OMB Circular A-4, and EPA's Guidelines for Preparing Economic Analyses. The primary benefit of this rulemaking is to codify a uniform benefit-cost approach in regulatory text. Wherever possible, EPA should do so.

As regards specific items on which EPA solicits comment: AXPC supports EPA's proposal that, when conducting benefit-cost analysis, it should select those health endpoints for which scientific evidence shows a clear or likely causal relationship between exposure and health effect, and where the regulation is expected to change that effect. AXPC does not support the alternative approach on which EPA takes comment, under which it would select all endpoints for which the available scientific literature supports a positive "willingness to pay." EPA's mission is to protect human health and the environment, not to improve utility in a more general sense.[9] Requiring scientific evidence of a link between pollutant and health effect, and reason to believe the regulation will change that effect, will ensure that EPA's rulemakings are transparent, grounded in sound science, and focused on the Agency's core mission.

AXPC supports EPA's proposal to present both benefits and costs not only as aggregate figures, but also in a "detailed disaggregation." This disaggregated presentation should be made prominent in the preambles of proposed and final rules. Clearly disaggregating benefits – for example, benefits from reduction in the pollutant targeted by the statutory provision under which EPA is issuing the rule in question, as distinguished from so-called "co-benefits" from reduction of other pollutants co-emitted with the targeted pollutant – will enhance public understanding of the scope and nature of EPA's benefit estimates, and will help ensure that EPA is using appropriate and efficient means to effect regulatory outcomes.

In this regard, AXPC notes that EPA must avoid "double-counting" of claimed benefits that are really attributable to another regulation than the one under analysis. AXPC suggests that EPA add specific language to proposed 40 CFR 8.3(a)(4) to forbid "double-counting" and prescribe specific steps to prevent it. AXPC agrees with EPA that one way to prevent double counting is to ensure that the effect of other regulations is properly accounted for in the baseline.

As for costs, presenting a detailed disaggregation will be particularly useful at the proposal stage. Regulated parties and other stakeholders may be able to identify from a disaggregated table of costs whether a particular type of cost has been wrongly estimated or disregarded entirely. This will enhance transparency and give those parties a more meaningful opportunity to participate in rulemakings by providing comment.

An inverse form of "double counting" may also occur with respect to costs. One example is in the 2016 oil and gas New Source Performance Standard rule (Quad Oa), in which EPA for the first time purported to directly regulate methane emissions from the source category, where before it had only directly regulated volatile organic compound (VOC) emissions. However, as EPA has since acknowledged in its proposed revisions to the standard, methane and VOC emission regulation from oil and gas operations are entirely redundant because the two pollutants are co-emitted. Framing methane as a

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[9] *See, e.g.*, CAA § 101(a)(2), (b)(1), 42 U.S.C. § 7401(a)(2), (b)(1) (Congress finds the growth of air pollution "has resulted in mounting dangers to the public health and welfare"; purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

directly regulated pollutant helped EPA make its action *seem* more cost-effective by claiming direct benefits for reduction of two pollutants (methane and VOC) from one set of regulations, when in practice both pollutants were *already* being controlled under the prior, VOC-targeting regulations. EPA should consider finalizing regulatory language to address and prevent this type of artificial inflation of benefit estimates.

EPA should also present domestic costs and benefits separately from non-domestic ones. The Clean Air Act's primary purpose is "to protect and enhance the quality of the Nation's air resources."[10] Clearly and separately analyzing domestic benefits and costs will assist EPA in transparently fulfilling this purpose. In this vein, EPA should also separately present a discussion of all statutory factors that it is required to consider by the statutory provision under which it undertakes a rulemaking. This will help ensure that EPA properly exercises the authority that Congress has delegated to it under the Clean Air Act. Similarly, a clearly articulated discussion of the governing statutory factors will also serve to empower the public to ensure that the Agency does so by reviewing and commenting on a proposal for the record.

As regards retrospective analysis, EPA should consider including in this rule a requirement that future Clean Air Act rulemakings subject to this benefit-cost regulation should include a mechanism for retrospective analysis. Specifically, EPA should require itself to provide the public with an analysis of the *actual* costs and benefits of a rule's implementation and compare them to the *estimates* of costs and benefits projected in the rulemaking that promulgated the rule. This will enhance the benefit-cost rule's goals of consistency and transparency, and will keep EPA accountable to the public for the integrity and accuracy of its estimates.

Finally, EPA should only use third-party models where the third party makes its models and assumptions publicly available to extent permitted by law. While it is important for EPA to protect confidential or privileged material, it is also important for the public to understand not only the conclusions but the methodology and underlying data of the models which EPA considers in its rulemakings. Empowering commenters to fully assess and critique these models enhances transparency and ensures the soundness and legitimacy of regulatory outcomes.

Link between benefit-cost analysis and regulatory decisions

EPA asks for comment on how it could consider the results of a benefit cost-analysis in future rulemakings under specific provisions of the Clean Air Act, and whether it should determine that future significant Clean Air Act regulations should only be promulgated when their benefits justify their costs.

One program under which a reform of benefit-cost analysis may be particularly important is the New Source Performance Standards (NSPS) program under Clean Air Act Section 111, 42 U.S.C. § 7411. That provision explicitly directs EPA to consider costs in setting standards, *see id.* at § 7411(a)(1)

[10] CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1).

(defining a “standard of performance” as being based on application of the “best system of emission reduction” which the Administrator determines has been “adequately demonstrated,” “taking into account the cost of achieving such reduction” and other factors). But permissive early D.C. Circuit caselaw gave the Agency broad discretion in this regard and arguably failed to place sufficient importance on this factor. *See, e.g.*, *Portland Cement v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975) (favorably describing EPA approach under which, “where the costs of meeting standards would be *greater than the industry could bear and survive*, such standards could not be implemented by the industry regardless of technological feasibility, and, moreover, that a *gross disproportion* between achievable reduction in emission and cost of the control technique would not be required”) (emphases added); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433, 437 (D.C. Cir. 1973) (“An adequately demonstrated system is one which . . . can reasonably be expected to serve the interests of pollution control without becoming *exorbitantly costly* in an economic or environmental way.”) (emphasis added) (declining to require a benefit-cost analysis under Section 111). The NSPS program has been the site of some of EPA’s most costly and controversial rulemakings in recent years, such as the Clean Power Plan and Quad Oa. AXPC urges to clarify in this rulemaking and in future NSPS rulemakings that this approach to cost consideration as reflected in D.C. Circuit caselaw is not the only permissible approach under Section 111, and to ensure a full estimate and thorough analysis of costs in any future standard-setting under that program.

AXPC appreciates that EPA may not be able to take cost into consideration when administering some programs in the Clean Air Act. For instance, the Supreme Court has ruled that it cannot do so when setting National Ambient Air Quality Standards. But wherever EPA is not precluded from considering costs, AXPC believes that it is entirely reasonable for the Agency to require that the benefits of its regulations should justify their costs. Particularly in light of the fact that the Agency’s benefit-cost analyses can, where appropriate, include quantitative or qualitative presentations of costs and/or benefits, a requirement that benefits justify costs is nothing more than the common-sense requirement that the reasons for taking an action (the benefits) justify (i.e., are collectively more compelling than) the reasons for not taking it (the costs). This may indeed be what rational rulemaking requires. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”). At the very least, it is appropriate for EPA in this rulemaking to impose a requirement that the benefits of its future significant Clean Air Act regulations justify their costs, where the statute does not preclude that approach. AXPC urges EPA to do so.

Limiting the Breadth of Exceptions from the Requirements of the Rule

AXPC appreciates that EPA cannot necessarily establish a “one size fits all” approach to benefit-cost analysis that will apply inflexibly to all significant rulemakings. In this regard, it may be appropriate for EPA to provide for deviations from strict observation of the requirements of this rule in particular rulemakings. However, AXPC is concerned that this proposal (in both the preamble and the proposed regulatory text) at times provides for deviations without establishing a sufficient threshold for deviating or parameters to guide the degree of deviation. If EPA in the future relies on these exceptions too

frequently, they may swallow the rule and frustrate its purpose of bringing consistency and transparency to the consideration of benefits and costs in Clean Air Act rulemaking.

Areas where EPA should add regulatory text and/or preamble discussion to cabin the scope of these exceptions include the following:

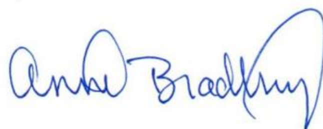
- 85 Fed. Reg. at 35,617/3 & Proposed 40 CFR 83.3(b) - which proposes to require only a "reasoned explanation" for a particular benefit-cost analysis to depart from best practices.
- 85 Fed. Reg. at 35,618/2 - "It will not always be possible to express in monetary units all of the important benefits and costs. When it is not . . . ."
- 85 Fed. Reg. at 35,618/3 - where EPA does not analyze at least three regulatory options, the analysis "must explain why it is not appropriate to consider more alternatives."
- 85 Fed. Reg. at 35,620/3 & Proposed 40 CFR 83.3(a)(8) - benefit-cost analysis will follow the prescribed methodology "as well as practicable in a given rulemaking."
- 85 Fed. Reg. at 35,622/1 & Proposed 40 CFR 83.3(a)(12) (EPA will protect "other privileged, non-exempt information," with no further definition or constraint on the scope of information to be withheld from public disclosure).
- 85 Fed. Reg. at Proposed 40 CFR 83.3(a)(1)(iii) - benefit-cost analysis must include an assessment of regulatory options' benefits and costs relative to the baseline "[t]o the extent feasible."

EPA should establish some threshold of legitimacy and limited frequency for deviations from full compliance with this rule—for instance, by enumerating in more detail the set of legitimate reasons for deviating, and/or explicitly stating the "fallback" methodology that will be employed in the case of a deviation from the rule's full requirements.

<u>Conclusion</u>

AXPC strongly supports this proposal and looks forward to the final rule. We appreciate the opportunity to comment on the proposal and look forward to continuing to work with EPA to ensure that its regulatory actions achieve the right environmental outcome while paying appropriate, consistent, and transparent attention to the costs of those actions.

Sincerely,



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