

**PUBLIC COMMENT TO PROPOSED RULE:
“Increasing Consistent and Transparency in Considering Benefits and Costs in the Clean
Air Act Rulemaking Process,”
85 Fed. Reg. 37057 (June 19, 2020), EPA Docket No: EPA-HQ-OAR-2020-0044**

Pursuant to Notice of Proposed Rulemaking, “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,” 85 Fed. Reg. 37057 (June 19, 2020) (“Proposed Rule”), it is requested the following public comments be considered and the Proposed Rule revised as set forth below. There is over-riding need for a more robust and definitive benefits-cost analysis for all EPA Clean Air Act rulemaking procedures.

1. Proposed Rule §83.1 Definitions: *Benefit-cost analysis* (BCA) means an evaluation of the favorable effects of a policy action and the opportunity costs, associated with the action. It addresses the question whether the benefits for those who gain from the action are sufficient to, in principle, compensate those burdened such that everyone would be at least as well off as before the policy. The calculation of net benefits (benefits minus costs) helps ascertain the economic efficiency of a regulation.

Comment: As written “Benefit-cost analysis” lacks clarity, because a key term “favorable effects of a policy action” is undefined. Evaluation of a benefits-cost analysis is incomplete a without concise, clear directive to EPA on what favorable effects may balance opportunity costs.

Recommended Revision: 40 CFR 83.1 should be revised to include the following definition:

“Favorable effects of a policy action” means positive benefits to human health and the environment, which are defined, discrete, and demonstrable by numeric data. Finding of a favorable effect of policy action shall not be based in part or in whole on: (1) modeling; (2) potential adverse health or environmental effects; or (3) suspected adverse health or environmental effects.

2. Proposed Rule §83.1 Definitions: *Compliance cost* means the private costs that a regulated entity incurs to comply with a regulation (e.g., installation and operation of pollution abatement equipment).

Comment: This definition fails to include all necessary costs of compliance, because costs of professional service and interrelated effects appear to be excluded.

Consideration of professional services as part of compliance cost is warranted because of the complexity and growth of air permitting and compliance regulations applicable to all stationary sources, especially small businesses. Smaller stationary sources do not have sufficient

internal resources to comply with complicated air programs such as MACT, NESHAP, NSPS, 112(r), NAAQS, and NSR/PSD requirements and must retain outside engineering and legal services experienced in air permitting and compliance to “comply with a regulation.” Accordingly, these professional services have a disproportionate impact on small business.

Moreover, the definition arbitrarily ignores past costs and expenditures for associated equipment or services integrated or effected by compliance projects, but not clearly within “compliance costs” as defined. This results in industry not being credited for all expenditures necessary to meet regulatory standards.

Recommended Revision: It is requested the compliance costs definition be expanded to include professional services as follows:

Compliance cost means the private costs that a regulated entity incurs to comply with a regulation and for interrelated services, equipment, or regulatory requirements, including professional services (e.g. installation and operation of pollution abatement equipment and the legal and engineering services associated therewith).

3. Proposed Rule §83.1 Definitions: *Social benefits, or benefits*, means the positive changes in societal well-being incurred as a result of the regulation or policy action.

Comment: The term “social benefit or benefits” is overly broad and vague and therefore not unenforceable. It violates a regulated entity’s due process rights. Use of the terms “positive changes” and “societal well-being” without definitions prevents meaningful determination of social benefits during the benefits-cost analysis.

Recommended Revision: In order to provide some certainty to the rulemaking, EPA should include the following definition:

Positive changes means a demonstrable increase in quality of life taking into account economic and financial factors, such that clear numeric data demonstrate the society well-being is documented to be improved exclusively due to the proposed EPA policy or rulemaking.

Social well-being means improved quality of human health and environment demonstrable by numeric data.

4. Proposed Rule §83.3(a)(1), (2):

- (1) In preparing the BCA, the Agency must include:
 - i. A statement of need;
 - ii. An examination of regulatory options; and
 - iii. To the extent feasible, an assessment of all benefits and costs of these regulatory options relative to the baseline scenario.

- (2) In preparing the BCA, the Agency must include a statement of need that provides:
A clear description of the problem being addressed, the reasons for and significance of any failure of by private markets or public institutions causing this problem, and the compelling need for federal government intervention in the market to correct the problem.

Comment: "Statement of need" should be removed as a factor in the benefits-cost analysis. By definition, consideration of need deprives the regulated community of property rights, since all persons should be free to determine their own economic or business "need" without resort to government oversight and control. The needs analysis deprives the person of freedom to invest and determine growth and expansion on its own.

Analysis of the statement of need will give rise to endless litigation over business needs of a particular applicant, risking breach of confidential business information and strategies currently protected from disclosure.

Recommended Revision: It is requested "needs analysis" be left to the applicant and economic forces at play and be removed from 40 CFR §83.3(a)(1), (2).

5. Proposed Rule §83.3(b): (b) The Agency must provide a reasoned explanation for any departures from best practices in the BCA, including a discussion of the likely effect of the departures on the results of the BCA.

Comment: This sub-section of 40 CFR §83.3 should be supplemented with clarification of how the benefits-cost analysis is subject to administrative procedures and judicial review. Interested persons should have the opportunity to contest a benefits-cost analysis, which violates established regulatory principles pursuant to the Administrative Procedures Act.

Recommended Revision: Regulation 40 CFR 83.3 should be revised to include subpart:

(c) The final benefit-cost analysis published by EPA is final agency action subject to review under the Administrative Procedures Act.

6. Proposed Rule §83.1: *Significant regulation* means a proposed or final regulation that is determined to be a “significant regulatory action” pursuant to Section 3(f) E.O. 12866 or is otherwise designated as significant by the Administrator.


Comment: EPA seeks comment on “approaches for how the results of the [benefit-cost analysis] could be weighed in further regulatory decisions.” 85 Fed. Reg. at 35623. The current proposal is to limit the benefits-cost analysis to “economically significant regulations.” *Id.*; Executive Order No. 12866.

This limitation undermines the benefits-cost analysis process:

1. The required \$100 million economic impact threshold in a “given year” is too great, since often changes in regulations or policies at EPA may not require that investment but still severely adversely effect smaller sources. A \$1.0 million impact is more appropriate;
2. Small businesses are impacted disproportionately by relatively minor EPA revisions to air permitting requirements, so they are disproportionately impacted by changes with impacts less than the threshold; and
3. Resource constraints compared to regulatory costs are not currently considered in the applicability threshold, but should be.

Submitted this 30th day of July, 2020.

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