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## Comment Letter

### Rule Proposed by the U.S. Environmental Protection Agency “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,” June 11, 2020

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**By electronic submission:**

<https://www.regulations.gov/comment?D=EPA-HQ-OAR-2020-0044-0001>

This comment letter responds to a request from the Environmental Protection Agency for comments on its June 11 proposed rule “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process” (hereinafter the “Benefit/Cost” rule). The proposed rule focuses on “processes that [EPA] would be required to undertake in promulgating regulations under the Clean Air Act (CAA) to ensure that information regarding the benefits and costs of regulatory decisions is provided and considered in a consistent and transparent manner.”<sup>1</sup>

My name is Benjamin Zycher. I am a resident scholar at the American Enterprise Institute in Washington, DC, and am the senior energy/environment policy specialist there. I formerly was a senior economist at the RAND Corporation, an adjunct professor of economics at the University of California, Los Angeles (UCLA), and a senior staff economist at the President’s Council of Economic Advisers. I hold a doctorate in economics from UCLA and a master’s degree in public policy from the University of California, Berkeley. The views that I express in this letter are my own and do not purport to represent those of any institution with which I am affiliated.

The Environmental Protection Agency has published and solicited public comments on its draft rule reforming the benefit/cost analytic methodology applied to new regulations promulgated under the Clean Air Act (CAA). This topic is exceptionally important. At a general level, such regulations can yield substantial environmental

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\* Resident scholar, American Enterprise Institute. The views expressed are solely those of the author.

<sup>1</sup> The proposed rule can be found at <https://www.federalregister.gov/documents/2020/06/11/2020-12535/increasing-consistency-and-transparency-in-considering-benefits-and-costs-in-the-clean-air-act>.

improvement at reasonable costs, or they can impose massive costs upon the economy with little or no environmental benefits in the bargain. At a more specific level, enhanced transparency with respect to the benefit/cost methodology used to determine the reasonableness and appropriateness of proposed rules is crucial to facilitate the public notice and comment process providing crucial feedback to decisionmakers.

With its central focus on clarity and transparency, this draft rule makes a good start in terms of rationalizing an analytic process that can be afflicted with poor analysis and even political and bureaucratic biases intended to support as “appropriate and necessary” the adoption of rules that could not satisfy any honest benefit/cost analysis.<sup>2</sup>

This is no small matter. Consider the 2011 Obama EPA benefit/cost analysis of its Mercury and Air Toxics Standards (MATS) aimed at coal-fired powerplants.<sup>3</sup> The EPA cost estimate for the intended reduction of mercury and other “hazardous air pollutants” (HAP) was \$9.6 billion (in year 2007 dollars); the estimated benefits were \$1 million to \$6 million, thus yielding estimated costs exceeding estimated benefits by at least 1600 to 1.

That was the finding for the “direct” objectives of MATS. In brief, EPA argued that the rule was “appropriate and necessary” because other CAA requirements failed to control powerplant HAP emissions adequately and because effective control technologies were available. EPA also declined to consider costs, arguing that it was not required to do so and should not.

The Supreme Court in 2015 in *Michigan v EPA* ruled that “EPA interpreted [section 112 of the CAA] unreasonably when it deemed cost irrelevant to the decision to regulate power plants” as appropriate and necessary in the context of HAP.<sup>4</sup> The Court: “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. . . . No regulation is ‘appropriate’ if it does significantly more harm than good.”

But EPA proceeded in 2016 to justify the rule by including indirect “co-benefits,” over 90 percent of which were the asserted health benefits of reductions in emissions of fine particulates (“PM2.5”).<sup>5</sup> Using a deeply dubious methodology, the health benefits of the PM2.5 reductions were estimated at between \$33 billion and \$90 billion, thus yielding benefits per dollar of costs between \$4 and \$9.<sup>6</sup> Note that fine particulates are a

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<sup>2</sup> See Benjamin Zycher, “The Social Cost of Carbon, Greenhouse Gas Policies, and Politicized Benefit/Cost Analysis,” *Texas A&M Law Review*, Vol. 6 (2018), at <https://www.aei.org/wp-content/uploads/2019/01/SCC-TAMU-LR-Final-fall-2018.pdf>.

<sup>3</sup> See Table 3 in [https://www.epa.gov/sites/production/files/2020-04/documents/utilities\\_mats\\_cost\\_memo\\_04-2020.pdf](https://www.epa.gov/sites/production/files/2020-04/documents/utilities_mats_cost_memo_04-2020.pdf).

<sup>4</sup> See [https://www.supremecourt.gov/opinions/14pdf/14-46\\_bqmc.pdf](https://www.supremecourt.gov/opinions/14pdf/14-46_bqmc.pdf).

<sup>5</sup> The EPA discussion of particulate matter regulatory actions is at <https://www.epa.gov/pm-pollution/particulate-matter-pm-implementation-regulatory-actions>.

<sup>6</sup> See Anne E. Smith, “Inconsistencies in Risk Analyses for Ambient Air Pollutant Regulations,” *Risk Analysis*, 2015, at <http://www.globalwarming.org/wp-content/uploads/2016/06/Anne-Smith-Risk-Analysis->

“criteria” pollutant,<sup>7</sup> as distinct from a HAP; EPA already limits ambient levels of PM<sub>2.5</sub> in a separate regulation, and is required under the CAA to determine every five years whether that standard “accurately reflects the latest scientific knowledge” on the health effects of exposure to particulates.<sup>8</sup>

Accordingly, EPA last May revised its analysis, finding that the MATS rule is not “appropriate and necessary.”

EPA believes that it would be inconsistent with the statute and with case law to base the appropriate and necessary finding on a monetized benefit estimate that is almost exclusively attributable to reductions of non-HAP pollutants. Further, the CAA sets out a specific regulatory scheme for the PM pollutants in question, the NAAQS, and as a first principle the EPA believes those regulations, not CAA section 112, should be the primary method by which the Agency targets those pollutants.<sup>9</sup>

EPA went on to point out that “the gross disparity between monetized costs and [the direct mercury/HAP] benefits, which should be the primary focus of the Administrator’s determination [of whether a proposed rule is appropriate and necessary]..... is so great as to make it inappropriate to form the basis of the necessary statutory finding.”

This brings us back to the new draft rule on reform of the EPA benefit/cost methodology. On the surface the draft rule merely would require EPA to distinguish clearly between the direct benefits and the indirect co-benefits of proposed regulations under the Clean Air Act so as to promote transparency. But EPA also

solicits comment on approaches for how the results of [benefit/cost analyses] could be weighed in future CAA regulatory decisions. For example, the EPA solicits comment on whether and under what circumstances the EPA could or should determine that a future significant CAA regulation be promulgated only when the benefits of the intended action justify its costs. The EPA also solicits comment on whether and under what circumstances the EPA could determine that a future significant CAA regulation be promulgated only when monetized benefits exceed the costs of the action.

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[Perspectives-early-view-Nov2015.pdf](#); and Marlo Lewis, Jr., “CEI Comments on the Mercury Rule,” April 17, 2019, at <https://cei.org/content/cei-comments-mercury-rule>.

<sup>7</sup> See the EPA summary discussion at <https://www.epa.gov/criteria-air-pollutants>.

<sup>8</sup> See the EPA requirements for fine particulates at <https://www.epa.gov/pm-pollution/implementation-national-ambient-air-quality-standards-naaqs-fine-particulate-matter>. The CAA sections are at <https://www.epa.gov/clean-air-act-overview/clean-air-act-title-i-air-pollution-prevention-and-control-parts-through-d#ia>.

<sup>9</sup> See <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf>.

The CAA explicitly requires the EPA, upon finding that a given criteria pollutant endangers the public health, to promulgate a “national ambient air quality standard” (NAAQS) that “protects the public health” with “an adequate margin of safety.”<sup>10</sup> The law mandates that costs not be considered in the establishment of the NAAQS; this means that those standards are likely to be too stringent in a benefit/cost sense. Lowering the emissions of those pollutants even more through insertion of a co-benefits calculation in a new regulation aimed at an entirely different type of emission means that the excess net costs of the regulation are likely to be driven up even more.

EPA is asking whether a regulation written under one section of the CAA aimed specifically at a given air pollutant (the direct benefit, in this context mercury) legally can be deemed “appropriate and necessary” primarily on the basis of the asserted benefits of reducing emissions of a different pollutant (the indirect co-benefit, PM2.5) covered under an entirely separate section of the CAA. That is a crucial question, the general answer to which is driven by common sense: Congress already has enacted a section of the CAA to address the co-benefit pollutant, and if the existing regulations applied to that pollutant fail to satisfy the public health requirements of the law, or if they fail to “accurately reflect the latest scientific knowledge,” then EPA should revise those existing regulations.

The vast majority of the asserted co-benefits of additional PM2.5 reductions would be observed in geographic areas already in attainment with that NAAQS, a precautionary standard sufficiently low to “protect the public health” with “an adequate margin of safety.” If, as required by law, the NAAQS “accurately reflects the latest scientific knowledge” on the health effects of exposure to particulates, then it is far from clear as to how PM2.5 reductions below the NAAQS can be justified in a benefit/cost sense.

Accordingly, the proposed reform---narrowly, pursuit of greater transparency---combined with the implications of the questions posed by EPA is wholly appropriate.

In 2017 the Office of Management and Budget noted that EPA rules yield over 80 percent of the monetized benefits ( and over 70 percent of the monetized costs) of federal regulations, and that over 95 percent of those benefits are the result of air quality rules, “mostly” asserted to result from the reduction in fine particulates.<sup>11</sup> The EPA Clean Air Scientific Advisory Committee last December criticized the analyses used previously to justify regulation of fine particulates, in substantial part because the biological basis and

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<sup>10</sup> See §7409 (b)(1), “National primary and secondary ambient air quality standards” at <https://www.govinfo.gov/content/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapI-partA-sec7409.htm>.

<sup>11</sup> See [https://www.whitehouse.gov/wp-content/uploads/2017/12/draft\\_2017\\_cost\\_benefit\\_report.pdf?sm\\_au=iVV6k7TnsZM6Rq5q01TfKK3Qv3fc4](https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf?sm_au=iVV6k7TnsZM6Rq5q01TfKK3Qv3fc4).

the evidence on a causal relationship between fine particulates and death rates are much less clear than commonly asserted.<sup>12</sup>

And so the new EPA draft rule on benefit/cost analysis potentially will prove a real advance for rationality in regulation under the CAA. First: The reform might serve to limit the regulation of other pollutants---in particular, fine particulates---to that already imposed by existing regulations. Second: No regulation of greenhouse gas emissions justified on climate grounds can satisfy any plausible benefit/cost test without the insertion of co-benefits.

Because American air quality has improved vastly over recent decades---there has been a two-thirds reduction in the emissions of the six criteria air pollutants since 1990<sup>13</sup>--it is difficult to justify new or tightened rules without the purported co-benefits of ever-greater reductions in fine particulates. Without the asserted co-benefits of reductions in fine particulates, it will prove difficult for new rules to be used to support demands for massive subsidization of costly, unreliable, and environmentally destructive wind and solar electricity, and in support of the political drive to centralize economic activity in dense urban areas and to force individuals out of automobiles and onto mass transit.

Moreover, the application of the co-benefits methodology is necessary to justify policies to limit greenhouse gas emissions: No climate policy can satisfy any plausible benefit/cost test regardless of what one believes about the science and evidence of climate phenomena. Using the EPA climate model,<sup>14</sup> the Obama Climate Action Plan would have reduced temperatures by 0.015°C by 2100. The Paris agreement: 0.17°C. The Green New Deal: the same 0.17°C. Zero greenhouse gas emissions by the entire Organization for Economic Cooperation and Development: 0.3°C. An impossible 30 percent cut in GHG emissions by virtually the entire world: 0.6°C. Such trivial effects would be achieved only at massive economic costs.

It is essential that EPA expand the transparency focus of this proposed rule to include a requirement that the benefits of future proposed rules under the CAA justify the attendant costs *in terms of the specific pollutant being regulated under that proposed rule*. If there is an argument to be made that emissions limits on other (ancillary) pollutants should be tightened, that should be the subject of a revision of whatever rule already applies to that ancillary pollutant under a separate section of the CAA. Opponents of the proposed reform need to explain why rules imposing substantial costs in return for trivial benefits are appropriate.

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<sup>12</sup> See

[https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentCASAC/E2F6C71737201612852584D20069DFB1/\\$File/EPA-CASAC-20-001.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentCASAC/E2F6C71737201612852584D20069DFB1/$File/EPA-CASAC-20-001.pdf).

<sup>13</sup> See <https://www.epa.gov/air-trends>.

<sup>14</sup> See <http://www.magicc.org/>.

