

Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process

Comments of American Chemistry Council; American Petroleum Institute; National Association of Manufacturers; U.S. Chamber of Commerce

June 14, 2021

Dear Sir or Madam,

The United States Environmental Protection Agency (EPA or Agency) has issued an interim final rule and requested comments on its plan to rescind the 2020 final rule addressing benefit cost analyses under the Clean Air Act.¹ The 2020 final rule “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process”² (hereafter “Benefit Cost Rule”) benefits all stakeholders and provides consistency and greater transparency in analyzing the benefits and costs of rules proposed and finalized under the Clean Air Act. It requires that EPA use consistent procedures and clear data that transparently show how the Agency develops proposed rules will benefit all stakeholders. Today we request that EPA reconsider its plans to rescind the Benefit Cost Rule and, at the very least, issue a replacement rule that addresses the elements of science and transparency as was done in the Benefit Cost Rule.

The Associations³ and their member companies are committed to adhering to the requirements of the Clean Air Act (CAA), with a focus on helping to provide air quality protective of public health and welfare, while continuing to expand equitable economic opportunity in the United States. We have worked collaboratively for many years with the Agency, states, tribal, and local authorities to dramatically reduce air pollution. As a result, between 1970 and 2020, the combined emission of criteria and precursor pollutants have

¹ <https://www.federalregister.gov/documents/2021/05/14/2021-10216/rescinding-the-rule-on-increasing-consistency-and-transparency-in-considering-benefits-and-costs-in>

² [85 FR 84130](#), (December 23, 2020).

³ These comments are submitted by the American Chemistry Council, American Petroleum Institute, National Association of Manufacturers, and U.S. Chamber of Commerce.

dropped dramatically, while the population grew steadily and the U.S. gross domestic product grew leading up to the pandemic.⁴ Over the last two decades, the number of days listed as unhealthy for sensitive groups dropped by almost 70 percent as the amount of criteria pollutants in our air continued to fall.⁵ Americans are breathing the cleanest air in decades as the combined emissions of criteria and precursor pollutants were reduced by 78 percent between 1970 and 2020.⁶ The past decade is proof that we can achieve environmental progress and economic growth at the same time. Under improved Clean Air Act regulatory provisions, we can build on these achievements with continued innovation and improved technologies.

Greater Transparency and Consistency in Agency Regulatory Analyses Is Needed

The Associations⁷ filed detailed comments on EPA's proposal in August 2020 (attached) supporting greater transparency and consistency in agency benefit-cost analyses (BCAs). We supported formally standardizing the elements of the benefit-cost analysis and requiring BCAs for all economically significant Clean Air Act rules. Fair, open book approaches to analyses would help ensure that the rulemaking process is transparent and adequately informs the public of the range of potential benefits and costs in a manner that achieves environmental protection without unnecessary and undue burdens on regulated parties. We supported the adoption of these principles in EPA's final rule and still do today.

We agree with Administrator Regan's statement that "[i]t is crucial that we apply principles of transparency and openness to the rulemaking process. This can only occur if EPA clearly explains the basis for its decisions and the information considered by the agency appears in

⁴ See www.epa.gov/criteria-air-pollutants.

⁵ There was an increase from 2019 to 2020 in unhealthy days driven by severe wildfires in the West demonstrating the potential effects that natural sources can have on air quality as emissions levels have increasingly gone down over time.

⁶ *Id.*

⁷ American Chemistry Council, American Petroleum Institute, National Association of Manufacturers, and U.S. Chamber of Commerce, Comment Letter on Proposed Rule Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35612 (June 11, 2020) <https://www.regulations.gov/comment/EPA-HQ-OAR-2020-0044-0617>

the rulemaking record.”⁸ Transparency and openness in agency decision-making form the basis for public trust.

In our comments on the proposed Benefit Cost Rule, the Associations specifically concluded and supported that:

- The Benefit Cost Rule is needed to improve consistency and transparency in how EPA assesses risk and arrives at estimates of benefits and costs; EPA has a history of inconsistent approaches to such estimates.
- EPA has ample authority under the Clean Air Act to issue the Benefit Cost Rule and the final rule will be binding upon the Agency.
- The Associations support the use of scientific, engineering, and economic best practices as the basis for developing the analyses. The Agency should provide detail as to the best practices in the preamble of the final rulemaking, and the Agency should adequately describe the best practices in the regulatory text.
- EPA should perform and fully consider benefit-cost analyses (BCAs) in making regulatory decisions under the Clean Air Act unless the courts have ruled that a specific statutory provision clearly prohibits such consideration.
- The final rule should require EPA to undertake a non-binding determination of whether the benefits of the statutory objective of the regulatory provision justify the costs as part of the BCA. This determination would help inform policymakers and the public regarding whether the benefits of the proposed regulation, based on the statutory objective, justify the costs. While the Administrator would be required to consider the findings of this determination, he or she would still retain full flexibility to issue a standard that does not meet this net targeted benefits determination described in these comments, when appropriately described and justified.
- EPA should promulgate language that ensures that all underlying risk assessments supporting significant Clean Air Act regulation, including those that provide key inputs to the development of EPA’s health benefit estimates in BCAs, are consistent with best practices. Furthermore, the rule should require EPA to assess the direct, indirect, explicit, and implicit costs of significant regulatory actions and their alternatives when feasible.
- EPA should present BCAs in a manner consistent with reasoned economic and scientific

⁸ Michael Regan Administrator Message to EPA Employees on Transparency and Earning Public Trust in EPA Operations, April 12, 2021, <https://www.epa.gov/sites/production/files/2021-04/documents/regan-messageontransparencyandearningpublictrustinepaoperations-april122021.pdf>.

judgments about uncertainties. In addition, the net benefits of each Clean Air Act rule should be presented based on the targeted pollutant without ancillary and criteria pollutant health co-benefits, before presenting the net benefits including the ancillary benefits and the criteria pollutant health co-benefits.

These are just some of the highlights from the Association's comments that we submitted on the proposed Benefit Cost Rule and we still support these principles of transparency and consistency today. While the final Benefit Cost Rule may not have incorporated all of these important concepts and considerations, several were adopted; thus the Benefit Cost Rule should be preserved and/or amended, rather than rescinded. In any event, EPA should conduct BCAs consistent with these concepts and considerations for all significant CAA rulemakings.

Decision to Rescind the Final Rule

EPA's decision to rescind the Benefit Cost Rule instead of proposing amendments is disappointing and in direct conflict with its own Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidenced-Based Policymaking.⁹ Many of the alleged weaknesses of the Benefit Cost Rule would be addressed more efficiently by amending instead of rescinding the rule. This includes questions regarding the potential application of the rule to non-economically significant rules as well as to claims that specific criteria remained too vague to be properly and consistently applied. Inviting public comments on ways to improve the rule would have advanced transparency and public participation in key decisions. Rescinding the Benefit Cost Rule does not advance scientific integrity; instead, it allows the current as well as any future Administration to make decisions in analyzing benefits and costs without full transparency, explanation, and public comment. This truncated process does not advance scientific integrity or restore public trust, and it prevents regulated entities and the public from providing full and effective comments on EPA's proposed rulemakings.

⁹ Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, January 27, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/>

In rescinding the Benefit Cost Rule, EPA states that the Agency has failed to “explain why the rule was needed or reasonable.” EPA further states that the Agency “adheres to the executive order requirements pertaining to economic analysis by following the guidance laid out by Circular A-4 and the Economic Guidelines.” Unfortunately, EPA is ignoring the many comments submitted to the 2020 rulemaking record and the Agency’s own repeated failures to adhere to OMB Circular A-4 guidance on such clear requirements as estimating and reporting the benefits to US citizens and residents when conducting analyses and applying recommended discount rates. Estimates of global benefits should be reported separately in a manner consistent with Circular A-4. Nonetheless, the American public also has a clear right to know how much of these benefits will accrue to US citizens and residents. EPA’s repeated failure to abide by OMB Circular A-4 in reporting only global benefits during the Obama Administration resulted in analyses that compared US costs with global benefits – an asymmetry that should be fully disclosed.

The Benefit Cost Rule would not have stopped the adoption of new practices, but instead would have required EPA to notify the public and seek public comment on the basis for the Agency’s decision to adopt the new procedures. This openness would have invited substantive comments on the strengths and weaknesses of the new procedure and its suitability to the specific circumstances described in the Benefit Cost Rule. In short, the Benefit Cost Rule would have allowed EPA to adopt and apply new practices transparently through notice and comment.

The inconsistency in the rescission rule’s rationale also underscores the agency’s difficult challenge in identifying legitimate reasons to abandon this important rule. At times, EPA complains that the Benefit Cost Rule is overly rigid while at the same time complaining of vagueness that provided the Agency with significant discretion in how to interpret the criteria. Those arguments ignore that the Benefit Cost Rule provides EPA with clear opportunities to deviate from the requirements when impracticable or if the Agency merely sought public comment on its reasoning for deviating from the requirements.

The interim final rescission rule also finds inconsistencies where there are none. For instance, the rescission rule notes the Benefit Cost Rule's acknowledgment that the Agency's application of benefits and costs in any specific rulemaking would depend on the statutory provisions and thus would not be consistent. However, the objective of the Benefit Cost Rule was to make the analysis, not its application, more consistent and transparent. For instance, while EPA cannot consider the result of the benefit cost analysis in setting NAAQS, the regulatory impact analysis does play an important role in informing the public of the likely costs and benefits of setting a new standard. This transparency is important. The Benefit Cost Rule further advances transparency by requiring more objective analysis and explanation of uncertainties in the benefit and cost estimation.

EPA should focus on consistency and transparency in science and economics when developing future rulemakings. EPA should employ a systematic and consistent approach to estimate benefits and costs, which is the underlying detailed information that drives the Agency decision making. Analyses should be consistent with OMB Circular A-4, establishing the appropriate baseline, analyzing alternatives, and estimating benefits and costs.

Rules should be fully transparent about the many uncertainties underpinning their cost and benefit estimates. These include the many embedded policy assumptions made in developing the various estimates of costs and benefits associated with a rulemaking and the significance of the impact of those assumptions on the final policy decision. The American people benefit when information is presented regarding the methods used to develop these values and how certain or uncertain these estimates are and what they include or omit. Furthermore, rules should require more systematic reviews of existing studies and models using clear and consistent criteria to prevent focusing disproportionately on one study that might support a preferred policy outcome. The public would have a greater understanding of the estimation of benefits and costs. This understanding would allow affected businesses to provide more relevant information in the rulemaking process. It would also allow the general public and other stakeholders to more effectively participate in the rulemaking process and ultimately lead to more durable public policy.

Conclusion

In conclusion, we call on EPA to maintain the Benefit Cost Rule, and if necessary, make certain modifications without fully rescinding the rule. EPA should have in place a regulatory process rule that lays out the economics, science and transparency principles and processes for analyzing a rule's benefits and costs. Stakeholders and the public deserve the transparency and consistency provided by the Benefit Cost Rule.