

EPA Seeking Comments on Cost-Benefit Analysis Regulations

By Mark L. Greenfogel, *The Legal Intelligencer*

For many in the Philadelphia region, summer means spending weekends “down the shore.” When families decide to head to and from the beach is often based on a balancing test of one’s tolerance for sitting in traffic and a desire to make the most of the time away. Leaving Friday after work and returning Sunday evening will theoretically maximize sunbathing time, though such enthusiasts recognize doing so will likely mean sitting on the Atlantic City Expressway for hours on end.

The Environmental Protection Agency (EPA) approaches regulatory analysis in much the same way, by balancing costs and benefits of proposed regulations. Once the EPA identifies a source of potential environmental harm, it then decides whether and how to regulate, and certain statutes also require the EPA to perform a cost-benefit analysis. By way of background, the risk management framework for federal agencies started to change in the early 1980s. During his first month in office, President Ronald Reagan issued executive order 12,291, which included an instruction to agencies that “regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society,” and “regulatory objectives shall be chosen to maximize the net benefits to society,” Exec. Order No. 12,291, 3 C.F.R. 127 (Feb. 17, 1981). This policy remained effective until President Bill Clinton replaced it with executive order 12,866. Building on the foundation of executive order 12,291, executive order 12,866 instructed that “in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

Last week, the EPA issued an advance notice of proposed rulemaking titled “Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process,” (ANPRM) indicating an overhaul of how the agency conducts cost-benefit calculations in its

decision-making process. The ANPRM identifies three broad topics on which the EPA is seeking input, including comments on the nature of concerns about “perceived inconsistency and lack of transparency” in the cost-benefit analysis process, approaches for addressing such concerns, and the “opportunities and challenges” of promulgating cost-benefit regulations. Introducing the proposed rulemaking, EPA Administrator Scott Pruitt stated, “Many have complained that the previous administration inflated the benefits and underestimated the costs of its regulations through questionable cost-benefit analysis. This action is the next step toward providing clarity and real-world accuracy with respect to the impact of the agency’s decisions on the economy and the regulated community.” The EPA is soliciting comments on “whether and how the EPA should promulgate regulations that provide a consistent and transparent interpretation relating to the consideration of weighing costs and benefits in making regulatory decisions in a manner consistent with applicable authorizing statutes.”

The Trump administration has been forthright about its disdain for environmental regulations it perceives as burdensome and costly. Prior actions of the administration signal how the agency considers certain costs and benefits within a regulatory scheme, which could have significant effects on environmental regulation adopted, modified or removed under a revised cost-benefit framework.

In early May, Pruitt published a memorandum titled “Back-to-Basics Process for Reviewing National Ambient Air Quality Standards” (NAAQS Memo). Section 109 of the Clean Air Act (CAA), directs EPA to establish primary and secondary national ambient air quality standards (NAAQS) for ambient pollutants such as carbon monoxide, ozone, and lead. The primary and standards are to be set as “requisite to protect the public health” and secondary standards are to be set as “requisite to protect the public welfare from any know or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.” Every five years, the EPA is required to review the NAAQS and revise the standards as appropriate to reflect any advancements in scientific knowledge. With the next statutory deadline in October

2020, this memo instructs the EPA’s independent scientific review committee, the Clean Air Scientific Advisory Committee (CASAC), to begin its review of NAAQS.

The Supreme Court in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001) examined whether the EPA could consider implementation costs in setting NAAQS. Writing for the majority, Justice Antonin Scalia held that Section 109(b), “interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process.” Consistent with that holding, the EPA’s website recognizes, the national air quality standards are to be based “solely on protecting public health and welfare.”

Nevertheless, citing Section 109(d)(2)(C)(iv) of the CAA, Pruitt specifically charges CASAC to advise “the administrator of any adverse public health, welfare, social, *economic*, or energy effects which may result from various strategies for attainment and maintenance of such NAAQS.” Although the memorandum recognizes that this charge to CASAC may “elicit information which is not relevant to the standard-setting process,” it states that such information “provides important policy context for the public, co-regulators, and EPA.” As the *American Trucking* court made clear, this provision directs the EPA to determine the costs of implementing the standards to provide cost data to the states as they carry out their role as the primary implementers, and not for purposes of formulating the standards in the first place. That EPA is elevating economic and cost concerns in reviewing NAAQS is significant, and suggests the air quality regulations could be threatened by information such as the cost of implementation not relevant to setting a safe air quality standard.

Further, the ANPRM explains, “commenters argued in past rulemakings [EPA] has justified the stringency of a standard based on the estimated benefits from reductions in pollutants not directly regulated by the action,” referred to as ancillary benefits. The ANPRM cites as an example the Mercury and Air Toxics Standards (MATS) rule. While the monetized benefits from regulating just mercury which was the subject of the rule was arguably lower than the costs rule compliance, the EPA had in 2012 included benefits from reductions in ambient fine

particulate matter. The Wall Street Journal editorial board similarly attacked the Obama administration's inclusion of these ancillary benefits in its cost benefit analysis as a "statistical sleight of hand" without which, the regulations would have ostensibly been more difficult to justify, editorial, *Cost-Benefit Reform at the EPA*, The Wall Street Journal, June 6, 2018.

In a section titled "Potential approaches for increasing consistency and transparency in considering costs and benefits in the rulemaking process," the ANPRM asked "to what extent should EPA develop a general rule on how the agency will weigh the benefits from reductions in pollutants that were not directly regulated ... when deciding the stringency of future regulations?" As the current administration is keen to devalue benefits of an environmental regulation, it is reasonable to anticipate that any such rule the EPA develops would preclude the inclusion of such ancillary benefits in its cost-benefit analysis. Such a decision, however, would arbitrarily exclude actual benefits that could improve the environment and public health. Simply because a particular pollutant was not the focus of a given regulation does not mean that any additional pollution reductions are any less real. It is good policy to consider the wide range of potential benefits rather than myopically considering only the primary pollution reduction benefits. Consistent with President Reagan's directive that regulatory choices should maximize net benefits to society, the EPA should prioritize actions that improve public health, whether intended or incidental.

Mark L. Greenfogel is an associate at Warren Environmental Counsel, an environmental and water resources law practice. Contact him at mgreenfogel@warrenenvcounsel.com.

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