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Public Interest Comment¹ on
The Environmental Protection Agency's Proposed Rule
Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources:
Electric Utility Generating Units

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Environmental Protection Agency's Notice of Proposed Rulemaking (NPRM) to repeal the Agency's Clean Power Plan does not represent the views of any particular affected party or special interest, but is intended to assist EPA in developing economically efficient options for its regulatory decisions and sound economic analyses to support them.

Introduction

The EPA has proposed to repeal the greenhouse gas (GHG) emissions guidelines for electric generating units issued on October 23, 2015—better known as the Clean Power Plan (CPP). The Agency has also sought comment separately on what, if anything, ought to replace it. I have filed a comment in that separate ANPRM docket with a number of suggestions for what a replacement

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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rule might look like. I also filed an earlier comment in December 2014, offering advice to states on the best method of complying with the then-proposed CPP.

This comment will focus on the Regulatory Impact Analysis (RIA) that supported EPA's 2015 CPP final rule. Quite apart from the Agency's interpretation of its authority under the Clean Air Act, the deficiencies in the 2015 RIA are severe, and by themselves form a compelling basis for repeal of the CPP. EPA has proposed revisions to the RIA that would make a substantial improvement in its accuracy, and that also would undermine the Agency's earlier claim that the benefits of the CPP outweighed the costs. Moreover, in many areas the proposed revisions do not go far enough in correcting the distortions of the original RIA. The comment below, often drawing on earlier comments and commentary, outlines those areas where the agency made major errors in the 2015 RIA, and where it could go further to improve the analysis.

What is the Purpose of an RIA?

In the case of the CPP, as in other rulemakings, highly consequential regulatory decisions can turn on the results of economic and related analyses published in the form of a Regulatory Impact Analysis—especially on the RIA's assessment of benefits and costs. The Clean Air Act requires that the Agency consider costs as well as benefits when setting standards under §111(d). Benefit-cost balancing is required also by Executive Order 12866, signed by President Clinton and still in effect. And in recent decisions the Supreme Court has indicated that, unless a statute explicitly instructs an agency to ignore costs, taking regulatory action without considering costs could be found arbitrary under the Administrative Procedure Act.

I outline these developments in a forthcoming article,³ and explain that a benefit-cost analysis (BCA) should not be viewed simply as a technical planning document for the agency's use, but as a necessary demonstration that an agency is acting in the public interest. Courts increasingly are, and ought to be, reviewing the substance of agency benefit-cost analyses to determine if regulatory actions comply with requirements of the authorizing statute and of the Administrative Procedure Act.

[O]ur government is one of checks and balances, not of independent decision-makers... Agency officials are not principals; they wield whatever power they have as agents of the people. They ought to be able to demonstrate that their discretionary official actions serve the public interest, promote the general welfare, or otherwise advance the common good... BCA can help distinguish those actions that appear to be justified from those that clearly are not...

³ Brian F. Mannix, "Benefit-Cost Analysis as a Check on Administrative Discretion" forthcoming, *Supreme Court Economic Review*.

[B]enefit-cost analysis, as applied to regulation, should be viewed less as a tool to inform the regulators and more as a test to see whether the regulators are acting as faithful agents of the public's interest.

It is helpful to keep that purpose in mind when reviewing agency RIAs, and to apply a healthy skepticism (rather than deference) towards the more extravagant economic claims that an agency might make in an attempt to justify its actions.

Domestic vs. Global Benefits

In its 2015 RIA, EPA chose to base its regulatory decisions on a calculation of global benefits. While this did not conform to the requirements of E.O. 12866, it was supported by an interagency committee led by the Office of Management and Budget, which earlier had calculated a global Social Cost of Carbon (SCC) for all agencies to use. I have supported the effort during the administration of President Obama to calculate both a global and domestic value for the SCC, but it is important to recognize that they serve two very different purposes.

This reasoning [a global SCC] makes sense if, and only if, the intent is to use the SCC to support the development of a global system of constraining carbon emissions. It does not make sense to use that same global SCC to characterize the benefits of unilateral domestic actions that are unlikely to achieve the stated global benefits...

It is simply not plausible to claim that any unilateral U.S. action could achieve, in practice, the global benefits that are implied by the SCC as it is calculated in the TSD [Technical Support Document]. International competition will cause the domestic costs of unilateral action to be amplified, even while the global benefits evaporate. The place to use the global SCC is not—at least for now—in the RIAs of U.S. regulatory agencies, but in the international fora where climate policies are being negotiated...

The absence of an international consensus is problematic for another reason. We know that the vast majority—perhaps all—of the benefits incorporated into the SCC will not accrue to the United States. It might be possible to justify using the SCC as a guide for domestic regulations if they are being undertaken within an international framework that promises reciprocal action by other countries. Even in that context, it seems likely that the U.S. would be a net loser – bearing more of the costs of effective global action, and less of the benefits. Nonetheless, with proper Congressional authorization, such actions might be justified. If carbon emissions are, as argued in the TSD, a global externality, then it makes sense that there will be winners and losers in a corrective global regulatory regime, and it is

not hard to imagine the U.S. being willing to do its part despite not being a net beneficiary.

In the absence of reciprocal action by other nations, however, the global benefits in the SCC cannot be regarded as a legitimate entry in the benefit-cost ledger. Basing domestic action on the global SCC would put U.S. government agencies in the impossible position of acting contrary to the interests of U.S. citizens, using the excuse that they are acting as representative agents of foreign countries.⁴

Another caution is in order with regard to the domestic SCC that EPA now proposes to use. The existing estimates were calculated, not by looking at the harm to the United States caused by greenhouse gas emissions, but by calculating the U.S.'s "fair share" of the global SCC, based on our relative contribution to global GHG emissions. In other words, it is analogous to the "damages" that might be assessed against the U.S. in some kind of global tort action, rather than to any actual injury experienced by the U.S. from GHGs.

It is reasonable for EPA to calculate the global SCC, and it is reasonable to calculate the U.S. share of the global SCC—as long as each is properly labeled. Both of these numbers could be useful in negotiating an international treaty, or informing Congress as it drafted legislation. Neither of these is appropriate to use in a rulemaking under the Clean Air Act, however. Instead, EPA needs to calculate a domestic SCC based on the estimated injury to the U.S. caused by climate change. This is a difficult calculation, and the resulting uncertainty will cover a wide range of values. Nonetheless, it is the right calculation to use.

Congress does, of course, have the power to authorize foreign aid or—even in the absence of a treaty or any sort of reciprocal action—to order agencies to assist foreign nations in a variety of ways. It must do so explicitly, however. Absent legislative authorization, an agency cannot presume that it has the power to take actions that affirmatively harm the U.S. in order to help foreign interests—which is what it means when an action fails a domestic benefit-cost analysis but passes when global benefits are tossed in. The fact that Congress has a power does not mean that domestic regulatory agencies, absent legislative authorization, may choose to wield it. This is arrogation running riot.

Nor can an agency, by consulting with foreign governments, acquire regulatory authority that has not been granted to it by Congress. This is true even if the consultation produces a treaty that is then ratified by the Senate. A treaty may obligate the U.S. to take specific actions, including

⁴ Brian Mannix and Susan Dudley, "The Social Cost of Carbon," *The Federalist Society Engage* Vol 15, Issue 1, July 2014. <https://fedsoc.org/commentary/publications/the-social-cost-of-carbon>. See also: Public Interest Comment on *The Interagency Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Executive Order No. 12866*, February 26, 2014. Available at: https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/OMB_2013-0007_SCC.pdf.

legislation. But it cannot eliminate the Constitutional requirement for bicameral enactment of legislation, nor can it nullify the Constitutional guarantees of due process for U.S. citizens. Until it is instructed by Congress to do otherwise, EPA needs to justify its actions under CAA §311(d) by using domestic costs and domestic benefits.

Public vs. Private Discount Rate

EPA proposes to go back to using the standard 3 percent and 7 percent discount rates for evaluating future benefits and costs, which is a useful step. However, it should also consider the possibility that these discount rates are inappropriate for evaluating rules that impose capital costs on the private sector. Many households do not have unencumbered access to capital markets, and they have effective discount rates that are several times higher than 7 percent. By using an artificially low discount rate EPA is severely undercounting the costs that households—especially poorer households—will bear as a result of the CPP.⁵

Public vs. Private Benefits

One result of the use of artificially low discount rates is the phenomenon of so-called “private benefits.” These are benefits that accrue to individuals when a regulation forces them to do something that they would prefer not to do. In other words, private benefits are inconsistent with the axiomatic foundations of benefit-cost analysis. It is not legitimate to “correct” the preferences of consumers and attribute regulatory benefits to them that they do not actually experience as such.

Any truthful analysis of benefits and costs will tell us what consumers think, not what the regulator thinks consumers should think. We do not allow the government to change the results of elections because of some theory of irrational and biased voters; neither should we allow it to distort consumers’ revealed preferences in an economic analysis.⁶

Generally, if an economic model generates private benefits by compelling consumers and businesses to act contrary to their own perceived best interest, it should be taken as an indication that the model is wrong—not that the regulated public is wrong. Using a more accurate, empirically based, discount rate would go a long way to correcting the errors in the CPP RIA.

⁵ Sofie E. Miller, “One Discount Rate Fits All? The Regressive Effects of DOE’s Energy Efficiency Rule,” *Policy Perspectives*, Vol. 22. <http://journal.policy-perspectives.org/article/view/15110>.

⁶ Brian F. Mannix and Susan E. Dudley, “The Limits of Irrationality as a Rationale for Regulation.” *Journal of Policy Analysis and Management* 34:705–12, 2015.

Co-Benefits

The CPP RIA also makes claims about the “co-benefits” that will be realized from the CPP rule. These are implausible for a variety of reasons, but the point I want to emphasize here is that they arise from a biased, and therefore illegitimate, analytical practice. Even the term, co-benefits, is a clue that the analysis sought to identify good side-effects from regulation, and ignored any bad side-effects. The RIA makes no mention of any co-costs, or negative co-benefits.

Yet we do not have to look far to find some negative co-benefits that could—and in two cases did—make the CPP appear undesirable. President Obama took a trip to Alaska to promote the CPP, and was greeted enthusiastically. But the enthusiasm for the rule in Alaska was not because of the benefits it produced, but rather it was the fact that the President exempted Alaska from having to comply. He also exempted Hawaii. Why?

The main concern of the Alaskans I spoke with, however, was not the glaciers; rather, it was the fate of the Susitna River. Recently the Alaskan Energy Authority has revived a proposal originally made by the U.S. Department of the Interior: the Susitna Hydroelectric Project. If built, it will be the most expensive hydroelectric dam ever built in North America, and it will supply power to Alaska’s central railbelt, where most of the state’s population lives.

There are serious environmental concerns about the project. Like many Alaska rivers, “The Su” flows two ways: the water flows downstream to the ocean; but vast quantities of nutrients from the ocean flow upstream, in the form of salmon, into the interior. The salmon spawn there, and die, and feed the eagles and the bears and ultimately the entire ecosystem—which otherwise, having been scraped clean by glaciers, might be rather barren. Many Alaskan environmentalists view the salmon as the very roots of the trees of the forests, and adamantly oppose damming the Su.

The energy options in Hawaii look a little different. That state’s high cliffs (pali) are ideally situated to catch the ocean breezes, and could, at great expense, supply most of Hawaii’s electricity demand. But many residents recoil at the sight of the high ridges bristling with wind turbines, and at the death toll the turbines take on the native birds, including Hawaii’s state bird, the beloved nene. If the president had capped fossil-fueled power there, many more Hawaiian ridges would likely become covered with wind turbines.

Of course, there are also difficult trade-offs to be made in the contiguous 48 states. In addition to higher utility bills and lower reliability, the Clean Power Plan may force states to choose energy options that are more environmentally damaging than the existing fossil-fueled infrastructure. But with numerous power

producers, interconnected grids, a maze of state plans, and linked carbon markets, the chain of cause and effect will be more variegated and difficult to trace. In a benefit-cost analysis, as in politics, this complex terrain makes it easier to engage in a game of smoke and mirrors. Regulatory agencies can make grand claims about the benefits that will flow from their good intentions, while finding other parties or other factors to blame for any “unintended” adverse consequences. When bad things happen, the president will have plausible deniability.

In contrast, Alaska and Hawaii both have “island” power systems, where the consequences of capping carbon will be all too easy for everyone to see. The president did not want to be greeted in Alaska with “Don’t Dam the Su” demonstrators; neither, should he decide to retire in Hawaii, would he want the carcasses of dead nene laid at his door.⁷

Any benefit-cost analysis has to draw boundaries in order to be manageable, but the process should be a neutral one. It is not acceptable to selectively include co-benefits without making a commensurate effort to also include co-costs, or negative co-benefits, that might paint a different picture.⁸ In the 2015 CPP RIA it appears that EPA went to great efforts to identify co-benefits while ignoring negative benefits—even though it was forced to avoid them in two states favored by the president.

Conclusion

EPA’s 2015 RIA is so flawed that the CPP should be repealed as unsupported by a reasoned analysis of benefits and costs. EPA should continue to do analysis of climate change, including the SCC. But if it acts to limit GHG emissions under the Clean Air Act, it should do so in the interests of the United States, until legislative action gives it another mandate.

⁷ Brian Mannix, “Alaska is Exempt!” <https://fedsoc.org/commentary/blog-posts/alaska-is-exempt>.

⁸ Dudley, S., Belzer, R., Blomquist, G., Brennan, T., Carrigan, C., Cordes, J... Zerbe, R. (2017). Consumer’s Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker. *Journal of Benefit-Cost Analysis*, 8(2), 187-204. doi:10.1017/bca.2017.11. available at: <https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/article/consumers-guide-to-regulatory-impact-analysis-ten-tips-for-being-an-informed-policymaker/FAF984595B822A70495621AEA7EF7DEB>