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Parsing a Pair of Two-track Regulatory Actions: Part I — Economic Analysis at EPA

In brief…

EPA is simultaneously pursuing two related initiatives: a revision of its longstanding Guidelines for Economic Analysis, and an NPRM on the use of such analyses in rulemakings under the Clean Air Act. Meanwhile, CEQ has been making major revisions to its regulations governing NEPA for all federal agencies, but the president just signed an Executive Order telling agencies to try to work around NEPA. What's going on? Part I of this two-part commentary looks at EPA.

By: Brian F. Mannix | June 17, 2020

There can be multiple ways to accomplish a goal and, given the substantial litigation risk facing many of the administration's regulatory actions, it would not be surprising if agencies sometimes chose to follow a "belt and suspenders" strategy to avoid being embarrassed. But in two ongoing cases something more complex seems to be going on. Leaving aside the substance of the actions for now, this two-part commentary takes a look their structure.

EPA: Analyses *should* follow our guidance, and *must* follow our rules

During the Trump administration several regulatory agencies have sought to impose more rigorous requirements for their use of economic analysis along with greater transparency about the assumptions that go into it; EPA is proceeding on two fronts.

Updated Guidelines for Preparing Economic Analysis

EPA's 300-page *Guidelines for Preparing Economic Analyses* are ten years old. They are used internally by the agency, but are also influential more broadly among practitioners of benefit-cost analysis. Recently the agency submitted a draft revision of the guidelines to a special panel of its Science Advisory Board for review. The revisions are intended to bring the *Guidelines* up to date with the environmental economics literature. The SAB panel recently made public some preliminary recommendations in a deliberative draft report.

The *Guidelines* are not legally binding regulations. As administrative guidance, they do not impose obligations on the public. In some contexts agency guidance can be interpreted as imposing legally enforceable obligations on the agency, but the EPA *Guidelines* were not written that way and have never

been used that way in the past. Economic analysis requires the application of professional judgement, and EPA's *Guidelines* are mostly written to give useful advice to analysts rather than to cabin the agency's discretion as it writes rules or takes enforcement actions.

In contrast, there are multiple Executive Orders, from multiple presidents, instructing regulatory agencies on the use of benefit-cost analysis to inform regulatory decisions. In the Trump administration, agencies have been asked to take steps to further institutionalize that longstanding practice. The *Guidelines* provide analysts with best practices for conducting analysis; they do not require decision- makers to use the analysis in any particular way. So EPA initiated a separate rulemaking.

A Procedural Rule under the Clean Air Act

Two years ago EPA's Policy Office – the same office that issues the Economic Analysis Guidelines – requested public comment in an ANPRM, *Increasing Transparency in Considering Costs and Benefits in the Rulemaking Process*. It made an important distinction between the two documents:

> In this ANPRM, EPA is taking comment on the role that regulatory analysis or aspects of that analysis play in decision making consistent with statutory direction, not what these existing guidance documents recommend about how best to conduct the underlying analysis of regulatory actions.

This distinction resembles the longstanding distinction between risk assessment and risk management. EPA is rightly trying to keep its *Guidelines* focused on objective, scientific, fact-finding methods. It chose to use a separate rulemaking to codify the ways that analysis is used to inform regulatory decisions, and to obligate the agency to comply with those procedures.

In a comment on the ANPRM, and also in a recent article and a working paper, I explored some of the legal questions surrounding the codification of benefit-cost balancing principles for regulators. I suggested that such a codification could be done centrally, similar to CEQ's NEPA regulations, which replaced myriad different agency practices and procedures.

EPA chose to go in a different direction, and to codify rulemaking procedures under each of the many statutes the agency implements. Last week EPA's Air Office, rather than its Policy Office, published an NPRM, *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*. While EPA is accepting comments (due July 27) on the NPRM, it does not believe that public notice and comment is required:

> This is a proposed rulemaking of agency organization, procedure or practice. This proposed procedural rule would not regulate any person or entity outside the EPA and would not affect the rights or obligations of outside parties. As a rule of Agency procedure, this rule is exempt from the notice and comment requirements set forth in the Administrative Procedure Act. See 5 U.S.C. 553(b)(A). Nonetheless, the Agency voluntarily seeks comment because it believes that the information and opinions supplied by the public will inform the Agency's views.

Note that the Department of Transportation has also adopted new rulemaking procedures that apply to the FAA, NHTSA, and other regulatory agencies within the Department. Initially, it did so through a series of Directives from Secretary Chao; more recently it published a final rule that codifies all those procedures Department-wide. Unlike EPA, it did not go through public notice and comment, and its reasoning is similar to EPA's:

> Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(3)(A). Since this final rule merely incorporates existing internal procedures applicable to the Department's administrative procedures into the Code of Federal Regulations, notice and comment are not necessary.

Left unsaid is another consequence of the decision to frame these rules as relating solely to agency organization, procedure, or practice: neither EPA's nor DOT's final rules will be subject to the Congressional Review Act. But it is not clear how much protection that will provide. If a new Congress were to use CRA's fast-track process to enact a resolution of disapproval, notwithstanding the usual rule allowing for filibusters, and a new president signed it, no court would then have any basis for preserving the disapproved rules. Alternatively, a new administration could repeal these procedural rules administratively, as expeditiously as they are adopted. Still, it is clear that the Trump administration is trying to give some durability, as well as some teeth, to the procedural requirements for the use of economic analysis to inform regulatory decisions. In the months ahead we may see other agencies adopt similar rules.