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Public Interest Comment¹ on
The Environmental Protection Agency's Advanced Notice of Proposed Rulemaking

Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process

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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 advanced notice of rulemaking (ANPRM) on "increasing consistency and transparency in considering costs and benefits in the rulemaking process" does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of EPA's rulemaking process on the welfare implications of future regulations.

Introduction

In this ANPRM, EPA seeks comment on the appropriate role for regulatory analysis in decisions authorized by the different statutes EPA administers. It explicitly does not seek comment on "how best to conduct the underlying analysis of regulatory actions."³

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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³ 83 FR 27524

The notice recognizes that:

Most statutory provisions require or allow some consideration of cost and benefits when setting regulatory standards to achieve public health and environmental benefits, but there can be a significant variation in terminology and specificity provided in each law regarding the nature and scope of cost and benefit considerations.⁴

For example, some statutes direct EPA to set standards that are “appropriate,” “reasonable,” “practicable,” “achievable,” “feasible,” etc, and others refer to available technologies. Even different sections of the same statute can use different terminology, leading to consideration of “a variety of concepts of ‘costs’.”⁵

The ANPRM seeks comment on the “perceived inconsistency and lack of transparency in how the Agency considers costs and benefits in rulemaking, potential approaches for addressing these concerns, and the scope for issuing regulations to govern EPA’s approach in future rulemakings.”⁶ This comment focuses largely on the first two issues, citing extensively to a recent article authored by 19 regulatory analysis experts, “Consumer’s Guide to Regulatory Impact Analysis: Ten Tips for Being an Informed Policymaker” (“Consumer’s Guide”), attached herein.⁷

Regulatory impact analyses are invaluable tools, but must be more transparent and consistent.

As the Consumer’s Guide observes:

Regulatory impact analyses (RIAs) weigh the benefits of regulatory proposals against the burdens they impose. They are invaluable tools for informing decision makers about the effects of regulatory choices; even regulatory decisions that are ultimately made on political, legal, ethical, or other grounds will benefit from the structured evaluation of tradeoffs and alternatives that a good RIA provides.

⁴ 83 FR 27524

⁵ 83 FR 27526

⁶ 83 FR 27527

⁷ Dudley, S., Belzer, R., Blomquist, G., Brennan, T., Carrigan, C., Cordes, J., Cox, L.A., Fraas, A., Graham, J., Gray, G., Hammitt, J., Krutilla, K., Linquti, P., Lutter, R., Mannix, B., Shapiro, S., Smith, A., Viscusi, W.K., 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.

https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FAF984595B822A70495621AEA7EF7DEB/S2194588817000112a.pdf/consumers_guide_to_regulatory_impact_analysis_ten_tips_for_being_an_informed_policymaker.pdf

Nevertheless, lack of transparency (regarding assumptions, methods, uncertainties, etc.) and inconsistency within and across analyses can make them difficult to comprehend and interpret. Applying different methods and decision rules to different policy areas can also lead to inconsistent policies, and the devotion of too many resources to one area and not enough to another. This leads to a misapplication of scarce resources and fewer public health and environmental protections than could be achieved through a more consistent set of analyses and approaches.

Transparency in regulatory analysis is essential if policy makers and others are to understand the assumptions and inputs underlying estimates, and to judge the objectivity or accuracy of the analysis and its conclusions. The goal of regulatory impact analysis should not be to compel decisions, but to provide information on the likely consequences of different possible actions. Yet, RIAs sometimes appear to be “used to justify decisions already made, rather than to inform those decisions.”⁸ To address these concerns, EPA should first commit to the principles expressed in Executive Order 12866, which directs agencies to:

promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.⁹

Recent court decisions recognize the importance of benefit-cost analysis for informing regulatory decisions.

Courts are increasingly reading ambiguous language in environmental statutes to support and even demand analysis of benefits and costs. In light of these recent decisions, EPA should reexamine its statutes and interpret them to permit rigorous benefit-cost analysis to the extent the law allows.¹⁰

⁸ Carrigan, Christopher, and Stuart Shapiro. 2016. “What's Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis.” *Regulation & Governance*. DOI: 10.1111/rego.12120.

⁹ Exec. Order No. 12866, Regulatory Planning and Review, §1(a).

¹⁰ For further discussion, see John D. Graham and Paul R. Noe, “A Paradigm Shift in the Cost-Benefit State,” RegBlog, University of Pennsylvania Law School (April 26, 2016), Brian Mannix, “Benefit-Cost Analysis as a Check on Administrative Discretion,” forthcoming *Supreme Court Economic Review* (2018), GW Regulatory Studies Center, Society for Benefit-Cost Analysis & Administrative Conference of the United States conference “New Developments in Regulatory Benefit-Cost Analysis,” (2017) video <https://regulatorystudies.columbian.gwu.edu/new-developments-regulatory-benefit-cost-analysis>

- In 2001, the Supreme Court ruled in *Whitman v. American Trucking Associations, Inc.* that EPA could not consider costs as a factor in setting ambient air quality standards without a clear “textual commitment” in the statute. In a concurring opinion, however, Justice Breyer argued that “other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.”¹¹
- In *Entergy Corp. v. Riverkeeper* in 2009, the Supreme Court ruled that silence regarding benefit-cost analysis did not preclude its use. It deferred to EPA’s interpretation of a Clean Water Act requirement to base standards on “best available technology to minimize adverse environmental impact” to conclude that “it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden.”¹²
- In 2015, in *Michigan v. EPA*, the Court went a step further to read the phrase “appropriate and necessary” in a section of the Clean Air Act as a statutory mandate *requiring* EPA to weigh costs against benefits. Justice Scalia wrote for the majority that “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.”¹³

Cass Sunstein reviews these and other cases and finds that absent solid justification, “agencies should be found to have acted arbitrarily in failing to quantify costs and benefits and to show that the benefits justify the costs.” He explains:

The central reason is that for all its limitations, cost-benefit analysis is the best available method for testing whether regulations increase social welfare. Whenever a statute authorizes an agency to consider costs and benefits, its failure to quantify them, and to weigh them against each other, requires a non-arbitrary justification.¹⁴

¹¹ *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

¹² *Entergy v. Riverkeeper*, 556 U.S. 208 (2009).

¹³ *Michigan v. Environmental Protection Agency*, 576 U.S. ____ (2015).

¹⁴ Sunstein, Cass R., Cost-Benefit Analysis and Arbitrariness Review (March 20, 2016). Harvard Public Law Working Paper No. 16-12. Available at SSRN: <https://ssrn.com/abstract=2752068> or <http://dx.doi.org/10.2139/ssrn.2752068>

To increasing consistency and transparency in the rulemaking process, EPA should interpret ambiguous statutory language to *require* consideration of benefits and costs.

The ANPRM asks “to what extent should standard benefit-cost analysis principles (e.g., setting a standard to maximize net benefits) guide the selection of specific statutorily required metrics and thresholds (e.g., “reasonableness”) against which to measure the effects of a proposed regulation?”¹⁵ **To the maximum extent possible, EPA should interpret its various statutory standards through a lens of standard benefit-cost analysis principles.**

Recent court decisions and the longstanding, bipartisan support¹⁶ for regulatory impact analysis recognize that benefit-cost analysis is an invaluable tool for informing decision makers about the effects of regulatory choices. However, this does not imply rigid or mechanical quantification of effects. As OMB Circular A-4 on “Regulatory Analysis” recognizes, “a complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs.”¹⁷

Elements of a consistent and transparent regulatory impact analysis

Regulatory impact analysis includes three important elements: 1) identification of the core problem the regulation seeks to address (the compelling public need addressed in the E.O. 12866 quote above), 2) examination of alternatives, and 3) estimation of benefits and costs of those alternatives.¹⁸

The Consumer’s Guide offers ten tips for policymakers and stakeholders reviewing RIAs as consumers. These tips follow the key elements of an RIA as expressed in peer-reviewed OMB documents,¹⁹ and are also relevant to the questions EPA poses in the ANPRM.

¹⁵ 83 FR 27527

¹⁶ Every president since Carter has asked agencies to assess the benefits and costs of regulation before they are issued. Executive Order 12866, issued by President Clinton in 1993, continues to guide regulatory development and analysis.

¹⁷ Office of Management and Budget (OMB). 2003. “Circular A-4, Regulatory Analysis.” Last modified September 17, 2003. <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

¹⁸ Office of Management and Budget (OMB). 2011b. “Circular A-4, Regulatory Impact Analysis: A Primer.” Last modified August 15, 2011. https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

¹⁹ See Office of Management and Budget (OMB): “Circular A-4, Regulatory Analysis.” <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf> (2003); “Agency Checklist: Regulatory Impact Analysis.” https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf (2010); “Circular A-4, Regulatory Impact Analysis: Frequently Asked Questions (FAQs).” https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf (2011); “Circular A-4, Regulatory Impact Analysis: A Primer.”

Tip #1 cautions against “anecdotal observations that may illustrate *symptoms* of a problem without articulating the underlying *cause* of those symptoms.” RIAs should start with a recognition of the value of “competition, [in which] the exchange of goods and services between willing buyers and sellers uses price signals to allocate scarce resources to their most valued uses, to encourage innovation, and to meet consumer needs.” This first step is essential to ensuring consistency and transparency in regulatory analysis. Tip #1 warns that “regulatory actions that do not explicitly point to a failure of private markets or public institutions underlying the need for action are likely to produce lower net benefits than those that correctly identify and seek to remedy the fundamental problem.”

Tip #2 encourages an objective, policy-neutral evaluation of the relative merits of reasonable alternatives. RIAs should transparently consider plausible alternatives, and not focus only on a preferred regulatory approach. They should also examine whether the identified alternatives are likely to target the identified failure of private markets or public institutions.

Tip #3 focuses on the importance of a reasonable “counterfactual” against which benefits and costs are measured. This is important to ensure consistency across actions and to present a transparent and realistic picture of the impacts of alternative approaches. The “baseline” should be a reasonable reflection of the way the world would look absent the proposed action, and include estimated benefits and costs of other regulations.²⁰

Tip #4 emphasizes the importance of incremental analysis. Totals and averages can obscure relevant distinctions and trade-offs. Especially for a rule with multiple components or different degrees of stringency, a transparent RIA should estimate the marginal benefits and costs of key elements or levels, and not just present totals or averages.

Tip #5 recognizes that all estimates involve uncertainty, so overly precise estimates of benefits and costs are misleading and can obfuscate important information. An RIA should present unbiased “expected values,” as well as ranges for costs and benefits, and sensitivity analysis that illuminates the effect key assumptions, data, and models have on estimates. Reliance on worst-

https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf (2011).

²⁰ Michael Livermore & Richard Revesz say: To guard against double counting the ancillary benefits, one needs to make sure that after each regulation is promulgated, a new baseline level of pollution is computed. Then, the further benefits from subsequent regulations need to be determined by reference to this baseline. “Rethinking Health Based Standards,” NYU Law Review (2014)
<http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-4-1184-Livermore-Revesz.pdf>

case or “health-protective” assumptions leads to inconsistency across policies, and can ultimately harm public health.²¹

Tip #6 argues specifically for transparency and objectivity of analytical inputs. Related to EPA’s concurrent rulemaking on science transparency,²² RIAs should include a clear presentation of alternative plausible models and assumptions used to predict regulatory outcomes.

Tip #7 discusses benefits estimation, emphasizing the importance of understanding how projected benefits relate to stated objectives. It argues that “the analysis should lay out causal linkages between regulatory requirements and desired outcomes, discuss the evidence supporting these linkages, and show how they differ across alternatives.”

More than half of all the benefits EPA estimates from its regulations over the last decade derive from “co-benefits” from reducing air emissions as an ancillary effect of the required action.²³ The Consumer’s Guide expresses caution,

particularly when the co-benefits are much larger than the direct benefits, if the direct benefits on their own are significantly less than the estimated costs, or if the co-benefits appear to materialize “for free.” The presence of co-benefits almost always signals that the agency is counting costs and benefits that arise outside of the specific statutory authority that the regulation operationalizes. That is not a problem per se; indeed, all significant benefits and costs should be counted. But in such cases, one might ask why this regulation is the best way to achieve those co-benefits. Generally, one would expect that regulation targeted directly at a particular outcome can achieve it more cost-effectively than one that achieves it circuitously as a side effect (co-benefit) of an unrelated regulation, and a sound analysis must make a thorough inventory of both the harmful, as well as the beneficial, consequences of each alternative.

Tip #8 reinforces Circular A-4 and EPA guidance that cost estimates should ideally reflect opportunity costs (the lost value of the best alternative forgone). It recognizes, however, that compliance expenditures “are often a reasonable proxy for welfare changes that are passed through to consumers, to employees, and to business owners.”

²¹ Susan E. Dudley and George M. Gray. 2012. “Improving the Use of Science to Inform Environmental Regulation,” in *Institutions and Incentives in Regulatory Science*, Lexington Books, Jason Johnston ed.

²² See our public interest comment on EPA’s “Proposed Rule Strengthening Transparency in Regulatory Science,” Susan E. Dudley, May 18, 2018. <https://regulatorystudies.columbian.gwu.edu/public-interest-comment-environmental-protection-agency%E2%80%99s-proposed-rule-strengthening-transparency>

²³ See our public interest comment on OMB’s 2017 annual report to Congress. Brian F. Mannix, Sofie E. Miller & Susan E. Dudley. <https://regulatorystudies.columbian.gwu.edu/public-comment-ombs-2017-draft-report-congress-benefits-and-costs-federal-regulations>

Tip #9 focuses on how benefits and costs are distributed. Transparency and consistency demand evidence on the incidence of benefits and costs so policymakers and others can understand how they affect different populations. On the question of whether to consider global or domestic benefits, it notes that the purpose of the program (as directed by legislation) is relevant. And “if the benefits are ‘global,’ accruing to foreign countries, but the costs are borne domestically,” it is important to be transparent about “the net effect on the U.S.”²⁴

Tip #10 addresses the importance of presenting benefits and costs symmetrically. For example, they should be measured from the same baseline and over the same time frame, and the discount rate used to convert the future streams of benefits and costs to present values should generally be the same. Since the discount rate used can have a very large impact on the present value of estimates, an RIA should clearly defend the use of different discount rates applied for costs and benefits (and present the effects of alternative choices in sensitivity analysis).

The boundaries of the analysis should be framed symmetrically. The Consumer’s Guide notes:

No analysis will ever be complete, of course. But major elements should not be missing on one side of the equation, or overemphasized on another. For example, if the analysis presents evidence of co-benefits, are ancillary costs or countervailing risks examined to the same extent?

Conclusion

Regulatory impact analysis is essential for transparently evaluating the pros and cons of alternative policy choices before they are put in effect. Presidents of both parties have long required it, and courts are increasingly expecting important regulatory decisions to be supported by an analysis of benefits and costs. While it cannot be reduced to a mechanical exercise that can be prescribed by a cookbook, consistency and transparency in regulatory analysis can greatly improve policy decisions. Inconsistent analytical approaches across programs can lead to inefficient use of resources and poorer environmental and public health outcomes. Lack of transparency can hide important information from policy makers and others who may have valuable input or an interest in outcomes.

²⁴ Art Fraas, Randall Lutter, Susan E. Dudley, Ted Gayer, John Graham, Jason F. Shogren, and W. Kip Viscusi. 2016. “Social Cost of Carbon: Domestic Duty.” *Science*, February 5, 2016. Accessed January 16, 2017. <http://science.sciencemag.org/content/351/6273/569.2>.

The OECD observes that an RIA’s “most important contribution to the quality of decisions is not the precision of the calculations used, but the action of analyzing—questioning, understanding real-world impacts and exploring assumptions.”²⁵ The Consumer’s Guide agrees, but observes

Despite this informational purpose, RIAs can be opaque, complex and even intimidating. Wittingly or unwittingly, they may be written in a way that obfuscates important information or skews the analysis to support a particular outcome.

EPA’s efforts to improve the transparency and consistency of the analysis supporting its significant regulations are welcome, and it should take seriously the input it receives on this ANPRM. Whether an EPA rulemaking is the appropriate vehicle for harmonizing its practices we will leave to other commenters. However, as a first step, EPA should review all its statutory authority and, to the maximum extent possible, interpret its statutory standards through a lens of standard benefit-cost analysis principles.

²⁵ Organisation for Economic Co-operation and Development (OECD). 2002. *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*. Paris: OECD Publishing.
<http://dx.doi.org/10.1787/9789264177437-en>. P. 47