June 10, 2021

Mr. Leif Hockstad
Office of Air Policy and Program Support
Office of Air and Radiation
U.S. EPA
Mail Code 6103A
1200 Pennsylvania Avenue NW
Washington, DC 20460

*Submitted via Regulations.gov*

RE: Docket ID No. EPA-HQ-OAR-2020-0044, "Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"

Mr. Hockstad:

I appreciate this opportunity to provide comments[1] to the Environmental Protection Agency on the interim final rule rescinding the benefit-cost analysis rule. My comments begin on the next page and are a variation of the oral comments I provided at the June 9, 2021 hearing.

Sincerely,

Daren Bakst
Senior Research Fellow in Regulatory Policy Studies
Thomas A. Roe Institute for Economic Policy Studies
Institute for Economic Freedom
The Heritage Foundation
daren.bakst@heritage.org
202.608.6163

[1] The views I have expressed in this comment are my own and should not be construed as representing any official position of The Heritage Foundation.

Comment Regarding the EPA's Interim Final Rule "Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"

*Daren Bakst*
*June 9, 2021*

Thank you for this opportunity to provide comments.[2]

My name is Daren Bakst and I'm a Senior Research Fellow at The Heritage Foundation. The views I express in this statement are my own and shouldn't be construed as representing any official position of The Heritage Foundation.

## The BCA Rule was Rational; Claiming Otherwise is Irrational

Making it possible for the American public, including outside experts, to understand how the EPA makes its regulatory decisions is a critical goal. If we are going to have meaningful public participation in the rulemaking process, including through notice and comment, the public needs to know and understand what the EPA is proposing, and how the agency is justifying its actions.

Without this requisite information, the regulatory process becomes mere window dressing. Further, it deprives the EPA of receiving much-needed public input that can help guide and improve regulatory proposals. The regulatory process is not an obstacle that has to be overcome; it exists to improve the quality of the regulatory decisions made by agencies, including the EPA.

So when the EPA finalized its benefit-cost analysis rule (BCA rule) that promotes greater transparency, sound science, and consistency in Clean Air Act rulemakings, this was a welcome improvement for those seeking to improve the regulatory process and promote greater public trust in the work of the EPA.

It therefore is disappointing that the EPA asserts that this entire rule should be rescinded. It also is irrational itself to claim, as the EPA does in its interim final rule, that there was no rational basis for the BCA rule. A rule that improves the rulemaking process by improving transparency and sound science has more than enough justification because of those reasons alone. It goes far beyond having a rational basis.

Here are four examples providing additional context to show why the BCA rule is not just rational but also a critical and compelling action:

1) Clean Air Act rules are some of the most prevalent and important rules issued across the entire government. According to OMB in its 2017 regulation report to Congress, "Across the Federal government, the rules with the highest estimated benefits as well as the highest estimated costs come from the Environmental Protection Agency and in particular its Office of Air and

[2] These comments are a variation of the oral comments presented at the June 9, 2021 hearing. It therefore is written in a manner consistent with an oral statement.

Radiation."[3]

2) When it comes to even the most basis benefit-cost analysis within Clean Air Act rulemaking, there isn't consistency. The EPA's MATS Rule highlights this problem. In 2012, the EPA decided that it didn't need to consider costs in promulgating the rule. These costs were as much as 2,400 times greater than the direct benefits.[4]

Speaking of "rational," the U.S. Supreme Court in rejecting the EPA's decision to ignore costs with the MATS rule explained, "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."[5]

3) There are even more irrational actions. The EPA has often finalized rules without even justifying the purpose of the rules. The MATS Rule is certainly a good example, where about 99.9 percent of the alleged benefits were from ancillary benefits.[6] This abuse of ancillary benefits has not been some isolated practice. According to NERA Consulting data, in just the two-year period from 2009-2011, the EPA didn't quantify *any* direct benefits for six major Clean Air Act rules.[7]

In an astonishing 21 of the 26 major non-particulate matter rulemakings analyzed from 1997-2011, the particulate matter ancillary benefits accounted for more than half of the total benefits.[8]

Despite these irrational and inconsistent practices, the BCA rule didn't prescribe any specific requirement on the EPA as it relates to how to consider ancillary benefits or provide a formula for when a rule "passes" a benefit-cost analysis. The EPA in the BCA rule merely required the agency to better inform the public about basic information contained in benefit-cost analysis, and to differentiate in a clear fashion (not buried somewhere) what the ancillary benefits are in a given rule.

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[3] Office of Information and Regulatory Affairs, "2017 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," Office of Management and Budget, 2017, https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5885-REV_DOC-2017Cost_BenefitReport11_18_2019.docx.pdf (accessed June 9, 2021).

[4] Michigan v. E.P.A., 576 U.S. 743, 748, 135 S. Ct. 2699, 2705, 192 L. Ed. 2d 674 (2015), https://www.law.cornell.edu/supct/pdf/14-46.pdf (accessed June 9, 2021).

[5] Ibid.

[6] Environmental Protection Agency, "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," Federal Register, Vol. 85, No. 100, (May 22, 2020), pp. 31286-31320, https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-08607.pdf (accessed June 9, 2021).

[7] Anne E. Smith, "An Evaluation of the $PM_{2.5}$ Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations," NERA Economic Consulting (December 2011), https://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf (accessed June 9, 2021).

[8] Anne E. Smith, "An Evaluation of the $PM_{2.5}$ Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations," NERA Economic Consulting (December 2011), https://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf (accessed June 9, 2021).

4) As explained by the EPA in the BCA rule, the CAA has specific statutory language, like with the "appropriate and necessary" language that indicates a requirement for consideration of costs and benefits. Therefore, the BCA rule was not merely some response to clarify, in part, how to comply with executive orders, but how best to comply with the statute itself.

**The BCA Rule is Necessary**

The interim final rule asserts that the BCA rule wasn't necessary because the agency already conducts analysis that "warrants such analysis." The agency is arguing that it doesn't think that any additional transparency and consistency requirements beyond what is already imposed on the agency are warranted. This is particularly troubling given how modest the requirements are in the BCA rule and the need for better quality information. It also does a disserve to the public, the agency, and to the environment.

There are multiple places in the interim final rule where the agency doesn't seem to understand what is meant by transparency or simply fails to appreciate its importance. For example, the agency states,"These presentational requirements are duplicative of existing information provided because the EPA already presents these types of benefits in disaggregated form in Regulatory Impact Analyses (RIAs), so there was no lack of transparency with respect to these subsets of benefits."

Transparency isn't merely about throwing out information. It's also about presenting information in an easy-to-understand manner and in a location where it can easily be found. The RIAs themselves are separate documents from rules, which assuming they exist, are not easily found. Even when they can be found, they are far from easy-to-understand for anyone, even experts. And with poor information, the public can be misled, such as thinking the MATS Rule is really about benefits from reducing mercury emissions.

Presenting information in a clear manner is not a new or novel concept. In fact, the Information Quality Act requires that federally disseminated information be objective, which includes a presentation requirement, meaning the information must be "presented in an accurate, clear, complete, and unbiased manner."[9]

This confusion or lack of appreciation for transparency is a major problem of the interim final rule. It is a problem that the agency should appreciate and reconsider as it takes any further action.

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[9] Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication," Federal Register, Vol. 67, No. 36, (February 22, 2002), pp. 8451-8460, https://www.federalregister.gov/documents/2002/02/22/R2-59/guidelines-for-ensuring-and-maximizing-the-quality-objectivity-utility-and-integrity-of-information (accessed June 9, 2021). *See also*, Richard Belzer, "Strengthening the Information Quality Act to Improve Transparency and Regulatory Quality," The Federalist Society, April 30, 2021, https://fedsoc.org/commentary/fedsoc-blog/strengthening-the-information-quality-act-to-improve-transparency-and-regulatory-quality (accessed June 9, 2021) and Daren Bakst, "Strengthening the Information Quality Act to Improve Federally Disseminated Public Health Information," 75 FOOD & DRUG L.J. 234 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753181 (accessed June 9, 2021).

Finally, the BCA rule is necessary because it would codify many critical requirements. The interim final rule discusses executive orders and OMB Circular A-4, but the BCA rule goes further by making the requirements enforceable against the agency through the CAA. In other words, the agency was making itself accountable for ensuring that CAA rulemaking reflects best practices, sound science, and sound rulemaking. Through this interim final rule, the agency is deciding that it shouldn't have such accountability.

## III. Recommendations

**1) Change the Process**. If the agency wants to take action in connection with the BCA rule, it should follow a reasonable process in doing so. The EPA shouldn't make a major change, such as rescinding the BCA rule, through an interim final rule. This action by itself is an indication that the EPA has already made up its mind on what to do. In developing the benefit-cost analysis rule, the EPA went through a proposed rulemaking process. In getting rid of the rule, or revising it, the agency should go through a similar process.

**2) Withdraw the Interim Final Rule.** The EPA should withdraw the interim final rule. The goal of transparency has long been a bipartisan objective and this modest rule is one step towards achieving that goal.

**3) At Most, Revise Don't Rescind the BCA Rule.** The interim final rule fails to make the case that the BCA rule wasn't rational, especially when looking at the rule in its entirety. It asserts questionable arguments on *specific* aspects of the rule. It therefore should revise the rule only to the extent necessary to address any concerns that remain after properly considering public comments. Instead of "throwing the baby out with the bathwater," the EPA should preserve the many provisions of the BCA rule that are not related to the specific concerns the agency described in the interim final rule.

Thank you.