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RE: "National Emission Standards for Hazardous Air Pollutants: Gasoline Distribution Technology Review and Standards of Performance for Bulk Gasoline Terminals Review," **Docket ID No.** EPA-HQ-OAR-2020-0371 FRL-8202-01-OAR

Dear Mr. Feinberg:

I am pleased to submit comments¹ regarding proposed amendments to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Gasoline Distribution facilities and the Standard of Performance for Bulk Gasoline Terminals.

In summary, my comment will focus on the following five key points:

1. The Regulatory Impact Analysis relies too heavily on theoretical impacts.
2. Offsetting the regulation costs using the potential value of recovered product is inappropriate.
3. Uncertainty around the social cost of carbon makes it an inappropriate tool for establishing a regulatory basis.
4. The regulation does not adequately account for business diversity among regulated firms.
5. The Regulatory Impact Analysis relies heavily on uncertain assumptions throughout its analysis.

While the best course of action would be to immediately cease all activities related to this proposed regulatory action, I urge the EPA to, at a minimum, pause the Office of Air Quality Planning and Standards work, and get a better grasp of the impact this proposed regulation will have on small and medium businesses and the American people by looking more deeply into the questions raised in this comment.

The Regulatory Impact Analysis Relies Too Heavily on Theoretical Impacts

As the proposed regulation describes, the costs and non-air quality health and environmental impacts should be taken into account when considering new regulatory actions. I would add

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.

further, that not only must they be considered but must be considered within the context of the real world.²

This proposed regulatory action, for example, builds its modeling around theoretical “model plants.” As described in section 3.2.3:

Model plants are the basis for this analysis due to the large number of affected facilities and the difficulties in conducting an analysis for each affected facility. Characteristics of the model plants include typical equipment, operating characteristics, and representative factors including baseline emissions and costs, emissions reductions, and product recovery resulting from each control option.

While using this method can help to understand the proposed regulatory action’s impact, it creates a gap between the theoretical and real-world impacts.

Washington bureaucrats and politicians too often ignore the intricacies of real world, complex systems and how their economic planning percolates through the economy. Indeed, such knowledge is impossible to ascertain, which is the why centrally planned economies always fail. In their pursuit of achieving some narrow policy goal, they often miss how their actions impact everyday Americans. They often do not account for the collateral economic damage to Americans that lies beyond the scope of the regulator’s theoretical framework. Given the many uncertainties, discussed below, which this proposed action relies upon, there is little doubt that this action, too, will result in unintended negative economic consequences.

Further, rather than relying on real-world data, as the Regulatory Impact Analysis’s (RIA) description of “model plants” acknowledges, the EPA relies on economic and behavioral models, which are built within a theoretical and/or empirical framework, using limited past data to help us understand the impact of the EPA’s proposed policy choices.³ These tools can certainly help policy makers understand the interactions within complex systems but cannot predict the future and thus are generally, though not exclusively, insufficient as the justification for regulatory action. Indeed, though robust economic modeling is a critical tool for policy makers, models still rely on assumptions, preferences, and data that is limited. These limitations manifest as biases and faults within the model. Section 5.2.2.3 describes some of the EPA’s acknowledged limitations, which will be discussed further below in addition to the problematic use of the Social Cost of Carbon.

An example of how this departure from the real world impacts the EPA’s impact analysis is when it absurdly assumes that consumers will be protected from any cost increases. The EPA’s cost analysis acknowledges that regulated entities “will incur total annualized costs of 0.42 percent of their revenue, with none exceeding 6.75 percent.” EPA then assumes that none of these costs will be passed on to consumers before also acknowledging that they could indeed be passed along. Specifically, the section titled “What are the economic impacts?” concludes this generically,

² For a discussion on how bureaucrats tend to ignore the distributional impacts of their regulatory actions, see Lisa Robinson, James Hammitt, and Richard Zeckhauser, “The Role of Distribution in Regulatory Analysis and Decision Making”, Harvard Kennedy School, Mossavar-Rahmani Center for Business, 2014 (https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Zeckhauser_final.pdf).

³ For a discussion of assumptions within economic models, see Sean Ross, “Economists’ Assumptions in Their Economic Models,” *Investopedia*, November 2, 2021, (<https://www.investopedia.com/ask/answers/032515/why-do-economists-build-assumptions-their-economic-models.asp>).

acknowledging impacts “regardless of whether they [the costs] are passed on to the purchaser or absorbed by the firms.”⁴

Either way, the analysis seems to assume that the \$18 million, absent product recovery, in total annualized costs, simply disappear—or more accurately, are so widely distributed that no one will feel the pain. This is a common mistake (or sleight of hand) among policy makers and regulators. While costs distributed throughout a supply chain or consumer base may not be felt in ways that can be attributed directly to a specific source, these costs do cause pain, especially in accumulation over time.

For example, those costs could result in reallocated capital that would result in losses somewhere. For example, a firm could decide, due to the regulation, against expanding operations, to put off investments that would yield additional efficiencies, or even in making upgrades that could achieve an environmental benefit. One cannot simply wand wave these away. The fact is that they will ultimately be paid for by American families and businesses somewhere.

Offsetting the Regulatory Costs Using the Potential Value of Recovered Product is Inappropriate

The EPA’s use of the of gasoline recovered to offset some of the regulatory costs is misapplied and creates uncertainty. It is presented as a theoretical co-benefit of the proposed regulatory action and is predicated on the idea that firms would not seek additional efficiencies and profit opportunities without government mandated actions to do so. Both assertions should be rejected as the basis for any regulatory actions.

A regulation should be considered on its own merit. The use of co-benefits to expand the alleged benefits of any action is inappropriate because it moves beyond the direct impact of a regulatory action and into the realm of assumption, bias, and tenuous legal authority⁵. Combined, this creates untenable uncertainty and opaqueness around a given regulatory action.

The use of the “product recovery” value to offset the cost of these proposed regulations is a prime example of this tactic. It combines a series of assumptions about a firm’s behavior (e.g. it would not seek to maximize profits or to achieve business efficiency without a government mandate), and assigns a monetary value that a firm would accrue by engaging in the mandated activity. It then captures that value and assigns it as an offset to the regulatory costs. This is a classic co-benefit.

Additionally, the analysis makes an array of illogical assumptions about a firm’s behavior. As the Regulatory Impact Analysis provides, regulatory mandates do create opportunity costs. If the value of the gasoline recovered is greater than the cost of the compliance activity, then a firm would likely apply the environmental control absent a mandate.

⁴ <https://www.federalregister.gov/d/2022-12223/p-301>

⁵ For a discussion of the problems with co-benefits, see C. Boyden Gray, “EPA’s Use of Co-Benefits,” The Federalist Society, September 24, 2022, (<https://fedsoc.org/commentary/publications/epa-s-use-of-co-benefits>).

Table 3-27 of the Regulatory Impact Analysis shows that the EPA analysis of the proposed rule cuts the total annualized cost from \$18,000,000 to a benefit of \$3,400,000 because of these recovered costs.

This basis assumes that the regulated firm would not seek efficiency improvements absent meeting the regulatory mandate and that the industry would not use the annual \$18 million in redirected capital to achieve even greater efficiencies. In other words, while it may be true that compliance with the proposed regulation may result in some gasoline recovery, there is no way to know whether this cost savings is more or less than what would have been achieved absent the mandate. Indeed, the market pressure to drive innovation toward efficiency would likely be even stronger in today's environment than when the analysis was done, as consumers are faced with generational inflation across the economy and firms are scrambling to increase production and distribution while reducing costs. Thus, the costs should simply be stated as costs. Implied savings are much too amorphous to be considered.

Further, the analysis assumes that the regulated firm will always access the value of the recovered product. This is simply not the case. In some, if not many, instances the regulated firm will need to pass the value, if not the actual product, on to other firms. While it may be true that the value of the recovered product is captured somewhere along the supply chain, it is not true that the value will always be captured by the regulated entity. The EPA implicitly acknowledges this when it recognizes that the complexity of the regulated industry is such that the RIA is unable, given its scope, to look at impacts at the firm level. Thus, one necessary action prior to moving forward with the proposed regulation should be to survey specific firms about product recovery.

This becomes increasingly important when considering diversity among the regulated firms. While some firms are quite large and maintain title to any product that is produced and sold forward, many regulated firms are small in comparison and often will not be authorized to accrue any profits from recovered product. These small firms will struggle to withstand the regulatory burden and could well go out of business.

Unfortunately, this would exacerbate the fuel supply chain and distribution constraints that have already emerged as economic challenges.

The Social Cost of Carbon is an Inappropriate Tool for Establishing a Regulatory Basis

Regardless of one's stance on human caused global warming, using social cost of carbon estimates to help justify the basis of regulatory action is completely inappropriate. As Dr. Kevin Dayaratna, chief statistician at the Heritage Foundation, concluded⁶:

...in addition to the uncertainty associated with the models' central components, social cost of carbon estimates are based on very questionable assumptions regarding the climate's sensitivity to

⁶ Kevin Dayaratna, "Why the 'Social Cost of Carbon' Is the Most Useless Number You've Ever Heard of," Heritage Foundation *Backgrounder*, March 2, 2021, (<https://www.heritage.org/energy-economics/commentary/why-social-cost-carbon-the-most-useless-number-youve-never-heard>)

CO2 emissions, naive projections reaching 300 years into the future, and ignorance of discount rate recommendations by the Office of Management and Budget regarding cost-benefit analysis.

Dr. Dayaratna goes on to argue that the statistical models used to develop a social cost of carbon are so uncertain that minor tweaks in assumptions well within reason result in a social cost that may be negative, implying a net positive benefit to society. In other words, the models used to determine a so-call social cost of carbon are so imprecise that their output is little more than meaningless. Given the importance of these proposed regulatory actions, such tools should have no part in the RIA.

Given Dr. Kevin Dayaratna's published research,⁷ the only logical conclusion is that the social cost of carbon should not be part of this, or any, regulatory analysis. Putting aside the real scientific debate over the impact of CO2 emissions, the fact is that the social cost of carbon models show that CO2 can have both positive and negative impacts, provide vastly different outputs based on reasonable assumptions, rely on outdated data, and use projections so far (300 years) into the future as to be meaningless, and should therefore be rejected.

The Proposed Regulation Does Not Adequately Address the Impact on Small Firms

Sections 5.3.1 and 5.3.2 attempt to described how the proposed regulation would interact with small firms. The problem is that the language is littered with terms that obfuscate real meaning. Here are three passages that use such language:

- While EPA could identify (*at least in certain cases*)⁸ when a facility was a pipeline breakout station or pumping station, *we could not determine* for bulk distribution facilities which facilities were bulk plants and which were bulk terminals.
- Given the very low average CSR for small entities (both with and without product recovery) and the low proportion of small entities with a CSR above 3 percent, *it is unlikely* that the proposed changes to MACT R and GACT 6B or proposed NSPS XXa *would have a significant* impact on a substantial number of small entities.
- given the low (and in the case of MACT R, negative) worst-case costs associated with pipeline facilities, it is clear that the proposed action would *not have a significant impact on a substantial number* of small entities

Identifying which types of firms are being analyzed is critical generally but especially in this case because, as described above, the analysis uses “model plants” as the basis of its analysis. Such an approach already overly simplifies a complex industry and minimizes the proposed regulations' impact on firms that lie outside of the median. It is even worse, however, as it relates to small

⁷ Kevin Dayaratna, Ph.D., Chief Statistician, Data Scientist, and Senior Research Fellow, The Center for Data Analysis of the Heritage Foundation , “Methods and Parameters Used to Establish the Social Cost of Carbon,” Congressional Testimony, Subcommittee on Environmental Oversight, Committee on Science and Technology, U.S. House of Representatives, February 24, 2017, (<https://docs.house.gov/meetings/sy/sy18/20170228/105632/hhrg-115-sy18-wstate-dayaratnak-20170228.pdf>).

⁸ Italicized to highlight referenced language.

firms because they will be the least able to withstand the additional regulatory burden. Further, couching conclusions with terms like “unlikely”, “significant”, and “substantial” demonstrates EPA’s lack of confidence in its findings. Indeed, it acknowledges as much in section 5.3.2 where it states:

The above analysis has one main limitation: EPA’s facility list does not provide complete coverage of the Gasoline Distribution source category. Given this circumstance, it is possible that the facility list is skewed towards larger entities (that would be easier to identify) in the source category, in which case the above analysis could understate the impacts of the action on small entities. This could be a particular problem in the case of bulk gasoline plants covered by GACT 6B.

The Regulatory Impact Analysis is Plagued by Uncertainty

Predicting the impact of complex regulations is nearly impossible. These actions are even more difficult than most due to the petroleum distribution industry’s diverse nature, the complexity of the system that EPA is proposing to further regulate, the ubiquity of the product throughout the economy, and the fact that this proposed rule, as the EPA explains, is really three rules being presented as a single regulation.

Thus, the daunting task of determining the regulatory impact, or even estimating such impact, would require an array of well-established and trusted analytical tools and assumptions. Unfortunately, the analytical conclusions of these proposed regulatory actions do not rely on such tools. In fact, the tools and assumptions used throughout the Regulatory Impact Analysis present uncertainty at almost every level.

One good example is the assumptions regarding the mandated controls that, as a co-benefit, would lead to gasoline recovery that could, in turn, be sold to generate offsetting costs. Section 3.2.6 states, “To the extent that any opportunity costs are not added to the control costs, the compliance costs presented above may be underestimated.” In other words, the EPA leaves the door wide open for it having not captured all the costs associated with its proposed regulations. The section introduces additional uncertainty with its discussion of compliance costs, where it assumes a 3.25 percent cost of capital, which was the bank prime rate at the time of the analysis. Aside from the fact that not all firms can access capital at bank prime rates, such rates change. For example, the bank prime rate on the day of this comment was 5.5 percent—a close to 70 percent increase in the cost of capital.

This is in addition to the social cost of carbon, the cost to consumers, the economic model’s limitations, and suspect product recovery assumptions that have already been discussed. Individually, each of these issues present a concern, but combined, with each layer of uncertainty amplifying the next, the accumulated effect of the uncertainty undermines the proposed regulatory action’s legitimacy.

Conclusion

Thank you for the opportunity to comment on this important proposed regulatory action.

While the Clean Air Act may well require the EPA to review some of the standards under which the regulated facilities and activities exist, it does not force the EPA to needlessly ratchet up regulatory compliance and associated costs just because it can.

This question is of extreme importance as American families and businesses face rising costs throughout the economy, especially for energy broadly and gasoline specifically.

Perhaps Americans could handle this regulatory endeavor during normal times. But these are not normal times. And that is why I ask the EPA to pause this effort, sharpen its tools of analysis, and seek additional information from those it will impact. More information is critical now more than ever.

Sincerely,

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