National Tribal Air Association’s Informational Webinar on EPA’s Proposal on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process

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By

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NTAA’s Policy Resource Kit (PRK)

• NTAA’s PRK can be found on NTAA’s website

• The PRK includes:
  • A two-page fact sheet
  • A template letter you can use to submit comments and will be posted on NTAA’s website by the end of the week
  • A recording of today’s webinar and a pdf of today’s presentation
  • NTAA’s comment letter will be posted after NTAA submits on August 3, 2020.

• https://www.ntaatribalair.org/policy-resource-kits/#CurrentNTAAPolicyResourceKits
Overview

• June 2018, EPA sought comment on an Advanced Notice of Proposed Rulemaking (ANPRM)
  • See Federal Register from June 11, 2020, for this proposal
• With this rulemaking, the EPA is seeking to regulate how Benefit/Cost Analyses (BCAs) should be conducted – this is currently done through guidance
• EPA wants to eventually expand this rulemaking beyond the CAA to other environmental statutes
• Comments due August 3rd, 2020
Overview

The Proposed Rule includes three elements:

1. EPA shall prepare a BCA for all future significant regulations under the CAA
2. BCAs are to be developed using the best available scientific information in accordance with best practices from the economic, engineering, physical, and biological sciences
3. Additional procedural requirements in the presentation of the BCA results, while maintaining the standard practices of measuring net benefits consistent with EO 12866

The NTAA and the MPCA object to this proposal for a number of reasons but mainly because it could limit the consideration given to co-benefits
NTAA Objections

• EPA Lacks Proper Authority
• Flexibility is needed and built into the CAA
• EPA itself has been inconsistent with how it treats co-benefits
• Co-Benefits are real and important
• Expansion of this rulemaking to other media
• Environmental justice and equity issues
• Tribal implications were not considered
• Action is unnecessary and addresses a problem that doesn’t exist
• Lack of Consistency Across Federal Agencies
Other Issues

• EPA seeks comments on proprietary data and models
• Retrospective analyses of existing rules
• Separation of domestic benefits from benefits outside the U.S.
• Best practices
EPA Lacks Authority to Promulgate This Rule

- The EPA claims authority under Section 301(a)(1) of the Clean Air Act
- This text is intended to cover general provisions and authorities for the EPA Administrator, those that are “necessary and reasonable to effect the purposes of the Act”
- Courts have declined to read “open ended power” into this citation
- In this administration it has become somewhat common for the EPA to issue a proposal seeking comments on whether the authority posed is appropriate and/or if commenters can suggest other authorities – bad policy
Flexibility

• The Clean Air Act treats BCAs differently in different situations
• Toxic v. criteria pollutants, non-attainment areas v. attainment
• OMB’s Circular A-4 and EPA’s Guidelines for Preparing Economic Analyses already offer agencies the flexibility they need
• Proposal is overly prescriptive – forces you toward middle ground
• Changing from guidance to rulemaking could open the EPA up to litigation if they do not apply BCAs consistently
• Adoption of rules based strictly on monetized costs vs. benefits may ignore important benefits and raises equity issues
EPA’s Inconsistencies

• The EPA itself has been inconsistent when considering co-benefits in BCAs
• In the Affordable Clean Energy rule, the BCA balance only supported the rule if co-benefits were considered
• However, in the Mercury Air Toxics Standard (MATS) reconsideration, the EPA objected to the inclusion of co-benefits in the “appropriate and necessary” finding
• In the SAFE rule the EPA ignored the fact that costs outweighed benefits by a large margin
Co-Benefits are Real and Important

• The proposal doesn’t say co-benefits cannot be included
• Instead it proposes that co-benefits be separated out
• Co-benefits are real and control real pollutants
• Indirect benefits of a rule can save control costs later on
• Controls can get complicated
• Benefits can be harder to calculate and to monetize than costs and are thus easier to sweep aside
• Many benefits are intangible
• The proposal narrows the types of studies that can be used to support a benefit but places no limits on what can be counted as costs
Expansion to Other Media

• EPA seeks comments on expanding rulemaking to other media
• Many of the same arguments will apply
• Authority still not there for other media
Environmental Justice Concerns

• Proposal does not address structural inequities that lead to disparities in risks and harms of air pollution

• Basing rulemaking on overall positive net benefits does not take into account that some people are harmed inequitably by air pollution

• Benefits are harder to value in monetary terms than costs and can be intangible, but nevertheless are important to consider

• Costs may need to increase to protect the vulnerable

• Market forces cannot always produce these protections
• This administration rarely considers Tribal implications
• No consultation offered
• No consideration of vulnerable population
• No consideration of the value of treaty rights and cultural practices
• Improper for EPA to decide what actions have Tribal implications
Action is Unnecessary

- Proposal does not demonstrate existence of a problem
- “Controversial” past rulemakings did in fact separate out co-benefits and account for them properly
- Circular A-4 and EPA Guidance offer appropriate guidance
Lack of Consistency Across Federal Agencies

• Proposal does not demonstrate problems or issues with Circular A-4 of EPA’s Guidance document

• Proposal does not address how other federal agencies will prepare consistent BCAs without adopting similar guidance

• Proposal does not address situations where Circular A-4 and EPA Guidance document may contradict this action

• Restrictions of studies (HIPPA)
Other Issues

• Restricting to proprietary data and models could narrow studies that could be used to support benefits

• Retroactive analysis of existing rules is unnecessary, could be used to undermine existing rules that are protecting human health and the environment, and could divert resources better spent on moving forward with rulemaking

• Separation of domestic benefits from benefits outside the U.S. is often not sensible or not practical, particularly with GHG’s and climate change

• Best Practices
Recommendations

• Recommend use of Circular A-4 and existing EPA Guidance in conducting BCAs
• BCAs should consider both targeted and ancillary co-benefits
• BCAs should consider the social costs of carbon, both domestic and non-domestic
• Impacts to flora and fauna should also be considered