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Leif Hockstad
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Office of Air and Radiation
Environmental Protection Agency
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Attn: Docket ID No. EPA-HQ-OAR-2020-00044

RE: Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process; Docket ID No. EPA-HQ-OAR-2020-00044

Dear Mr. Hockstad:

The National Tribal Air Association (NTAA) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA)'s proposal entitled, "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act (CAA) Rulemaking Process." 85 Fed. Reg. 35612 (June 11, 2020).

The NTAA is a member-based organization with 151 principle member Tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is important to understand interactions with the organization do not substitute for government-to-government consultation, which can only be achieved through direct communication between the federal government and Indian Tribes.

Unique Health Status of Alaska Natives/American Indians (AN/AI)

The NTAA holds the protection of the health and welfare of AN/AI people as our highest priority. The recent COVID-19 outbreak has shown how vulnerable our communities are to impacts that exacerbate underlying health conditions of these individuals. The AN/AI population suffers from poorer health outcomes from diseases such as asthma, Chronic Obstructive Pulmonary Disease, and heart or lung disease when compared to the general population. These facts are included in a white paper titled "Detailing the Science and Connections Between Air Pollution, Tribes, and Public Health", published in 2019 (updated in 2020) by the National Tribal

Air Association (NTAA).¹ These vulnerabilities demand that the federal government seek the highest protections for our people when clean air regulations are promulgated. For these reasons, the NTAA opposes the proposal cited above, as there is no assurance that any or all the benefits resulting from stricter regulations will be accounted for in benefit cost analyses (BCAs) performed by the agency under this proposal.

History of this Proposal

On June 4, 2020, the EPA issued a proposal for processes to be followed during promulgation of regulations under the Clean Air Act (CAA) to ensure that the appropriate benefits and costs of regulatory actions are developed and presented to the public in a consistent and transparent manner. These BCAs should use the best available scientific information, in accordance with the best practices from the economic, engineering, physical and biological sciences.

The proposal has three main tenets:

- The EPA will prepare a BCA for all future significant proposed and final regulations under the CAA.
- The BCA should be developed in accordance with best practices from the economic, engineering, physical and biological sciences.
- EPA must increase transparency in the presentation of the benefits resulting from significant CAA regulations.

In addition to these three main areas, the EPA is seeking comments on how to take into consideration BCA results in the future for specific areas of the CAA and in future CAA regulatory decisions as well as comments on expanding this proposal to other environmental regulations such as the Clean Water Act. The NTAA submits the following comments in opposition to this proposal.

Objections to This Action

1) Authority

The EPA claims to be issuing this rule under the authority of Section 301(a)(1) of the Clean Air Act, which allows the EPA Administrator to “prescribe such regulations as are necessary to carry out his functions” under this law.

Courts have consistently “decline[d] to read . . . open-ended power into section 301.”² “[S]ection 301 does not provide the Administrator ‘carte blanche authority to promulgate any rules, on any matter relating to the Clean Air Act, in any manner that the Administrator wishes,’” and instead

¹ Wiecks, Joy, Dara Marks-Marino, Jaime Yazzie. “National Tribal Air Association’s 2020 Update to: A White Paper Detailing the Connections Between Air Pollution, Tribes, and Public Health.” National Tribal Air Association, April 2020

² *Nat. Res. Def. Council v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992).

“allow[s] the promulgation of rules that are necessary and reasonable to effect the purposes of the Act.”³ EPA’s authority is not open-ended, particularly when there is statutory language on point.⁴

This proposal is not necessary for the Administrator to carry out his functions under the Clean Air Act. The proposal does not try to suggest otherwise. EPA has been implementing the Clean Air Act for decades, considering costs and benefits based on Office of Management and Budget (OMB) and EPA guidance. The proposal even recognizes that federal courts have developed significant case law regarding regulatory cost considerations and the usefulness of BCAs. Instead of following those, this proposal represents a dramatic shift, without basis or justification. Further, there are specific CAA statutory language on point regarding the consideration of costs, making EPA’s proposed reliance on its general grant of authority more so unlawful.

The proposal continues a recent pattern of EPA asking the public for comment on additional or alternative authority. NTAA has repeatedly explained that this process—where EPA proposes rules first and searches for a legal justification later—is improper.

This approach is further problematic due to decisions made by the D.C. Circuit Court of Appeals on June 16, 2020, that struck down other efforts to stretch similar references to rule-making authority.⁵ The judicial record on this matter is clear, that the EPA may not use its housekeeping authority on this proposal.

2) **The CAA Requires Flexibility**

The CAA requires flexibility in regulatory approaches to air pollutants. In constructing the CAA, Congress very specifically called for costs to be considered in some areas but not in others, and with varying degrees of significance. Indeed, in 25 sections and subsections of the CAA, cost is neither mentioned nor even implied as a consideration. This is due to the variety of health concerns that arise from different categories of emissions sources (e.g. mobile versus stationary, new sources versus existing sources) and different pollutants (criteria pollutants versus toxics). A more prescriptive approach, such as this proposal, also ignores the fact that not all sources of air pollutants respond to the same control technologies, not all control technologies work in all situations, and not all public health impacts are evenly distributed. This one-size-fits-all approach would take a sledgehammer to the careful design of the CAA where a more nuanced approach is needed, and could likely skew the results of future BCAs, and rulemakings, away from the protection of public health.

This proposal is also overly prescriptive in its requirement that where there is a continuum of options, the BCA must present at least three options – one more stringent and one less stringent than the proposed choice. 85 Fed. Reg. at 36518. First, the EPA assumes that a continuum of options is possible. For toxic or other particularly harmful pollutants, there may be no exposure level that is safe for public health. Further to this point, it is unclear how the EPA will determine

³ *Nat. Res. Def. Council v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994) (quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979)).

⁴ *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014).

⁵ Farber, Dan. “DC Circuit Restricts ‘Housekeeping’ Regulations”. Legal Planet. June 16, 2020.

that a continuum of options exists. Also, this proposal could improperly tie the agency into proposing three alternatives even though two of the alternatives may be patently inappropriate or otherwise unacceptable for a variety of reasons, as might be the case in the control of pollutants that have the potential to cause extreme health impacts at very low doses. The suggestion of two alternatives may also lead the agency to put forward intentionally poor choices, making the desired choice appeared better by comparison. Although the EPA is given the opportunity to explain why additional options are not proposed, there is no further information given on how this approach might work in practice, or why it is needed nor does the EPA address the fact that in some situations (e.g. cases of science, public health or safety) multiple valid or legitimate options do not exist. NTAA also argues that this approach pushes the EPA toward “middle ground” measures, where the agency must justify requiring more aggressive actions. At best, the proposal will result in an arbitrary diversion of resources and delay important rules to protect human health and the environment.

The NTAA believes that internal economic analysis procedures are appropriately placed in guidelines rather than in regulations. Putting such procedures into regulations would open the EPA up to the potential of litigation if it does not follow these procedures exactly and would take away the agency’s ability to be flexible in its regulatory approaches.

3) **Inconsistency from EPA on Co-benefits**

While the current Administration rails against inconsistency, it stands accused of the same offense on measuring the application of co-benefits for many of the regulations it has or is currently pursuing or seeking to weaken. While this Administration purports to be acting to provide more consistency, their actions so far are already remarkably consistent in favoring the side of polluters at the expense of the environment and public health. Many of this Administration’s own rules would not appear beneficial without a broad look at expected benefits.

An October 9, 2019, article on Climatewire provides details on how the EPA has contorted its arguments over the just last few months to support its deregulatory agenda.⁶ As outlined in this article, the EPA argued *against* the inclusion of co-benefits in its decision to scrap the appropriate and necessary finding from the Mercury in Air Toxics Standard (MATS) promulgated by the Obama Administration while it argued *for* the inclusion of co-benefits in its Affordable Clean Energy (ACE) regulation. In both cases, the inclusion of co-benefits is what ultimately made promulgation of the rules effective. It seems the EPA wants to have it both ways – to exclude co-benefits when it wants to abandon a rule and to include them when it wants to write a preferred rule.

The promulgation of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule is another example of cherry picking by the current Administration of the information that supports its goals. Comparing the National Highway Traffic Safety Administration’s (NHTSA) 2018 Notice of Proposed Rule Making to the final rule results in:

- Increased costs of \$223 billion

⁶ Chemnick, Jean. October 9, 2019. “EPA – Agency’s been all over the map on ‘health co-benefits’”. Climatewire.

- Net consumer loss of \$678 over the lifetime of the vehicle

The final rule estimates costs of \$22 billion for model year analysis (~ 28 miles/gallon) or \$62 billion for the alternate scenario (~ 31 miles per gallon). It is unclear why this final rule was promulgated with these results when other rules with net benefits are ignored or manipulated unreasonably. Recently uncovered internal documents show comments from EPA staff pointing out areas in this rulemaking where costs and benefits are not shown accurately, and also appear to be positioned solely to support the case for rolling back emissions standards.^{7,8}

In promulgating the SAFE rule, only the analysis performed by NHTSA was considered. Further, career staff at the EPA did not participate in the development of either the Notice of Proposed Rule Making or the Federal Register notice, and EPA’s own data was ignored. Thus, EPA can claim it wants to provide for “consistency and transparency” in BCAs but it has failed to demonstrate any consistency or transparency so far.

Another example of inconsistency is the third main tenet of the proposal, which calls for transparency in detailing benefits of proposed rules but doesn’t make the same demand for the estimation of costs. This aspect of the problem is particularly concerning because costs are consistently found to be significantly lower than initial estimates – for example costs for the MATS rule have been found to be billions lower than EPA and industry initially estimated, and which EPA ignores in its 2020 decision to scrap the appropriate and necessary finding.⁹

4) **Importance of Co-Benefits**

This proposal would essentially require the EPA to conduct and summarize two analyses: one full BCA that would describe the overall results including total benefits (which include co-benefits), total costs, and net benefits; and a partial analysis that would focus solely on benefits related to the primary objective of the action (which would leave out co-benefits). While the proposal doesn’t go as far as to ban consideration of co-benefits, the EPA is seeking comment on this possibility.

Co-benefits are real and have real impacts on human health that must be accounted for in a benefits assessment. Just because they may be “ancillary” rather than “targeted” benefits doesn’t mean they are not important or valuable. Further, EPA should recognize the efficiencies achievable by control of multiple pollutants – concomitant controls can reduce the need for separate emissions controls for the ancillary pollutants, thereby saving costs. The EPA and state and local air agencies

⁷ Eilperin, Juliet and Dennis, Brady. “Trump promised his mileage standards would make cars cheaper and safer. New documents raise doubts about that.” *Washington Post*, Jan. 23, 2020.

⁸ Eilperin, Juliet and Dennis, Brady. “EPA staff warned that mileage rollbacks had flaws. Trump officials ignored them.” *Washington Post*, May 19, 2020.

⁹ National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk Technology Review 85 Fed. Reg. 3218631306-07 (May 22, 2020); Environmental Defense Fund, *Power Companies’ Declining Estimates of the Compliance Costs of the Mercury and Air Toxics Standards (MATS)*, http://blogs.edf.org/climate411/files/2014/05/Declining-costs-of-MATS-compliance.pdf?_ga=1.64911789.383468789.1454952534.

have examined and accounted for the co-benefits of air regulations for decades. Seeking to downplay or exclude co-benefits now would be a dramatic departure from past actions and would serve to ignore real benefits and overstate regulatory costs.

The calculation of benefits can be more difficult and less straightforward than the calculation of costs. For example, there were several instances in the Regulatory Impact Analysis for the MATS rule where the EPA acknowledged that it did not have enough information on the effects of mercury and other hazardous air pollutants to make quantitative benefits analyses. Yet these pollutants cause significant impacts on human health, even if EPA does not estimate those monetary values. Exclusion or diminishment of these benefits would expose the public to impacts that are not widely understood and could be harmful to human health and well-being. Adoption of rules based strictly on monetized costs versus benefits may ignore important benefits and raises equity issues.

The EPA proposes disaggregating benefits into those that are “targeted” by the statutory objective of a regulation and those that are “ancillary” in order to “explore whether there may be more efficient, lawful and defensible, or otherwise appropriate ways of obtaining ancillary benefits, as they may be the primary target of an alternative regulation that may more efficiently address such pollutants”. 85 Fed. Reg. at 35622. While it may be informational to conduct such an exercise, this may also lead to unsound decisions being made based on incomplete knowledge or hopes that future regulations may address the issue, even while changes in administration or funding may negate such opportunities.

In addition, 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. Further, there is no debate that consideration of co-benefits is lawful and defensible and EPA’s nonsensical suggestion otherwise as a basis for the proposal makes the proposal arbitrary and capricious.

5) Proposed Use of BCA in all Environmental Statutes

The EPA is seeking comment on the extent to which it could use BCAs as the basis for decisions about protections under all environmental statutes. The NTAA presents the same arguments against the application of this proposal to other environmental rulemaking, such as those promulgated under the Clean Water Act, among others. The EPA itself acknowledges, “Additionally, several other provisions use terminology that in context implicitly direct the EPA to consider costs, alone or in conjunction with benefits and other factors.” 85 Fed. Reg at 35613. As explained above, the EPA should not be planning regulations and then searching for authority. The scope and context of the EPA’s ability to consider costs and other factors in rulemaking are set forth in its specific statutory authorities, which the EPA is required to follow.

6) Environmental Justice Concerns

In this proposal, as in most proposals from this Administration, the EPA appears to have not considered environmental justice and equity concerns. The EPA discusses the concept of willingness to pay (WTP) which is defined as “the largest amount of money that an individual or group would pay to receive the benefits or avoid the damages resulting from a policy change,

without being made worse off.” 85 Fed. Reg. at 35619 n.27. This is believed by economists to be the most appropriate measure of opportunity cost but it may not be appropriate in this context because it is closely linked to an individual’s ability to pay. The proposal also discusses the market as a place where consumer decisions are made. These terms, however, do not consider the fact that many Americans do not get the opportunity to make these “choices” to pay more to live in a clean area, or to agree on what value to put on a clean environment but rather live where they must, due to economic realities, or in contaminated homelands defined by Reservation boundaries, even if these areas are contaminated or receive higher amounts of pollution than others. In reality, these individuals also do not get to choose what their neighbors’ willingness to pay is, even though pollution knows no boundaries and doesn’t stay where it is generated. The concept of WTP fails these individuals, as the people with the power to vote with their checkbooks may not be willing to pay more for their neighbors to also live in a clean area. The EPA fails to consider whether the cost and/or benefits from the policy action are sufficient for those who gain to theoretically compensate those burdened such that “everyone would be at least as well off as before the policy.” The market cannot always produce these protections on its own, and costs may need to increase to protect the vulnerable.

This discussion has obvious problems, as some groups will balk at being asked to pay more so other groups (e.g. those already carrying a heavier body burden of pollution) can benefit. It may be inevitable that some groups lose monetarily so others can have better health outcomes. As stated previously, inability to monetize certain benefits may lead to ignoring these benefits and raises equity issues. Overly prescriptive regulations on BCA could serve to obstruct the control of emissions that may disproportionately affect Environmental Justice communities, who have historically borne a heavier burden of exposure.

The proposal further states:

“When feasible a probability distribution of risk is appropriate to use when determining the expected benefits for CAA regulations. When it is infeasible to estimate a probability distribution, the EPA proposes that measures of the central tendency of risk be used. Upper-bound risk estimates must not be used unless they are presented in conjunction with lower bound and central tendency estimates.” 85 Fed. Reg. at 35621.

By using the vague terms “feasible” and “infeasible,” the EPA offers an easy “out” from its duty of protecting the most vulnerable individuals. Stronger language requiring protection of these individuals is needed.

Further, BCAs are traditionally conducted through guidance, not rulemaking, to allow flexibility to fit each situation. The Advance Notice of Proposed Rule Making didn’t address how the existing guidance would relate to the rulemaking in instances where there may be disagreement between the two. Uncertainty in interpretation between the two should lead to over-consideration of benefits out of an abundance of caution.

7) **Tribal Implications**

The EPA claims that there are no tribal implications for this proposed action. 85 Fed. Reg. at 35625. The NTAA strongly disagrees with this conclusion. As described in the paragraphs above, AN/AI populations in America suffer disproportionately from health discrepancies that leave them more vulnerable to impacts from pollution. This was not acknowledged in the analysis for this rule. The EPA further ignored impacts to Tribal populations from a subsistence lifestyle; where hunting, fishing, and gathering provide a greater proportion of the nutritional needs of these populations. The paragraph above on environmental justice showed how Tribal and other minority populations bear a disproportionate amount of the burden of pollution from many industries. Not only did the EPA ignore these implications, but also it has not offered Tribal consultation on this proposal, in direct disregard for Executive Order 13175. Lastly, it is not for EPA to determine whether Tribes are impacted by this rule - only Tribes can make that determination. There is no way to estimate the cost to Tribes of the loss of culturally significant species due to the impacts of pollution or climate change, nor to measure the benefit to the entire Tribe and to each individual of being able to exercise hunting, fishing, and gathering rights as guaranteed by treaties with Congress.

8) This Action is Unnecessary

Throughout this proposal, it is unclear exactly what problem the EPA is trying to solve. There are no examples provided of errors or miscalculations that have been made in the past or examples of how this proposal would have produced better regulations. As mentioned in the paragraphs above, OMB's Circular A-4 already requires federal agencies to conduct BCAs for significant rulemakings. Additionally, EPA's Guidelines for Preparing Economic Analyses complements Circular A-4 by providing hundreds of pages of more detailed, periodically updated, peer-reviewed guidance on preparing these analyses. These resources already ensure that analyses are conducted in a rigorous and transparent fashion.

Even though the EPA suggests that some of its previous decisions improperly or controversially accounted for co-benefits, those analyses clearly stated which benefits would accrue from control of which pollutants, along with the methods, assumptions, and models used to obtain those results. For these reasons, this action is arbitrary and capricious and a waste of taxpayers' dollars.

9) Lack of Consistency Across Federal Agencies

The OMB's Circular A-4 is currently the guidance document that all federal agencies are required to use when performing BCAs submitted to OMB in support of rulemakings. Therefore, it is unclear if the EPA really has the authority to contradict OMB's Circular A-4 in how BCAs are conducted only for regulations written under the CAA. Nor does the proposal address how this situation fits in with their notion of "consistency" when theoretically the EPA would be conducting BCAs using different standards than every other federal agency and even within the EPA. 85 Fed. Reg. at 35615. While the proposal claims that it will "complement" Circular A-4, there is no discussion of how differences between the two documents might be handled, or of why the Circular itself isn't being updated.

The proposal states that:

“The agency would select among concentration-response relationships from studies that satisfied the following minimum standards: (1) the study was externally and independently peer-reviewed consistent with Federal guidance;... (3) concentration-response functions must be parameterized from scientifically robust studies;... “85 Fed. Reg. at 35620”

These criteria are problematic given the EPA’s April 30, 2018 proposal and March 18, 2020 supplemental proposal to restrict studies that provide Health Insurance Portability and Accountability Act protections to patients (“Strengthening Transparency in Regulatory Science”). The NTAA commented negatively on those proposals because they would improperly eliminate many seminal studies on the impacts of air pollution on human health. If EPA applies the flawed and illogical restrictions from those proposals to its BCA estimations, the result will be a further flawed and illegal BCA.

Suggestions for this Proposal

1) Proprietary Data and Models

The EPA proposes to “make the underlying inputs and assumptions used, primary equations, and methodologies available to the extent permitted by law while continuing to protect information claimed as confidential business information (CBI), personally identifiable information (PII) and other privileged, non-exempt information.” 85 Fed. Reg. at 35622. The NTAA urges the EPA to release data, assumptions, and calculations used in these proprietary models so that commenters can adequately analyze and address any issues. However, EPA must not exclude inputs and assumptions from valid, peer-reviewed, science based on the inability to release underlying data.

2) Retrospective Analysis

The EPA seeks comment on whether to require retrospective analyses of significant CAA rulemakings. 85 Fed. Reg. at 35624. The NTAA opposes this suggestion. This would divert precious resources that would be better spent addressing areas where environmental benefit could be gained. Further, any attempt to change decisions that were reached by proper application of BCAs would undermine the CAA and the benefits to be gained through those duly promulgated regulations. Any such action would also likely lead to litigation and possible delays in implementing these regulations.

3) Best Practices

The EPA seeks comment on Best Practices for the development of BCAs, including on whether non-domestic costs and benefits should be reported separately from domestic costs and benefits. 85 Fed. Reg. at 35623. It is not appropriate to codify the requirements EPA proposes, particularly with respect to domestic and global benefits from greenhouse gases. EPA’s recent decisions to ignore the scientifically supported and peer-reviewed global cost of greenhouse gas emissions (ignoring the relevant consequences that climate change impacts outside of the United States will have on the United States), and instead limit its analysis to an unscientific interim measure of domestic costs of greenhouse gases are unlawful, as demonstrated by the recent federal court decision in *State of California, et al. v. David Bernhardt, et al.* This decision criticized the Trump

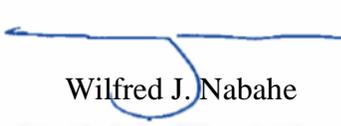
Administration for arbitrarily relying on an aggressively scaled back social cost of carbon (SCC) to roll back Obama Administration methane standards for oil and gas equipment.¹⁰ The Government Accountability Office also criticized the Trump Administration for lacking a plan to update its “interim” tool for estimating SCC.¹¹ Any attempt to codify these actions would also be unlawful. As a general matter, and to the extent supported by valid, peer-reviewed science, the NTAA does not object to these facts being reported separately, as long as they are accounted for accurately and reported fully, particularly with regard to climate change, which has and will also disproportionately negatively impact AN/AI populations and lands. Nevertheless, the proposal does not justify, and the NTAA sees no justification for codifying such requirements, which can be left to more flexible guidance that can be changed easier as new information is learned.

Recommendations

The NTAA supports the proper use of guidance to compile BCAs, along with the use of Circular A-4. We believe that co-benefits should be an integral part of this analysis and support environmental protections no matter whether they are “targeted” or “ancillary”, or domestic or non-domestic in nature. Social costs of carbon should be included in these calculations, as should pollutants that affect not only human health but also welfare (e.g. impacts on flora and fauna). If the EPA truly wants to improve the economic analyses that support regulatory action, they would do better to incorporate approaches that provide a better understanding of the true benefits of a clean environment.

If you have any questions or require clarification from the NTAA’s Project Director, Andy Bessler, at 928-532-0526 or Andy.Bessler@nau.edu.

Sincerely,



Wilfred J. Nabahe

Chairman

National Tribal Air Association

Executive Committee

¹⁰ *California v. Bernhardt*, 4:18-cv-05712-YGR (N.D. Cal. July 15, 2020)

¹¹ U.S. Government Accountability Office, Report to Congressional Requesters, *SOCIAL COST OF CARBON – Identifying a Federal Entity to Address the National Academies’ Recommendations Could Strengthen Regulatory Analysis*. June, 2020.