

Oral Statement Regarding the Scientific Advisory Board Draft Report on the Proposed Rule “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process”

Daren Bakst
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Thank you for this opportunity to provide comments.¹

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.

For decades, the use of benefit-cost analysis has been embraced by Administrations of both parties.

Benefit-cost analysis is especially important for the EPA, and even more specifically, the Office of Air and Radiation.

Here’s why:

Based on OMB’s latest finalized regulatory report to Congress,² from 2006-2016, the EPA finalized 39 major rules. This was by far the most among federal agencies, with the next closest agencies finalizing 27 major rules.

Of the 39 rules, 26 (or two-thirds) came from the Office of Air and Radiation.

In addition, there were also four joint DOT and EPA major rules. All four came from the Office of Air and Radiation.

The OMB report states, “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 Radiation.”³

Further, Congress used language throughout the Clean Air Act to direct the EPA to consider costs when promulgating regulations.

¹ These comments were drafted to be presented orally.

² Office of Management and Budget, 2017 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5885-REV_DOC-2017Cost_BenefitReport11_18_2019.docx.pdf

³ Office of Management and Budget, 2017 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5885-REV_DOC-2017Cost_BenefitReport11_18_2019.docx.pdf

Therefore, it's easy to see why the EPA's current proposed rule to address benefit-cost analysis in the Clean Air Act is necessary.

The rule could also serve as an important response to past questionable practices by the EPA.

In 2012, when the EPA finalized its MATS rule, the agency decided it didn't need to consider costs at all. This was despite the fact that annual projected costs were as much as \$9.6 billion, or as much as 2,400 times greater than the benefits.⁴

The U.S. Supreme Court in *Michigan v. EPA* properly rejected the agency's complete disregard for costs.⁵

In response, the EPA then justified the rule based on what are known as ancillary benefits, or secondary benefits.

Particulate matter ancillary benefits accounted for about 99.9 percent of all monetized benefits of the MATS rule.⁶

In other words, the EPA justified a rule to address *hazardous air pollutants* by pointing to the secondary benefits of addressing *non-hazardous air pollutants*.

If the EPA doesn't have to justify the purpose of its air rules, then it often won't do so.

This isn't a far-fetched argument; it's a description of past EPA 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

So what needs to be done?

⁴ See e.g. 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," Final Rule, *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>

⁵ *Michigan v. EPA*, 135 S. Ct. 2699 (2015), <https://www.scotusblog.com/case-files/cases/michigan-v-environmental-protection-agency/>

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," Final Rule, *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>

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

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

First, requiring transparency, consistency, and sound regulatory analysis is a good start, as is making common sense changes, such as stopping the abuse of ancillary benefits.

Second, finalizing a rule with clear requirements imposed on the agency will help ensure current and future agency compliance and allow for judicial review.

I encourage the SAB to include support for these important objectives in its report.

Thank you.