



July 31, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Andrew Wheeler, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on EPA’s proposed rule “Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process” (EPA Docket EPA-HQ-OAR-2020-00044).

Dear Administrator Wheeler:

On June 11, 2020 the Environmental Protection Agency (EPA) published a proposed rule titled “Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process.”¹ This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy generally supports the use of Benefit-Cost Analyses in the development of rules under the Clean Air Act. However, aggregate analyses can mask significant economic impacts on small entities. Advocacy strongly encourages EPA to incorporate elements of its statutory obligations under the Regulatory Flexibility Act into this rule, to directly address the disproportionate impacts that regulatory decisions can have on small entities.

I. Background

A. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily

¹ 85 Fed. Reg. 35612 (June 11, 2020).

reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵ Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

B. The Proposed Rule

On May 13, 2019, EPA Administrator Wheeler issued a memorandum to the EPA Assistant Administrators, instructing them "to develop reforms, including notice-and-comment rulemakings, that outline how benefit-cost considerations will be applied in areas that are in need of greater clarity, transparency and consistency."⁷ The memorandum laid out the following principles for reform:

- "Ensuring the agency balances benefits and costs in regulatory decision-making."
- "Increasing consistency in the interpretation of statutory terminology."
- "Providing transparency in the weight assigned to various factors in regulatory decisions."
- "Promoting adherence to best practices in conducting the technical analysis used to inform decisions."

This proposed rule is the first EPA rulemaking in response to the Administrator's memorandum. It would apply to rulemakings under the Clean Air Act but would likely establish some important precedents for future rulemakings that would apply under other statutes administered by EPA.

² 5 U.S.C. § 601 et. seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ 5 U.S.C. § 601 note 7.

⁷ Memorandum from Andrew R. Wheeler, "Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process" (May 13, 2019), Regulations.gov Document ID EPA-HQ-OAR-2020-0044-0028.

II. The Office of Advocacy recommends incorporating elements of the analyses required under the Regulatory Flexibility Act.

Advocacy commends EPA's work to formalize its current practice of developing economic analyses to support rulemaking development under the Clean Air Act. Advocacy has challenged the specifics of some of these analyses in its public comment letters but values the work that EPA does to describe the likely economic impacts of its rules on regulated entities and the public.

Advocacy, however, believes that EPA can better support the principle of "providing transparency in the weight assigned to various factors in regulatory decisions" by incorporating elements of the analyses required under the Regulatory Flexibility Act (RFA) directly into its analyses. The RFA requires EPA to "solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."⁸ This suggests that impacts on small entities should be given substantial weight. EPA should therefore present the impacts of small entities alongside the impacts directly addressed in this proposed rule so that the public can transparently understand the way that EPA has weighed impacts on small entities in its regulatory decisions.

A. EPA should require a Benefit-Cost Analysis whenever it must conduct a Regulatory Flexibility Analysis.

Advocacy recommends that this rulemaking be applicable to any rulemakings for which the agency must prepare an Initial Regulatory Flexibility Analysis (section 603 of the RFA) or Final Regulatory Flexibility Analysis (section 604 of the RFA), in addition to significant rulemakings under Executive Order 12866.

Under the RFA, when an agency issues a proposed rule or a subsequent final rule, it must prepare a Regulatory Flexibility Analysis, except when the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (i.e., a certification under section 605(b) of the RFA). This analysis must include a description of significant regulatory alternatives "which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact on small entities."

Advocacy recommends that EPA prepare a Benefit-Cost Analysis (BCA) whenever it must conduct a Regulatory Flexibility Analysis. A BCA would provide a consistent framework for the evaluation of the costs imposed on small entities and for demonstrating that the benefits to be gained by regulating small entities accomplish the stated objectives of the applicable section of the Clean Air Act. Such a framework would support EPA's statutory obligation under the RFA to consider regulatory alternatives and provide the public with a transparent demonstration that EPA gave these regulatory alternatives serious consideration.

⁸ Pub. L. 96-354, sec. 2(b).

B. A Benefit-Cost Analysis should include an accounting of small entities impacted.

Under the RFA, EPA must provide a description of the small entities to which a proposed rule or final rule would apply and counts of these small entities where possible. This is part of the regulatory flexibility analysis and is a necessary predicate to a certification under section 605(b).

An accurate description of small entities in a regulated industry is also crucial to credible cost assessment. For example, many small businesses and small governmental jurisdictions finance large capital environmental projects by issuing bonds or other financial instruments. Access to capital and credit ratings is a concern for small entities that is not necessarily reflected in a cost of capital calculation that would apply to a large, publicly traded company. Similarly, their business model may not allow for pass-through of compliance costs to the same extent, while they are also less likely to have cash on hand necessary to handle rapid increases in compliance costs. A cost assessment based only on the behavior of large entities in response to new regulatory mandates risks mischaracterizing the economic impacts of a regulatory proposal on small entities, raising questions about the aggregate economic impacts as well.

Advocacy thus recommends that a BCA always have a description of regulated industries, including where feasible the number of small entities regulated and how they differ from large businesses in the same industry.

C. A Benefit-Cost Analysis should include disaggregation of impacts on small entities.

Advocacy supports a separate presentation of all factors that the Administrator must consider in making a regulatory decision. Under the RFA, one of these factors is impact on small entities, so Advocacy supports incorporating impacts on small entities into the BCA.

In particular, Advocacy recommends a detailed disaggregation of impacts of regulating small entities, both the costs imposed by and the social benefits from regulating small entities. The RFA requires an agency to consider significant regulatory alternatives “which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact on small entities,” including exemptions for small entities. By disaggregating benefits and costs of the rule, EPA can clearly demonstrate how it has considered small business flexibilities in the same framework as other regulatory alternatives, including whether the regulation of small entities can be justified separately from regulation of the industry as a whole. This will provide consistency between consideration of aggregate economic impacts and consideration of small entity impacts and increase transparency in EPA’s weighing of small entity impacts against other impacts described in the BCA.

III. Conclusion

Advocacy supports the use of BCA in regulatory development and supports EPA’s effort to improve the consistency and transparency of BCA in Clean Air Act rulemakings. Advocacy recommends the incorporation of elements of the analyses required under the Regulatory Flexibility Act to further these goals and better support the purposes of the RFA.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Dave Rostker by email at david.rostker@sba.gov.

Sincerely,

Major L. Clark, III

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