Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

Hearing on
"Undermining Mercury Protections: EPA Endangers Human Health and the Environment"

May 21, 2019

Mr. Adam R.F. Gustafson, Partner, Boyden Gray & Associates PLLC

The Honorable Brett Guthrie (R-KY)

1. During the hearing, Representative Griffith asked you questions about ancillary costs, or co-costs, of a proposal and whether an Agency should consider co-costs when the Agency considers the co-benefits of a proposal. You answered that it is important for an Agency to consider corresponding co-costs when the Agency is considering co-benefits of a proposal, and that the EPA did not consider co-costs in the 2016 Supplemental Finding entitled "Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units." Is that correct?

Yes. EPA's 2016 Supplemental Finding did not attempt to quantify the co-costs of the Mercury and Air Toxics Standards (MATS) Rule. By "co-costs," I mean the broader social costs of regulation apart from the direct costs incurred by regulated entities to comply with the rule. In the context of the MATS Rule, co-costs include consequences like jobs lost as a result of power plant closures and businesses that would close or relocate as a result of higher energy prices. EPA's 2016 Supplemental Finding relied on its quantification of particulate matter co-benefits to conclude that the MATS Rule was "appropriate and necessary,"[1] but it did not quantify any of the rule's corresponding ancillary costs. EPA's Regulatory Impact Analysis (RIA) did acknowledge that the MATS Rule would have co-costs like plant closures and higher energy prices.[2] But EPA did not attempt to quantify co-costs even though it quantified the projected co-benefits of the rule. As a result, EPA's analysis undervalued the costs of the MATS Rule relative to the Rule's benefits.

   a. Were co-costs for the Mercury and Air Toxics Standards (MATS) rule evaluated at any point during the rule-making process, such as in the Regulatory Impact Analysis (RIA) for the MATS rule?

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[1] *See Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units*, 81 Fed. Reg. 24,420, 24,427 (Apr. 25, 2016).
[2] EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards 3-17, 3-22 (Dec. 2011) (MATS RIA), https://www3.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf.

No. EPA did not evaluate co-costs at any point during the rule-making process.

In the MATS Rule's RIA, EPA's quantification of costs was limited to the "annual incremental compliance cost" of complying with the Rule—$9.4 billion in 2015.[3] That includes "the amortized cost of capital investment" in new pollution controls, "the ongoing costs of operating additional pollution controls," and other costs of regulated entity "actions associated with compliance."[4] In other words, this $9.4 billion figure includes only the direct costs for the firms that have to comply with the MATS Rule.

The $9.4 billion figure does not include, for example, the broader costs to local communities from plant closures. These costs are not insubstantial: EPA estimated that 4.7 GW of coal-fired capacity would retire by 2015 as a result of the MATS Rule.[5] It also does not include the costs to businesses and consumers from higher electricity prices. Again, those costs are not insubstantial: EPA estimated that by 2015 electricity prices would be on average 3.1% higher as a result of the MATS Rule (and even higher in regions that rely on coal).[6]

b. Why, in your opinion, should corresponding co-costs be considered by an Agency if the Agency is considering co-benefits?

An analysis that weighs co-benefits but ignores corresponding ancillary costs will overestimate the relative benefits of a rule. In some situations, the social costs of regulation can be orders of magnitude higher than the direct costs of compliance, so compliance costs are often a poor proxy for the real costs of regulation. That is why EPA's own guidelines for preparing cost-benefit analysis say that "it is only in cases where the regulation is not expected to significantly impact the behavior of producers and consumers that compliance costs can be considered a reasonable approximation of social cost."[7]

The MATS Rule, with its large effect on energy prices and local economies, has significant impacts on the behavior of energy producers and consumers alike. Failing to quantify co-costs of the rule therefore undercounts the social costs of

[3] MATS RIA at 3-13.
[4] *Id.*
[5] MATS RIA at 3-17.
[6] *Id.* at 3-22.
[7] Guidelines for Preparing Economic Analysis 8-14 (Dec. 17, 2010), https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.

the MATS Rule relative to its co-benefits, leading to an inflated assessment of the Rule's net benefits.

c. If co-benefits are used to justify a rule, is it typical for co-costs to also be considered when justifying the rule? Why or why not?

For the legal reasons discussed below, it should be the norm for agencies to consider the indirect costs of regulation to the same extent that they consider co-benefits. But in my experience, it is not uncommon for EPA to neglect to quantify the co-costs of a rule even while EPA goes to great lengths to estimate the rule's co-benefits. EPA invests in complex models that allow it to quantify the co-benefits of its rules and promote the Agency's regulatory mission, but EPA seems to have been less inclined to invest in quantifying the social costs of its rules.

d. In your opinion, when should co-costs and co-benefits be used to justify a proposal and when should they not be used to justify a proposal?

Under Executive Order 12,866, the White House requires Executive Branch agencies to consider ancillary costs and benefits of all significant rules, and to quantify those co-costs and co-benefits "to the extent feasible."[8] The relevant co-costs include "any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment."[9] With this range of indirect costs and benefits in view, the Executive Order requires agencies to regulate "in the most cost-effective manner to achieve the regulatory objective."[10]

Likewise, the White House Office of Management and Budget's Circular A-4 provides that agencies should, if feasible, quantify *both* "expected undesirable side-effects and ancillary benefits."[11]

It would be irrational and contrary to these Executive Branch authorities for an agency to weigh co-benefits without weighing co-costs to the same extent. Without attempting a general theory of the array of co-costs and co-benefits that should be included in such an analysis, it is sufficient to point out that the more attenuated and contingent the co-benefits an agency weighs, the more important it is that corresponding indirect co-costs be included in the analysis. To include

[8] E.O. 12,866 § 6(a)(3)(C)(i), (ii). Elsewhere the Executive Order requires agencies to use quantifiable measures "to the fullest extent that these can be usefully estimated." *Id.* § 1(a).
[9] *Id.* § 6(a)(3)(C)(ii).
[10] *Id.* § 1(b)(5).
[11] Circular A-4, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.

highly speculative co-benefits while excluding fairly certain co-costs would be arbitrary and capricious.

In addition to these Executive-Branch requirements, Congress may by statute set other requirements for regulation. In *Michigan v. EPA*, the Supreme Court interpreted section 112's "appropriate and necessary" standard to require consideration of both costs and benefits, because "[n]o regulation is 'appropriate' if it does significantly more harm than good."[12] The relevant costs "include[] more than the expense of complying with regulations; any disadvantage could be termed a cost." When considering co-costs, it is reasonable for EPA to consider corresponding co-benefits, but the Agency must take care to avoid double-counting or inflating co-benefits, as it did in the 2016 Supplemental Finding by counting fine particulate matter reductions that are already required under a different provision of the Clean Air Act.

The Honorable Michael C. Burgess, M.D. (R-TX)

1. Everyone at the hearing acknowledged the severe impact many mercury compounds can have on public health. As a licensed obstetrician, I am acutely aware of the damage mercury can have on pregnant mothers and infants. Furthermore, no one at the hearing claimed that the Environmental Protection Agency (EPA) does not have the authority to regulate Hazardous Air Pollutants, as outlined by Section 112 of the Clean Air Act. What *is* at question is the ability of a federal agency to regulate industry without properly evaluating the cost-to-benefit of such regulations.

    a. The EPA estimates that the benefits of reductions in hazardous air pollutants to be up to $6 million dollars annually and the costs of this regulation is up to $9.6 billion dollars annually. How often do federal agencies enforce regulations greater than a thousand times costlier than its benefits?

It is very rare for an agency to impose regulatory requirements whose costs outweigh its benefits to such a degree. Unless required by law, it is not "rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[13] Aside from this case, I am not aware of any specific instance of an agency voluntarily using broad discretionary authority like § 112 to impose a regulation with compliance costs a thousand times greater than its direct benefits. In the normal course, the Office of Information and Regulatory Affairs would block such a rule, because it would violate Executive Order 12,866's requirement of "cost-effective" regulation.[14]

[12] 135 S. Ct. 2699, 2707 (2015).
[13] *Id.* at 2707.
[14] Executive Order 12,866 § 1(b)(5).

b. Do you know of any other instances when a federal agency was able to claim that ancillary benefits (co-benefits) gave them the authority to skirt the law giving that agency the ability to promulgate such rules?

There are other examples, although none as stark as this one. For example, I represented a coalition of petitioners who challenged EPA's "Clean Power Plan" in the D.C. Circuit in part because the rule was justified (in our view improperly) based on particulate matter co-benefits. The Trump Administration has withdrawn the Clean Power Plan,[15] and the D.C. Circuit never reached a decision in the case.

c. If the EPA was willing to consider the ancillary benefits of its regulations, shouldn't it also have to consider the ancillary costs to the same regulations?

Yes. As I explain in response to 1(b), failure to consider ancillary costs results in an inaccurate picture of the net benefits or net costs of a rule. It is arbitrary and capricious for an agency to weigh a rule's indirect benefits without giving equal weight to the corresponding indirect costs of the rule.

d. In your opinion, is this good governance?

No. Reducing pollution is a laudable goal. But it is not good governance to achieve that goal at any cost and without attending to other important societal goods. The MATS Rule sought modest environmental benefits at enormous social costs, and it did so by compromising other cherished values like the rule of law, federalism, and democratic government.

[15] *Repeal of the Clean Power Plan: Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019).