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. Michael A. Livermore, Associate Professor of Law, University of Virginia School of Law

The Honorable Frank Pallone, Jr. (D-NJ)

1. At the hearing, Representative Griffith asked Mr. Gustafson whether the EPA had considered ancillary costs, or co-costs, in evaluating the costs and benefits of regulating mercury and other air toxics 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." Mr. Gustafson replied that the EPA did not. However, in a response to a question from Mr. Sarbanes later in the hearing, you disagreed and stated that the EPA did consider co-costs as part of the Mercury and Air Toxics Standards and as part of this current proposal to rescind the "appropriate and necessary" finding.

    a. Can you explain how the EPA considered co-costs in support of its 2016 Supplemental Finding?

Response 1a

The 2016 Supplemental Finding relied on a compliance cost estimate from the 2012 Regulatory Impact Assessment (RIA) for the final MATS rule.[1] The cost estimates for that rule were for the power sector as a whole, not only MATS-related expenditures made by plants subject to the rule's emissions limits.[2] EPA's peer-reviewed Guidelines for Preparing Economic Analyses ("EPA's Economic Guidelines") define direct costs as "those costs that fall directly on regulated entities as the result of the imposition of a regulation." [3] Indirect costs, meanwhile, are "those incurred in related markets or experienced by consumers or government agencies not under the

[1] EPA, 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, 24,423 (Apr. 25, 2016) [hereinafter EPA, Supplemental Finding].

[2] "The annual incremental cost is the projected additional cost of complying with the final rule in the year analyzed, and includes the amortized cost of capital investment (at 6.15%) and the ongoing costs of operating additional pollution controls, *investments in new generating sources, shifts between or amongst various fuels*, and other actions associated with compliance." EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards 3-13 (Dec. 2011) (emphasis added).

[3] EPA, Guidelines for Preparing Economic Analyses 8-7 (2010).

direct scope of the regulation."[4] In the case of the MATS rule, indirect costs (or "co-costs") would include expenditures incurred at natural gas-fired combined cycle units that ramp up generation to compensate for MATS-driven coal plant retirements.

In the 2016 Supplemental Finding, EPA expressly acknowledged that its compliance cost estimate included indirect costs.[5]

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b. Can you explain how the EPA considers co-costs as part of its recent proposal to rescind the "appropriate and necessary" finding?

Response 1b

EPA continues to rely on the cost estimates from the 2012 RIA in its proposal to rescind the "appropriate and necessary" finding. [6] As discussed above, this estimate includes indirect costs.

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c. How does the EPA's treatment of co-costs in its current proposal compare to its treatment of co-benefits in the proposal?

Response 1c

In its proposal, the agency states:

> In this action, the EPA proposes to conclude that it is not appropriate and necessary to regulate HAP from EGUs under CAA section 112 because the costs of such regulation grossly outweigh the HAP benefits.[7]

In other words, EPA gives full weight to co-costs while functionally ignoring co-benefits.

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[4] *Id.*

[5] "In conducting benefit-cost analyses, the EPA routinely considers consequences (both positive and negative) that are ancillary to the intended purpose of a regulation. For example, the $9.6 billion cost estimated in the MATS RIA included costs that would be passed on to electricity customers and higher fuel costs, which are beyond the costs borne by owners of coal- and oil-fired units regulated by MATS." EPA, Supplemental Finding at 24,439–40.

[6] EPA, 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 2677 (Feb. 2019) (stating that "the total cost of compliance with MATS ($7.6 to $9.6 billion annually) dwarfs the monetized HAP benefits of the rule").

[7] *Id*. at 2676

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d. In your opinion, is it appropriate for the EPA to consider co-costs but not co-benefits?

Response 1d

It is irrational and inconsistent with prior practice, relevant guidance documents, and the goals of cost-benefit analysis to disregard co-benefits. It is especially arbitrary to treat co-benefits and co-costs differently, as occurred in this rule.

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e. What is the impact of considering co-costs but not co-benefits?

When an agency relies on a cost-benefit analysis to support its rulemaking, as EPA has done here, "a serious flaw undermining that analysis can render the rule unreasonable."[8] For all the reasons discussed above, failing to consider indirect benefits is serious flaw in EPA's proposed rescission of the appropriate-and-necessary finding, rendering the decision unreasonable and arbitrary.

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2. Section 112 of the Clean Air Act regulates air toxic emissions such as mercury. Sections 108, 109 and 110 of the Act regulate criteria pollutants such as particulate matter ("PM"). At the hearing, Mr. Gustafson suggested that the EPA's reliance on PM co-benefits in the 2016 Supplemental Finding violates an express prohibition in Section 112 against regulating criteria pollutants.

    a. Does Section 112 of the Clean Air Act either expressly or implicitly prohibit the EPA from considering co-benefits in deciding whether regulation of mercury and other air toxics from power plants is "appropriate and necessary"?

Response 2a

There is no express text in Section 112 that addresses the issue of co-benefits. In the absence of an express prohibition, case law suggests that EPA has discretion to take such benefits into account. For example, in *U.S. Sugar Corp. v. EPA*, the D.C. Circuit held that EPA properly exercised discretion to consider potential non-HAP co-benefits when setting standards for

[8] Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

hydrogen chloride emissions from boilers under section 112(d)(4).[9] The court noted that the "text [of section 112(d)(4)] does not foreclose the Agency from considering co-benefits" and that considering such benefits "is consistent with the [Clean Air Act]'s purpose—to reduce the health and environmental impacts of hazardous air pollutants."[10]

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b. Does the Supreme Court's decision in *Michigan v. EPA* expressly or implicitly prohibit the EPA from considering co-benefits in deciding whether regulation of mercury and other air toxics from power plants is "appropriate and necessary"?

Response 2b

In *Michigan v. EPA*, the Supreme Court interpreted the term "appropriate" as "'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'"[11] The thrust of *Michigan v. EPA* is to reject a narrow interpretation of the types of factors that the agency may consider as part of is analysis under section 112. Because the issue was not presented, the Court expressly declined to address the issue of co-benefits and whether and how they should be weighed against costs.[12]

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The Honorable Diana DeGette (D-CO)

1. In its current proposal, the EPA claims that the 2016 Supplemental Finding erred in using a "cost reasonableness" approach based on compliance costs relative to the size of industry. The EPA asserts that such an approach does not satisfy the EPA's obligations under section 112(n)(1)(A) of the Clean Air Act, as informed by *Michigan v. EPA*, 135 S. Ct. 2699 (2015). 84 Fed. Reg. 2670, 2674-2675 (Feb. 7, 2019).

   In your opinion, does the "cost reasonableness" approach that EPA took in its 2016 Finding meet the requirements of the Clean Air Act and appropriately respond to the Supreme Court's direction in *Michigan v. EPA*? Why or why not?

[9] 830 F.3d 579, 625–26 (D.C. Cir. 2016).

[10] *Id*.

[11] 135 S. Ct. 2699, 2707 (2016) (quoting White Stallion Energy Ctr., LLC, 748 F.3d at 1266 (Kavanaugh, J., dissenting)).

[12] 135 S. Ct. at 2711

Response 1

The *Michigan* Court emphasized EPA's discretion concerning how to conduct its economic analysis, noting that it would be "up to [EPA] to decide (as always, within the limits of reasonable interpretation) how to account for cost."[13] Courts have upheld many past EPA Clean Air Act rules that address the question of cost consideration in a similar fashion to the "cost reasonableness" approach in the 2016 Finding.[14]

[13] *Id*. at 2711.

[14] *See* EPA, Legal Memorandum Accompanying the Proposed Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units (EGUs) 18–19 (2015).