

Comments of Louis E. Tosi

“Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process”

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Thank you for the opportunity to comment on the proposed rule published by the Environmental Protection Agency (EPA) to refine and standardize cost benefit analysis procedures under the Clean Air Act. I am making these comments as an individual and not on behalf of any entity or organization. I am a lawyer who has been practicing environmental law since the early 1970s, usually representing business interests. I have worked on many of the original EPA Clean Air Act critical regulations, including State Implementation Plans, New Source Review, Interstate Air Pollution, various National Ambient Air Quality and attainment and nonattainment designations, the definition of Best Available Technology, Lowest Available Emission Rate, and Reasonably Available Control Technology. I have been involved in EPA cases in the Sixth, Seventh, Fourth and D.C. Circuits, as well as counsel of record in the United States Supreme Court in the *Chevron* case. Over my years, I fully recognize the need for balance, credibility, transparency, and full public participation in EPA standards setting. This current rulemaking is particularly important to the sound implementation of the Clean Air Act, because it will codify best scientific and economic practices to protect public health and the economic lifeblood of the nation and emphasize the importance of sound CBA processes. My comments will address some ideas on transparency and “particularized” approaches to consistency. I support the EPA’s effort to codify this important idea.

Importance of Cost Benefit. Cost benefit analysis (CBA) is one of the most important tools in the regulator’s toolbox. It is a primary tool to address the overarching question of why should we regulate and how far should the regulation go. Environmental protection is a national, shared priority, and countless business operations critical to national economic vitality fall under the jurisdiction of the EPA. Already, the EPA’s regulations [account for 80% of benefits and 70% of costs for all regulations from 2007 to 2016](#). CBA has been used often by EPA but, as [Administrator Wheeler mentioned last year](#), costs and benefits within the EPA have “historically been treated differently depending on the media office and the underlying authority,” alongside “various concepts of benefits, costs and other factors” in the regulatory decision making process that yield sub-optimal outcomes. Too often regulations are enacted even when costs outweigh benefits. The result is heightened regulatory burdens on private industry and enterprise, both large and small. When regulations impose compliance costs that significantly outstrip benefits, it may incentivize to engage in avoidance mechanisms, loopholes, or move production offshore.

Properly conducted, CBA does more than promote economically sound regulations. It adds “credibility” to them for both the regulated industries and to the public. By providing sound data

on the balance of the impact of regulation on the economy and public health, all parties will better understand “why” to regulate and what impact the rule will have on their lives and health. Credibility, in turn, allows wider public support to EPA’s mission, and therefore encourages compliance, acceptance, and legitimacy. Regulations which have hidden burdens (perhaps resulting in loss of jobs) or which poorly protect against health risks, have little chance of standing and a greater chance of creating controversy after conflict.

In an important sense, rulemaking which ignores CBA borders is arbitrary and capricious. At one end of the spectrum, it is hard to imagine that a rule with billions in costs and trivial benefits as being not capricious. By balancing various costs and benefits, EPA is better equipped to make the tradeoff between the degree of control versus costs. Questions like this involve deep and careful thought and cannot be dealt with in an abstract manner, such as these comments, but they can be vital in particular rulemakings.

In the appeal of the electric utility MATS rule, Justice Scalia, writing for the majority, recognized the need to consideration of costs in the promulgation of the “MATS” rule to reduce mercury and air pollutants from coal and oil-fired energy plants. While his opinion turns on statutory language and intent, it is easy to suggest that without considering costs, the Agency rulemaking borders on capricious action. Or, put another way, rules with excessive cost and de minimis benefits disregard common sense. [It has been reported compliance costs for that MATS rule would exceed \\$9 billion with the benefits of reduced hazards totaling \\$6 million.](#) This is a huge discrepancy that should have spurred more in-depth review or rewriting of the regulation. One consequence of the MATS rule was that many utilities complied with the rule during the time the case made it to the Supreme Court, so in many ways the legal decision had little impact on real life.

Consistency. While consistence is an admirable virtue, EPA should apply CBA in particular cases, as the statute allow or specifies. The Clean Air Act allows for cost consideration in both technology determinations and others which would require health impact assessments. In all regulatory actions, the case law and the actual language of the rule in question should guide just how costs and/or benefits will be analyzed. Likewise, it is important for the Agency to be open to developing data or modeling advances. Risk analysis is not a static science. More is known every day on relative risks and the assessment methods. Existing risk models themselves may prove less accurate (note the early errors in the COVID morbidity models). But, in every case, risk models carry statistical uncertainty. Without disclosing the actual statistical uncertainty or variance, CBA results could give a false impression of certainty. It should be a standard protocol for EPA to publish clear and understandable discussion of the uncertainties inherent in all “benefit” calculations and what that means to the public.

Likewise, economic cost models suffer from the same problem of inherent inaccuracies or whether any given model is applicable to the economic and industrial status. Economies change rapidly, and industry decisions are often based on unseen circumstances. In order to avoid the false appearance of certainty, the Agency should clearly discuss statistical error and variance in predicted economic impacts.

To remedy some of these problems, the EPA should continue forward on instituting summaries of the results of cost benefit analyses, including relevant ranges and ancillary benefits that are also worth considering. The EPA can also improve its position as an authority on regulations by being clear about key assumptions that drive these analyses, as well as a frank disclosure of uncertainty or risk in the models used and how that may influence decision making.

Transparency. Despite this word being overused to the point of meaning all things to all people, it is nonetheless an important aspect for rulemaking for several reasons. Not the least is that transparency is required by law. EPA rules are reviewed by courts “on the record.” The failure of an agency to make available and discuss the assumptions, uncertainties, and data bases can undermine the legality of a rule. The old maxim of garbage out couldn’t be truer here. CBA based on inaccurate data, or data which has not been collected on statistically acceptable methods, has no place in the arena. A model based on bad data is useless. Transparency allows an orderly and more efficient notice and comment process. It is not practical to comment on an important rule without knowing if the algorithms used in CBA modeling represent reality, have been verified, and are not out of date.

Conclusion. EPA’s proposal represents a strong step in incorporating CBA into Clean Air Act decision making. When finalized the result will be better rules, better public acceptance of rules, and rules which balance competing public interests. S/ Louis E Tosi.