



August 13, 2018

Docket ID No. EPA-HQ-OA-2018-0107

Subject: Comments on Advance Notice of Proposed Rulemaking for “Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process”

The Institute for Policy Integrity at New York University School of Law¹ (“Policy Integrity”) is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity has considerable expertise in evaluating agencies’ analyses of regulatory costs and benefits. Drawing from that expertise, Policy Integrity respectfully submits the following comments:

- The Advance Notice is a proposal hopelessly in search of a problem, based on vague or false assumptions and misleading examples;
- The Advance Notice implicitly and wrongly attacks EPA’s historically appropriate, consistent, and transparent consideration of co-benefits, unquantified benefits, and uncertainty; and
- Through 2016, EPA’s analyses of regulatory costs and benefits were among the most thorough, consistent, and transparent regulatory impact analyses conducted in the federal government; were based on the well-regarded and peer-reviewed *Guidelines for Preparing Economic Analyses*; and had justified some of the most net beneficial rules in the history of federal regulation.

To begin, EPA wrongly states that, while the Advance Notice is a “significant regulatory action” under Executive Order 12,866, the “various [requirements] of Executive Orders that normally apply to rulemaking do not apply in this case” because the Advance Notice “does not propose or impose any requirements, and instead seeks comments.”² In fact, this Advance Notice—like all regulatory actions—is subject to Executive Order 12,866’s “Principles of Regulation,” including the very first principle: “Each agency shall identify the problem that it intends to address . . . as well as assess the significance of that problem.”³ The Advance Notice fails to adequately identify a real problem or to assess its significance.

By its title and text, the alleged purpose of the Advance Notice is to “increas[e] consistency and transparency in considering costs and benefits.”⁴ Though the terms *consistency* and *transparency* undoubtedly sound desirable in the abstract, EPA fails to consider the possible costs of increasing consistency and transparency or to explain what tradeoffs the agency is willing to make, and why, to achieve those goals. EPA also fails to assess the significance or frequency of alleged problems with consistency and transparency in the agency’s past analyses. EPA offers only two concrete complaints from industry about the agency’s consideration of regulatory costs, and neither example is a case of inconsistency or lack of transparency.

¹ No part of this document purports to present New York University School of Law’s views, if any.

² 83 Fed. Reg. 27,524, 27,528 (proposed June 13, 2018).

³ Exec. Order No. 12,866 § 1(b)(1) (these principles apply “to the extent permitted by law and where applicable”).

⁴ 83 Fed. Reg. at 27,524; *id.* at 27,526 (“The purpose of this ANPRM is . . . to solicit comments on potential approaches that would provide improved consistency and transparency.”).

One example EPA offers is the Mercury and Air Toxics Standards (MATS). Industry complained that EPA issued MATS even though the “monetized benefits from one of the pollutants being directly regulated (i.e., mercury) were significantly lower than the estimated costs of the rule,” and that the rule’s total monetized benefits outweighed costs only because the agency considered the ancillary benefits from the reduction of a co-pollutant.⁵ As the Advance Notice’s presentation of this example makes clear, industry’s complaints with the MATS rule were (1) that the rule was justified by the highly significant but nevertheless largely unquantified benefits of reducing mercury and other toxic pollutants, and (2) that the rule’s massive net monetized benefits included co-benefits. Neither consistency nor transparency is part of this complaint from regulated industry. In fact, as the attached amicus briefs and comments submitted by Policy Integrity in the various proceedings over MATS make clear, EPA’s consideration of unquantified and ancillary benefits was fully consistent with longstanding regulatory precedent and best practices, and was conducted transparently, especially with respect to setting the baseline and addressing uncertainty. A recently published article by Kimberly Castle and Richard Revesz (also attached) confirms the robust support for valuing co-benefits, including the consistent consideration of co-benefits under administrations of both major political parties.

EPA’s only other concrete example offered in the Advance Notice, the Oil and Natural Gas NSPS, also involves industry complaints about counting the full benefits of a regulation that reduces multiple pollutants.⁶ With this rule, industry again wishes that EPA had not counted co-benefit or unquantified benefits, or possibly wishes that EPA had manipulated its valuation of the social cost of methane to falsely lower the rule’s benefits. Industry’s complaints about the Oil and Gas NSPS have nothing to do with consistency or transparency. Policy Integrity’s attached comments on the Oil and Gas NSPS show that, like the MATS rule, the original regulation was massively net beneficial and supported by a consistent, transparent, and rigorous regulatory impact analysis.

Those are the only two concrete examples of rules that EPA offers with alleged problems of consistency or transparency. The Advance Notice vaguely alludes to “criticisms . . . regarding . . . key uncertainties, baseline assumptions, and other analytical factors in quantifying both benefits and costs,”⁷ but EPA offers no examples or proof that analytical consistency and transparency on such topics have been problems, or what the consequences of those alleged problems might have been. The Advance Notice also vaguely alludes to “a variety of concepts of ‘costs’” that have been developed under different statutes,⁸ but gives no examples and does not specify how that variation has caused problems. Instead, the Advance Notice calls on commenters to “provide specific examples” of problems with consistency and transparency,⁹ even as the bulk of the notice already assumes that such problems exist.

The Advance Notice lists several “technical and practical factors” that could, in theory, contribute to inconsistent consideration of costs or benefits: “the state of scientific and economic modeling”; “available data”; “statutory authority to collect information”; “the costs of data collection” including the existence of “publicly-available data” and cases when the collection costs would “outweigh the data’s anticipated utility”; the “lack of a regular process for ongoing or retrospective review”; and the fact that “some metrics may be more or less relevant to the affected industries, sectors, or question at hand.”¹⁰ EPA fails to assess, however, the actual occurrence or significance of these factors. Nor does EPA make any meaningful attempt to connect these factors to solutions or consider the tradeoffs involved. For

⁵ 83 Fed. Reg. at 27,526 (characterizing the MATS rule’s justification).

⁶ *Id.* (characterizing the Oil and Gas NSPS rule).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 27,527.

¹⁰ *Id.* at 27,526.

example, if inconsistent degrees of analysis occur because data collection costs sometimes outweigh the data's utility, is the goal of consistency worth bearing those collection costs without regard to the data's value? If inconsistent degrees of analysis occur because some metrics are not relevant to certain proceedings, does the goal of consistency justify considering irrelevant metrics? If the problem is lack of models, data, and retrospective reviews, is EPA willing and able to bear the financial costs and delay costs of additional research? The Advance Notice assumes that increasing consistency is a desirable goal without grappling with any of these issues. Furthermore, none of these stated factors, nor any other theory or example in the Advance Notice, provides evidence of the significance or even the existence of the alleged problem with *transparency* in past EPA analyses.

Because the Advance Notice gives no concrete examples of alleged problems other than MATS and the Oil and Gas NSPS—and because both MATS and the Oil and Gas NSPS were massively net beneficial rules supported by consistent and transparent analyses—the entire Advance Notice reads less like an honest search for solutions to improve consistency and transparency, and more like a salvo against EPA's historically appropriate consideration of co-benefit, unquantified benefits, and uncertainty, as well as perhaps the social cost of greenhouse gas metrics. In fact, EPA's *Guidelines for Preparing Economic Analysis* are quite clear and detailed on the treatment of co-benefits, unquantified benefits, baselines, uncertainty, and other issues, and both MATS and the original Oil and Gas NSPS rules were consistent with the *Guidelines*. Indeed, MATS and the Oil and Gas NSPS are just two of many massively net beneficial rules that EPA developed prior to 2017 by following the *Guidelines*. As the Advance Notice concedes, the *Guidelines* already provide a “peer-reviewed . . . scientific framework for analyzing the benefits, costs, and economic impacts of regulations and policies.”¹¹

The Advance Notice suggests the possible need for “a regulatory action that commits the Agency to following its existing peer-reviewed guidance documents on risk assessment and *Guidelines for Preparing Economic Analysis*”¹²—and yet the Advance Notice gives no examples of when specifically EPA might have failed to follow the *Guidelines*. Tellingly, the Advance Notice makes no mention of examples from recent months—identified by Policy Integrity in comments on the recent proposed rescissions of, for example, the Waters of the United States rule and the Emissions Requirements for Glider Vehicles—when EPA actually has inconsistently treated costs and benefits in violation of the *Guidelines*. But in those cases, as explained in our attached comments, the solution would be proper adherence to the best practices contained in EPA's *Guidelines* and OMB's *Circular A-4*. The Advance Notice fails to make any plausible case why a new guidance document or rule on cost-benefit analysis would be necessary or beneficial.

Sincerely,

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Attachments:

- Kimberly M. Castle & Richard L. Revesz, *Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations*, 103 Minn. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3154669

¹¹ *Id.* at 27,525.

¹² *Id.* at 27,527.

- Comments to EPA on the Proposed Repeal of Emission Requirements for Gliders (submitted Jan. 5, 2018), http://policyintegrity.org/documents/glider_repeal_comments_v2.pdf
- Joint Comments of Policy Integrity et al., to EPA, on Stay of the Oil and Gas NSPS (submitted Dec. 8, 2017), http://policyintegrity.org/documents/12.8.17_Joint_Comment_on_EPA_Oil_and_Gas_NODA-final.pdf
- Comments to EPA on the Proposed Rescission of the Waters of the United States Rule (submitted Sept. 27, 2017), http://policyintegrity.org/documents/IPI_WOTUS_comments.pdf
- Comments to EPA on Stay of the Oil and Gas NSPS (submitted August 9, 2017) (attaching the December 2015 Joint Comments of Policy Integrity et al., on the use of the Social Cost of Methane in the original Oil and Gas NSPS proposal), http://policyintegrity.org/documents/2017-09-09_-_Policy_Integrity_Comments_on_Proposed_Stays_of_111b_Methane_Standards.pdf
- *Amicus* Brief to the U.S. Courts of Appeals for the D.C. Circuit on MATS, *Murray Energy Corp. v. EPA*, No. 16-1127 (submitted Jan. 25, 2017), http://policyintegrity.org/documents/MATS_Final_Brief.pdf
- Comments to EPA on the MATS Supplemental Finding (submitted Jan. 15, 2016), <http://policyintegrity.org/projects/update/comments-on-supplemental-finding-for-epa-mercury-rule>
- Comments to EPA on the Proposed Oil and Gas NSPS (submitted Dec. 4, 2015), http://policyintegrity.org/documents/Oil_Gas_Comments_Dec2015.pdf
- *Amicus* Brief to the U.S. Supreme Court on MATS, *Michigan v. EPA*, Nos. 14-46, 14-47, 14-49 (submitted Mar. 4, 2015), http://policyintegrity.org/documents/SCOTUS_brief_MATS_March2015.pdf