

June 2019 Update on Trump EPA's 'Benefits-Busting' Rule

Latest Development

In a [May 13 memo](#) to the agency's Assistant Administrators, Environmental Protection Agency (EPA) Administrator Andrew Wheeler announced the agency was partially backtracking on its pending rulemaking to overhaul how it would perform cost-benefit analyses for its future rules. For nearly a year now, public interest advocates had [criticized](#) the planned rulemaking's one-size-fits-all approach to cost-benefit analysis because it failed to account for important variations in the statutory requirements of the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and more. In his May 13 memo, Wheeler gave ground, apparently agreeing with critics' assessment, and acknowledging that each statute's different protective standards require different approaches to regulatory decision-making that could not be so easily glossed over or shoved aside. Even with this concession, however, Wheeler has left ample room for anti-safeguards shenanigans at the EPA.

The memo announces three significant changes to the EPA's plans for completing this rulemaking.

1. ***EPA will pursue what is described as a "media-specific approach,"*** which would involve breaking up the proposed benefits-busting rule into four separate rulemakings, each of which corresponds to one of the agency's major programmatic offices. The memo outlines four principles that the heads of the programmatic offices should adhere to in developing their respective rules: (1) ensuring the agency balances benefits and costs in regulatory decision-making; (2) increasing consistency in the interpretation of statutory terminology; (3) providing transparency in the weight assigned to various factors in regulatory decisions; and (4) promoting adherence to best practices in conducting the technical analysis used to inform decisions.
2. ***EPA will delay the completion of its cost-benefit analysis overhaul.*** Under this new media-specific approach, new rules governing cost-benefit analysis will likely be delayed by several months, if not years. The memo anticipates the four planned rulemakings will be pursued in a staggered fashion, with the EPA's air office set to take the lead. When it issued its Fall 2018 Regulatory Agenda, the EPA projected that it would release the proposal for the agency-wide benefits-busting rule by the end of [May 2019](#). In contrast, the Wheeler memo suggests it may be more than a year before the agency is able to issue the last of its four media-specific proposals. The Spring 2019 Regulatory Agenda sets a target date of [December 2019](#) for completing the air office proposal. Neither the EPA's [active Regulatory Agenda](#) nor its [Long-Term Actions list](#) mention the rulemakings for the agency's other programmatic offices, suggesting that it could take significantly longer for the agency

to issue the other proposals. The bottom line is that the only benefits-busting rule that has a realistic chance of being completed before the 2020 presidential election is the air office one, and even that seems a remote prospect.

3. **EPA's Office of Policy will update existing internal agency guidance** that defines [best practices](#) for conducting regulatory cost-benefit analyses.

Background

Along with the EPA's pending "[censored science](#)" rule, which seeks to arbitrarily limit what kind of science the agency can consider in its regulatory decision-making, the [benefits-busting rule](#), first announced by then-Administrator Scott Pruitt in a June 2018 [Advance Notice of Proposed Rulemaking](#), is part of a broader effort to skew how the agency conducts its business to systematically favor corporate polluters at the expense of public health and environmental protection.

Regulatory cost-benefit analysis generally involves an effort by agencies to first quantify and then monetize (that is, assign a dollar-and-cents value) to all the pros and cons of a particular regulatory decision, though the particulars of how the methodology is practiced and its goals can vary greatly. A litany of policy justifications have been marshalled in support of regulatory cost-benefit analysis, but the actual motivations behind its use have always been political. Opponents of environmental regulations have long recognized that the methodologies involved in the practice of cost-benefit analysis are inherently biased against stronger public health and environmental protections. In particular, since benefits like saving lives and preserving ecosystems are difficult to measure in dollar terms, and are thus likely to be underestimated in comparison to regulatory costs, cost-benefit analysis tends to make rules less protective of the environment and public health.

Undoubtedly for that reason, opponents of environmental regulations – either for ideological or profit-driven reasons – have long sought to force the EPA to ground its regulatory decision-making in the methodologies of cost-benefit analysis. At their behest, President Reagan issued an executive order directing the EPA and other agencies to demonstrate that their biggest and most important regulations pass a cost-benefit analysis "test," requiring that the monetized benefits of a proposed regulation exceed the costs of compliance. This test thus treats the environmental, health, and safety impacts of pollution as if they were mere items on a balance sheet, costs that consumers should rightly expect to shoulder on industry's behalf, so long as industry profited sufficiently as a result. Ever since, agencies have operated under a series of [executive orders](#) providing for different variations on that cost-benefit analysis test.

In the intervening decades, though, the fields of science and environmental economics have advanced to the point that the EPA is better equipped to recognize and account for regulatory benefits, which has risked undermining the systemic advantage that cost-benefit analysis offered to opponents of environmental regulations. [Corporate interests](#) have thus pushed the EPA to pursue something like the benefits-busting rule that would recalibrate the already-biased methodologies of cost-benefit analysis to ensure its pro-polluter bias remains firmly in place. The Trump administration has eagerly adopted the polluters' cause.

What Might Be Included in the Air Office's Benefits-Busting Rule?

One noteworthy practical consequence of the media-specific approach is that the individual program offices will take charge of drafting their respective rules, rather than the agency's Office of Policy, which is where the technical expertise on matters related to cost-benefit analysis resides at the agency. Perhaps not surprisingly, Administrator Wheeler has tapped EPA's air office, under the leadership of [former utility industry lobbyist Bill Wehrum](#), to lead the way on this effort. Assistant Administrator Wehrum is well versed in industry's ploys for attacking the cost-benefit analyses that underlie important Clean Air Act safeguards. The air office's benefits-busting rule will afford him the chance to codify those tricks into a binding regulation that would hobble future efforts to protect public health and the environment against harmful air pollution.

An air office benefits-busting rule would likely include the following elements:

- **Limit consideration of co-benefits.** The air office's rule is likely to impose significant restrictions on the use of co-benefits in regulatory cost-benefit analysis, if not bar their consideration outright. Co-benefits are those that a rule produces even though they were not the rule's explicit purpose. The epicenter of the industry attack on co-benefits has been the EPA's [Mercury and Air Toxics Standard \(MATS\) rule](#), for which the bulk of the benefits that could be quantified and monetized were co-benefits (*i.e.*, health benefits and lives saved by reducing particulate matter) while the rule's substantial "direct" benefits (reductions in mercury and a bunch of other toxins) could largely be accounted for only in qualitative terms. The proposal might bar the consideration of such co-benefits entirely, or it might place arbitrary restrictions on their use. For example, the EPA has indicated in other rulemakings an intent to exclude the co-benefits of air pollution reductions that occur [below certain thresholds](#). Both approaches would fly in the face of well-established economics and science. Ultimately, the effect of disregarding co-benefits will be to make it difficult, if not impossible, for the EPA to issue rules like MATS in the future since the underlying cost-benefit analysis would be so heavily biased against effective protections.
- **Create a new (lower) social cost of carbon.** The rule is also likely to codify the Trump administration's efforts to gut the Obama-era Social Cost of Carbon (SCC). The SCC attempts to put a price on the value of efforts to reduce greenhouse gas emissions and thus plays an outsized role in determining the stringency of climate-related regulations. The higher the SCC, the more stringent the regulations that can be justified on cost-benefit analysis grounds.

The Obama administration set the SCC at [about \\$45 per ton of carbon dioxide](#) emissions, a figure many economists have criticized as too low. Nevertheless, the Trump EPA has signaled its intent to reduce the SCC to [as little as \\$1 per ton](#) by [making two significant changes](#) to how it is calculated. First, while the Obama SCC would include global benefits of carbon dioxide emissions reductions (a reflection of the fact that climate change is a global problem with no borders), the Trump revision would only account for domestic benefits. Second, the Trump revision would adopt a much higher discount rate (as high as 7 percent) than that used by the Obama administration (as low as 2.5 percent). Because the value of money changes over time, cost-benefit analysis uses discount rates to make the monetary values of

regulatory impacts that occur at different times (e.g., compliance costs spent now for benefits that occur sometime in the future) directly comparable.

The practical effect of the higher discount rate is to reduce the value of preventing the long-term harms of climate change, no matter how catastrophic, to virtually nothing, making it nearly impossible to justify significant regulatory action in the short term. While the logic of higher discount rates can make sense for some of the shorter time horizons that exist for some regulations, their use for the kinds of intergenerational impacts implicated by climate change is contrary to both sound economics and basic ethics. By adopting these changes to the SCC, the air office proposal could essentially thwart any meaningful effort to address climate change through regulation.

- **Ignore qualitative benefits.** One of the fundamental problems that cost-benefit analysis has never been able to solve is how to meaningfully account for the significant benefits that regulations produce that can only be described in qualitative terms. This actually includes the majority of benefits categories. For many, we lack the scientific and economic tools for accurate quantification and monetization (e.g., protecting healthy ecosystems or reducing the 189 toxic pollutants listed in the Clean Air Act). Others are incompatible with those attempts (e.g., preserving the cultural and religious practices of indigenous peoples in the United States or affording asthmatic children an equal opportunity to play outside). Cost-benefit analysis is supposed to identify unquantifiable benefits categories and describe them qualitatively, but these important values get excluded from the final mathematical tally of costs and benefits tallies, rendering them effectively irrelevant.

The air office benefits-busting proposal might include new ways to reinforce or exploit the secondary status that cost-benefit analysis already assigns to qualitative benefits. The Trump EPA's proposal to revise the MATS rule's cost-benefit analysis illustrates one possible approach. There, the proposal acknowledged that only a tiny subset of the benefits of reducing hazardous air pollution could be quantified and monetized then nevertheless set up a [subjective and manipulable test for considering the remaining qualitative benefits](#). Under this test, the qualitative benefits are only treated as relevant if they are considered to be large enough to close the gap between the rule's large costs and the exceedingly small category of quantified and monetized benefits. The proposal then summarily concludes that these benefits are not large enough, using that large gap as an excuse to avoid undertaking anything resembling a reasoned analysis of the rule's qualitative benefits. As a result, the EPA was able to ignore the [enormous benefits that the MATS rule would generate by reducing several kinds of hazardous air pollutants](#). Not only would the rule's mercury emissions reductions protect children's developing brains, which the EPA's analysis was able to particularly quantify and monetize; they would reduce the incidence of heart disease and kidney damage in adults, as well as damage to animals, plants, and affected ecosystems. Likewise, the rule would significantly reduce emissions of other types of hazardous air pollutants – which include arsenic, cadmium, chromium, nickel, selenium, various acid gases, and dioxin – all of which have all been linked to various human health and environmental harms.

- **Redefine key statutory terms in the biased language of cost-benefit analysis.** The Wheeler memo specifically charges program office heads with including in their respective benefits-busting rules provisions that would purportedly promote greater

consistency in the interpretations of key statutory terms, such as “practical” and “appropriate,” presumably with an eye toward recasting these terms in the stilted vocabulary of cost-benefit analysis.

The recent Supreme Court case of [Michigan v. EPA](#) may provide a model for what these provisions might seek to accomplish. There, the Court interpreted the statutory phrase “appropriate and necessary” as requiring the EPA to conduct some form of analysis of the rule’s costs and benefits (though it stopped short of mandating the kind of formal cost-benefit analysis required by the Reagan executive order and its successors). Industry has made no secret of its desire to [replicate this development across all of the EPA’s authorizing statutes](#), creating what they refer to as a “cost-benefit state” in which cost-benefit analysis would take on a kind of determinative primacy in guiding regulatory decision-making. In this reconceptualization of the EPA’s decision-making, the agency’s primary charge of protecting public health and the environment would become secondary to concerns of using regulation as a means for ensuring the most efficient allocation of our economic resources. Not only does this reconceptualization ensure a pro-polluter bias in regulatory decision-making; it also provides official sanction to the notion that the moral weight of the public’s claims for security against threats to their health and the environment is at best equal to polluters’ claims to a right to earn a profit by foisting the harms they cause onto the backs of the American people.

To be sure, the courts would have the last word on interpreting these statutory terms. Nevertheless, they typically defer to statutory interpretations put forward by the EPA and other agencies, and they are especially like to do so for interpretations that were codified through a notice-and-comment rulemaking.

Next Steps for Public Interest Advocates

CPR looks forward to continuing our collaborative campaign to defend the EPA’s rulemaking process against the threat posed by the benefits-busting rulemakings. We will continue to monitor the EPA air office’s development of its benefit-busting proposal, which is scheduled for release in December 2019. Likewise, we will monitor the other EPA programmatic offices for movements on their respective benefits-busting proposals as well.

If you are interested in joining this campaign, we hope you do the following:

- Email CPR Senior Policy Analyst James Goodwin at jgoodwin@progressivereform.org in order to keep receiving periodic updates like this on the benefits-busting rulemakings.
- Share this memo among any progressive advocacy allies in your network who might also be interested in joining this campaign.
- Visit CPR’s website for additional resources on the damaging role that cost-benefit analysis plays in the environmental regulation, <http://www.progressivereform.org/costBenefit.cfm>.