Insight

EPA Rule Deals Blow to Use of Co-Benefits

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EXECUTIVE SUMMARY

- The Obama Administration commonly used co-benefits to amplify the benefits of regulations, with a 2012 rule regulating mercury claiming $90 billion in benefits despite only $6 million coming from mercury reductions.
- The Environmental Protection Agency's (EPA) recent supplemental-finding rule reversed both the finding of this 2012 regulation and the practice of relying on co-benefits to justify regulations.
- The change formalizes EPA's view that co-benefits should not carry the same weight as direct benefits, which has implications for future rulemakings.

INTRODUCTION

The Environmental Protection Agency (EPA) finalized a rule on April 16 that rebuked the use of co-benefits, or incidental benefits not directly related to regulating a targeted pollutant, to substantially justify regulation.

An Obama-era rule justified costly regulation of power plants almost entirely on the basis of reducing pollutants outside the scope of Clean Air Act (CAA) requirements. In the April 16 rule, "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," EPA reversed the Obama-era rule. In doing so, the Trump Administration's EPA established a precedent for how it will consider co-benefits in other regulations—a precedent that could lead to additional deregulation in the future.

BACKGROUND

The supplemental-finding rule that EPA finalized on April 16 is the latest part of a regulatory odyssey spanning three decades. Amendments to the CAA enacted in 1990 required EPA to study public health hazards expected to result from hazardous air pollutants (HAPs) of electric utility steam generating units (EGUs). That study was completed in 1998 and found mercury to be the HAP of greatest concern. The CAA then required EPA to determine if it was "appropriate and necessary" to regulate EGUs. In its waning days, the Clinton Administration determined regulation was appropriate and necessary. This decision was reversed by the George W. Bush Administration, though a federal court ultimately vacated the rule.

Once again, the Obama Administration took a crack at finding that regulation was appropriate and necessary. In 2012, EPA made its finding and in the same action issued a mercury standard for EGUs, commonly called the Mercury and Toxic Air Standards (MATS) rule. The estimated benefits were up to $90 billion annually, of which just $6 *million* were from regulating mercury. Nearly all of the remaining $89.994 billion in benefits were co-benefits from reductions in particulate matter (PM), which has its own regulatory standards under the CAA. Those co-benefits helped EPA conclude that total benefits outweighed estimated costs of $9.6 billion annually.

In the component of that rule to determine if regulation was appropriate and necessary, however, EPA made no consideration of these costs. The 2015 Supreme Court decision *Michigan v. EPA* mandated EPA to consider costs in its finding and remanded the rule back to EPA but did not vacate the MATS rule. In 2016, EPA issued a supplemental finding to address the Supreme Court's decision, which contained two approaches to considering cost. One was called the "cost reasonableness" approach, and it found that industry could meet the compliance cost without jeopardizing its ability to deliver electricity at a reasonable cost to consumers. The other approach weighed the costs identified in the 2012 rule against the benefits, including the co-benefits. It found that with annual benefits about 10 times greater than costs, there was sufficient justification to find that the rule was appropriate and necessary.

THE TRUMP ADMINISTRATION'S REEVALUATION OF CO-BENEFITS

Industry subsequently challenged the 2016 supplemental finding, which allowed the Trump Administration to review the rule upon taking office in 2017. That review culminated with the latest rule, which reversed the 2016 finding and concluded that it is "not 'appropriate and necessary' to regulate HAP emissions" from EGUs.

EPA's analysis is straightforward. It believes the Obama Administration was incorrect to give equal weight to co-benefits as it did to the direct benefits of regulating mercury. While the Trump Administration acknowledges the existence of these co-benefits, it does not view them as sufficient to support the finding. Instead, it views annual compliance costs of $9.6 billion versus direct benefits of $6 million as not meeting the "appropriate" prong of appropriate and necessary. The reversal of the finding does not affect the MATS rule itself – EPA is keeping that in place. It does make the MATS rule's standing precarious, however, as a legal challenge may argue that the rule cannot stand without the needed appropriate and necessary finding.

In addition to situations like the above, another problematic use of co-benefits – particularly with PM – is that they are sometimes used to justify other rules simultaneously. In another well-known EPA rule, the Clean Power Plan, the Obama Administration claimed huge benefits from reducing PM, despite claiming many of the same benefits in the MATS rule issued three years earlier. This type of double counting can tilt cost-benefit analyses in the favor of regulation, and especially in the environmental context, where rules continue to get more expensive as regulations seek ever-greater limits on certain emissions.

IMPLICATIONS OF EPA'S FINDING

The most immediate implication of EPA's finding is that EPA will likely now seek to establish its view of co-benefits in the regulatory code. EPA is expected soon to propose a rule on how it weighs costs and benefits for the purposes of the CAA. EPA published an advanced notice of proposed rulemaking in 2018, and the Office of Information and Regulatory Affairs is currently reviewing a proposal. Codifying how co-benefits factor into a cost-benefit analysis would require future CAA regulations to adhere to those rules. Future administrations could undo such codification, but such a change would require going through the time-consuming rulemaking process.

A second implication of the recent rule is that it may make it more likely that a deregulatory-minded EPA could review existing rules where co-benefits outweigh direct benefits or reevaluate existing rules to see if the cost-benefit math changes in light of a greater emphasis on direct benefits.

Of course, this rule will likely be subject to a legal challenge, so its future will depend on how it fares in the federal courts.

CONCLUSION

The EPA's supplemental finding rule regarding mercury emissions from EGUs is a rebuke to the practice of considering co-benefits to justify recent CAA rules. This change, which holds direct benefits in greater weight than co-benefits, will make it more difficult for the agency to justify expensive CAA regulations that fail to yield much direct benefit. It also shows that EPA is likely to include the new calculus on co-benefits in an upcoming rule on cost-benefit analysis, which would make it more difficult for a future administration to reverse.