6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 83

[EPA-HQ-OAR-2020-0044; FRL 10024-10-OAR]

RIN 2060-AV18

Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule; request for comments.

SUMMARY: The Environmental Protection Agency (EPA) is rescinding the final rule entitled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process." The EPA is rescinding the rule because the changes advanced by the rule were inadvisable, untethered to the CAA, and not necessary to effectuate the purposes of the Act.

DATES: This rule is effective **[INSERT DATE 30 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]**. The EPA will consider comments on this rule received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

If a member of the public requests a public hearing by **[INSERT DATE 7 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the EPA will hold a virtual public hearing on Wednesday, June 9, 2021. Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2020-0044, by the following method:

- Federal eRulemaking Portal: https://www.regulations.gov/ (our preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OAR-2020-0044 for this rulemaking. Comments received may be posted without change to https://www.regulations.gov/, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments

via https://www.regulations.gov/ or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at https://www.epa.gov/dockets.

FOR FURTHER INFORMATION CONTACT: Leif Hockstad, Office of Air Policy and Program Support, Office of Air and Radiation, U.S. EPA, Mail Code 6103A, 1200 Pennsylvania Avenue NW, Washington, DC 20460; (202) 343-9432; email address: hockstad.leif@epa.gov.

SUPPLEMENTARY INFORMATION:

Acronyms

APA	Administrative Procedure Act
BCA	Benefit-Cost Analysis
CAA	Clean Air Act
CBI	Confidential Business Information
CDC	Centers for Disease Control and Prevention
CFR	Code of Federal Regulations
CRA	Congressional Review Act
CRS	Congressional Research Service
E.O.	Executive Order
EPA	Environmental Protection Agency
FR	Federal Register
GAO	Government Accountability Office
NAAQS	National Ambient Air Quality Standards
NAS	National Academies of Science, Engineering, and Medicine
NESHAP	National Emission Standards for Hazardous Air Pollutants
NRDC	National Resources Defense Council
NTTAA	National Technology Transfer and Advancement Act
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
RIA	Regulatory Impact Analysis
RFA	Regulatory Flexibility Act
RTC	Response to Comments document
SAB	Science Advisory Board
UMRA	Unfunded Mandates Reform Act
U.S.C.	United States Code

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I. General Information

A. What action is the Agency taking?

In this interim final rule, the EPA is rescinding the final rule entitled, "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process" (hereafter "Benefit-Cost Rule").[1] For all of the reasons stated in this preamble, the EPA has determined that the Benefit-Cost Rule should be rescinded.

[1] 85 FR 84130, (December 23, 2020).

B. Does this action apply to me?

This rule does not regulate the conduct or determine the rights of any entity or individual outside the Agency, as this action pertains only to internal EPA practices. However, the Agency recognizes that any entity or individual interested in the EPA's regulations promulgated under the Clean Air Act (CAA) may be interested in this rule. In addition, this rule may be of particular interest to entities and individuals interested in how the EPA conducts and considers benefit-cost analyses (BCA).

C. What is the Agency's authority for taking this action?

The Agency is taking this action pursuant to CAA section 301(a)(1).[2] Section 301(a)(1) provides authority to the Administrator "to prescribe such regulations as are necessary to carry out his functions" under the CAA. As discussed in Section III of this preamble, the EPA has determined that the Benefit-Cost Rule was not "necessary" and lacked a rational basis under CAA section 301(a), and therefore the EPA lacked authority to issue it; we are accordingly rescinding the Rule.

II. Background

On January 20, 2021, President Biden signed Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,"[3] which, among other actions, directed the EPA to immediately review and consider suspending, revising, or rescinding the Benefit-Cost Rule. Accordingly, the EPA has conducted a comprehensive review of both the legal and factual predicates for the Benefit-Cost Rule and, in particular, the need for the regulations that the Agency promulgated in the Benefit-Cost Rule. As a result of this review, the EPA has determined that the changes to Agency practice required by the Benefit-Cost Rule were inadvisable, not needed, and untethered to the CAA, and is therefore rescinding the Rule.

The Benefit-Cost Rule was a procedural rule establishing requirements related to the development and consideration of BCA that the EPA would have been required to undertake when promulgating certain proposed and final regulations under the CAA. The final Benefit-Cost Rule stated, "[t]he purpose of this action is to codify procedural best practices for the preparation, development, presentation, and consideration of BCA in regulatory decision-making under the CAA. This codification will help ensure that the EPA implements its statutory obligations under the CAA, and describes its work in implementing those obligations, in a way that is consistent and transparent."[4] The final Benefit-Cost Rule was effective upon publication in the Federal Register based on the procedural rule exemption from delayed effective-date requirements in the Administrative Procedure Act (APA). After publication, several parties filed

[2] 42 U.S.C. 7601(a)(1).
[3] 86 FR 7037 (January 25, 2021).
[4] 85 FR 84130.

petitions for review of the Benefit-Cost Rule in the U.S. Court of Appeals for the District of Columbia, and these consolidated cases are currently in abeyance.[5]

The Benefit-Cost Rule included four independent elements. The first element required the EPA to prepare a BCA for all significant proposed and final regulations under the CAA. The Rule defined a significant regulation to include any proposed or final regulation that was determined to be significant by the Office of Management and Budget (OMB) under E.O. 12866 or was otherwise so designated by the EPA Administrator.

The second element codified specific practices for developing the BCAs required by the Rule. Those practices were drawn largely from, but not identical to, the EPA's Guidelines for Preparing Economic Analyses (hereafter "Economic Guidelines")[6] and OMB's Circular A-4.[7] Such practices included providing a statement of need, analysis of regulatory options, and appropriate baseline. In addition, the Rule required the risk assessments used to support BCAs to follow certain methods for risk characterization and risk assessment, including a systematic review approach. These methods included a specific process for selecting health benefit endpoints for quantification, including the requirement that a clear causal or likely causal relationship between pollutant exposure and effect had been established; a systematic review process; use of particular models to quantify the concentration-response relationships; and a presentation of results that highlighted uncertainty associated with the estimated benefits. The BCA was also required to include specific methods for assessing uncertainty and an explanation for the methods chosen to analyze uncertainties. To the extent permitted by law, the Benefit-Cost Rule required the EPA to ensure that all information used in the development of the BCA would be publicly available. Any departures from the specified practices required a discussion of the likely effect on the results of the BCA.

The third element required the presentation of the BCA results in the preamble of the rulemakings subject to the Rule. In addition to a summary of the overall BCA results, the Benefit-Cost Rule required preambles to include a separate reporting of impacts that accrue to non-U.S. populations, an additional reporting of the public health and welfare benefits that pertain to the specific objective(s) of the CAA provision(s) under which the rule is promulgated, and a similar presentation of any costs that the CAA provision(s) specifies should be considered.

Finally, the fourth element required the Agency to consider the BCA in promulgating the regulation except where the CAA provision(s) under which the regulation is promulgated prohibit it. The Rule required that the Agency explain in the preamble how the Agency considered the BCA in its decision-making. The preamble indicated the EPA's intention that compliance with the Rule's requirements would be judicially reviewable.

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[5] *State of New York v. EPA*, No. 21-1026 (D.C. Cir.); *Cal. Cmtys. Against Toxics v. EPA*, No. 21-1041 (D.C. Cir.); *Envt'l Def. Fund v. EPA*, No. 21-1069 (D.C. Cir.). *State of New York v. EPA*, No. 21-1026 (D.C. Cir.), Doc. No. 1886762 (Feb. 23, 2021) (abeyance order).

[6] U.S. EPA. 2010. *Guidelines for Preparing Economic Analyses*. https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses.

[7] Exec. Office of the President, OMB, *Circular A-4: Regulatory Analysis* (Sept. 17, 2003), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

The EPA cited CAA section 301(a)(1) as the sole source of authority for the Benefit-Cost Rule. That provision states, "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." The preamble to the Rule explained that the Agency had authority under that CAA provision because the "authority in Section 301(a)(1) extends to internal agency procedures that increase the Agency's ability to provide consistency and transparency to the public in regard to the rulemaking process under the CAA."[8] The final Rule cited *NRDC v. EPA*, 22 F.3d 1125, 1148 (D.C. Cir. 1994) for the proposition that "[CAA section 301] is sufficiently broad to allow the promulgation of rules that are necessary and reasonable to effect the purposes of the Act."[9]

III. Rationale for Rescission

After review of the Benefit-Cost Rule and its record, the EPA has concluded that the Rule should be rescinded in its entirety for several reasons. The Agency stated that it had authority to promulgate the Rule under CAA section 301(a) because it asserted that the Rule's additional procedures were necessary to ensure consistency and transparency in CAA rulemakings.[10] However, as discussed in Section III.A of this preamble, the Agency failed to articulate a rational basis for the Rule, and did not explain how the existing CAA rulemaking process had created or was likely to create inconsistent or non-transparent outcomes, i.e., that an actual or theoretical problem existed. We have also determined, after reviewing each element of the Rule, that the additional procedures required under the Rule were not needed, useful, or advisable policy changes. In some cases, as discussed in this Section of the preamble, the new procedures could have hindered the EPA's compliance with the CAA and may not have even furthered the Rule's stated purposes of consistency and transparency. Our rationale for rescinding each of the four independent elements of the Rule is severable and provided below in Sections III.B-E of this preamble. Finally, in Section III.F we note that the existing public process provides ample ability for the public to participate in the EPA's CAA rulemakings.

A. The Benefit-Cost Rule failed to establish a rational basis for its requirements based on the Rule's record.

As an initial matter, the EPA has determined that the Agency failed to provide a rational basis to support the Rule or explain why the Rule was needed or reasonable. The Rule did not provide any record evidence that the guidance and administrative processes already in place presented problems that justified the mandate imposed by the Rule. Indeed, the Rule failed to point to a single example of a rule promulgated under the CAA where problems emerged that would have been avoided had the mandate imposed by the rule been in place. Although the Agency asserted that the Benefit-Cost Rule's purported achievement of greater consistency and transparency in economic analyses across those CAA rulemakings affected by the Rule would

[8] 85 FR 84137.
[9] *Id.*
[10] 85 FR 84137.

"better allow the Agency to fulfill the purpose described in Section 101(b)(1) of the CAA 'to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population,'"[11] the mere assertion of "consistency" or "transparency" in the Rule did not adequately explain what the Agency was trying to accomplish. Furthermore, there was no discussion of how the requirements of the Rule improved the Agency's ability to accomplish the CAA's goals to protect and enhance air quality.[12]

Some portions of the Rule suggested that it was intended to combat a theoretical threat. For example, the preamble of the final rule stated, "Without enforceable procedural regulations for BCA, future regulations may be promulgated without consideration of, and public accountability concerning, their costs and benefits. Thus, the EPA has determined that the Final Rule is necessary to ensure that BCA practices are implemented in a consistent fashion prospectively."[13] The hypothetical threat that future significant CAA regulations would be promulgated without appropriate consideration of costs and benefits and without due public process is highly implausible. The Agency's consideration of all factors it is required to analyze under the specific provisions of the CAA is already subject to public notice and comment processes (*see* Section III.F of this preamble) and enforceable judicial review. Moreover, as discussed in Section III.B of this preamble, there has been an unbroken, bipartisan, decades-long commitment from Presidential Administrations to conducting benefit-cost analyses for economically significant regulations issued in the United States. These analyses are rigorous, publicly available, subject to interagency review, and are conducted according to extensive peer-reviewed guidelines from OMB and the EPA.[14]

We therefore rescind the Rule on the basis that it failed to articulate a rational basis justifying its promulgation.

B. The Benefit-Cost Rule was not necessary to carry out the CAA because the EPA already prepares a BCA for CAA rules that warrant such analysis.

In this section, we address the reasons for rescinding the Rule's expansion of BCA to "significant" CAA rulemakings that are not economically significant under E.O. 12866. While BCA is a useful analytic tool for informing regulatory actions, it is a resource-intensive undertaking. The Rule expanded the universe of CAA rulemakings for which the EPA would be required to conduct BCAs without justifying why such expansion was necessary or appropriate. We conclude that existing directives under E.O. 12866 and guidance to conduct BCAs for economically significant rules, while retaining flexibility in analyzing costs, benefits, and other factors for non-economically significant rules, strike the better balance between agency resources and the information provided by additional economic analysis for such rules.

[11] 85 FR 84138.

[12] The Rule referenced CAA sections 101(b)(1) and 101(c) but failed to explain how its procedures better served those Congressional aims than the status quo ante.

[13] 85 FR 84137.

[14] *See* Section III.C of this preamble.

BCA has been part of executive branch rulemaking for decades. Presidents since the 1970s have issued E.O.s directing agencies to conduct analyses of the economic consequences of regulations as part of the rulemaking development process. E.O. 12866, which is still in effect, requires that for all significant regulatory actions, an agency provide "an assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate . . ."[15] Some statutes also impose analytical requirements for regulatory actions. For example, the Unfunded Mandates Reform Act of 1995 (UMRA) includes requirements that are similar to the analytical requirements under E.O. 12866. Both E.O. 12866 (and its predecessors) and its implementing guidance, Circular A-4, call for Agencies to focus resources on quantifying benefits and costs using BCA for those regulations that are anticipated to have the largest effects on the economy. Specifically, E.O. 12866 requires a quantification of benefits and costs to the extent feasible for any regulatory action that is "likely to result in a rule that may . . . have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[16] Rules meeting any of these criteria are labelled as "economically significant." Similarly, UMRA's analytical requirements pertain to all regulatory actions that include federal mandates "that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year."[17]

The EPA estimates the anticipated impacts of its regulatory actions using methods and assumptions that are transparent, consistent with the best available science, and appropriate for the scope of the regulatory action. In performing analysis of regulatory action, the EPA adheres to the executive order requirements pertaining to economic analysis by following the guidance laid out by Circular A-4 and the Economic Guidelines. Per those directives and guidance, the BCAs and other types of analysis supporting significant CAA regulations are subject to internal review and an interagency review process under E.O. 12866 that involves application of the principles and methods defined in Circular A-4. The scientific information and models used within BCA and other analyses supporting regulatory decisions are also subject to EPA's peer review guidance[18] and OMB's guidance to federal agencies on what information is subject to peer review, the selection of appropriate peer reviewers, opportunities for public participation, and related issues.[19]

Executive orders and subsequent guidance distinguish between analytical requirements for economically significant rules and other significant rules, both because of the resource intensity of regulatory analysis and because of substantive differences between types of rules. Developing a BCA for an economically significant CAA rule takes considerable Agency resources often spanning a year or more and frequently involves the development of policy-

[15] E.O. 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993).
[16] *Id.* at section 3(f)(1).
[17] 2 U.S.C. 1532(a).
[18] *See* EPA's *2015 Peer Review Handbook*, 4th Edition, *available at* https://www.epa.gov/osa/peer-review-handbook-4th-edition-2015.
[19] *See* OMB's *Final Information Quality Bulletin for Peer Review* (70 FR 2664, January 14, 2005).

relevant emissions inventories, photochemical air quality modeling, engineering research assessments and analyses, engineering cost assessments, and benefits assessments for human health, climate, visibility, ecological and/or other categories of benefits. These complex and time-consuming analytical undertakings are appropriate for economically significant rules. However, these complex analyses may not always be the best use of Agency resources for smaller rules determined to be significant by OMB under E.O. 12866 because they raise novel legal or policy issues rather than because of the magnitude of their benefits or costs.

The Benefit-Cost Rule significantly expanded the set of rulemakings for which a BCA would have been conducted. As the Rule required BCA for all rules designated as significant under E.O. 12866, this would have included many actions that are not economically significant.[20] For example, between January 2017 and January 2021, the EPA finalized 32 significant regulations under the CAA, including only 7 economically significant regulations.[21] This expansion to conduct BCA for a substantially larger set of CAA rules would have consumed significant EPA staff time and other resources, and the additional time such unwarranted analyses would have taken could have resulted in delays in fulfilling statutory obligations under the CAA. Removal of this requirement allows the Agency to better target analytic resources towards CAA rules that tend have larger economic consequences.

Under E.O. 12866, rules that are designated significant include those that may: "[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities"; "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency"; "[m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof"; or "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." Most significant CAA regulations that are not economically significant are determined to be significant for novel legal or policy reasons. These rules raise issues that may be unrelated to the magnitude of benefits or costs analyzed in BCA. As a result, key policy decisions in the context of these rules are often issues that can be fully addressed through a more targeted or different kind of analysis than a BCA. For significant rules that are not economically significant, other less resource-intensive and time-consuming analyses are prepared to inform and support the rulemaking. For example, instead of conducting a BCA, the EPA may instead examine the emission and cost impacts on particular regulated entities or conduct qualitative analyses for less consequential rules, which may regulate smaller sectors of economy, affect sectors that are not

[20] Section (3)(f) of E.O. 12866 states "'Significant regulatory action'' means any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

[21] *See* the memorandum in the docket "Final Significant Regulations under the Clean Air Act 2017-2021" for the list of the significant and economically significant regulations.

well connected with other parts of the economy, or have smaller effects to the economy overall. In addition, often in these situations data and methods for quantifying and monetizing overall net benefits may not be available. In such cases, less extensive analyses may provide sufficient information for the rulemaking. These analyses may also include elements of a BCA that contribute important information to the policy decision. For example, the Agency routinely prepares economic impact assessments for many rules, including risk and technology reviews for NESHAPs and new source performance standards. As noted above, though, the resources involved in doing a BCA may not be warranted when the focus of regulatory analysis is on novel legal or policy issues or other non-economic factors that make the action significant.

The Benefit-Cost Rule did not provide a justification for its expansion of the number of CAA rules for which the EPA must conduct a BCA, and after reviewing the Rule, we have concluded that we do not think a BCA is necessarily warranted for every CAA rule that is designated as significant under E.O. 12866. The EPA remains committed to the principles outlined in the Economic Guidelines and Circular A-4 when designing and conducting analysis of all significant regulations. As noted, these analyses are the most extensive – i.e., result in a BCA - for economically significant rules as those would most benefit from resource-intensive, complex inquiries into societal costs and benefits and a calculation of net benefits. The Rule did not provide an explanation for why BCAs are required for other CAA rules that OMB has designated "significant" for reasons other than the magnitude of their benefits or costs. Requiring a BCA even when the primary issues of importance are not economic unnecessarily complicates the rulemaking process, potentially diverts the Agency's resources from those aspects of the rule that warrant additional consideration (i.e., the reasons why the rule was designated significant), and could delay rules needed for protection of public health and the environment. In addition, requiring a BCA for all significant CAA rules could delay BCAs for economically significant rules if staff time and resources are diverted.

C. The codification of specific practices in the Benefit-Cost Rule limited the EPA's ability to rely on the best available science.

The EPA is rescinding the Benefit-Cost Rule's codification of specific practices for the development of BCA in a regulation because this aspect of the Rule could have prevented the EPA from relying on best available science. First, because best practices for conducting a high-quality BCA cannot be established using a set formula, codification of specific practices could prevent situation-specific tailoring of BCA, which is always necessary. Second, best practices evolve over time, and the Benefit-Cost Rule would have locked the EPA into using outdated practices until it could have been amended via rulemaking, which could have delayed incorporation of new scientific information and methods. Third, some of the Rule's "best practice" requirements did not derive from the Economic Guidelines, Circular A-4, or the EPA's Science Advisory Board (SAB) advice. Below we discuss each rationale for rescission in turn.

1. The Benefit-Cost Rule demonstrated the difficulty in codifying specific practices into implementable and reviewable requirements for BCA

Although the Benefit-Cost Rule stated that it was based on the requirements of Circular A-4 and the Economic Guidelines, codification of such requirements in regulation is inconsistent with the instructions in those same guidance documents to tailor an analysis to the specific situation. In the 2003 memo to the heads of executive agencies and establishments, Circular A-4 states: "You will find that you cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions."[22] The Economic Guidelines similarly acknowledge that there are a wide variety of case-specific issues that arise in conducting a BCA, noting that "[the] most productive and illuminating approaches for particular situations will depend on a variety of case-specific factors and will require professional judgment."[23] The Economic Guidelines emphasize that they are not intended to be a "rigid blueprint" or a "cookbook,"[24] as doing so would be unproductive and ultimately less helpful to analysts due to the diversity of analyses and situations requiring professional judgement. For example, the Benefit-Cost Rule required quantitative methods to analyze uncertainties in the assessment of costs, changes in air quality, assessment of likely changes in health and welfare endpoints, and the valuation of those changes, without allowing flexibility to tailor this requirement to the size or complexity of the rule being analyzed. In contrast, Circular A-4 recognizes that formal quantitative uncertainty analysis is most important to conduct for the largest rules: "For major rules involving annual economic effects of $1 billion or more, you should present a formal quantitative analysis of the relevant uncertainties about benefits and costs."[25]

In their review of the proposed Benefit-Cost Rule, the SAB commented on the tension created by codifying BCA requirements into regulation. The SAB "urge[d] EPA to consider carefully which aspects of BCA should be included in the final rule versus which aspects should be in guidance, given the case-by-case nature of BCA."[26] The SAB also highlighted examples where a more flexible approach would be warranted, including recommending that "no 'one size fits all' approach to causality be mandated because a variety of approaches may need to be taken."[27] However, the EPA did not revise the requirements in the proposed Benefit-Cost Rule in response to this advice from SAB. After further review, the EPA has reconsidered the record of the Benefit-Cost Rule, including the public comments and SAB advice, and agrees that a "one size fits all" approach is not an appropriate approach to BCA in general or mandating specific practices for benefits assessment causality in particular.

In addition, the final Benefit-Cost Rule had no exemption for rules without costs or with de minimis costs or benefits, and certain limitations were only caveated by technical

[22] *Circular A-4* at p. 3.
[23] *Economic Guidelines* at p. 1-2.
[24] *Id.*
[25] *Circular A-4* at p. 40.
[26] U.S. EPA SAB. 2020. *Science Advisory Board (SAB) Consideration of the Scientific and Technical Basis of EPA's Proposed Rule titled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process."* EPA-SAB-20-012. September 30. ("SAB (2020)") at p. i, *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/0A312659C8AC185D852585F80049803C/$File/EPA-SAB-20-012.pdf.
[27] *Id*. at p. 7.

considerations rather than practicality or usefulness (e.g., 40 CFR 83.3(a)(9)(vi) ("When sufficient data exist"); 40 CFR 83.3(a)(10)(iii) ("Where data are sufficient")). Circular A-4 provides a contrary, more flexible and reasoned approach, stating that "[a]s with other elements of regulatory analysis, you will need to balance thoroughness with the practical limits on your analytical capabilities."[28] Even the CAA provision (section 317) that requires economic impact assessments for certain proposed regulations under the CAA also requires the EPA to consider practicability, professional judgement, and the time and resources involved in determining the extent of any such assessment.[29] This disconnect between the need to adapt economic analyses to particular circumstances as articulated in Circular A-4 and CAA section 317, and the requirements in the Benefit-Cost Rule provides an additional rationale for rescinding the Benefit-Cost Rule. Existing guidance affords flexibility for the EPA to conduct the type of analysis warranted by a particular rulemaking.

Even the parts of the Benefit-Cost Rule that appeared to be intended to provide flexibility – such as certain caveats for benefits assessment like "to the extent possible" – would have unnecessarily constrained the Agency compared to the recommendations in the Economic Guidelines and Circular A-4. In practice, these caveats demonstrated one of the problems with attempting to codify BCA best practices into regulation, and the advantages of using guidance to conduct BCAs. Under the guidance documents, technical experts exercise their professional judgment to design and conduct analyses tailored to the situation at hand. The Benefit-Cost Rule's restrictive caveats like "to the extent possible" eliminated or at the very least cabined the ability for experts to exercise that judgment by potentially requiring the expert to first demonstrate that compliance with the requirement was not possible, before being able to select more appropriate methods and approaches.

Further, some of the requirements of the Benefit-Cost Rule were very unclear. For example, the requirement in 40 CFR 83.3(a)(9)(iii)(E) ("To the extent possible, the studies or analyses should be: […] reliably distinguish [sic] the presence or absence (or degree of severity) of health outcomes") did not provide clear direction to the analyst because multiple technical interpretations of the standard in the regulation were reasonable. The lack of clarity in these requirements would have created confusion within the Agency and with the public. The codification of such unclear requirements in regulation would undoubtedly have generated unnecessary and wasteful litigation by creating opportunities to question whether the EPA had strictly followed the letter of the Benefit-Cost Rule, rather than focusing on whether it had conducted scientifically sound analyses.

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[28] *Circular A-4* at p. 40.

[29] CAA section 317 applies to a subset of regulations promulgated under the CAA. Specifically, it applies to new source performance standards, ozone and stratospheric protection, prevention of significant deterioration, new motor vehicles and engines, fuel and fuel additives, and aircraft emissions regulations. In contrast, the Benefit-Cost Rule would have applied to all significant CAA regulations. In addition, the economic impact assessment required by CAA section 317 is a less complex and time-consuming analytical undertaking than a BCA because it does not require the assessment of benefits. *See* CAA section 317(d) ("Extensiveness of assessment. The assessment required under this section shall be as extensive as practicable, in the judgment of the Administrator taking into account the time and resources available to the Environmental Protection Agency and other duties and authorities which the Administrator is required to carry out under this chapter.").

We conclude that reverting to the use of existing, well-vetted guidance allows the Agency to design BCAs and analyses that demand scientific rigor without forcing the Agency's economists and other scientists into choosing between complying with the Benefit-Cost Rule or exercising professional scientific and economic judgment.

2. As best practices evolve over time, the Benefit-Cost Rule would have locked the EPA into using outdated practices until the Rule could have been amended

As acknowledged in the Economic Guidelines, environmental policymaking and economic analysis evolves over time and new literature is continually published.[30] For this reason, the EPA adopted an approach described as the "loose-leaf" format[31] in the Economic Guidelines that provides flexibility to account for new information and the growth and development of economic tools over time. Circular A-4 also acknowledges the continual advancement of BCA methods: "New methods may become available in the future. This document is not intended to discourage or inhibit their use, but rather to encourage and stimulate their development."[32] However, the final Benefit-Cost Rule failed to account for this constantly evolving environment by enshrining specific practices in regulation. If the EPA had retained the Benefit-Cost Rule, the Agency would have been required to amend the Rule before being allowed to incorporate new scientific, including economic, information or update methods that had evolved since the Benefit-Cost Rule was promulgated. Preventing the EPA from keeping up with evolving best practices and requiring the EPA to rely on potentially outdated methods until a revised rulemaking is completed is inconsistent with the CAA direction to make decisions based on the best scientific data available.[33]

By freezing and defining what constituted "best practices" at a single point in time, the Benefit-Cost Rule elevated "consistency" over the exercise of sound judgment based on latest scientific knowledge and, given that revision by rulemaking would take a long time, would have slowed or discouraged progress in the development and use of newer and better methods. This risk was particularly notable for the highly prescriptive requirements in the Benefit-Cost Rule for benefits assessment and uncertainty analysis (as discussed below in this Section of the preamble). In contrast, since guidance is inherently less prescriptive than regulation, it can be more flexible in allowing agencies to keep up with the evolution of best practices to be used to support CAA regulations.[34] As further evidence of how best practices change over time, we note

[30] *Economic Guidelines* at p. 1-1.
[31] *Id.*
[32] *Circular A-4* at p. 42.
[33] *See, e.g.*, CAA section 108(a)(2) (directing the EPA to use "latest scientific knowledge" in setting the NAAQS); CAA section 211(c)(2)(A) (requiring the EPA to consider "all relevant medical and scientific evidence available" in regulating fuels); CAA section 606(a)(1) (instructing the EPA to consider accelerated timetable for regulation in part "based on an assessment of credible current scientific information").
[34] As a parallel example under another environmental statute, the National Academies of Science, Engineering, and Medicine (NAS) recently released a peer review report that criticized the EPA's systematic review process for evaluating existing chemical substance risks under the Toxic Substances Control Act for not meeting state-of-practice standards. *See* National Academies of Sciences, Engineering, and Medicine. 2021. *The Use of Systematic Review in EPA's Toxic Substances Control Act Risk Evaluations*. Washington, DC: The National Academies Press. https://doi.org/10.17226/25952. In response, the EPA announced that it would no longer use the prior systematic

that the Economic Guidelines are in the process of being updated as part of a periodic review undertaken by the EPA.[35] In addition, President Biden issued a memorandum on January 20, 2021, on Modernizing Regulatory Review,[36] which directs OMB in consultation with other agencies to recommend revisions to Circular A-4. Therefore, the Benefit-Cost Rule, because it froze the requirement to use certain practices, may not have been consistent with the forthcoming updates to the Economic Guidelines or Circular A-4.

While the Benefit-Cost Rule purported to promote consistency, after further consideration we have concluded that it instead would have promoted inconsistency. Best practices for preparing BCA evolve and improve over time as scientific learning advances. The Benefit-Cost Rule sought, by codifying a discrete set of specific requirements as "best practices," to lock in those specific practices and allow judicial review to enforce them until a future rulemaking was undertaken to update them. Because these requirements applied only to significant CAA rules, they would not have affected how the EPA conducts BCA for economically significant rules issued under other statutes. For these rules under other statutes, the EPA would have been able to conduct BCA by using the latest state-of-the-art methods, without waiting for updates to the Benefit-Cost Rule. The EPA has determined, consistent with the approach in the Economic Guidelines and Circular A-4, that a more flexible approach than the Benefit-Cost Rule is warranted, and thus the Rule should be rescinded in its entirety.

3. The Benefit-Cost Rule codified certain practices that conflict with best science

Implementation of some of the specific requirements of the Benefit-Cost Rule would also undermine the quality of the EPA's BCA for CAA regulations. Some of the requirements for health benefits assessment promoted particular types of data in a way that could have conflicted with the use of best scientific practices. As discussed in Sections III.C.1 and 2 of this preamble, the codification of BCA practices in regulation as opposed to guidance presents significant disadvantages; this problem is only compounded where there are requirements in the regulation that are scientifically problematic. While the EPA is not asserting that every requirement in the Benefit-Cost Rule conflicted with sound scientific or economic best practices, the problematic elements were significant and difficult to address in piecemeal fashion. These substantive problems provide further support that the Rule as a whole should be rescinded.

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review approach and would instead develop a new approach that incorporates the NAS advice. *See* EPA. 2021. *EPA Commits to Strengthening Science Used in Chemical Risk Evaluations*. Press Release. Feb 16. https://www.epa.gov/newsreleases/epa-commits-strengthening-science-used-chemical-risk-evaluations. The Benefit-Cost Rule would have precluded or slowed this kind of adjustment in response to future peer reviews and the Agency's ability to keep up with evolving best practices for significant CAA rules.

[35] In January 2021, the SAB released their final peer review report of the EPA's draft revision, and the EPA anticipates finalizing the updated Economic Guidelines shortly. Although the EPA intended for the requirements in the Benefit-Cost Rule to align with the updated Economic Guidelines, the Rule was finalized before the SAB's peer review was completed. U.S. EPA SAB. 2021. Transmittal of the Science Advisory Board Report titled "SAB Peer Review of the EPA's Revised Guidelines for Preparing Economic Analysis". EPA-SAB- 21-002. January 6, *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/61C74C0E14BD5956852586550071E058/$File/EPA-SAB-21-002.pdf.

[36] 86 FR 7223 (January 26, 2021).

For example, the requirement in 40 CFR 83.3(a)(9)(iii)(C) to "employ or design an analysis that adequately addresses relevant sources of potential critical confounding" could have led to inferior selection of health studies or the potential exclusion of some health endpoints altogether. Specifically, this requirement could prioritize the selection of studies that attempt to control for confounding,[37] inappropriately or to an unwarranted extent, when scientific evidence demonstrates that a particular confounder is not important (e.g., not well correlated with the health outcome) or if the model incorporating a particular confounder yields implausible or unstable statistical results. In addition, the SAB advised that the proposed requirement regarding consideration of confounders was "vague and would be difficult to implement" since "there is ample room for disagreement over which confounders are appropriate, or how to evaluate an actual confounding effect."[38]

As another example, the requirement in 40 CFR 83.3(a)(9)(iii)(D) to "consider how exposure is measured, particularly those that provide measurements at the level of the individual and that provide actual measurements of exposure" introduced a bias against some higher quality methods. Specifically, this requirement suggested that individual-level or "actual" measurements are more highly valued than other established and accepted methods of estimating exposure. Though individual measures of exposure would be preferred, no population-level study has yet gathered these data due in part to the resources that would be required. Rather, most epidemiologic studies of air pollution use measures or models of concentrations in ambient air as a surrogate for human exposure. Indeed, measured concentrations from air quality monitors may yield less accurate estimates of exposure among populations living further from a monitor compared to modeled exposure. In addition, codifying a preference for measured concentrations could discourage consideration of studies that combine both measured and modeled concentrations. For example, studies that estimate air quality and human exposure using a combination of approaches (e.g., remote sensing techniques and/or models, ground-truthed by monitoring data) are preferred over those that use a single method (e.g., measured concentrations), because the combination of multiple estimation methods can reduce statistical bias and generate higher-resolution exposure estimates than data from a single monitor.[39]

Further, the requirement in 40 CFR 83.3(a)(9)(i)(A) that the process of selecting human health benefit endpoints would be based upon scientific evidence that indicates there is "a clear causal or likely causal relationship between pollutant exposure and effect" did not derive from the Economic Guidelines, Circular A-4, or SAB advice. In fact, the SAB criticized the requirement that benefits analyses for health endpoints should be limited to those with a "causal or likely causal" relationship. Specifically, the SAB recommended the Rule allow for inclusion of effects for which the relationship may be less certain (e.g., "possibly causal") if the impact

[37] Confounding occurs when a variable is associated with both pollutant exposure and the health outcome, which could mask the true statistical association between them. For example, people are exposed to multiple pollutants in the ambient air that can be associated with the same health outcome. Epidemiologic studies attempt to control for confounding using a variety of methods, and relevant confounders vary across pollutants, health outcomes, and study designs. For more information, see Chapter 3 (Exposure to Ambient Particulate Matter) in: U.S. EPA. 2019. *Integrated Science Assessment for Particulate Matter (Final Report)*; Research Triangle Park, NC, *available at* https://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=539935.

[38] SAB (2020) at p. 11.

[39] For more information, see Chapter 3 (Exposure to Ambient Particulate Matter) in U.S. EPA (2019).

would be substantial, as a way to more completely account for uncertainties.[40] The Benefit-Cost Rule did not address the SAB's recommendation.

The Benefit-Cost Rule in 40 CFR 83.3 also imposed disparate requirements on the consideration of costs and benefits that would have led to arbitrary and distorted BCAs. The Rule set a high bar for which benefits to include and how they should be calculated (scientific evidence indicates there is a clear causal or likely to be causal relationship between pollutant exposure and effect (40 CFR 83.3(a)(9)(i)(a)), a preference for "actual" measurements (40 CFR 83.3(a)(9)(iii)(D)), potentially prioritizing confounding controls over other considerations 40 CFR 83.3(a)(9)(iii)(C), etc.). By contrast, the Rule contained no requirements specific to how costs were to be calculated (*see generally* 40 CFR 83.3). The EPA merely discussed in the preamble that certain approaches could generate "relatively precise" and "reasonable" estimates of a proposed regulation's compliance costs. The Benefit-Cost Rule did not justify this disparity between setting highly specific and very stringent requirements for assessing benefits and substantially less stringent requirements for assessing costs. In addition, this requirement in the Benefit-Cost Rule only applied to health benefits, which created an inconsistency with other categories of benefits (e.g., visibility, ecological effects) that did not have this limitation. This could have led to misleading BCAs in future significant CAA rules. The Rule's inconsistencies with sound economic and scientific principles warrant the Rule's rescission.

D. The Benefit-Cost Rule's presentational requirements invited net benefit calculations in regulatory preambles that are misleading and inconsistent with economic best practices.

We discuss in this section our reasons for rescinding the Rule's requirements in 40 CFR 83.4(a) and (b) to separately and selectively present certain subsets of benefits . The EPA already disaggregates benefit and cost estimates in BCAs, so these presentational requirements do not provide additional transparency.[41] Moreover, the presentational requirements seemingly invited partial net benefit calculations that are contrary to economic best practice.

Both the Economic Guidelines and Circular A-4 explain what BCA is and its purpose in regulatory analysis. BCAs assess economic efficiency by asking whether it is theoretically possible for those who gain from the policy to fully compensate those who lose and remain better off. When the answer to this question is 'yes,' then net benefits are positive, and the policy is a movement toward economic efficiency. The Economic Guidelines state that a BCA "evaluates the favorable effects of policy actions and the associated opportunity costs of those actions" and "the calculation of net benefits helps ascertain the economic efficiency of a regulation."[42] Circular A-4 further clarifies that "[w]here all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects). This is useful information for decision makers and the public to

[40] SAB (2020) at p. ii.
[41] *See, e.g.*, Chapter 11 of the *Economic Guidelines* (Presentation of Analysis and Results) and *Circular A-4* at p. 15.
[42] *Economic Guidelines* at p. xi.

receive, even when economic efficiency is not the only or the overriding public policy objective."[43]

Both guidance documents are clear that net benefits are calculated by subtracting total costs from total benefits, regardless of whether the benefits and costs arise from intended or unintended consequences of the regulation. As Circular A-4 notes, the "analysis should look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks," where an ancillary benefit is defined as a "favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking."[44] This is particularly important in instances when unintended effects are important enough to potentially change the rank ordering of the regulatory options considered in the analysis or to potentially generate a superior regulatory option with strong ancillary benefits and fewer countervailing risks.

The Benefit-Cost Rule required the EPA to present in the preamble a summary of both the overall BCA results as well as an additional reporting of subsets of the total benefits of the rule. First, the Rule required a presentation of only the benefits "that pertain to the specific objective (or objectives, as the case may be) of the CAA provision or provisions under which the significant regulation is promulgated."[45] Second, the Rule required that if any benefits and costs accrue to non-U.S. populations, they must be reported separately to the extent possible.[46] These presentational requirements are duplicative of existing information provided because the EPA already presents these types of benefits in disaggregated form in Regulatory Impact Analyses (RIAs), so there was no lack of transparency with respect to these subsets of benefits. The additional requirement to separately present and articulate these benefits was problematic because it could have resulted in, and seemingly invited, misleading net benefit calculations that excluded impacts that were due to the regulation. For example, in the final Affordable Clean Energy Rule, the EPA provided complete net benefit calculations consistent with economic best practices, but also used calculations of segregated benefits—like those required under the Benefit-Cost Rule—to create tables of "net" benefit calculations (i.e., benefits minus costs) that accounted for only a subset of the rule's benefits.[47] In addition, requiring a separate presentation that excluded certain categories of benefits that Circular A-4 and the Economic Guidelines indicate should be considered could call into question, without justification, the significance of those benefits. Such an exclusion is inconsistent with the purpose of BCA and thus would have promoted arbitrary rather than informed decision-making.

E. The Benefit-Cost Rule did not reconcile its consideration requirement with the substantive mandates of the CAA.

[43] *Circular A-4* at p. 2.
[44] *Id.* at p. 26. Ancillary benefits or benefits not related to the statutory provision under which a rule is promulgated have sometimes been called "co-benefits." However, this term is imprecise and has been applied inconsistently in past practice, and as such should be avoided (unless the term is used explicitly in statutes).
[45] 40 CFR 83.4(b).
[46] 40 CFR 83.4(a).
[47] *See* 84 FR 32520, 32572 tbl.10-12 (July 8, 2019).

In this section, we address the Rule's requirement that the Agency "consider" the required BCAs in decision making and the Rule's stated intention to make compliance with the Rule enforceable by outside parties through judicial review. As a preliminary matter, we did not intend these aspects of the Rule to be read as creating a substantive cause of action, and we do not think the record for the Benefit-Cost Rule supports such a position. Moreover, after reviewing the record for the Benefit-Cost Rule, we conclude that the Rule's failure to identify the CAA provisions to which it would apply, much less its lack of any explanation of how to reconcile the Rule's requirement to "consider" the BCA in the context of the various CAA provisions, as discussed in Sections E.1 and E.2 of this preamble, support rescission of the Rule. First, for CAA provisions where the EPA is prohibited from considering costs, the Rule's requirement to prepare a BCA and include it in the judicially reviewable rulemaking record solely for the purpose of providing "additional information" is not necessary to effect any purpose under the Act. Second, for CAA provisions that do permit some consideration of cost or other economic factors, the Rule did not explain why BCA is an appropriate way to consider cost, particularly given the existence of areas in which Congress required the EPA to regulate despite anticipating that few, if any, benefits could be monetized. Because the EPA would essentially have to give the newly required BCA little to no weight in such situations, we fail to see why the added procedure was a necessary one to carry out the statute. To the contrary, we conclude that the traditional, pre-existing manner of interpreting and implementing the CAA is the better way to interpret and apply the CAA.

Addressing the preliminary question noted above, to the extent that these aspects of the Benefit-Cost Rule could be read as requiring more than just an additional procedural step, such a reading would be impermissible. The EPA's general-rulemaking authority under CAA section 301(a) is broad, but the authority "to issue ancillary regulations is not open-ended, particularly when there is statutory language on point."[48] Given the complexity of the CAA, including the numerous provisions addressing the authority of the Agency to consider costs, the EPA could not have issued a substantive rule along the lines of the Benefit-Cost Rule under our general rulemaking authority without substantial, additional analysis and explanation addressing the specific requirements of the Act. The EPA acknowledged as much in the preamble to the Benefit-Cost Rule in discussing our view that the Agency's compliance with what we characterized as "these procedural requirements" would be subject to judicial review but admitting also that we had not based the Rule on any interpretation of the substantive provisions of the CAA.[49] Notwithstanding this discussion, to the extent that some may have viewed the Benefit-Cost Rule as creating a new avenue for substantive judicial review of future CAA actions, which was not intended, we do not agree that the Benefit-Cost Rule and its record could support such a view, and this supports rescinding the Rule. At most, we believe that the procedural requirements in the Benefit-Cost Rule—similar to an Agency's failure to provide adequate notice under the APA or CAA 307(d)—could only have provided a basis for remanding a rule to the Agency to cure process flaws. Rescinding the Rule will avoid misunderstanding that the Rule created a substantive cause of action and will avoid unnecessary litigation contending that the Rule had substantive impacts that were not intended and not supported.

[48] *See NRDC v. EPA*, 749 F.3d 1055, 1063-64 (D.C. Cir. 2014) (citing *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).
[49] 85 FR 84138.

This view is consistent with provisions in the CAA indicating that Congress did not intend that additional analytical requirements such as those at issue in the Benefit-Cost Rule should play a substantive role in determining compliance with statutorily mandated agency action. In CAA section 317, Congress created a process by which it required the EPA to prepare an economic impact assessment prior to issuing proposed rulemakings for seven types of regulations under the Act.[50] However, Congress was careful to point out that the specific statutory mandates underlying the regulations are controlling and that failure to comply with the additional economic impact assessment requirements is not a basis upon which review can be obtained for the applicable rules.[51] Congress even explicitly stated that where a statutory provision required the Agency to consider costs, "the adequacy or inadequacy of any assessment required under [CAA section 317] may be taken into consideration, but shall not be treated for purposes of judicial review of any such provision as conclusive with respect to compliance or noncompliance with the requirement of such provision to take cost into account." CAA section 317(g). If Congress did not want its own statutorily mandated economic impact assessments to provide a basis to invalidate CAA rules, then it is unlikely Congress would have granted the EPA authority to create a new substantive cause of action based on failure to comply with a procedural rule establishing BCA requirements.

1. The Rule is plainly unnecessary with respect to CAA provisions that prohibit the EPA from considering cost

The Benefit-Cost Rule's requirement to prepare a BCA applied to all significant CAA rulemakings, including those promulgated under CAA provisions that prohibit consideration of cost or other economic factors. The only waiver from the Rule's requirements for these rulemakings was that the BCA need not be "considered" in such cases where "the provision or provisions . . . prohibit the consideration of the BCA."[52] In the final rule, the Agency reasoned that "while certain statutory provisions may prohibit reliance on BCA or other methods of cost consideration in decision-making, such provisions do not preclude the Agency from providing additional information regarding the impacts of a proposed or final rule to the public. For example, while the CAA prohibits the EPA from considering cost when establishing or revising requisite NAAQS for certain criteria pollutants, the EPA nonetheless provides RIAs to the public

[50] The Benefit-Cost Rule did address comments regarding CAA section 317, but its discussion of that provision is limited to making the point that nothing in CAA section 317 precludes the Agency from requiring any additional analysis, such as its BCA. *See* Response to Comments (RTC) at page 53, available in the docket at EPA-HQ-OAR-2020-0044-0687.

[51] CAA section 317(c) ("Nothing in this section shall be construed to provide that the analysis of the factors specified in this subsection affects or alters the factors which the Administrator is required to consider in taking any [covered] action"); CAA section 317(e) ("Nothing in this section shall be construed—(1) to alter the basis on which a standard or regulation is promulgated under this chapter; (2) to preclude the Administrator from carrying out his responsibility under this chapter to protect public health and welfare; or (3) to authorize or require any judicial review of any such standard or regulation or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.").

[52] 40 CFR 83.2(b).

for these rulemakings."[53] The desire to provide "additional information" for those rules where Congress prohibited the EPA from considering cost does not on its face fall within CAA section 301(a)'s authority to promulgate regulations as are necessary to carry out the statute. We therefore find the Rule's application to CAA provisions that prohibit the consideration of cost to be inconsistent with the Act.

To support the argument for broad application of the Benefit-Cost Rule, the EPA asserted equivalency between the Benefit-Cost Rule's requirements and the EPA's historic preparations of RIAs for rulemakings under which it was prohibited from considering costs, such as setting the NAAQS. We have concluded, however, that even where equivalent, the EPA's past practices do not provide support for a conclusion that such practices are necessary to carry out the Act. In addition, the new procedures promulgated under the Rule made two key changes to the existing process under which the EPA prepared RIAs for economically significant rulemakings. The Benefit-Cost Rule required that the EPA develop a BCA meeting very specific requirements (as opposed to one tailored to the rule at issue, as permissible under existing guidance, *see* Section III.C of this preamble), and perhaps more importantly, it required the EPA to include the results of the BCA and how the information was considered in the preambles to forthcoming proposed and final rules promulgated under the CAA. That is, the BCA mandated by the Rule was explicitly required to be part of the Agency's record for decision-making. In addition, the Benefit-Cost Rule's preamble stated the Agency's compliance with the Rule's requirements would be subject to judicial review. *See* the preamble to the final rule ("[T]he Final Rule is binding upon the Agency for significant CAA regulations, and . . . EPA's compliance is subject to judicial review in challenges to such rulemakings.").[54] These changes are in stark contrast to the existing process for interagency review for rules such as the NAAQS, where the EPA does not include the RIA as part of its administrative record for the rulemaking, nor is compliance with the E.O. subject to judicial review.[55]

The Benefit-Cost Rule's proffered explanations for why the Rule was necessary are expressly tied, in part, to these two changes. The Rule noted that one motivation for requiring BCAs was that "courts have noted the usefulness of BCA and have utilized the information provided therein to inform their analysis when reviewing agency-created BCAs and/or RIAs as

[53] 85 FR 84134.

[54] 85 FR 84138.

[55] While the earlier E.O.s that required a regulatory analysis (i.e., E.O. 12291 (46 FR 13193, February 17, 1981)) contained a requirement that BCAs prepared per E.O.s be included in the Agency's rulemaking record, that directive was removed from E.O. 12866, which replaced the prior E.O. *Compare* E.O. 12291 section 9 ("The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.") *with* E.O. 12866 section 11 (containing no such requirement). Neither E.O. has ever subjected agency compliance with these E.O.s to judicial review. *See* E.O. 12866, section 11 ("Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive Order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."); E.O. 12291, section 9 ("This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.").

evidence that an agency ignored alternatives or acted in an arbitrary or capricious manner when taking action."[56] Similarly, the EPA articulated that it viewed enforceability of its new requirements as critical to its argument that the Rule was necessary. In the Response to Comments document, the Agency stated, "EPA has not had procedural enforceable regulations in place to ensure consistency in its past BCA practices. To the extent that commenters assert that EPA's past practice has been consistent and transparent, it is not due to an enforceable standardized approach that would ensure such a result. . . . Without enforceable procedural regulations for BCA, future regulations may be promulgated without consideration of, and public accountability concerning, their costs and benefits. Thus, the EPA has determined that the Final Rule is necessary to ensure that BCA practices are implemented in a consistent fashion prospectively."[57]

But neither of these reasons articulating the necessity of the Rule can extend to regulations promulgated under CAA provisions where the Agency is prohibited from considering cost or economic factors. Where Congress did not intend the EPA to consider cost, there would be no purpose for the EPA to incorporate a BCA into its rulemaking record, and it would be contrary to the CAA to subject a Congressionally-required rule to review based on failure to adhere to an agency-created mandate to prepare a BCA where the statute precludes consideration of cost.

2. For provisions that permit consideration of cost or economic factors, the requirement to consider BCA is unwarranted because implementation of those provisions should begin with analysis of statutory text and context

The CAA contains a vast array of instructions about whether and how the EPA may consider benefits, costs, or other economic factors, and discerning Congress' intent with respect to those instructions requires analysis of statutory context.[58] Rather than grapple with any of the statutory provisions at issue, the Benefit-Cost Rule assumed that because Congress provided authority for the EPA to consider costs in making some regulatory decisions, and because courts have concluded that BCA may be an appropriate way for agencies to account for costs in some contexts, it was "necessary" and reasonable that the EPA should require consideration of BCA in all significant CAA rules where it was not precluded from doing so. However, this faulty logic does not constitute an adequate justification, and the EPA has concluded that the Rule's approach is inferior to the existing process of interpreting and applying the relevant CAA provisions.

Under the CAA, Congress granted the EPA broad powers to act on behalf of protecting and enhancing the nation's air resources. The Act specifically directs the EPA to, among other things, set NAAQS, establish emission standards for both stationary and mobile sources of air

[56] 85 FR 84134.
[57] RTC at Chapter 3.1.1, p. 32.
[58] Three Supreme Court cases from the last two decades addressing whether the EPA properly interpreted the CAA with respect to whether it could consider cost illustrate the critical role of context and purpose in statutory interpretation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *Michigan v. EPA*, 576 U.S. 743 (2015).

pollution, reduce emissions of nearly 200 specified hazardous air pollutants, regulate fuels and fuel additives, and issue permits and enforce the Act's emission limits. In these various authorities, Congress established a wide range of direction with respect to the EPA's consideration of benefits, costs, or other economic factors.[59] With respect to costs, the statutory text in some provisions explicitly indicates that the EPA should incorporate a consideration of cost or economic factors.[60] Other authorities suggest by implication that the EPA should or may consider costs, using language directing the EPA to establish standards that are "practicable," "reasonably achievable," or "feasible."[61] And in many if not all of the CAA authorities, Congress made clear that the EPA was to give strong, if not overriding, consideration to the "benefits" of its regulations—i.e., beneficial effects on public health, welfare, risk prevention, the environment, safety, and visibility, to name but a few.

In the Benefit-Cost Rule, the EPA presumed that its requirements were permissible because it "was not aware of any impediment to this rulemaking."[62] But the Rule failed to identify, much less discuss, *any* statutory provision governing the rules to which its requirements would have applied. The EPA is bound to look to the statutory language and context of a particular provision, and in some cases consider the factual circumstances of the issue the agency is attempting to address in determining whether *and how* the EPA may consider benefits, costs, and other factors.[63]

The Benefit-Cost Rule's failure to examine the statutory provisions governing the regulations it would impact would have resulted in cases where the Rule required "consideration" of BCAs where it may not have been feasible to even produce a meaningful or useful BCA. Even for those CAA provisions where cost may be considered, BCA is not necessarily useful, and may even be misleading. As Circular A-4 has noted, "[w]here all benefits and costs can be quantified and expressed as monetary units, benefit-cost analysis provides

[59] For additional information regarding various CAA authorities and discussion of cost, see Congressional Research Service (CRS) report titled "Cost and Benefit Considerations in Clean Air Act Regulations." In the report, the CRS identifies various CAA authorities that either mention or imply cost considerations and authorities that neither mention nor imply cost consideration. May 5, 2017, *available at* https://crsreports.congress.gov/product/pdf/R/R44840/4.

[60] Examples include: the setting of emission standards for new stationary sources in section 111, going "beyond the floor" in emission standards for sources of 187 hazardous air pollutants in section 112(d), setting emission standards for motor vehicles beyond those standards listed in the act under sections 202(a) and 202(i), controlling mobile source air toxics under section 202(l), controlling or prohibiting the manufacture and sale of fuels and fuel additives under section 211(c), requiring the sale of reformulated gasoline in nonattainment areas under section 211(k), setting emission standards for nonroad vehicles and engines under section 213, and setting emission standards for locomotives, buses, and aircraft, under sections 213, 219, and 231.

[61] Examples include: providing for the use of "generally available control technologies" to control area sources of hazardous pollutants under section 112(d)(5), promulgating "reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases," of extremely hazardous substances and take into consideration "the concerns of small business," under section 112(r)(7), and imposing emission standards or emission control technology requirements that "reflect the best retrofit technology and maintenance practices reasonably achievable" for retrofit of urban buses under section 219(d).

[62] 85 FR 84138.

[63] *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508 (1981); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009).

decision makers with a clear indication of the most efficient alternative."[64] Circular A-4 goes on to caution, however, that it is not always possible to quantify benefits (or costs), and "[w]hen important benefits and costs cannot be expressed in monetary units, BCA is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."[65]

This caution is relevant as there are a number of authorities under the CAA authorizing or requiring the EPA to regulate pollutants where, in many cases, important benefits cannot readily be monetized. For example, in CAA section 112(d)(2), the Act prescribes that the EPA establish emission standards based on maximum achievable control technology or "MACT" for new and existing sources of hazardous air pollutants. Section 112 authorizes the EPA to consider costs at some steps in this process but not at the first step of establishing the minimum stringency emission limit, because Congress recognized the dangerous nature of hazardous and toxic air pollutants. Where the EPA can consider cost in this context (e.g., requiring more stringent emission limits), it has not historically used BCA to establish appropriate emission standards. We note that as methods do not yet exist that can reliably quantify the value of changes in many HAP-related risks, a BCA would include only a qualitative assessment of the benefits of HAP reductions. In other words, while we know that there are important health outcomes associated with exposure to HAP that include cancer, birth defects, reproductive effects, and neurodevelopmental defects, we currently lack the ability to precisely quantify and fully monetize all of the benefits of a change in the MACT standard. In implementing section 112, the EPA has therefore historically employed other types of analyses, such as examining the cost per ton of emissions removed.[66]

Perhaps recognizing the varied landscape presented by the CAA's provisions, the Benefit-Cost Rule ultimately only required that its BCA be "considered," but prescribed no further instruction or requirement as to how the Agency should consider it.[67] The Agency had taken comment on the possibility of requiring a more substantive outcome, soliciting input "on approaches for how the results of the BCA could be weighed in future CAA regulatory decisions," including "whether and under what circumstances the EPA could or should determine that a future significant CAA regulation be promulgated only when the benefits of the intended action justify its costs" or "only when monetized benefits exceed the costs of the action."[68] Because the final Benefit-Cost Rule did not strictly direct how the Agency should weigh BCA in its future CAA rulemakings, the EPA could have formally complied with the Rule while giving the BCA little to no weight in its decision making. The need to adhere to the particular statutory language and context governing the significant CAA rulemaking at issue, including examples like the one cited above, would make that outcome plausible, if not likely. By appropriately allowing the EPA to determine how best to consider benefits, costs, and other factors in the context of a particular statutory provision, the Benefit-Cost Rule conceded that it may serve no purpose in helping the EPA to effectuate the purposes of the Act. At the same time,

[64] *Circular A-4* at p. 2.
[65] *Id*. at p. 10.
[66] *See, e.g., Natl. Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1157 (D.C. Cir. 2013).
[67] *See* 40 CFR 83.2(b).
[68] 85 FR 35623.

by acknowledging that the Agency's choice of analysis depends on what each CAA provision requires or permits,[69] the Benefit-Cost Rule refuted its claim that the Rule provided "consistency."

Given the exacting demands of discerning Congressional intent in any given CAA provision, we conclude that returning to implementation of the CAA using the traditional process of statutory interpretation provides advantages over the Benefit-Cost Rule's presumption that consideration of BCA is "necessary" and reasonable to promulgate all significant CAA regulations regardless of statutory text and context. Under its pre-existing process, the Agency first looks to the text of the relevant statutory provision to determine whether Congress intended or permitted the Agency to consider cost or economic factors. If yes, the Agency further looks to the statutory context, legislative history, and the nature of the program or environmental problem to be addressed to determine a reasonable manner of considering cost. We conclude that this process of interpreting and discerning Congress' intent, subject to public notice and comment and judicial review, is superior to the Benefit-Cost Rule's presumptive imposition to consider BCA followed by a subsequent attempt to reconcile with the statutory text.

F. The pre-existing administrative process provides for ample consistency and transparency

In the Benefit-Cost Rule the EPA also failed to establish that its requirements were needed with respect to process, in light of the existing procedures under the APA and, where applicable, CAA section 307(d). These requirements are more than adequate to accomplish the general good government goals of "consistency" and "transparency," and the Benefit-Cost Rule failed to provide any support for its contention that the pre-existing process was deficient so as to warrant the Rule's new procedures.

When promulgating regulations under the CAA such as those targeted by the Benefit-Cost Rule, the EPA is already required by statute to provide "[g]eneral notice of proposed rulemaking" in "the Federal Register," including the legal authority under which the rule is proposed and the terms or substance of the proposed rule.[70] Moreover, the EPA must give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.[71] For many rules promulgated under the CAA, including those designated by the Administrator, CAA section 307(d) further requires the establishment of a rulemaking docket,[72] and specifies that the notice of proposed rulemaking must include a summary of "the factual data on which the proposed rule is based,"[73] "the methodology used in obtaining the data and in analyzing the data,"[74] and "the major interpretations and policy considerations underlying the proposed rule."[75] CAA section 307(d)(2) also requires the EPA to "set forth and summarize and provide a reference to any pertinent findings, recommendations,

[69] *See* 40 CFR 83.2(b); 40 CFR 83.4(d).
[70] 5 U.S.C. 553(b); CAA section 307(d)(3).
[71] 5 U.S.C. 553(c); CAA section 307(d)(5).
[72] CAA 307(d)(2).
[73] CAA section 307(d)(2)(A).
[74] CAA section 307(d)(2)(B).
[75] CAA section 307(d)(2)(C).

and comments by the Scientific Review Committee . . . and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences."

The EPA must respond to all significant comments it receives on its proposed regulations before issuing a final rule, including contentions from stakeholders that the EPA has failed to reasonably consider the costs or benefits of an action. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("[t]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (requiring reviewing court to assure itself that all relevant factors have been considered by the agency). Such comments can encompass arguments that by failing to conduct a BCA, the EPA has contravened the CAA or complaints that its data or analysis is flawed or arbitrary. Where the EPA promulgates a final CAA section 307(d) rule, the EPA is required to provide "a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period."[76] The EPA is forbidden from promulgating a rule based on "any information or data which has not been placed in the docket as of the date of . . . promulgation."[77]

While "agencies should be free to fashion their own rules of procedure,"[78] and "are free to grant additional procedural rights in the exercise of their discretion,"[79] where Congress so carefully specified the procedural requirements for CAA rules (at least those enumerated in section 307(d)), we question the wisdom of adding to those procedures an additional BCA requirement, particularly where the EPA did not show that statutory procedures were deficient.[80]

The Benefit-Cost Rule did not explain how the pre-existing ample public process was inadequate to accomplish the rule's stated goals of promoting consistency and transparency. The existing process already requires the EPA to present in a proposed notice published in the Federal Register its relevant interpretations of a particular statutory provision regarding whether and how it considers costs and benefits. The existing process already permits interested parties to promote during the public comment period a view that weighing the results of a BCA is a valuable or appropriate way for the EPA to consider costs, benefits, or other factors specified in the provision of the Act under which a rule is promulgated; any views asserting that the agency has not been transparent in providing factual data, methodologies, legal interpretations, and policy considerations; or any views asserting that the agency has been inconsistent in its interpretations. The existing process, under CAA section 307(b), already subjects any failure on the EPA's part to grapple with significant comments to review by the U.S. Courts of Appeals.[81]

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[76] CAA section 307(d)(6)(B).
[77] CAA section 307(d)(6)(C).
[78] *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978).
[79] *Id.* at 524.
[80] *See NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (EPA cannot use its general rulemaking authority as justification for adding to a statutorily specified list); *NRDC v. EPA*, 749 F.3d at 1064 ("EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill.").
[81] Outside parties regularly exercise their right to challenge the EPA's actions under the CAA. In a 2011 report, the Government Accountability Office found that during a 16-year period between 1995 and 2010, about 2,500 environmental cases were brought against the EPA. Of those challenges, CAA cases were more than twice as

Therefore, the EPA has determined that the existing process already provides sufficient consistency and transparency.

IV. Rulemaking Procedures, Procedural Rule Exemption, and Request for Comment

In this action, the EPA is issuing an interim final rule to rescind the Benefit-Cost Rule in its entirety and requesting comment on that action. We intend to follow this interim final rule with a final rule that responds to comments received during this public comment period, if any, and reflects any accompanying changes to the Agency's approach. This interim final rule will stay in place until it is replaced by the final rule that responds to any public comments and makes any warranted changes. This interim final rule will become effective 30 days after publication.

Like the Benefit-Cost Rule that this rule rescinds, this interim final rule is a rule of agency organization, procedure, or practice. This procedural rule does not regulate any party outside of the EPA but instead exclusively governs the EPA's internal process for conducting benefit-cost analysis. This interim final rule does not regulate the rights and obligations of any party outside of the EPA nor does it have any legal force and effect on them. Any incidental impacts on voluntary behavior outside of the EPA do not render this a substantive rule.

While procedural rules are exempt from the APA's notice and public comment requirements, *see* 5 U.S.C. 553(b)(A), the EPA has nonetheless decided to voluntarily seek post-promulgation public comment on this procedural interim final rule and follow it with a final rule because the information and opinions the public may provide could inform the Agency's decision-making.[82] By electing to proceed with an interim final rule rather than a final rule, the EPA is acting consistently with Administrative Conference of the United States Recommendation 95-4, which recommends that agencies consider providing post-promulgation notice and comment even where an exemption is justified, be it a substantive rule relying on the "good cause" exception to notice and comment, 5 U.S.C. 553(b)(B), or a procedural rule such as this one.[83]

A. Written comments

Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2020-0044, at https://www.regulations.gov (our preferred method), or the other methods identified in the ADDRESSES section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.)

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common as cases brought under any other statute (i.e., comparing the three most litigated groups of actions: 59% of cases were brought under the CAA, 20% under the Clean Water Act, and 6% under Resource Conservation and Recovery Act). *Environmental Litigation: Cases against EPA and Associated Costs over Time*, GAO-11-650, August 2011, *available at* https://www.gao.gov/assets/gao-11-650.pdf.

[82] *Vt. Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion.").

[83] *See* ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking* (1995).

must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit https://www.epa.gov/dockets/commenting-epa-dockets.

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors to reduce the risk of transmitting COVID-19. Written comments submitted by mail are temporarily suspended and no hand deliveries will be accepted. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via https://www.regulations.gov. For further information and updates on EPA Docket Center services, please visit us online at https://www.epa.gov/dockets.

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

B. Participating in a virtual public hearing

If a member of the public requests one, the EPA will hold a virtual public hearing on this interim final rulemaking on Wednesday, June 9, 2021. Please note that any hearing would be a deviation from the EPA's typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, the EPA cannot hold in-person public meetings at this time.

Upon publication of this document in the Federal Register, the EPA will accept requests for a public hearing. If a hearing is requested, the EPA will also begin pre-registering speakers and attendees for the requested hearing. The EPA will accept registrations on an individual basis. To register to speak at the virtual hearing, individuals may use the online registration form available via the EPA's Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process web page for this hearing (https://www.epa.gov/air-and-radiation/rescission-of-2020-benefit-cost-rule) or contact Leif Hockstad at (202) 343-9432 or hockstad.leif@epa.gov. The last day to pre-register to speak at the hearing will be Wednesday, June 2, 2021. On Monday, June 7, 2021, if a hearing has been requested, the EPA will post a general agenda for the hearing that will list pre-registered speakers in approximate order at: https://www.epa.gov/air-and-radiation/rescission-of-2020-benefit-cost-rule.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing, if held; however, please plan for the hearing to run either ahead of schedule or behind schedule. Additionally, requests to speak will be taken the day of the hearing at the end of each session as timing allows. The EPA will make every effort to accommodate all speakers.

Each commenter will have 3 minutes to provide oral testimony. The EPA recommends submitting the text of your oral comments as written comments to the rulemaking docket. The

EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

The EPA is also asking hearing attendees to pre-register for the hearing, if held, even those who do not intend to provide testimony. This will help the EPA ensure that sufficient phone lines will be available.

Please note that any updates made to any aspect of the hearing logistics, including potential additional sessions, will be posted online at the EPA's Rescission of the Benefit-Cost Rule website (https://www.epa.gov/air-and-radiation/rescission-of-2020-benefit-cost-rule). While the EPA expects the hearing, if held, to go forward as set forth above, please monitor our website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing and describe your needs by Wednesday, June 2, 2021. The EPA may not be able to arrange accommodations without advanced notice.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a rule of agency procedure and practice.

B. Paperwork Reduction Act (PRA)

This action does not contain any information collection activities and therefore does not impose an information collection burden under the PRA.

C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This action would not regulate any entity outside the federal government and is a rule of agency procedure and practice.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use
This action is not a ''significant energy action'' within the meaning of Executive Order 13211. It is not likely to have a significant adverse effect on the supply, distribution or use of energy, and it has not otherwise been designated as a significant energy action by the Administrator of the Office of Information and Regulatory Affairs (OIRA).

I. National Technology Transfer and Advancement Act (NTTAA)
This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard that results in disproportionate impacts on minority and low-income populations.

K. Congressional Review Act (CRA)
This rule is exempt from CRA because it is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of nonagency parties.

List of Subjects in 40 CFR Part 83

Environmental protection, Administrative practice and procedure, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, the EPA removes 40 CFR part 83.

PART 83 [REMOVED AND RESERVED]

Remove and reserve part 83.