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# EPA Requests Comment on Cost Benefit Analysis Approaches

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The U.S. Environmental Protection Agency's ("EPA") cost benefit analyses have been a topic of significant debate in recent years, with challenges extending all the way to the U.S. Supreme Court. On June 13, 2018, EPA published an advanced notice of proposed rulemaking ("ANPRM"), entitled "[Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process](#)," seeking public comment on new approaches the agency is considering. This ANPRM provides an important and unusual opportunity for regulated entities to play a role in how EPA will potentially revise its approach to evaluating the costs and benefits of major regulatory actions. Interested parties should review the proposal carefully and consider submitting comments before the July 13, 2018, deadline.

Under the terms of long-standing [Executive Order 12866 on Regulatory Planning and Review](#), EPA and other federal agencies are required to identify the costs and benefits of potential regulations, imposing requirements "in the most cost-effective manner to achieve the regulatory objective" and only if the benefits justify the costs. These terms are not defined, however, and have largely been left to agency discretion, often resulting in substantial disagreements during rulemaking. To respond to these concerns, EPA's ANPRM seeks comment on several specific questions:

1. issues relating to perceived inconsistency and lack of transparency in EPA's cost-benefit analysis;
2. potential approaches for increasing consistency and transparency; and
3. whether EPA should issue regulations governing its cost-benefit analysis for future rulemakings.

According to the Office of Management and Budget,<sup>[1]</sup> from 2006 to 2016, EPA finalized 39 major rules that annually imposed \$54.1 to \$64.8 billion in costs and resulted in an estimated \$195.8 to \$705.7 billion in benefits. Critics have frequently taken issue with these benefit totals, but even apart from that concern, these wide-ranging estimates reflect the recognized challenges and speculative nature of fully capturing the comprehensive cost and benefits associated with a particular regulation.

The lack of clarity over key terms has resulted in criticisms of the cost-benefit justifications for recent EPA regulations. For example, EPA has relied on "co-benefits" when determining whether the benefits outweigh the costs of certain Clean Air Act regulations. Co-benefits are additional reductions in atmospheric matter that occur coincidentally as the result of a regulation. These co-benefits have been considered a monetary benefit of the proposed regulation, regardless of whether the regulation was aimed at reducing that particular pollutant or not. In recent years, EPA has been criticized for implementing costly regulations in which the benefits of reducing the chief pollutant being directly regulated were significantly lower than the cost of the regulation, but by including the added benefits from reductions in ambient particulate matter, which is already separately regulated, the benefit was increased to justify the final regulation.

In recent years, two Supreme Court cases have highlighted EPA's use of cost-benefit analyses. In *Entergy Corp. v. Riverkeeper*, the Court upheld Clean Water Act regulations that were challenged on the basis of EPA's consideration of cost in the final regulations. The Court found that, when regulating, EPA had authority under Section 316(b) of the Clean Water Act to consider both the benefits of the regulations and the cost of achieving them. More recently, *Michigan v. EPA* held that EPA incorrectly interpreted Section 112 of the Clean Air Act when it found cost to be irrelevant in its decision to regulate power plants.

While many favor reform of EPA's cost benefit approaches, opponents have raised concerns about potential changes, and have urged EPA to extend the comment period and hold a public hearing.

This ANPRM is receiving considerable attention and could change the future landscape of EPA's regulatory process. The comment period is short, but it is important that regulated entities use this opportunity to express concerns and offer suggestions for how EPA can improve its rulemaking process moving forward.

Clark Hill attorneys are experienced in working with clients to develop effective legal strategies and advocacy approaches to address regulatory and deregulatory initiatives. For more information, please contact Jane C. Luxton at [jluxton@clarkhill.com](mailto:jluxton@clarkhill.com) | (202) 572-8674; Kenneth von Schaumburg at [kvonschaumburg@clarkhill.com](mailto:kvonschaumburg@clarkhill.com) | (202) 772-0904; or Amanda L. Tharpe at [atharpe@clarkhill.com](mailto:atharpe@clarkhill.com) | (202) 772-0913; or another member of Clark Hill's Environment, Energy & Natural Resources practice group.

[1] 2017 Draft [Report](#) to Congress on the Benefits and Costs of Federal Regulations.