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Submitted via Regulations.gov

RE: "National Emission Standards for Hazardous Air Pollutants: Gasoline Distribution Technology Review and Standards of Performance for Bulk Gasoline Terminals Review," Docket ID No. EPA-HQ-OAR-2020-0371

Mr. Feinberg:

I appreciate this opportunity to provide comments[1] to the Environmental Protection Agency (EPA) on the proposed rule entitled "National Emission Standards for Hazardous Air Pollutants: Gasoline Distribution Technology Review and Standards of Performance for Bulk Gasoline Terminals Review."[2]

This comment focuses on the EPA inappropriately using ancillary benefits to justify the proposed rule and specifically focuses on the NESHAPs. The agency did not monetize any direct benefits for the two NESHAPs and is relying exclusively on ancillary benefits to justify them.

Background on Past EPA Abuse of Ancillary Benefits

The abuse of ancillary benefits is nothing new for the EPA. Based on data assembled by NERA Economic Consulting, there were six major CAA rules that did not have any quantified direct benefits in just the two-year period of 2009-2011. In 21 of the 26 rulemakings analyzed from 1997 to 2011, the particulate matter ancillary benefits accounted for more than half of the total benefits.[3]

[1] The views I have expressed in this comment are my own and should not be construed as representing any official position of The Heritage Foundation.
[2] "National Emission Standards for Hazardous Air Pollutants: Gasoline Distribution Technology Review and Standards of Performance for Bulk Gasoline Terminals Review," https://www.federalregister.gov/documents/2022/06/10/2022-12223/national-emission-standards-for-hazardous-air-pollutants-gasoline-distribution-technology-review-and (accessed August 9, 2022).
[3] Anne E. Smith, "An Evaluation of the $PM_{2.5}$ Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations," *NERA Economic Consulting* (December 2011), https://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf (accessed August 9, 2022).

There is also the Mercury and Air Toxics Standards (MATS) rule. Initially, the EPA argued that the cost of this power plant rule did not have to be considered at all. The Supreme Court in *Michigan v. EPA* rejected this argument.[4] In response, the EPA finalized a supplemental finding in 2016,[5] moving forward with the MATS rule even though 99.9% of the monetized benefits did not come from direct benefits (i.e. emission reductions from mercury and other HAPs) but instead came from the ancillary benefits of reducing particulate matter.[6]

To its credit, the EPA finalized a rule in 2020 that would have helped some in putting an end to this abuse of ancillary benefits, at least in the power plant context. In the rule, the EPA argued:

> While the Administrator could consider air quality benefits other than HAP-specific benefits in the CAA section 112(n)(1)(A) context, consideration of these co-benefits [ancillary benefits] could permissibly play only, at most, *a marginal role* in that determination, given that the CAA has assigned regulation of criteria pollutants to other provisions in title I of the CAA, specifically the NAAQS regime pursuant to CAA sections 107–110,… [Emphasis added].[7]

The EPA should clearly be expected to justify the purpose of its rules (i.e. through the use of direct benefits). A rule that relies heavily or exclusively on benefits connected to unrelated pollutants (ancillary benefits) would be unjustified, and in effect, it would be a regulation addressing those unrelated pollutants. For example, a HAP rule that relies exclusively on ozone benefits is really an ozone rule. This matters from a regulatory analysis standpoint because the agency should then be examining regulatory alternatives connected to ozone. Using a HAP rule to address ozone would be an inefficient and indirect way of addressing ozone.

More important, this overreliance on ancillary benefits is a legal issue. When the EPA issues a rule under the statutory section specifically targeting HAPs to address unrelated pollutants, the agency is ignoring the plain language of the statute and the will of Congress. It is doing an end-run around the law. This end-run is even more pronounced when the ancillary benefits come from a pollutant that is addressed within a separate statutory section of the CAA, such as ozone. In fact, Chief Justice John Roberts brought up this end-run problem in the *Michigan v. EPA* oral

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[4] *Michigan v. EPA*, 135 S. Ct. 2699 (2015), *Michigan v. EPA*, 135 S. Ct. 2699 (2015), https://www.scotusblog.com/case-files/cases/michigan-v-environmental-protection-agency/ (accessed August 9, 2022).

[5] "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," https://www.federalregister.gov/documents/2016/04/25/2016-09429/supplemental-finding-that-it-is-appropriate-and-necessary-to-regulate-hazardous-air-pollutants-from (accessed August 9, 2022).

[6] "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units-Reconsideration of Supplemental Finding and Residual Risk and Technology Review," https://www.federalregister.gov/documents/2020/05/22/2020-08607/national-emission-standards-for-hazardous-air-pollutants-coal--and-oil-fired-electric-utility-steam (accessed August 9, 2022).

[7] Ibid.

arguments.[8]

The Abuse of Ancillary Benefits in the Proposed Rule

It requires some serious digging to ascertain that the benefits of the proposed rule do not include any monetized benefits from HAP reductions. There is one sentence in the entire proposed rule that adequately clarifies this: "Due to methodology and data limitations, we did not attempt to monetize the health benefits of reductions in HAP in this analysis." Unfortunately, language used throughout the rule, including the tables, does not make this point in a direct and easily understandable fashion, and even creates confusion. The same problem applies to this other point regarding the benefits: the monetized benefits are based exclusively on ozone-related health benefits connected to reductions in VOC emissions.

Two of the rules within the rule (the proposed rule according to the EPA is three rules in one, which itself is unusual and confusing, to say the least[9]) are NESHAPs. The focus of Section 112, entitled "Hazardous air pollutants," is unsurprisingly on hazardous air pollutants. Section 112(d) clarifies the process by which regulations establishing emission standards for HAPs are to be promulgated. Further, Section 112(b) clarifies that criteria pollutants like ozone may not be regulated under Section 112.[10] Yet the EPA is proposing NESHAPs in which there are no quantified benefits from reducing HAPs, and further relying exclusively on the benefits from reducing ozone.

Based on the arguments regarding the inappropriate reliance on ancillary benefits, including within the NESHAP context, the proposed rule is unreasonable and likely violates the Clean Air Act. In addition, the rule (and specifically the NESHAPs) can hardly be considered "necessary"[11] as required under Section 112(d)(6) if there are no monetized benefits from reducing HAPs.

Conclusion

The EPA should not finalize the proposed rule for numerous reasons, but one of the most important reasons, as explained, is the abuse of ancillary benefits. For the NESHAPs, the

[8] *Michigan v. EPA* oral argument, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-46_1b5p.pdf (accessed August 9, 2022).
[9] Whether this "three rules in one rule" approach creates any problems (besides confusion) or serves as an end-run around any requirements, is not clear.
[10] "No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section." 42 U.S.C. §7412(b)(2).
[11] The first definition of "necessary" within the Merriam-Webster definition is "absolutely needed: REQUIRED," https://www.merriam-webster.com/dictionary/necessary (accessed August 9, 2022).

ancillary benefits are not just a major source of the monetized benefits, but the *only* source. [12] Therefore, moving forward with the rule and the NESHAPs is inappropriate and unreasonable.

Sincerely,

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[12] There could be ancillary benefits problems with the NSPS in the proposed rule as well, but this is not the focus of the comment.