ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 83

[EPA–HQ–OAR–2020–0044; FRL-6530.8-02-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: Final rule.

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

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2020-0044. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov*.

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SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations

The EPA uses multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

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
E.O.	Executive Order
EPA	Environmental Protection Agency
FR	Federal Register
HAP	Hazardous Air Pollutants
MACT	Maximum Achievable Control Technology
NAAQS	National Ambient Air Quality Standards
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
RIA	Regulatory Impact Analysis
RFA	Regulatory Flexibility Act
SAB	Science Advisory Board
UMRA	Unfunded Mandates Reform Act
U.S.	United States
U.S.C.	United States Code

Organization of this document. The information in this preamble is organized as follows:

I. General Information

A. 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 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).

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

The Agency is taking this action pursuant to CAA section 301(a)(1).[1] 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

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[1] 42 U.S.C. 7601(a)(1).

CAA section 301(a), and therefore the EPA lacked authority to issue it; we are accordingly rescinding the Rule.

II. Background

On December 23, 2020, the EPA finalized the Benefit-Cost Rule.[2] 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. Specifically, the Benefit-Cost Rule (1) required a BCA for all significant proposed and final regulations under the CAA; (2) codified specific practices for developing the BCA; (3) required certain presentations of the BCA results in the preamble; and (4) required the EPA to consider the BCA in promulgating the regulation except where prohibited. 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), 5 U.S.C. 553(b)(A). After publication, several parties filed 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.[3]

On January 20, 2021, President Biden signed Executive Order (E.O.) 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,"[4] which, among other things, directed the EPA to immediately review and consider suspending, revising, or rescinding the Benefit-Cost Rule. Accordingly, the EPA 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. Based on this review, the EPA determined that the changes to Agency practice required by the Benefit-Cost

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[2] 85 FR 84130.

[3] *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).

[4] 86 FR 7037 (January 25, 2021).

Rule were inadvisable, not needed, and untethered to the CAA. Therefore, in May 2021, the EPA published an interim final rule rescinding the Benefit-Cost Rule (hereinafter, the "Interim Final Rule").[5] The Interim Final Rule became effective on June 14, 2021, which was 30 days after its publication in the *Federal Register*.

While procedural rules are exempt from the notice-and-public-comment requirements in the APA, the EPA nonetheless decided to voluntarily seek post-promulgation public comment on the Interim Final Rule.[6] This final action considers and responds to the public comments the EPA received on the Interim Final Rule. The EPA's process is consistent 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.[7]

III. Summary of the Final Rescission Rule

In the Interim Final Rule, the EPA concluded that the Benefit-Cost Rule should be rescinded in its entirety. The EPA has reviewed and considered comments received on the Interim Final Rule, as discussed in section IV, but none of the comments received have led the EPA to materially change our view, as explained in the Interim Final Rule, that the Benefit-Cost Rule is not needed and does not further the CAA's goals. As such, the EPA is finalizing the rescission of the Benefit-Cost Rule with this action. Consistent with and as discussed further in the Interim Final Rule, the rationales for rescission are summarized below.

In the Benefit-Cost Rule, the Agency stated that it had authority to promulgate the Rule under CAA section 301(a) because the Rule's additional procedures were necessary to ensure

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[5] 86 FR 26406 (May 14, 2021).

[6] *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.").

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

consistency and transparency in CAA rulemakings. However, as discussed in the Interim Final Rule, the Agency failed to articulate a rational basis for the Benefit-Cost 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 even theoretical problem existed. After reviewing each element of the Benefit-Cost Rule, we have determined that the additional procedures required were not needed, useful, or advisable policy changes. In some cases, the new procedures established by the Benefit-Cost Rule 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 Benefit-Cost Rule is severable and discussed in the Interim Final Rule and summarized below. In addition, as noted in the Interim Final Rule, the existing public process provides ample ability for the public to participate in the EPA's CAA rulemakings.

First, the EPA has determined that the Agency failed to provide a rational basis to support the Benefit-Cost Rule or explain why the Rule was needed or reasonable. The Benefit-Cost 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 Benefit-Cost 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. Furthermore, there was no discussion of how the requirements of the Benefit-Cost Rule would have improved the Agency's ability to accomplish the CAA's goals to protect and enhance air quality. Moreover, there has been an unbroken, bipartisan, decades-long commitment from Presidential Administrations to conduct BCAs 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. We are therefore finalizing rescission of the Benefit-Cost Rule on the basis that it failed to articulate a rational basis justifying its promulgation.

Second, the Benefit-Cost Rule's expansion of BCA to all "significant" CAA rulemakings, rather than just those that are significant under monetary thresholds of E.O. 12866, is unnecessary. The Benefit-Cost Rule greatly expanded the universe of CAA rulemakings for which the EPA would have been required to conduct resource-intensive BCAs without justifying why such expansion was necessary or appropriate. In many cases, rules may be designated "significant" by the Office of Management and Budget (OMB) for reasons other than economic significance such that other types of assessments of economic impact are appropriate. Requiring BCA for all rules designated "significant" by OMB, even when the primary issues of importance are not economic, would have unnecessarily complicated the rulemaking process, potentially diverted 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 have delayed rules needed for protection of public health and the environment. Existing directives under E.O. 12866 and guidance regarding BCAs for economically significant rules, while retaining flexibility for agencies to analyze 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. Simply put, a BCA is not warranted for every CAA rule that is designated as significant under E.O. 12866.

Third, the codification of specific practices for the development of BCA is inadvisable because it is contrary to best practices for preparing BCAs and could have prevented the EPA from relying on best available science. As articulated by OMB and EPA guidelines, best practices for conducting a high-quality BCA cannot be established using a set formula, and the Benefit-Cost Rule's codification of specific practices would have prevented situation-specific tailoring of the regulatory analysis to the policies being proposed. In addition, best practices evolve over time, and the Benefit-Cost Rule would have locked the EPA into using outdated practices until those practices were amended via rulemaking, which could have delayed incorporation of new scientific information and methods. Some of the Benefit-Cost Rule's "best

practice" requirements did not even derive from the EPA's Guidelines for Preparing Economic Analyses (hereinafter "Economic Guidelines"),[8] OMB's Circular A-4,[9] or the EPA's Science Advisory Board (SAB) advice. As discussed in more detail in the Interim Final Rule, a number of the specific provisions required by the Benefit-Cost Rule, in particular those related to health-benefits assessments, would have promoted particular types of data in a way that could have conflicted with the use of best scientific practices or arbitrarily caused the Agency to disregard important or high-quality data. The Benefit-Cost Rule's attempt to craft a one-size-fits-all approach to BCAs in fact demonstrated the difficulty and inadvisability of codifying specific practices appropriate for every BCA.

Fourth, the Benefit-Cost Rule required the EPA to present net-benefit calculations in regulatory preambles in a manner that would have been misleading and inconsistent with economic best practices. Specifically, 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." 40 CFR 83.4(b). The Rule also required that if any benefits and costs accrue to non-U.S. populations, they must be reported separately to the extent possible. This information is duplicative of existing information provided in EPA's Regulatory Impact Analyses (RIAs) because EPA already presents these types of benefits in disaggregated form in its RIAs, so these presentational requirements would not have provided additional transparency. EPA is careful, however, not to use these disaggregated subsets of benefits in calculating total net benefits. Both EPA and OMB guidelines, and economic best practice generally, are clear that the purpose of a BCA is to assess the economic efficiency of policies, and in order to do so accurately, net benefits are calculated by subtracting

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

[9] 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.*

total costs from total benefits, regardless of whether the benefits and costs arise from intended or unintended consequences and regardless of the particular recipients of the benefits or costs. Even though the Benefit-Cost Rule did not specifically require incorrect partial net-benefit calculations that excluded certain impacts due to the regulation, we are concerned that retaining the Rule's presentational requirements could have invited such misleading partial calculations. In fact, in one of the rules that was promulgated during the same time period as the Benefit-Cost Rule's requirements were being considered, the EPA used calculations of segregated benefits—like those required under the Benefit-Cost Rule—to create tables of misleading "net" benefit calculations (*i.e.,* benefits minus costs) that only accounted for a subset of the rule's benefits.[10]

Fifth, we are rescinding the Benefit-Cost Rule because the Rule did not reconcile its requirement that the Agency "consider" in its CAA rulemakings the required BCAs with the various and varied substantive mandates of the CAA. The Benefit-Cost Rule did not even identify the CAA provisions to which it would apply. This identification is critical because the statute, not Agency procedural rules, dictate what the Agency may or may not "consider" in the context of exercising authority. For those CAA provisions where EPA is prohibited from considering costs, the Benefit-Cost 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. Even for those CAA authorities that permit consideration of cost or other economic factors, the Benefit-Cost Rule did not establish why BCA specifically is an appropriate way to consider cost. The rule failed entirely to grapple with the varied ways in which Congress granted authority or directed the EPA whether and how to consider benefits, costs, and other factors, and how the Benefit-Cost Rule's requirement to consider BCA should be reconciled with the need to adhere to particular statutory language and context. As noted in the Interim Final Rule, we are finalizing rescission of the

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[10] See 84 FR 32520, 32572 tbl.10-12 (July 8, 2019).

Benefit-Cost Rule's requirement to prepare and consider BCA (followed by a subsequent attempt to reconcile that analysis with the CAA's mandates) in favor of the Agency's current "statute first" approach to decision making. That is, we believe the traditional process of statutory interpretation is superior, wherein we first look to the text of the relevant statutory provision to determine whether Congress intended or permitted the Agency to consider cost or economic factors, and, if yes, we then examine the statutory context, legislative history, and nature of the program or environmental problem to be addressed to determine a reasonable manner of considering that cost or economic factor.

Finally, we are finalizing rescission of the Benefit-Cost Rule on the basis that its requirements are not needed with respect to process, and that the pre-existing administrative process, including existing procedures under the APA and, where applicable, CAA section 307(d), provide for ample consistency and transparency. 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.

IV. Responses to Signficant Comments

This section of the preamble summarizes significant comments received on the Interim Final Rule[11] and the EPA's responses to those comments. All comments made on the Interim Final Rule and the EPA's responses can be found in the document, *"*Summary of Public Comments and Responses for Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*,"* available in the docket for this rulemaking.

Comment: Some commenters supported retaining the Benefit-Cost Rule and opposed the Interim Final Rule rescinding it. Several of these commenters cited their 2020 comments on the

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[11] 86 FR 26406

proposed Benefit-Cost Rule, asserting that in those comments, they had raised examples of prior analyses being performed by the EPA that were inconsistent in their approaches or methodologies or inappropriately relied upon a "misuse of co-benefits." The commenters claimed that leaving the Benefit-Cost Rule in place would have addressed their concerns.

Response: The commenters to the Interim Final Rule did not provide in their comments, with any kind of specificity, examples of how the Benefit-Cost Rule would have resolved any problems those commenters had with prior BCAs performed by the EPA. Nevertheless, the EPA has examined the prior comments that were referenced to determine whether any commenter demonstrated that there was a significant problem of inconsistency or transparency that the Benefit-Cost Rule's requirements would have resolved. After examining the rulemaking record for the Benefit-Cost Rule, we do not agree with these commenters that they identified concrete examples of how the Benefit-Cost Rule would have improved their perceived flaws. To the contrary, the comments in support of the Benefit-Cost Rule proposal simply alleged broadly that the EPA had "historically used inconsistent approaches" to BCA, that there was a need to "correct past practices," that there was "inconsistency in methodologies," and that EPA had "misused co-benefits." We do not agree that these general complaints about past inconsistency, without any specificity, provide an adequate basis for establishing a concrete problem, nor do they explain how the Benefit-Cost Rule would have addressed any such problem.

Comment: A commenter contended that the EPA should not make a major change, such as rescinding the Benefit-Cost Rule, through an Interim Final Rule. The commenter stated that this action, by itself, is an indication that the EPA has already made up its mind to rescind the rule. The commenter added that, in developing the Benefit-Cost Rule, the EPA went through a proposed rulemaking process, so in rescinding the rule, or revising it, the EPA should go through a similar process and revise the Benefit-Cost Rule only to the extent necessary to address any concerns that remain after properly considering public comments.

Response: Agencies are always free to adopt additional notice-and-comment procedures, but to the extent that the commenter suggests that such procedures were required in this instance, we do not agree. The Benefit-Cost Rule was a procedural rule, *i.e.,* a rule of agency organization, procedure, or practice. A procedural rule does not regulate any party outside of the EPA but instead exclusively governs the EPA's internal process for conducting business. As discussed in section IV of the Interim Final Rule, procedural rules are exempt from the APA's notice-and-comment requirements, and therefore it was permissible and appropriate to make the rescission of that rule effective using an interim final rule. However, EPA recognizes the value of transparency and public input and therefore voluntarily sought public comment on its decision to rescind, consistent 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.

Comment: Several commenters requested that the EPA revise rather than rescind the Benefit-Cost Rule in its entirety. These commenters said that they do not agree that the issues raised by the EPA were significant enough to warrant rescinding the Benefit-Cost Rule. Some commenters urged the EPA to reconsider each provision of the Benefit-Cost Rule on an individual basis, seek public comment on the issue, and amend the provisions after considering the comments. Another commenter contended that the EPA should have amended the scope of the Benefit-Cost Rule to address concerns raised in the Interim Final Rule regarding burdensome requirements for some non-economically significant rules. One commenter noted that, rather than rescinding the rule, the EPA could have revised the rule to retain some provisions as regulation and left some as guidance, as the Agency's Science Advisory Board (SAB) had suggested as a possible improvement in its comments on the Benefit-Cost Rule. Some commenters contended that EPA's decision to repeal the Benefit-Cost Rule is in direct conflict with the January 27, 2021 memorandum, "Restoring Trust in Government Through Scientific

Integrity and Evidenced-Based Policymaking." These commenters stated that ensuring "evidence-based decisions" that are "guided by the best available science and data" requires the EPA to undertake a rigorous and objective BCA and to present the analysis, including key uncertainties, in a transparent manner.

Other commenters agreed with EPA's decision as explained in the Interim Final Rule that the rule should be rescinded in its entirety. These commenters further stated that fixing the rule through targeted amendments was not viable because the problematic elements were significant and difficult to address in piecemeal fashion. The commenters agreed the problems were substantive and the Benefit-Cost Rule as a whole should be rescinded.

Response: We disagree that the EPA should have revised the Benefit-Cost Rule rather than rescind it. The EPA conducted a comprehensive review of both the legal and factual predicates for the Benefit-Cost Rule and, in particular, the need for an imposition of and codification of "one-size-fits-all" requirements governing economic analyses for a large subset of regulations promulgated under the CAA. We do not agree that revision rather than rescission would have resolved our concerns with the Benefit-Cost Rule. The problematic elements of the Rule were significant, and many of those problems extended across the entirety of the rule and could not be excised and resolved on a case-by-case basis. For example, one particularly problematic element of the Benefit-Cost Rule was its codification of methodologies and practices that we think are better suited to guidance. As explained in the preamble to the Interim Final Rule and in section III of this preamble, and as recognized by OMB itself, guidance allows the EPA to tailor economic analyses to the regulatory question and problem at hand, and it also facilitates using up-to-date methodologies in those analyses without first undergoing a notice-and-comment rule revision. Therefore, some of the revisions suggested by commenters, such as amending the scope of the Benefit-Cost Rule to exclude non-economically significant rules, would not have addressed this fundamental problem.

With respect the SAB's suggestion, we do not agree that the SAB was specifically endorsing revision of the Benefit-Cost Rule over rescission. The one sentence in the SAB's cover letter in which it "urges EPA to carefully consider which aspects of BCA should be included in the final [Benefit-Cost] rule versus which aspects should be in guidance," should be read in context of the significant and detailed concerns detailed by the SAB with many of the Rule's specific requirements.[12] The more accurate overall message from the SAB's report is that the proposed rule as drafted would have been problematic if implemented, and that at the very least the EPA should consider retaining some requirements as guidance "given the case-by-case nature of BCA." In some instances, the SAB acknowledged that while it was providing specific recommendations regarding how to improve certain sections of the rule, complete overhaul was preferable.[13] We also disagree with the commenters who assert that repealing the Benefit-Cost Rule is in direct conflict with the January 27, 2021 memorandum, "Restoring Trust in Government Through Scientific Integrity and Evidenced-Based Policymaking." To the contrary, the Benefit-Cost Rule was not necessary to making "evidence-based decisions" "using best available science and data," and as we have explained, could have hindered that outcome.

Comment: Numerous commenters agreed with the EPA's assertion that the Benefit-Cost Rule codified certain practices that conflicted with the best science, particularly for quantifying the health benefits of a rule. Other commenters disagreed with the EPA's assertion that the Benefit-Cost Rule codified certain practices that conflicted with the best science. These commenters asserted that the Benefit-Cost Rule directed the EPA to base its decisions on the best available science and in accordance with best practices from science and fields such as

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[12] 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 Rulemaking Process."* EPA-SAB-20-012. September 30. ("SAB (2020)"), *available at https://sab.epa.gov/ords/sab/f?p=100:12:6591070354315:::12::*

[13] SAB (2020) at 12.

economics. The commenters argued that this requirement was a broadly supported principle for sound regulatory decision making that has enjoyed bipartisan support for decades, as stated in E.O. 13563 and E.O. 12866. One commenter asserted that the Benefit-Cost Rule required the use of best practices for risk assessment/characterization and would have prevented the Agency from taking shortcuts in analyses or applying assumptions that are not identified or supportable.

Response: We agree that the EPA should use the best available scientific information and best scientific practices for BCAs. However, we disagree that the Benefit-Cost Rule was necessary to promote best practices. Indeed, in section III.C.3 of the preamble of the Interim Final Rule, we provided several examples of how implementation of some of the Benefit-Cost Rule's requirements could have undermined the scientific integrity of the EPA's BCAs for CAA regulations rather than strengthened them. We also disagree that the Benefit-Cost Rule's requirements regarding risk assessments and characterization would have prevented the Agency from taking shortcuts or applying unsupportable assumptions. As discussed in section III.C.3 of the Interim Final Rule, those requirements could have led to inferior selection of health studies or the potential exclusion of some health endpoints altogether. By imposing a requirement that studies or analyses used to quantify concentration-response relationships should "consider how exposure is measured," and favor "particularly those that provide measurements at the level of the individual and that provide actual measurements of exposure," the Benefit-Cost Rule introduced a bias against methods that in some cases may have been both higher quality and more appropriate by discouraging consideration of studies that combine both measured and modeled concentrations.[14] We have also noted how, rather than codifying a best practice, the Benefit-Cost Rule's requirement to limit assessment of human health benefit endpoints to instances where there is "a clear causal or likely causal relationship between pollutant exposure and effect" was unsupportable. It did not derive from the Economic Guidelines, Circular A–4, or

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[14] 85 FR 84155 (40 CFR 83.3(a)(9)(iii)(D)).

SAB advice, and in fact was criticized by the SAB.[15] Finally, as noted in the Interim Final Rule, we are concerned that the Benefit-Cost Rule's imposition of highly specific and stringent requirements for assessing benefits in conjunction with substantially less stringent requirements for assessing costs would have led to unbalanced BCAs. Moreover, these requirements only applied to health benefits, which created an inconsistency with other categories of benefits (*e.g.,* visibility, ecological effects) that were not subject to the requirements. By rescinding the Benefit-Cost Rule, the EPA is not forswearing BCAs, which it has undertaken for decades consistent with the Executive Orders cited by the commenters. Rather, we think undertaking those BCAs pursuant to guidelines issued by EPA and OMB, which provide for flexibility and tailoring in order to permit incorporation of evolving science and best practices, will produce higher quality analyses than if EPA conducted BCAs subject to the Benefit-Cost Rule's rigid codification of particular practices that were frozen at a moment in time, and in some cases, were substantively problematic.

Comment: Some commenters agreed with the EPA's assertion that the Benefit-Cost Rule would have locked the EPA into using outdated practices until the rule could be amended. Another commenter said the Benefit-Cost Rule would have weakened the integrity of the BCA process for CAA regulations by hindering EPA's ability to use the best scientific data available. Another commenter asserted that if the Benefit-Cost Rule had conflicted with future changes to the Economic Guidelines, the EPA would have had to undergo a lengthy notice-and-comment process to make updates to its rule, as opposed to just updating the Economic Guidelines already in existence, and this process could seriously delay the EPA's ability to adapt to changes in best practices and could hinder the promulgation of public health and environmental protections.

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[15] *See, e.g.*, SAB 2020 at 2-7 (suggesting that there are a number of ways to interpret causal relationship and the Benefit-Cost Rule is not clear what evidence would be acceptable to demonstrate causality), 8 (recommending that the EPA allow inclusion in its benefits analyses of effects for which causal or likely causal relationships may be less certain, but the impact would be substantial).

Other commenters argued that the Benefit-Cost Rule would not have stopped the adoption of new practices, but instead would have required the EPA to notify the public and seek public comment on the basis for the Agency's decision to adopt the new procedures. Some of these commenters said that 40 CFR 83.3(a)(11)(v) of the Benefit-Cost Rule specifically authorized departures from the Rule's requirements if the EPA provided a "reasoned explanation," including a discussion of the "likely effect of the departures on the results of the BCA." The commenters argued that, in response to changes in best practices, the EPA could at any time simply amend the Rule separate from or in parallel with a new covered CAA rulemaking after seeking notice and comment and providing a reasoned explanation. The commenters asserted that rescission of the Benefit-Cost Rule allows the EPA to make ad hoc decisions without notification or explanation. Another commenter contended that the Benefit-Cost Rule did not force the EPA to revise the rule if best practices change over time. The commenter pointed out that the Benefit-Cost Rule did not provide a specific definition of best practices, and the requirements of 40 CFR 83.3(a)(1) through (12) were predominantly general in nature without prescribing exact methods. The commenter said that many of the requirements in 40 CFR 83.3(a) addressed what information the EPA was required to provide, not the specific methodology the EPA had to use to estimate benefits and costs.

Response: We agree that with the Benefit-Cost Rule in place, if the latest or best scientific practice differed from the Rule's requirements, the EPA would have been required to amend the Rule in order to be consistent with best practice. The process of revising a rule often takes a year or more to complete, which would have prevented the EPA from keeping up with evolving best practices and required the EPA to rely on potentially outdated methods until a revised rulemaking could be completed. We maintain this is inconsistent with making decisions based on the best scientific data available. As discussed in section III.C.2 of the Interim Final Rule, 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 could take a long time, would have slowed or discouraged progress in the development and use of newer and better methods. Promulgating updates to the Benefit-Cost Rule every time the Rule became outdated "in parallel with" substantive, statutorily required CAA rules would have been no small regulatory burden; it would have required a significant amount of agency resources to do so and created uncertainty in the CAA rule, by linking that rule to an unsettled regulatory change to the Benefit-Cost Rule that was itself open to challenge and judicial review.

We also do not agree with commenters that the requirement in 40 CFR 83.3(a)(11)(v) that the EPA include in every BCA "[a] reasoned explanation for any departures from best practices in the BCA, including a discussion of the likely effect of the departures on the results of the BCA" was an authorization for the Agency to diverge from the Benefit-Cost Rule. That provision states that the EPA has to explain why it has diverged from "best practices," not from the Benefit-Cost Rule. "Best practices" is a term not defined in the Benefit-Cost Rule, and is on its face subject to interpretation. Far from providing clear guidance to the Agency on when it would have been permitted to take an updated approach to BCA absent a change to the Benefit-Cost Rule, we think that provision itself bred a great deal of uncertainty—how, for example, is the Agency to know whether it has adequately explained the "likely effect" of its departures from best practices (which, if the Agency is taking such departure, it likely does not believe to *be* "best practice")? As further evidence of how best practices change over time, we note that the Economic Guidelines are in the process of being updated as part of a periodic review undertaken by the EPA. In addition, President Biden issued a memorandum on January 20, 2021, on Modernizing Regulatory Review[16], which directs OMB in consultation with other agencies to recommend revisions to Circular A–4. The confluence of updates to these two documents, which provided the ostensible underpinning to the regulatory requirements of the Benefit-Cost Rule,

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[16] 86 FR 7223.

only highlights the misguided nature of attempting to freeze "best practices" at one moment in time.

Finally, we do not agree with the commenters who asserted that the regulatory requirements of 40 CFR 83.3(a)(1) through (12) were predominantly general in nature. For example, as noted in the Interim Final Rule, those provisions contained highly prescriptive (but in many cases vague and confusing) requirements for benefits assessment and uncertainty analyses (with no corresponding requirements for how costs are calculated and considered). 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 support CAA regulations.

Comment: Some commenters agreed with the EPA's assertion that the Benefit-Cost Rule was inconsistent with the mandates in the CAA that prohibited the EPA from considering cost for some types of rulemakings. They agreed with the EPA that the Benefit-Cost Rule's rationale for including BCA in the records and preambles of rulemakings in which the agency is prohibited from considering cost is not "necessary" to carry out the statute within the meaning of CAA section 301(a).

Other commenters disagreed with the EPA's assertion that the Benefit-Cost Rule was inconsistent with the mandates in the CAA that prohibited the EPA from considering cost for some types of rulemakings. These commenters argued that the Benefit-Cost Rule applied with respect to a significant rule implementing the CAA only when the CAA required or permitted consideration of cost. These commenters contended that the Benefit-Cost Rule did not violate the CAA because it required (at 40 CFR 83.2(b)) EPA to consider the results of a BCA except in those circumstances where the applicable CAA provision(s) prohibited that consideration. These commenters added that when not prohibited by the statute, the Benefit-Cost Rule left the EPA significant discretion in how it would consider the BCAs in individual CAA rules to account for the significant differences among statutory provisions as long as the Agency provided the public with a description in the preamble. Another commenter said that 40 CFR 83.4(d) provided the

EPA with clear direction and appropriate discretion in when and how to consider the results of BCAs in making regulatory decisions.

One commenter stated that, while the EPA may be prohibited from considering costs in some cases, such as with revisions to the NAAQS, this did not negate the need for the Rule's requirements with regard to how the EPA calculates benefits. The commenter also stated that the EPA routinely presents cost information in addition to benefits even in cases where the EPA is prohibited from considering costs, such as in the RIA for the 2015 ozone NAAQS revision. The commenter contended that such information is still beneficial in that it informs the public on the potential cost impacts of the EPA's regulatory actions, even if the EPA cannot directly consider those cost impacts. Another commenter argued that the actual text of the CAA's substantive authorities (and most other statutory provisions) rarely prohibits benefit-cost balancing and arguably may require it. The commenter stated that Administrations have recognized that the public has a right to know the projected benefits and costs of a new rule even if the underlying statutory provision (as in the case of CAA section 109 for setting NAAQS) has been interpreted to prohibit the consideration of costs. The commenter said elevating BCA practices is consistent with the recent Supreme Court decisions on BCA, particularly *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) and *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The commenter asserted that these decisions apply the fundamental principle, established in *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463U.S. 29, 43 (1983), that it is arbitrary for an agency to neglect an important aspect of a regulatory problem. Another commenter also pointed out that *Michigan v. EPA*, 135 S. Ct. 2699 (2015), concluded that when interpreting CAA section 112(n)(1)(A), "Read naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost."

Response: We disagree that provisions in the Benefit-Cost Rule's regulations granting EPA discretion in how and when to consider the results of the mandated BCA resolves the problems presented by the Rule. Where the CAA prohibits the EPA from considering cost in

implementing a provision, it cannot be "necessary" to require the EPA to conduct a BCA and include it in the decisional rulemaking record. The EPA is already conducting BCAs pursuant to Executive Order in situations where it is appropriate to do so, so commenters' assertions that the Benefit-Cost Rule is necessary for public information ring hollow, and the commenters did not address how incorporation of a BCA into the agency's rulemaking record where Congress has instructed the Agency not to consider cost is consistent with the CAA. As one commenter pointed out, the Agency's current practice for rules like the 2015 ozone NAAQS, where the rule is economically significant but where the statute does not permit the Agency to consider cost, is to conduct RIAs but not to include those in the record. The Benefit-Cost Rule's requirement that the EPA include the BCA in its record is a distinct change from its current practice, and is both unnecessary and inappropriate given the limits of EPA's statutory authority to consider cost.

We are also unconvinced by the commenters who assert that the Benefit-Cost Rule is not inconsistent with the CAA for those rules promulgated under provisions that permit consideration of cost just because the Rule left it to the Agency's discretion *how* it should consider cost. The fact remains that the Rule did not explain why, for any particular CAA provision, BCA is the best or even a reasonable way for the agency to consider cost. For CAA rules that would have been impacted by the Benefit-Cost Rule, the EPA believes it would have needed to justify why complying with the Rule's requirement to conduct and consider a BCA was reasonable under the given CAA provision; the existence of the Agency's own procedural rule requiring analysis and consideration of a factor does not create statutory authority to consider a factor that Congress did not intend the Agency to consider. We do not agree that what would have been a case-by-case post-hoc rationalization of the Benefit-Cost Rule as it applied to any particular provision is superior to the existing process of statutory interpretation, where we first look to the CAA to try to ascertain those factors Congress intended the Agency to consider, and whether the statutory provision suggested how the EPA should consider any such factor. We disagree that any of the court decisions cited by the commenters evince any general principles

that "elevate" BCA over any other economic analysis. In *Entergy*, the Court upheld as reasonable the EPA's *choice* to consider cost using a BCA given particular statutory language in the Clean Water Act. In *Michigan*, the Court spoke only to whether the EPA needed to consider cost at all in implementing a CAA provision and explicitly did not opine on *how* the Agency might reasonably consider cost. The *Michigan* Court's holding that a particular CAA phrase required the Agency to consider cost is more consistent with the EPA's findings today that it should look first to the statute to determine what factors are required under a *State Farm* analysis, rather than start from an Agency-generated procedural rule that articulates a particular type of analysis irrespective of statutory text.

Comment: Several commenters agreed with the EPA's assertion that the administrative processes already in place before the Benefit-Cost Rule was promulgated provide ample consistency and transparency in the rulemaking process. One commenter asserted that rather than increasing transparency, the Benefit-Cost Rule's requirements would have obscured the basis of the EPA's decisions. Another commenter said that the Benefit-Cost Rule did not support its contention that the pre-existing procedural requirements established by Congress were deficient. A commenter also noted that the EPA is already required to transparently share its data, relevant statutory interpretations, and methodology underlying its rulemaking, and concerned parties are able to supplement that data, raise arguments that BCA should be integrated into a rulemaking, make other recommendations for consideration of costs, or share any concerns that the Agency has been insufficiently transparent. Another commenter asserted that the EPA failed to articulate any inconsistency or lack of transparency in existing BCAs that would call for the drastic changes the Benefit-Cost Rule would impose, and that the EPA violated numerous executive orders by, for example, failing to consult with States on the Benefit-Cost Rule's federalism implications and failing to assess regulatory costs and environmental justice impacts.

Other commenters disagreed with the EPA's assertion that the administrative processes already in place before the Benefit-Cost Rule was promulgated provided ample consistency and

transparency in the rulemaking process. Several of these commenters referenced comments they had submitted on the proposed Benefit-Cost Rule. The commenters reiterated their comments on the proposed Benefit-Cost Rule that an overriding goal of the Agency should be to present data regarding benefits and costs to decisionmakers and the public as objectively and accessibly as possible.

Some commenters also pointed out that the Benefit-Cost Rule included additional procedural requirements to increase transparency in the presentation of results, such as providing a summary of the overall results of the BCA. A commenter noted that while the EPA cannot consider the result of the BCA in setting NAAQS, the RIA does play an important role in informing the public of the likely costs and benefits of setting a new standard. The commenter argued that the Benefit-Cost Rule further advanced transparency by requiring more objective analysis and explanation of uncertainties in the benefit and cost estimation. The commenter added that the analyses should be consistent with Circular A-4, establishing the appropriate baseline, analyzing alternatives, and estimating benefits and costs. The commenter added that rules should be fully transparent about the many uncertainties underpinning their cost and benefit estimates, including the many embedded policy assumptions made in developing the various estimates of costs and benefits associated with a rulemaking and the significance of the impact of those assumptions on the final policy decision. Another commenter asserted that if the EPA decides to rescind the Benefit-Cost Rule, then the EPA must still maintain transparency in calculating and reporting the ancillary benefits associated with regulatory actions under the CAA and all other sources of regulatory authority.

Response: We disagree that the administrative process already in place before the Benefit-Cost Rule was promulgated is inadequate. For CAA rules that are subject to the rulemaking requirements of CAA section 307(d), which include many of the major CAA rulemakings that would have been subject to the Benefit-Cost Rule, the CAA already requires proposed rulemakings to include a statement of basis and purpose, which must include "A) the

factual data on which the proposed rule is based; B) the methodology used in obtaining the data and in analyzing the data; [and] C) the major legal interpretations and policy considerations underlying the proposed rule." CAA section 307(d)(3). The CAA also requires that these statements "set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee, . . . and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences." *Id.* Finally, the CAA already requires, for rules subject to CAA section 307(d), that "[a]ll data, information, and documents . . . on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule." *Id*. Those CAA rulemakings that are not subject to these specific requirements are still subject to the requirements that apply to all proposed rulemakings under the APA, which similarly require the proposal to include "reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule." APA section 553(b). EPA must also provide an opportunity for comment on proposed rulemakings and respond to all significant comments, and all final rules are subject to judicial review for EPA's failure to adequately respond to significant comments.

We agree that BCA requirements and analyses should be clear and transparent, and we agree that EPA should follow OMB Circular A-4 guidance to present data regarding benefits and costs to decisionmakers and the public as objectively and transparently as possible. We disagree that this was not the case prior to the promulgation of the Benefit-Cost Rule, and we disagree that EPA's analyses of its regulatory actions are inconsistent with OMB Circular A-4. Then, as now, in performing analyses of regulatory actions, the EPA follows the guidance laid out by OMB Circular A–4 and the Economic Guidelines in areas such as identifying the baseline, analyzing alternatives, and estimating costs and benefits, including ancillary benefits. The analyses and results 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

results of the analyses, documented in RIAs, are also reviewed by OMB to ensure consistency with Circular A-4. While BCAs are similar for different rules, as instructed in Circular A-4 and the Economic Guidelines, the analyses are often tailored to the specific source category by considering a number of variables, such as the type of pollutants being controlled, available data, and the location of the emission sources.

Additionally, we disagree with commenters who contended that the Benefits-Cost Rule would have increased transparency in the presentation of results. The EPA already disaggregates benefit and cost estimates in BCAs, so these narrow presentational requirements do not provide additional transparency. As discussed in the Interim Final Rule, the Benefits-Cost Rule would have required the preambles of significant proposed and final CAA regulations to include a separate presentation that excluded certain categories of benefits that Circular A-4 and the Economic Guidelines indicate should be considered. This could have resulted in misleading net-benefit calculations that would have inaccurately characterized the benefits of a rulemaking and would have called into question the significance of the excluded benefits.

We disagree that RIAs are difficult to find as they are always included in the docket for significant rulemakings. Additionally, all of the RIAs are available online, and many can be found at EPA's website sorted by source category: *https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/regulatory-impact-analyses-air-pollution*. While the RIAs are technical in nature, the EPA takes steps to provide information to aid in their interpretation by the public.

We also note that the overall summary of BCA results that one of the commenters supports, which present the overall net benefits associated with a rulemaking, are already recommended by Circular A-4 and are thus included in the RIAs for our rulemakings. The contents of the summary tables already provided by the EPA are consistent with the guidance for such summary tables in Circular A-4 for all rulemakings. For significant rules, the EPA also

follows Circular A-4 procedures that require presenting a formal quantitative analysis of the relevant uncertainties about benefits and costs.

Comment: Some commenters agreed with the EPA that the Benefit-Cost Rule's presentation requirements would be misleading. These commenters supported the EPA's assertion that 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 the significance of those benefits without justification. They contended that excluding co-benefits from a presentation of benefits would violate established economic principles, established best practices, and longstanding practices of previous administrations. One commenter cited *Michigan v. EPA*, stating that in its view, the Supreme Court held that the EPA needed to consider all advantages and disadvantages in deciding whether a regulation is appropriate, such as in the case where a regulation controls emissions but has the indirect effect of causing new health harms.

Another commenter noted that, out of the hundreds of pollutants the EPA regulates under the CAA, the EPA only has sufficient information on particulate matter, and more than 90 percent of all benefits that the EPA quantifies in its BCAs are attributable to this one pollutant. The commenter stated that when significant benefits are missing from the monetized estimate, calculating a number that meaningfully represents a rule's net benefits is simply a logical impossibility, and any calculation that purports to do so is, as OIRA itself acknowledges, "misleading" at best.

Other commenters opposed rescinding the Benefit-Cost Rule's requirements regarding the presentation of ancillary benefits and non-domestic benefits. One commenter defended the Benefit-Cost Rule on the basis that the Rule did not prescribe any specific requirement as to how EPA must consider ancillary benefits or provide a formula for when a rule "passes" a benefit-cost test; the Benefit-Cost Rule only required the EPA to better inform the public about basic information contained in BCAs and to differentiate in a clear fashion what the ancillary benefits

are in a given rule. Other commenters stated that the Benefit-Cost Rule's requirement to present statutory-objective benefits separately from ancillary co-benefits and non-U.S. based benefits would enhance transparency and would not limit the Agency's ability to recognize and account for these benefits. Another commenter contended that, without the required clarity and accounting for the sources of the benefits, the public and decisionmakers are more likely to be misled in understanding the nature of the benefits and whether those benefits could have been achieved more efficiently under other provisions of the statute. A commenter re-iterated its previous comment on the proposed Benefit-Cost Rule that presenting disaggregated cost and benefit information allows for evaluation and consideration of possibly disproportionate costs on one population from a rule where the benefits are primarily focused on another population. The commenter provided an example where it asserted that the EPA's BCA for the Clean Power Plan estimated benefits using the global social cost of carbon but compared those benefits to costs within the U.S. The commenter asserted that such a comparison was misleading and could have caused parties to not question EPA's justification of the Clean Power Plan when they might have if the EPA had disaggregated the benefits and costs as required by the Benefit-Cost Rule. Another commenter contended that estimates of global benefits should be reported separately in a manner consistent with Circular A-4. The commenter added that the EPA's failure to abide by OMB Circular A-4 by reporting only global benefits resulted in analyses that compared U.S. costs with global benefits – an asymmetry that should be fully disclosed.

Some commenters contended that the EPA used ancillary benefits to justify rules that did not quantify emission reductions or that showed only minimal emission reductions from pollutants directly regulated. Another commenter cited two greenhouse gas regulations, the EPA's Phase 2 rule for Medium and Heavy-Duty Engines and Vehicles and the Clean Power Plan, where the EPA estimated substantial net economic benefits due to the inclusion of the non-climate effects of climate policies as co-benefits. Another commenter added that the EPA used ancillary benefits to support six major CAA rules that did not quantify direct benefits, and in 21

of 26 major non-particulate matter rulemakings analyzed from 1997 to 2011, the particulate matter ancillary benefits accounted for more than half of the total benefits. A commenter contended that reliance on co-benefits to justify regulatory action circumvents Congressional intent because it disregards the target of the underlying statutory provision and circumvents the substantive focus and procedural safeguards established under the law. The commenter added that regulation through co-benefits also undermines the very purpose of BCA by obscuring the question of whether the proposed action accomplishes its intended purpose in a reasonable and resource-efficient manner. One commenter suggested that the EPA can avoid using cost-ineffective "co-benefits" in the BCA by requiring a robust regulatory baseline that reflects all projected federal and state emission reductions, as well as a robust alternatives analysis that outlines the opportunity costs of pursuing "co-benefits" through sub-optimal, if not unnecessary, measures to achieve standards.

Response: At the outset, we note that, by definition, a BCA includes all the costs and benefits of a rulemaking, *i.e.,* the net benefits of a regulatory change, in order to ascertain the economic efficiency of that change. We believe some commenters are mistaken in their understanding of how the EPA currently presents net benefits and also what the Benefit-Cost Rule required. To clarify, the EPA already disaggregates benefit and cost estimates in its RIAs, per the instructions in Chapter 11 of the Economic Guidelines (Presentation of Analysis and Results) and the OMB Circular A-4 section on characterizing uncertainty in benefits, costs, and net benefits. The results of BCAs are presented in RIAs. 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. Section 6 of Circular A–4 instructs that 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."[17] 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. Circular A-4 also notes that, "In some cases the mere consideration of these secondary effects may help in the generation of a superior regulatory alternative with strong ancillary benefits and fewer countervailing risks."

In our view, the Benefit-Cost Rule's requirements would not have provided additional transparency, and we are concerned that the Rule's requirements may have led to misleading net-benefit calculations. The Benefit-Cost Rule required preambles of affected rules to include a summary of both the overall BCA results as well as an additional reporting of subsets of the total benefits of the rule. Specifically, the Benefit-Cost 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." The Benefit-Cost Rule also required that if any benefits and costs accrue to non-U.S. populations, they must be reported separately to the extent possible. These presentational requirements are duplicative of information the EPA already presents in its RIAs, so they would not have provided additional transparency. If, however, these subsets of benefits were compared to total costs and deemed to be some type of limited net-benefits calculation, we think that application of the information would be misleading and contrary to best economic practice. In addition, requiring a separate presentation that excluded certain categories of benefits that Circular A–4 and the Economic Guidelines indicate should be considered might lead the public to question the significance of those benefits without any justification.

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[17] We note that the specific term used in Circular A-4 is "ancillary benefits" and not "co-benefits."

The remainder of the comments summarized above are outside the scope of this action, and the question of whether the EPA should rescind the Benefit-Cost Rule. Specifically, with respect to the suggestion that the EPA should include in its baselines projected federal and state emission reductions, the Benefit-Cost Rule would not have changed how the Agency calculates baselines, and we do not agree that the commenter's suggestion would be consistent with recommended guidelines or advisable, to the extent that the commenter is including in "projected" reductions any that are not finalized and on-the-books. The EPA follows Circular A-4 and the EPA's Economic Guidelines, which direct the EPA to develop baselines that include all significant projected federal emission reductions for fully promulgated rules and the future impacts of state regulation to the extent they are known and on the books at the time of the rulemaking.

Regarding the suggestion that the EPA conduct a "robust alternatives analysis" looking at lost opportunity costs of pursuing co-benefits through "sub-optimal" if not unnecessary measures, the comment is unclear but also appears to be beyond the scope of this action. We disagree that the EPA has designed regulatory options to meet its statutory obligations for the purpose of pursuing reductions in other pollutants (or ancillary benefits). It is simply a fact that many of the control technologies designed to reduce emissions of specific pollutants also happen to reduce emissions of other pollutants, in part because sources that are targeted under the Act often tend to emit many kinds of pollutants and control of one pollutant can often result in reductions of other non-targeted pollutants.

Moreover, we disagree with comments that the EPA used ancillary benefits to justify regulations or circumvent Congress, but in any case, the Benefit-Cost Rule's requirement to report certain subsets of benefits separately would not have addressed these concerns. In general, the Agency undertakes RIAs in order to comply with E.O. 12866. Those Clean Air Act rulemaking RIAs, in almost every instance, are *not* part of the Agency's record basis for the action. They are not included in the Agency's record basis for the action because they are *not*

used to justify the Agency's decision making. The net-benefits calculations in RIAs, which, consistent with Circular A-4 and the Economic Guidelines, include *all* benefits, are provided in order to comply with E.O. 12866 and for illustrative and informational purposes only. Therefore, even if the monetized particulate matter benefits associated with a number of CAA rules were greater than the monetized benefits for any other pollutant, it does not follow that the EPA justified promulgation of these rules based on particulate matter benefits. Instead, it indicates that the Agency may have more data and information to monetize the benefits of reducing that particular pollutant and that it is extremely common for required emissions controls to result in ancillary benefits.

Commenters cited two examples of EPA RIAs that they claimed would have been conducted differently had the Benefit-Cost Rule's presentational requirements for ancillary benefits been in place—the 2016 Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 Rule and the 2015 Clean Power Plan, but we do not agree. Both examples adhered to OMB Circular A-4. The RIAs provided separate reporting for all categories of both benefits and costs (see summary beginning on page 8-71 of the Phase 2 Rule RIA and Tables ES-6 through ES-8 and additional details in Chapter 4 of the Clean Power Plan RIA). For example, for the Phase 2 Rule RIA, benefits in the form of savings in fuel expenditures, increased vehicle use associated with the fuel economy "rebound" effect, benefits of greenhouse gas emission reductions, benefits of non-greenhouse gas emissions reductions, and the economic value of improvements in U.S. energy security are separately reported. We also disagree with the commenter who cited the Clean Power Plan RIA's estimation of climate benefits as an example of a misleading analysis that could have caused parties to not question EPA's justification of the Clean Power Plan when they might have if the EPA had disaggregated the climate benefits as required by the Benefit-Cost Rule. In the RIA, the EPA strove to be very transparent and provided a lengthy discussion of why EPA appropriately centers attention on a global measure of the social cost of carbon when estimating climate

benefits resulting from reductions in this global pollutant. In addition, the Agency clearly stated that the monetized benefits analysis was not EPA's justification for the rule. As explained in the preamble for the final rule, "As required under Executive Order 12866, the EPA conducts benefit-cost analyses for major Clean Air Act rules. While benefit-cost analysis can help to inform policy decisions, as permissible and appropriate under governing statutory provisions, the EPA does not use a benefit-cost test (*i.e.,* a determination of whether monetized benefits exceed costs) as the sole or primary decision tool when required to consider costs or to determine whether to issue regulations under the Clean Air Act, and is not using such a test here."

Comment: One commenter noted that the Benefit-Cost Rule's limits on the types of scientific data that the EPA can consider, as well as its prescriptions regarding the presentation of certain categories of benefits, would have impeded the adoption of additional public health protections that are critically needed to ensure breathable air to overburdened communities. Some commenters stated that the Benefit-Cost Rule's failure to undertake any analysis of these potential environmental justice impacts is directly contrary to the EPA's mission under the CAA. Some commenters asserted that the Benefit-Cost Rule would have interfered with the EPA's efforts to address distributional and environmental justice impacts. These commenters said that rescinding the Benefit-Cost Rule removed an unnecessary and inappropriate impediment to the Agency's rigorous pursuit of its mission, including its ability to advance environmental justice. The commenters asserted that the Interim Final Rule reduced this risk and associated negative environmental health and safety risks that often disproportionately affect children and residents of environmental justice communities. Some commenters said that the Interim Final Rule was fully in line with the Administration's commitment to advancing environmental justice, both broadly and through specific agency actions. Another commenter contended that the Benefit-Cost Rule disregarded the complex ways in which pollutants interact within and across environmental media, thereby undermining environmental protections and the existing regulatory

programs that are essential to public health, protection of ecosystems and wildlife, and local economies.

Some commenters argued that the EPA's development of the Benefit-Cost Rule did not adequately reflect the mandates of E.O. 12898 and 13045 or comply with the required analysis. A commenter contended that E.O. 12898 applies to programs, policies, and activities, and the Benefit-Cost Rule was clearly a policy, and therefore, should have been subject to E.O. 12898 directives to consider environmental justice. One commenter stated that the Benefit-Cost Rule would have codified value judgments that could impact the evaluation and development of regulations that can significantly affect health risks to children and the pollution burdens on environmental justice communities. Another commenter asserted that aggregating those health benefits that can be quantified overlooks communities of color that have been subjected to racist practices, such as redlining, that have confined them to pollution hotspots or areas of disinvestment. Another commenter said that the Benefit-Cost Rule would have applied benefits as an average across societies instead of a distributional analysis and that this was extremely problematic and even unethical because the approach masks disparities in the location of polluting facilities and resultant air pollution (and health outcomes).

Other commenters said that ongoing efforts are needed to ensure that the EPA appropriately considers environmental justice implications moving forward. A commenter asserted that the EPA failed to recognize any environmental justice considerations in both its reasoning for rescinding the Benefit-Cost Rule and its explanation for returning to the pre-existing BCA process. The commenter argued that building environmental-justice considerations into the BCA process is needed to ensure that the EPA's future CAA actions do not re-enforce the existing pollution-exposure discrepancies underserved communities face. Similarly, another commenter asserted that low-income communities and communities of color have long been disproportionately harmed by air pollution and other forms of environmental degradation. The commenter added that the Benefit-Cost Rule would have obscured environmental-justice

implications because the EPA's BCA would be required to focus on calculated net benefits of actions and would ignore distributional equities. Another commenter requested that the EPA promulgate a better Benefit-Cost Rule to truly realize equality under the law and environmental justice—a rule that accurately accounts for cumulative and aggregate impacts of pollutants on overburdened communities and gives unquantifiable and/or non-monetary harms the attention they deserve.

Response: The EPA agrees that the Benefit-Cost Rule did not address the environmental justice impacts raised by the commenters. While this final rule rescinding the Benefit-Cost Rule will not directly address environmental justice impacts, it should be noted that a cornerstone goal of the EPA is to provide an environment where all people enjoy the same degree of protection from environmental and health hazards and equal access to the decision-making process to maintain a healthy environment in which to live, learn, and work.

V. Judicial Review

Section 307(b)(1) of the CAA indicates which federal courts of appeals are the proper forum for petitions of review of final actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit for (i) "Any nationally applicable regulations promulgated, or final actions taken, by the Administrator" or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

This final action is "nationally applicable" within the meaning of section 307(b)(1). Pursuant to CAA section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the *Federal Register*.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders*.

A. Executive Order 12866: *Regulatory Planning and Review and Executive Order 14094*: *Modernizing Regulatory Review*

This action is not a significant regulatory action as defined in Executive Order 12866. 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. EPA notes the release of EO 14094 after issuance of the interim final rule, which amended EO 12866. The discussion in this final action relates to interpretation of EO 12866, which was the governing executive order for the duration of when the rule was in effect. The same reasoning applies to the updated definitions contained in EO 14094. That is, the Benefit-Cost 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.

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)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action would not impose any requirements on small entities. 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" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated as a significant energy action by the Administrator of the Office of Information and Regulatory Affairs.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations.

The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This action has no current or projected monetized costs or benefits nor does it stipulate any changes that may adversely affect people of color, low-income populations and/or Indigenous peoples. This rule pertains only to internal EPA practices in how the EPA conducts and considers benefit-cost analyses. While this rule does not directly address environmental justice impacts, it should be noted that a cornerstone goal of the EPA is to provide an environment where all people enjoy the same degree of protection from environmental and health hazards and equal access to the decision-making process to maintain a healthy environment in which to live, learn, and work.

K. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 40 CFR Part 83

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

Michael S. Regan,
Administrator.

PART 83—[REMOVED AND RESERVED]

For the reasons stated in the preamble, and under the authority of 42 U.S.C. 7601, the EPA removes and reserves 40 CFR part 83.

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