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Public Interest Comment¹ on

The Office of Management and Budget's
Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations

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The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. Center scholars evaluate rulemaking proposals from a public interest perspective, and share their insights through comments on the public record as well as other publications. This comment on the Office of Management and Budget's (OMB) Draft 2013 Report to Congress shares concerns about the lack of analysis of alternatives in recent major rules issued by the Environmental Protection Agency (EPA) and encourages OMB to report annually on the extent to which major rulemakings are supported by analyses that examine alternatives and comply with other executive requirements.

EPA recently published a proposed rule to reduce the sulfur limits for gasoline and establish more stringent limits for vehicle emissions of hydrocarbons (HC), carbon monoxide (CO) and nitrogen oxide (NO_x) that will require additional control technology. In reviewing the draft regulatory impact analysis (RIA) for the Tier 3 proposal, I was disappointed to discover that the analysis only evaluated the benefits and costs for a single option—the selected option presented in the proposal.

Section 6(a)(3)(C)(iii) of Executive Order 12866 requires “An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

² Art Fraas has served as an economist and branch chief within the OMB Office of Information and Regulatory Affairs (OIRA), the office responsible for coordinating regulatory review. He has extensive experience in undertaking benefit-cost analysis, designing regulations, and reviewing regulatory proposals and has published papers in peer-reviewed journals relevant to benefit-cost analysis and diverse aspects of regulatory policy.

alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions)...” Circular A-4 and OMB’s recently issued “Agency Checklist for Regulatory Impact Analysis” make it clear that the evaluation of the benefits and costs of viable alternatives in addition to the selected option represents a critical element in developing an effective RIA. The “Agency Checklist,” issued on November 3, 2010, briefly summarizes the central requirements. These include: “Does the RIA assess the potentially effective and reasonably feasible alternatives?”³

The failure to identify and evaluate alternatives appears to be a more general problem in recent rulemakings. For the last five major rule proposals (NPRMs) promulgated by EPA’s air program and reviewed by OIRA, only two identified and evaluated alternatives to the proposed option.⁴ The draft RIAs for the other three NPRMs—the NESHAP for Coal and Oil-Fired Electric Utility Units, the GHG standards for MY 2017 to 2025 light duty vehicles, and the Tier 3 standards for light duty vehicles—did not identify alternative options with estimates of their associated benefits and costs as required by Section 6(a)(3)(C)(iii) of Executive Order 12866 and by Circular A-4.⁵

Tier 3 Draft Regulatory Impact Analysis

EPA’s proposed regulatory option for the Tier 3 rule combines several distinct regulatory requirements: a required reduction in the sulfur in gasoline by petroleum refiners, additional control equipment for light duty cars and trucks to reduce HC, CO, and NO_x tailpipe emissions, and additional vehicle control of evaporative HC emissions. According to EPA’s analysis, the reduction in sulfur in gasoline will reduce the direct PM emissions from cars and trucks and yield some additional reduction in HC, CO and NO_x tailpipe emissions with the control equipment currently installed in these vehicles without imposing any additional vehicle costs.⁶ In addition,

³ As one of the sub-bullets the Agency Checklist includes: “Does the RIA assess the benefits and costs of different regulatory provisions separately if the rule includes a number of distinct provisions?” And, as a separate bullet: “Does the RIA include an explanation of why the planned regulatory action is preferable to the identified potential alternatives?” OMB, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, pp 147 – 151.

⁴ Over this period, EPA also submitted reconsideration proposals for 2 other rules listed as major: the reconsideration proposals for the NESHAP for boilers and process heaters and the NESHAP for reciprocating internal combustion engines. As reconsideration packages, they represent an ongoing rulemaking process and we did not consider them as proposals initiating public comment for these rules. As a practical matter, the additional analysis attached to these reconsideration packages was limited. The boilers NESHAP provided a 6 page memo supplementing the February 2011 final RIA with an estimate of the benefits and costs of the proposed option selected for reconsideration. The RICE NESHAP RIA compared estimated benefits and costs of the proposed option with the estimated benefits and costs for the standards adopted in the 2010 final rule.

⁵ A Regulatory Studies Center review of the 14 major rules considered in this report found that about half of them contained no quantitative analysis of alternatives to the proposed options.
http://research.columbia.gwu.edu/regulatorystudies/sites/default/files/u41/2013_OMB_Report_to_Congress_PIC.pdf

⁶ EPA estimates the sulfur in fuel requirement will impose an annual cost of \$1.3 billion beginning in 2017. Draft RIA, pp 8-1 to 8-3)

the proposal will require additional vehicle control equipment—with additional costs to manufacturers and consumers—to achieve further control of HC, CO, and NO_x evaporative and tailpipe emissions. The RIA should separate the evaluation of these several requirements and consider the additional evaporative and tailpipe vehicle controls as separate incremental options.⁷ [See the attached comments filed with EPA’s docket ID No. EPA–HQ–OAR–2011–0135 for the Tier 3 proposal.]

This incremental analysis is particularly important because EPA and others have reported a nonconvexity in the air quality effects associated with NO_x reductions in a number of major US metropolitan areas. In these areas, reductions in NO_x emissions actually result in increases in ambient levels of ozone and fine particulate matter. The incremental requirement for further control of tailpipe emissions predominantly results in additional NO_x reductions. Because of the nonconvexity in air quality effects associated with NO_x reductions, the additional vehicle control requirements may yield little additional air quality benefit in many areas—and may actually make air quality worse. By only considering the combined effects of fuel and vehicle regulatory requirements in assessing the benefits of the proposal, the draft RIA may obscure the potentially small—or even negative—effects of the required additional tailpipe emission controls for cars and trucks.

Next Steps for the Report to Congress

In November of 2010, OIRA issued an “Agency Checklist for Regulatory Impact Analysis.” Now that agencies have had over two years to incorporate the elements of the checklist in their regulatory analyses, it is time for OIRA to include in its Reports to Congress tabular information indicating the extent to which draft RIAs adhere to this Checklist. When I served in OIRA, staff kept track of eight critical elements in their review of agency RIAs. OIRA should start by reporting on agency adherence to the following items on the Agency Checklist:

- Does the RIA include a reasonably detailed description of the need for the regulatory action?
- Does the RIA use an appropriate baseline (i.e., best assessment of how the world would look in the absence of the proposed action)?
- Does the RIA use appropriate discount rates for benefits and costs that are expected to occur in the future?
- Does the RIA assess the potentially effective and reasonably feasible alternatives?

⁷ EPA estimates that the vehicle evaporative emissions requirements will impose annual costs in excess of \$200 million in 2020 and later years and that the vehicle tailpipe emission standards will impose annual costs of over \$1 billion in 2018 rising to \$1.8 billion in 2025 and later years. (Draft RIA, pp 8-1 to 8-3)

- To the extent feasible, does the RIA quantify and monetize the anticipated benefits from the regulatory action and the identified alternatives?
- To the extent feasible, does the RIA quantify and monetize the anticipated costs (and/or cost savings) of the regulatory action and the identified alternatives?
- Does the preferred option have the highest net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires a different approach?
- Does the RIA include, if and where relevant, an appropriate uncertainty analysis?

Thank you for your consideration of these comments.