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U.S. Environmental Protection Agency
EPA Docket Center
Attention Docket ID No. EPA-HQ-OAR-2020-00044
Mail Code: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the U.S. Environmental Protection Agency's (EPA's) notice of proposed rulemaking (NPRM), "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process," which was published in the *Federal Register* on June 11, 2020 (85 Fed. Reg. 35,612). NACAA is the national, non-partisan, non-profit association of 155 local and state air pollution control agencies in 41 states, the District of Columbia and four territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based on that experience. The views expressed do not represent the positions of every state and local air pollution control agency in the country.

The goal of the NPRM, according to EPA, is to improve consistency- and transparency-based concerns with EPA's current cost-benefit analysis practices as applied to Clean Air Act (CAA) rulemakings. By establishing procedural requirements governing the development and presentation of benefit-cost analyses (BCAs) for all significant proposed CAA rules, EPA aims to help ensure that that it "implements its statutory obligations under the CAA, and describes its work in implementing those obligations, in a way that is consistent and transparent." However, it appears the proposal would do little to sharpen EPA's understanding of the economic implications of CAA rulemakings and may undermine, rather than strengthen, the public health protections afforded by CAA regulatory actions.

NACAA has a number of concerns with the proposed rule that EPA should seek to address in any final rule. First, the BCA methodology that EPA outlines in the proposal would duplicate efforts that EPA already undertakes as part of the regulatory impact analysis (RIA) process, and by layering on additional, inflexible requirements, the proposal may have unintended and harmful results. Second, the proposal does little to improve

EPA's record of overestimating the costs and underestimating the benefits of its rulemakings. Moreover, the proposal would fail to address – and may exacerbate – systemic issues that result in discriminatory public health outcomes for vulnerable communities disproportionately harmed by air pollution.

If EPA decides to pursue a rulemaking that modifies its approach to cost-benefit analyses, the changes should focus on improving the agency's ability to comprehensively identify and assess public health benefits, while also addressing systemic deficits in affording public health protection to disproportionately impacted communities. Of critical importance, EPA's actions to improve transparency must not eliminate or diminish consideration of the co-benefits of air quality regulations. While transparency and consistency are important, flexibility and accuracy are more important to achieving the delivery of EPA's core mission: the protection of public health and the environment. The following comments address NACAA's concerns in greater detail.

A. The Proposed Rule is Redundant and Would Deprive EPA of Needed Flexibility

Many of the consistency and transparency goals articulated by EPA in the NPRM preamble are already being met through existing agency practices, particularly regulatory impact analyses (RIAs). RIAs examine the benefits, costs and economic impacts of regulations, including their potential net benefits, and they are required by Executive Orders 12866 and 13563 to be performed for all major CAA rules. A rulemaking that creates a new and duplicative analytic requirement will always be more inflexible than if EPA simply promulgated or implemented guidance to improve consistency and transparency in the RIA process and other existing efforts.¹ Conversely, requiring an overlaying BCA process would be a duplicative drain on existing resources. And of even greater concern, the inherent inflexibility of EPA's proposed BCA process could ultimately prove detrimental to public health and the environment.

Flexibility is critically important. A flexible analytical framework respects that not all sources of air pollution respond to the same control technologies, not all types of air pollution cause the same types of harms, and not all public health impacts are distributed uniformly across all communities. These distinctions present challenges that cannot be solved with forced uniformity, but are best met with a flexible BCA framework that can account for these distinctions.

Flexibility is also important in another respect: EPA's ability to deploy its limited resources to the areas where they are most needed. The importance of preserving EPA's organizational flexibility is underscored by the current fiscal and political environment, in which EPA is regularly threatened with deep budget cuts and is experiencing a declining

¹ In fact, EPA issued a memorandum with guidance on this topic on May 13, 2019, titled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Rulemaking Process," available at <https://www.epa.gov/environmental-economics/administrator-wheeler-memorandum-increasing-consistency-and-transparency>

workforce. Applying requirements to perform additional and often duplicative benefit-cost analyses is not an efficient way to manage EPA's already over-taxed resources.

EPA also seeks comment on whether the BCA requirement should apply only to "economically significant" rules, or to rules with effects on a broad-ranging list of sectors of the economy, geographic regions, governments, and subgroups. The proposal already risks depleting EPA's analytic, financial, and expertise resources without providing any benefit to public health or the environment, NACAA opposes expanding its applicability in the ways considered.

B. EPA Has Historically Overestimated the Costs of CAA Regulations

The proposed rule does not address a key shortcoming of EPA's existing cost-benefit analysis practices: the agency's tendency to overestimate costs and underestimate benefits. This pattern is well documented. One study showed that the agency's *ex ante* estimates of environmental compliance costs were more than double the actual compliance costs in eleven out of twelve cases.² In another, more recent example, an analysis by the nonprofit International Council on Clean Transportation found that automakers would have to invest \$886 on average per vehicle in new technology to meet 2025 light duty vehicle standards, compared to EPA's estimate of \$1,378.³

The tendency to overestimate costs and underestimate the benefits of environmental regulation is not limited to EPA, but appears to be endemic in cost-benefit analyses of environmental and safety regulations in general. As a 2011 comparison of *ex post* and *ex ante* studies of the costs and benefits of compliance with such regulations revealed, "Most existing studies have found that regulators are more likely to over- than to underestimate costs,"⁴ and a 2004 study's review of more than two dozen environmental and occupational safety regulations indicated that "*ex ante* estimates of total (direct) costs have tended to exceed actuals," with twice as many studies overestimating costs as underestimating them.⁵

² Hart Hodges, "Falling prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised," EPI Briefing Paper #69, Nov. 1997, available at <https://www.epi.org/publication/bp69/>

³ Efficiency technology and cost assessment for U.S. 2025–2030 light-duty vehicles, an assessment of the Technical Assessment Report of the EPA and the National Highway Traffic Safety Administration for the midterm review of the US passenger vehicle greenhouse-gas emission regulation. ICCT, Mar. 22, 2017, available at <https://theicct.org/publications/US-2030-technology-cost-assessment>

⁴ "Do Regulators Overestimate the Costs of Regulation?," R. David Simpson, National Center for Environmental Economics /U.S. EPA, Aug. 2011, available at https://www.epa.gov/sites/production/files/2014-12/documents/do_regulators_overestimate_the_costs_of_regulation.pdf

⁵ Winston Harrington, Richard D. Morgenstern & Peter Nelson, "On the Accuracy of Regulatory Cost Estimates," Journal of Policy Analysis and Management Vol. 19, No. 2 (Spring, 2000), at 297-322, available at <https://www.jstor.org/stable/3325616?seq=1>

With respect to the CAA in particular, industry estimates before the 1990 CAA Amendments famously overvalued the cost of compliance by a factor of ten.⁶

Compliance costs are naturally overcounted in *ex ante* estimates because they overlook economies of scale, the cost-reducing effects of growing expertise, and the innovation-encouraging effects of regulation – all of which are difficult to model. Given this disparity between predicted and actual economic costs, EPA would be well-served to focus on improved analytics that are not considered in this proposal.

In the case of clean air programs, the costs of regulations are often easier to identify and estimate for regulated entities than are the public health costs borne by the public. This makes it even more important that potential health benefits be comprehensively identified and carefully analyzed to provide EPA and the public with a complete and full understanding of both costs and benefits. Without a more sophisticated approach from EPA, many significant health costs borne by the public may remain excluded from future analyses.⁷

C. EPA’s Proposed Framework for Evaluating Benefits Could Perpetuate Structural Discrimination

NACAA is very concerned that the proposed rule will continue to propagate the understatement of CAA benefits, to the detriment of all, but particularly to low-income and minority communities. In so doing, the proposal may perpetuate structural discrimination in CAA rulemaking.

In order to assess impacts and benefits for which there is no market or price, EPA’s proposal articulates “willingness to pay” as the correct method for pricing health, environmental, safety, or other non-economic harms. However, “willingness to pay” is strongly affected by factors such as ability to pay and by the awareness of the respondent of the harms being inflicted or avoided. Those with less ability to pay may set their willingness within different competing constraints than those for whom money is more readily available.

The proposal also does not address the disparity between those with a subjective low discount rate regarding prevention of future harms – those with less money and for whom pollution impacts represent more urgent concerns – and those who have more money and less exposure to harms, who can afford to delay protection today, keeping options open for future action. The real-world result is that poorer people – particularly minorities and people of color – are disproportionately harmed by pollution. NACAA is concerned that the proposed rule would reinforce those disparities, thereby structurally reinforcing outcomes

⁶ Frank Ackerman & Lisa Heinzerling, “Priceless: On Knowing the Price of Everything and the Value of Nothing,” New Press, New York, NY, 2004, at 38.

⁷ Many expenses borne by the public that are more challenging – but possible – to quantify are currently excluded from cost-benefit analyses. For example, ambulance deployments that do not result in hospital stays have important cost impacts to those who experience them and are excluded from EPA’s cost-benefit accounting.

that are discriminatory even if implemented by an agency committed to affording equitable protection from pollution to disadvantaged communities.

EPA also identifies the “fitness for purpose” standard (requiring information with “higher impact” in regulation to be of “higher quality”) as the method for prioritizing inputs and assumptions within economic analyses. While in many instances this standard may be appropriate, in issues for which there may be disparities in impact and in the value of protection, another standard such as the “precautionary principle” may be more appropriate and more consistent with the federal guidance cited in EPA’s NPRM (OMB Circular M-19-15).⁸

NACAA appreciates EPA’s organizational recognition that more needs to be done to afford environmental justice to the inequitably under-protected, as demonstrated by its ongoing commitment to operating EPA’s Office of Environmental Justice. Creating a regulatory requirement that may perpetuate systemic injustice undermines that commitment. As such, EPA should proceed carefully and not constrain itself to the rigid operational requirements of the proposal, instead maintaining flexibility to apply the right frameworks to the situation as warranted to best serve its mission.

D. EPA’s Proposed Requirements for the Presentation of Costs and Benefits Are Flawed

The proposed rule would require BCAs to include a presentation of total costs and benefits, and separately, to include a presentation of the public health and welfare benefits attributable to the specific pollution-reduction or other objectives that are targeted by the CAA provisions under which the regulation is promulgated. This reflects an effort to address transparency by preventing co-mingling of “benefits” and “co-benefits” in justifying a regulation. At first glance, such a requirement would seem to improve the transparency and consistency objectives espoused by the proposal. However, NACAA is concerned with the potential implications of requiring this disaggregated presentation of a regulation’s benefits. Under no circumstances should disaggregated information be used to eliminate or in any way diminish the consideration of a CAA regulation’s co-benefits.

EPA and its co-regulators at state and local air agencies have examined and relied on the co-benefits of air pollution regulations for decades. Excluding them from future impacts analyses would depart dramatically from past practice and artificially ignore some of the real public health and environmental benefits of EPA’s programs that are most readily quantifiable. The elimination or restriction of co-benefits consideration would also harm air quality planning efforts. State and local air agencies rely on co-benefits for compliance planning, and they are often included as compliance strategies within State Implementation

⁸ Numerous studies likewise suggest that in environmental regulatory decision-making, the precautionary principle is sometimes a useful construct to improve outcomes for disadvantaged communities, defined in one study as having “four central components: taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making.” D. Kriebel et. al, “The precautionary principle in environmental science,” *Environmental Health Perspectives*, September 2001; 109(9) at 871-876.

Plans for attaining and maintaining the National Ambient Air Quality Standards (NAAQS). Access to the co-benefits information in EPA's regulatory impacts analyses are an important tool for state and local air pollution control officials, and using separate presentation to eliminate, discount, or reduce them in future EPA benefit-cost analyses would make it harder for state and local air agencies to meet their federal air quality obligations.

EPA requests comment on whether evaluated costs and benefits should be limited to the U.S. economy, or if non-domestic welfare and impacts should be considered. Without further justification, the exclusion of non-domestic considerations seems arbitrary. The United States, for example, remains connected to Canada, Mexico, and other countries by transboundary transport of air pollution. Moreover, for rules where global impacts more accurately reflect an action's effects, such as for rules addressing global climate change, limiting evaluations and data to domestic endpoints would provide lower accuracy in articulating the effects of the rule than broadening it to account for the true scope of the action. Should EPA finalize this proposal, it should prioritize flexibility and accuracy over a reliance on consistency that may lead to inaccurate outcomes in its analyses.

E. Retrospective Review and Transparency

EPA seeks comment whether it should require retrospective analysis of the costs and benefits of existing rules. It also seeks comment on whether the rule should apply to the entire Clean Air Act, or only to specific provisions. As described earlier in these comments, *ex post* reviews and comparisons with *ex ante* analyses can help the agency identify areas where, whether as the result of bias or through natural uncertainty about the future, BCA produced low accuracy in *ex ante* assessments of economic impact. In that respect, *ex post* analyses can be helpful. However, in its 2014 study of the value of retrospective analyses, EPA itself concluded that "retrospective assessments were challenging to conduct and were often limited by a paucity of comprehensive cost information on treatment technologies and mitigation strategies. Disentangling the expenditures made expressly for required pollution control from other investments made at the same time was a challenge for several of the case studies."⁹ Before setting mandatory requirements for itself for all of its CAA regulatory actions, EPA's expectations should be set realistically about what is possible given available data.

EPA proposes that in the interest of transparency it will, to the extent permitted, make public all data and models used in rule determination. EPA further proposes that in quantifying endpoints in the analysis, studies will be limited to those that are externally and independently reviewed, and match the pollutant of interest of the regulation. On July 26, 2018, NACAA submitted comments on EPA's proposed rule, "Strengthening Transparency

⁹ Retrospective Study of the Costs of EPA Regulations: A Report of Four Case Studies (2014) <https://www.epa.gov/environmental-economics/retrospective-study-costs-epa-regulations-report-four-case-studies-2014>

in Regulatory Science”¹⁰ that are germane in this context as well. In short, NACAA supports greater transparency where it serves to broaden the record and improve EPA’s ability to afford protection from pollution harms to the public and the environment. However, “transparency” should not be used as a hollow justification for eliminating studies with sensitive patient information from inclusion, or taking other actions that narrow the evidentiary record, threaten privacy, reduce the quality and rigor of the science underlying a proposed action, or introduce political decision-making as a substitute for the science-driven framework that underlies the Clean Air Act and other statutes foundational to EPA’s activities and mission. The same principles should also govern transparency considerations described in this proposal.

F. The Role of BCA in Specific Rule Decisions

The proposal asks for comment on whether rules should be adopted 1) “only if benefits justify costs,” or 2) “only when monetized benefits exceed the cost of the action.” Limiting public health protection actions to those whose monetized benefits exceed the cost is contrary to the most foundational directives of the CAA. When written in 1970, the Act was predicated on prioritizing actions that protect public health and the environment. While economic considerations are important and worthy of consideration, they do not override the mission of the Agency and the Act, and cannot universally be the foremost consideration. The CAA is replete with instances where economic considerations are explicitly secondary, most notably with respect to the health-science driven NAAQS. Economic efficiency is laudable but not always the best measure of the wisdom of all public policy: analysis can inform, but not substitute, for wisdom.

The various CAA programs that state and local air agencies are responsible for implementing rely on different regulatory approaches, target different categories of sources and address pollutants with different health impacts. Mandating a single cost-benefit approach for all CAA programs would ignore these important distinctions, conflict with statutory directives and eliminate important flexibilities that can be used to account for these distinctions. Moreover, as noted earlier in these comments, BCA is an imperfect tool that can frequently overstate costs, and can only incompletely articulate the scope and diversity of environmental, health, and safety benefits for which there is no market price.

The CAA itself was implemented without extensive study of the cost of implementation, or even much consideration of the cost of its command-and-control provisions when balanced against its public health objectives. And yet the Act delivered benefits in its first twenty years that exceeded costs, in EPA’s estimates, by a factor of forty, and by thirty-to-one since 1990.¹¹ The CAA stands as evidence that it is sometimes possible

¹⁰ National Association of Clean Air Agencies, July 26, 2018 Comments on EPA’s “Strengthening Transparency in Regulatory Science” Proposal, *available at* http://www.4cleanair.org/sites/default/files/Documents/NACAA_Science_Transparency_Comments_FINAL_072618.pdf

¹¹ U.S. EPA, “Benefits and Costs of the Clean Air Act,” *available at* <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act>

to make very good public policy decisions without benefit of intricate economic analysis. Consequently, BCA should be given due weight, but as one among many other important tools in decision-making.

G. Conclusion

In summary, whatever steps EPA takes to improve its BCA capabilities, it should not limit its focus to transparency and consistency, and it should not sacrifice flexibility. The agency should improve its understanding of public health costs and the benefits of avoiding public health harms from air pollution. Opportunities exist for the agency to improve its analyses' accuracy, structural equity, and sustainability, and to better align its economic analytical tools to its mission. Given the potential magnitude of an effort to change how EPA conducts benefit-cost analyses, in in consideration of the role of state and local air agencies as EPA's partners in the protection of clean air and public health, NACAA urges EPA to consider these comments as it decides whether, and how, to proceed.

Thank you for considering NACAA's input. If our association can be of further assistance, please do not hesitate to contact me at mkeogh@4cleanair.org or 571-675-6678.

Sincerely,

A handwritten signature in black ink, appearing to read 'Miles E. Keogh', with a large, stylized loop at the end.

Miles E. Keogh
Executive Director
National Association of Clean Air Agencies