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United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov: Docket ID No. EPA-HQ-OW-2018-0107

RE: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process – Advance Notice of Proposed Rulemaking

The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act (“CWA”). While this Advance Notice of Proposed Rulemaking (“ANPRM”) covers benefit and cost considerations across EPA programs, ACWA wishes to provide comment given member experience with benefit-cost analyses under the CWA. ACWA’s comments respond directly to a number of the questions posed in Section II of the ANPRM.

A. The nature of potential concerns regarding perceived inconsistency and lack of transparency

States feel strongly that EPA should more adequately and consistently consider state implementation costs in the rulemaking process. In the past, EPA has often expressed that costs borne by state regulatory agencies will be minimal or that agencies will see a benefit. However, contrary to EPA’s assertions, state regulatory agencies have found that they often bear significant costs when implementing rules, regulations, standards, etc. To remedy this issue, EPA should work directly with state regulatory agencies when performing benefit-cost analyses.

B. Potential approaches for increasing consistency and transparency in considering costs and benefits in the rulemaking process.

1. What would increased consistency look like?

Strict consistency across all environmental programs should not be required as each environmental statute is unique. Further, some environmental statutes lay out different economic tests that prevent strict consistency across all programs. Therefore, EPA should not pursue a

regulatory action on this issue. Rather, EPA should issue a memorandum from the Administrator's office to the Regions and states committing EPA to continued use of EPA's *Guidelines for Preparing Economic Analyses* (the "Guidelines")¹. Confirming use of the Guidelines across EPA program would allow for greater flexibility than a rule, allowing for latitude when the Guidelines do not exactly fit a situation.

While strict consistency should not be required, and EPA should not pursue regulatory action on this issue, EPA should adopt common definitions for previously undefined economic terms and factors that appear in multiple statutes. In adopting common definitions, EPA should consider how specific terms are used and be clear in each statute and section to align with the Guidelines and Office of Management and Budget's *Circular A-4*.²

EPA need not develop a general rule specifying how the Agency will factor outcomes or key elements of benefit-cost analyses in future decision making. To retain flexibility, EPA should be clear that the Agency will continue to follow the Guidelines. Regarding ancillary benefits and co-benefits, when compliance approaches for a specific pollutant also reduce the emissions/discharges of other harmful pollutants there is a benefit to public health and the environment that should be attributed to the rulemaking. Further, flexibility is needed when analyzing benefits and costs as gray areas often exist when evaluating both quantified and monetized effects and non-quantified and non-monetized effects. As Executive Order 12866 explains, "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." Therefore, economic analyses should consider all benefits and costs and retain the flexibility to weigh them as Chapter 7 and 8 of the Guidelines provide.³

Lastly, EPA should not require consideration of cumulative regulatory benefits and costs of multiple regulations during the rulemaking process. This type of analysis would be impractical as it would be almost impossible to determine the baseline date from which such analysis would be conducted. However, it does make sense for economic analyses to consider compliance times in a rulemaking. Currently, the compliance dates in proposed rules appear to be selected ad hoc, without consideration of the actual necessary time to allow state regulatory agencies to adequately plan. Having a standardized approach would provide for more consistency in this area.

2. *What would improved transparency look like?*

All economic analyses conducted by EPA should specify the methodological process, data, and information used in the specific analysis as specified in Chapter 11 of the Guidelines. Chapter 11 states,

¹ U.S. Env'tl. Protection Agency, *Guidelines for Preparing Economic Analyses* (2010) (available at: <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>).

² Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-4* (2003) (available at: https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/#1).

³ U.S. EPA, *Guidelines 91-162* (2010).

The presentation of the results of an economic analysis should be thorough and transparent. The reader should understand:

- What the primary conclusions of the economic analysis are;
- How the benefits and costs were estimated;
- What the important non-quantified or non-monetized effects are;
- What key assumptions were made for the analysis;
- What primary sources of uncertainty are in the analysis; and
- How those sources of uncertainty affect the results⁴

As stated above, EPA should issue a memorandum from the Administrator's office to the Regions and states committing EPA to continued use of the Guidelines.

Regarding transparency in cases where the decision was based on information barred from release by law, EPA should not be constrained from using this information, especially when such data may be the only relevant information available. For transparency purposes, EPA should explicitly explain that such information was used and discuss the decision-making process performed in reaching a decision. Therefore, EPA can consider all relevant information and provide an accurate benefit and cost assessment.

3. *To what extent would requiring a systematic retrospective review element in new regulations help to provide ongoing consistency and transparency in how regulatory decision making will adapt over time to new information?*

EPA should not require a systematic retrospective review as part of new rulemaking. It is impractical to conduct such a review as baseline date from which such analysis would be conducted would be nearly impossible to determine. As an example, for Clean Water Act effluent guideline rulemakings, would one conduct such an analysis from the date preceding the adoption of the Clean Water Act, the date of adoption of Best Practical Technology, the date of adoption of Best Available Technology Economically Achievable, or some other date?

Instead, EPA should commit in a policy statement to periodically (such as every 5 years) review the Guidelines and update the document to reflect new economic methods and problems with use of the previous versions. This approach would help remedy the past problems of EPA economic analyses and keep the EPA approaches up-to-date. After EPA conducts its review, any change to the Guidelines should be peer reviewed and available for public comment.

⁴ U.S. EPA, Guidelines 207 (2010).

C. Potential for issuing regulations to govern EPA's approach in future rulemakings

The Guidelines already explain in detail the process for conducting economic analyses. This 300-plus page peer-reviewed document also allows for flexibility when data or information available is insufficient to precisely follow the Guidelines. Therefore, EPA need not issue a rule. Instead, EPA should issue a memorandum from the Administrator's office to the Regions and states committing EPA to continued use of the Guidelines. Confirming use of the Guidelines across EPA program would allow for greater flexibility than a rule, allowing for latitude when the Guidelines do not exactly fit a situation.

As EPA moves forward on this issue, in the interest of cooperative federalism EPA should consult with state regulatory agencies. States hold a specific role as co-regulators under the CWA and other environmental statutes and are in the best position to understand local conditions relevant to benefit-cost analyses. We ask EPA to coordinate with states as it reviews public comments on this issue and determines what future actions to take.

Conclusion

While ACWA's process to develop comments is comprehensive and intended to capture the diverse perspectives of the states that implement Clean Water Act programs, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. If you have any questions, please contact ACWA Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600.

Sincerely,



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