

**THE ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, ILLINOIS, IOWA,
MARYLAND, MASSACHUSETTS, MINNESOTA (BY AND THROUGH ITS
MINNESOTA POLLUTION CONTROL AGENCY), NEW JERSEY, OREGON,
VERMONT, WASHINGTON, THE DISTRICT OF COLUMBIA, AND THE
DEPARTMENT OF ENVIRONMENTAL PROTECTION OF
THE COMMONWEALTH OF PENNSYLVANIA**

August 13, 2018

BY ELECTRONIC SUBMISSION TO REGULATIONS.GOV

Andrew R. Wheeler, Acting Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20004

Re: Advance Notice of Proposed Rulemaking – Increasing Consistency and
Transparency in Considering Costs and Benefits in the Rulemaking Process
83 Fed. Reg. 27524 (June 13, 2018)
Docket ID No. EPA-HQ-OA-2018-0107

Dear Acting Administrator Wheeler:

The undersigned twelve Attorneys General and State Agency appreciate this opportunity to comment on the advance notice of proposed rulemaking issued by former Administrator Pruitt regarding consistency and transparency in how the U.S. Environmental Protection Agency (“EPA”) considers benefits and costs in its rulemakings, 83 Fed. Reg. 27524 (June 13, 2018) (the “Administrator’s notice”). For the reasons below, we oppose as unnecessary, ill-conceived, and unworkable, any rulemaking along the lines contemplated in the Administrator’s notice, and respectfully ask that EPA not proceed with development of a proposed rule.

Introduction

Changes to EPA’s consideration of cost-benefit analysis have wide-ranging implications for regulatory decisions on which our states rely. We have a strong interest in ensuring that these analyses faithfully follow the respective statutory regimes that govern their use and fully account for the benefits of federal regulation to the health and welfare of our residents and the environment. Some states’ environmental laws and regulations expressly adopt EPA standards in all or some instances, or at the very least require an express justification for any deviation. A fundamental change in how EPA considers the relative costs and benefits of regulation would consequently affect standards that our states typically implement and enforce to protect public health and the environment. The balance of cooperative federalism in the implementation of these programs by the states depends on EPA fulfilling its duties under the statutes it administers as directed by Congress.

In light of the states' vested interests in EPA's faithful execution of its statutory duties, including the proper consideration of the costs and benefits of agency regulations, we are troubled by the fact that the Administrator's notice does not identify a problem that needs a solution. Although the notice expresses a desire to promote increased consistency and transparency in EPA's consideration of benefits and costs in rulemaking proceedings, the notice identifies no examples of EPA action where there was a lack of consistency or transparency. There is already ample guidance that promotes consistency and transparency in consideration of benefits and costs prepared by the Office of Management and Budget and EPA itself. Indeed, one of those guidance documents expressly states that its purpose is to provide consistency in agency treatment of benefits and costs, that is, to "standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported."¹

The Administrator's notice identifies no instance where EPA has failed to follow that guidance. Nor does the notice explain why that existing guidance is inadequate. Instead, at most, the Administrator's notice identifies a few particular issues that have arisen in EPA rulemaking where an interested party has questioned EPA's approach to considering benefits and costs. To the extent, if any, that EPA needs to address such distinct issues – and the notice does not establish any such need – EPA can do so on a case-by-case basis and does not need to undertake a broad administrative rulemaking.

In addition, the Administrator's notice fails to distinguish between two types of analyses of benefits and costs: those done pursuant to statute ("statutory analyses") and those done pursuant to executive order or other authority ("nonstatutory analyses"). By definition, statutory analyses are constrained by relevant statutory language and structure established by Congress. In light of the large number of statutory programs that EPA administers, and the variety of statutory standards required by Congress that govern the consideration of benefits and costs in those programs, the possibilities for imposing consistency on analyses performed for these various programs may well be extremely limited or even nonexistent. More importantly, any requirement to impose a uniform benefit-cost analysis on EPA rulemaking across the board, notwithstanding specific statutory mandates, would invite arbitrary and capricious agency action, since any such requirement could potentially force EPA to rely on factors in its decision making that Congress did not intend it to consider, or otherwise fail to consider matters Congress deemed essential. EPA is not empowered to substitute its judgment for Congress's, and, as the Supreme Court recently held, where Congress has not required formal benefit-cost analysis, EPA is not required to undertake it. *See Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015).

In sum, the Administrator's notice has identified no problems regarding consistency or transparency in EPA's consideration of benefits and costs and therefore has established no reason for EPA to promulgate a rule or otherwise to change EPA's approach to that subject. Indeed, any broad-based attempt to impose additional consistency or transparency could unduly curtail EPA's flexibility to carry out its mandate. That mandate, as expressed in many statutes, is

¹ Office of Management & Budget, Circular A-4 at 1 (Sept. 17, 2003), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

to protect human health and the environment, and any EPA effort to address unidentified consistency and transparency issues, if undertaken at all, should not interfere with EPA's more important statutory tasks. As with EPA's other pending proposals initiated by former Administrator Pruitt that threaten to undermine the integrity of EPA's science- and data-based decision making, including the rule that would limit the use of scientific evidence in rulemakings² and the directive forbidding many of the most qualified experts to sit on EPA science advisory panels,³ the Administrator's notice signals yet another unsupported attempt to undermine EPA's mission to protect public health and the environment. We urge you to discontinue further development of a proposed rule.

Statutory and Regulatory Context

I. EPA's Ability to Consider Costs and Benefits Necessarily Varies Under the Statutes it is Tasked with Administering

The Administrator's notice is by no means a complete survey of the environmental statutes under EPA's administration that require the agency to conduct some level of cost-benefit analysis. Without a comprehensive analysis, the Administrator's notice does not, and cannot, appreciate the difficulty of adopting any meaningful regulation that would both satisfy the statutory requirements and constraints of these disparate statutes, on the one hand, with the notice's stated desire to impose "consistency" and "uniformity" on the EPA's rulemaking process.

EPA administers a wide variety of major statutes, including, among others: the Clean Air Act, 42 U.S.C. §§ 7401-7671q; the Clean Water Act, 33 U.S.C. §§ 1251-1388; the Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j-26; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2697; and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-163y.

Within each of those statutes, there may be many separate regulatory programs, and the statutory standards for each of those programs may vary as to how they direct EPA's consideration of benefits or costs. The Clean Air Act, for instance includes, among others, the following interrelated but distinct programs: national ambient air quality standards ("NAAQS"), hazardous air pollutants, and new source standards of performance. Under each of these programs, Congress prescribed different approaches as to how and whether EPA could consider benefits and costs in rulemakings.

² 83 Fed. Reg. 18768 (Apr. 30, 2018).

³ Pruitt, E.S., "Strengthening and Improving Membership on EPA Federal Advisory Committees," Oct. 31, 2017, available at: https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf.

For example, under the NAAQS program, EPA cannot consider costs in establishing primary and secondary standards that are “requisite to protect the public health” with an “adequate margin of safety.” 42 U.S.C. § 7409(b)(1). The Supreme Court has interpreted that provision to “unambiguously bar[]” EPA from considering costs. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 471 (2001).

In contrast, the section of the Clean Air Act’s hazardous air pollutants program setting out the standard for deciding to regulate power plants, while also not mentioning costs, *see* 42 U.S.C. § 7412(n)(1)(A) (providing that EPA shall regulate if it “finds ... regulation is appropriate and necessary after considering the results of a [statutorily required public health] study”), has nonetheless been held in that particular context to require some consideration of costs. *Michigan*, 135 S. Ct. at 2708-2709.

As for the new source performance standards program, the statute expressly requires consideration of the cost of achieving emissions reductions in setting the emission control level. 42 U.S.C. § 7411(a)(1). Here, the D.C. Circuit has upheld EPA’s decision not to apply a formal benefit-cost standard, but instead to use a standard that determined that a control level was acceptable unless “the cost of meeting [that level] would be greater than the industry could bear and survive.” *Portland Cement Ass’n v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975). This structure is not unique to the Clean Air Act. As discussed below, the Clean Water Act similarly differentiates in its application of costs and benefits to different standards EPA is charged with setting. *See* pages 9-10, *infra*.

The Administrator’s notice starts from a false premise that “uniformity” across these disparate statutes and provisions is lawful and possible. But, as noted above and explained further in the next section, what the notice terms a “perceived inconsistency” is actually variability dictated by statute and case law. Congress has given EPA discretion to consider costs and benefits very differently in its rulemaking and other activities, including the manner in which it must consider them. The Administrator’s notice assumes, wrongly, that the “variety of concepts of ‘costs’ that may be considered across statutes and even under the same statute” is a problem in need of a rulemaking solution.

II. EPA Has Successfully Relied on Longstanding Guidance In Considering Costs and Benefits in its Rulemaking Activities

To the extent that EPA’s consideration of costs and benefits is appropriate and allowed by statute, EPA’s actions are subject to other directives, including executive orders and agency guidance, making it unnecessary for EPA to proceed with the rulemaking it contemplates here. For decades, and through previous administrations’ regulatory reform efforts, this guidance, together with EPA’s program-specific regulations, has sufficed to direct EPA’s rulemaking efforts while balancing statutory constraints and providing necessary program-by-program flexibility. The Administrator’s notice acknowledges that “many previous administrations” have reviewed EPA’s cost-benefit analysis guidance and regulations, and have modified them from

time to time.⁴ But the Administrator's notice cannot point to any previous attempt to abandon the previous guidance and to shoehorn all of EPA's programs into a single cost-benefit rulemaking. The Administrator's notice fails to make the case why such an imprudent attempt is warranted now, given the appropriateness of existing guidance on the same topic.

For example, Executive Order 12866 requires all executive agencies, including EPA, to analyze benefits and costs on "significant regulatory actions."⁵ Specifically, for each significant regulatory action, the order requires an agency to provide, among other things, an "assessment of the potential costs and benefits of the regulatory action." *Id.* at 51741. For actions deemed to be significant regulatory actions under provision (1), often referred to as economically significant regulatory actions, the agency must provide a more detailed formal benefit-cost analysis, which must include "[a]n assessment, including the underlying analysis of benefits anticipated from the regulatory action . . . together with, to the extent feasible, a quantification of those benefits," as well as an analogous assessment and quantification of the costs anticipated from the action. *Id.* The order also directs agencies, as a general principle and to the extent permitted by law, to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." *Id.* at 51736. In 2011, Executive Order 13563 reaffirmed these requirements and directed that, in applying these principles, agencies use "the best available techniques" to quantify benefits and costs as accurately as possible, and added that they may consider "values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."⁶

The Office of Management and Budget has provided guidance regarding the implementation of Executive Order 12866 in its Circular A-4. One of the purposes of the Circular is to provide consistency in agency treatment of benefits and costs, that is, to

⁴ 83 Fed. Reg. at 27526 n.8.

⁵ 58 Fed. Reg. 51735 (Oct. 4, 1993). The order defines "significant regulatory action" as:

any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Id. at 51738.

⁶ 76 Fed. Reg. 3821 (Jan. 21, 2011).

“standardiz[e] the way benefits and costs of Federal regulatory actions are measured and reported.” *Id.* at 1.

EPA itself has prepared a guidance document regarding consideration of benefits and costs, entitled *Guidelines for Preparing Economic Analyses*.⁷ The Guidelines provide detailed discussion and guidance on all aspects of evaluating the benefits and costs of agency action “to support policy decisions and meet[] the requirements described by related statutes, [executive orders] and recommendations in guidance materials.”⁸ In particular, the Guidelines have chapters setting out EPA’s considered approaches to implementing benefit-cost analysis, including not only evaluation of the benefits and costs themselves, but also choosing baselines and discount rates and addressing distributional issues. *See generally id.*⁹

In light of EPA’s many years of successful reliance on the guidance already available, it would be both unnecessary and highly counterproductive for EPA to impose across-the-board reforms along the lines contemplated in the Administrator’s notice.

Specific Responses to the Administrator’s Notice

We have organized our comments here by the same headings used in the Administrator’s notice.

I. Background

The title of the Administrator’s notice invokes a search for increased “consistency” and “transparency” in EPA rulemaking, and the body of the notice uses those two terms repeatedly. But the notice identifies no inappropriate inconsistency or lack of transparency in EPA’s past rulemakings.¹⁰

⁷ *Guidelines for Preparing Economic Analyses* (Dec. 2010, updated May 2014), *available at*: <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>

⁸ *Id.* at 1-1.

⁹ We cite Circular A-4 and the Guidelines in this comment letter as examples of guidance that already direct EPA to consider the benefits and costs of proposed action in consistent and transparent ways. In citing those documents, we do not endorse, adopt or otherwise concede the appropriateness of any particular directive or suggestion set out in those documents.

¹⁰ Indeed, recent EPA regulatory impact analyses for air pollution rules contain hundreds of pages discussing the benefits and costs of those rules, including detailed analyses of compliance costs, economic and employment impacts, health and welfare benefits (both quantified and unquantified), and uncertainty, with consistent reference to and reliance on the guidance contained in OMB and EPA guidance documents. *See, e.g.,* EPA, *Regulatory Impact Analysis of the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 National Ambient Air Quality Standards for Ground-Level Ozone* at 1-3, 4-2 through 4-3, 4-8, n. 57, 4-26, 5-5, 5-15, 5-16 through 5-17, 5-23 through 5-29, 5-37, 6-1 through 6-32, 7-1 to 7-2 (Sept. 2016); EPA, *Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone* at 1-3, 1-5, 4-13, 4-4, 4-36 through 4-44, 5-9 through 5-14, 6-16 through 6-20, 6-77 through 6-88, 6-89 through 6-92, 6-61, 6-63 & n.158, 8-1, 8-8 through 8-9, 8-16 (Sept. 2015); EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* at ES-12

In fact, existing guidelines already provide for how consistency and transparency should be addressed in agency cost-benefit analyses. Circular A-4 and the Guidelines provide significant guidance for EPA to apply when analyzing benefits and costs. For example, Circular A-4 has an entire subsection devoted to the considerations involved in “Developing a Baseline” against which to measure the benefits and costs of a proposed rule.¹¹ The Circular notes that the choice of an appropriate baseline is not a mechanical decision and “may require consideration of a wide range of potential factors.” The Circular then cites EPA’s 1998 polychlorinated biphenyl disposal rule as a “good example” of evaluating benefits and costs using multiple baselines, “each reflecting a different interpretation of existing regulatory requirements.”¹²

Similarly, EPA’s Guidelines have an entire chapter entitled “Analyzing Costs.”¹³ Among other things, that chapter discusses broad categories of costs, such as explicit and implicit costs, and direct and indirect costs.¹⁴ The chapter then defines specific types of costs, including incremental costs, capital costs, operating and maintenance costs, industry costs, transaction costs and government regulatory costs.¹⁵

The Administrator’s notice identifies no inconsistency between the directives or suggestions in those guidance documents and EPA’s analysis of benefits and costs in any particular regulatory proceeding. Nor does the notice identify any way in which the directives or suggestions in Circular A-4, the Guidelines, or any other relevant guidance document are inadequate or should or could be revised. For example, the notice does not indicate how EPA could condense the detailed 21-page discussion of costs in the Guidelines chapter into a short, useful definition of “costs.” Finally, the Administrator’s notice does not identify any instance where EPA’s consideration of benefits and costs suffered from a lack of transparency.

On a separate note, the scope of the advance notice is unclear. The title and much of the text refer to “rulemaking,” but there are instances where the text purports to address an arguably broader set of “regulatory decisions.” 83 Fed. Reg. at 27527. For the reasons we set out, EPA should not proceed with this rulemaking, but if it does, it should clarify its intent as to the scope of applicability of any rulemaking or other action it may take as a follow-up to this advance notice.

through ES-14, 3-45, 4-19, 4-42 through 4-43, 5-1 through 5-7, 6-1 through 6-36, 7-1 through 7-21, 8-5 through 8-9 (Aug. 2015).

¹¹ Circular A-4 at 15-16.

¹² *Id.* at 15.

¹³ Guidelines at 8-1 through 8-21.

¹⁴ *Id.* at 8-7 through 8-8.

¹⁵ *Id.*

II. Topics for Which EPA Is Seeking Input

A. *The Nature of Potential Concerns Regarding Perceived Inconsistency and Lack of Transparency*

The Administrator's notice identifies no circumstances in which an EPA rulemaking has lacked consistency or transparency, and it therefore provides no basis for any regulatory changes to address such perceived issues. Even if EPA could identify instances of inconsistency or lack of transparency in its rulemaking, the Administrator's notice is still unnecessary and potentially harmful to EPA's mission, as discussed herein.

B. *Potential Approaches for Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process*

1. *What would increased consistency look like?*

- a. *Given statutory constraints, how could EPA more consistently adhere to existing guidance on benefit-cost analysis principles, definitions and analytical techniques whether across the entire agency or specific programs? For example, to what extent, if any, should EPA develop a regulatory action that commits the Agency to following its existing peer-reviewed guidance documents on risk assessment and Guidelines for Preparing Economic Analysis when developing future rulemakings?*

This set of questions is lacking in foundation, as the Administrator has identified no circumstances where EPA under previous administrations has failed to follow existing EPA guidance, such as the Guidelines, or other relevant guidance, such as Circular A-4. Because the Administrator's notice has not identified any instances in which EPA did not previously follow relevant guidance, it has identified no instances where deviation from applicable guidance was inappropriate.

By contrast, in some recent rulemakings, EPA has focused on compliance costs without adequately incorporating consideration of costs to society, inconsistent with the relevant guidance.¹⁶ This is a problem EPA could cure, however, by simply following the guidance that is already in place.

¹⁶ See, e.g., EPA, Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 16077 (Apr. 2018); and EPA, Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal 44 (2017), available at https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf; see also Comments of Attorneys General of New York *et al.* on Reconsideration of Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles and Comment on Model Year 2021 Greenhouse Gas Emissions Standards, Docket ID No. EPA-HQ-OAR-2015-0827 (Oct. 5, 2017), available at: <https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0827-10132>; Comments of Attorneys General of New York *et al.* on EPA's proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary

- b. *Should EPA consider adopting uniform definitions of specific terms used in statutes – e.g., “cost,” “benefit,” “economic factors,” “reasonable,” “appropriate,” and “weight of scientific evidence” – and specifying ex ante how they will be factored into subsequent regulatory decisions? How should EPA approach the scope of the uniformity of these definitions (e.g., within a particular regulatory program; within statute; across statutes)*

For EPA to adopt uniform definitions of these statutory terms is problematic for several reasons. First, any uniform or “one size fits all” definition may be inconsistent with statutory language. Second, assuming that EPA did seek to develop such cross-program definitions, it is far from apparent that any more specific, cross-program definition of costs is even possible.

- ***Adopting uniform definitions of statutory terms would be inconsistent or interfere with EPA regulatory action.***

First, it would be impossible to draft a single definition that encompasses and incorporates all of the relevant statutory standards that Congress has established. For example, the Supreme Court has acknowledged that the meaning of the term ‘appropriate’ depends on the statutory context. In *Michigan*, the Court held that “appropriate,” in the context of the Clean Air Act’s hazardous-air-pollutants program, required consideration of costs, 135 S. Ct. at 2707. At the same time, the Court noted that there are “undoubtedly” settings in which the term “appropriate” does not require consideration of cost. *Id.* Any effort to impose a uniform definition of such statutory terms would impose artificial consistency in EPA’s actions under differing statutes and create likely conflicts with Congressional intent. Not only would this inevitably generate litigation over the validity of the rule, it would place EPA in the position of challenging federal court decisions that have validated EPA’s prior determinations of costs and benefits. Instead, EPA must retain the legal flexibility to comply with and apply the varied directions and constraints set out in the numerous statutes that it implements in accord with the requirements and norms of sound administrative decision making.

Given the reality that the statutes governing EPA’s actions differ in their purposes and approaches to regulation, it would be impossible to craft a single definition that is consistent with the purposes and approaches taken in all of the statutes that EPA administers – or even some subset of more than two or three of those statutes.

For example, different programs for establishing effluent limitations under the Clean Water Act allow EPA to consider costs to varying degrees. One statutory standard for setting effluent limitations for water pollution is “best practicable control technology,” or BPT, which requires “consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.” 33 U.S.C. § 1314(b)(1)(B). The Supreme Court has held that this provision requires a comparison of the aggregate cost to

industry with the aggregate benefits. *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 76-77 (1980). The Fifth Circuit has stated that EPA need not apply any particular approach in determining BPT so long as it considers total costs in relation to total benefits and the costs are not “wholly disproportionate” to the benefits. *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 184 (5th Cir.), *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989).

A second standard under the Clean Water Act is “best conventional technology,” or BCT, which requires “consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived.” 33 U.S.C. § 1314(b)(4)(B). The Fifth Circuit has stated that BCT is subject to a form of benefit-cost analysis that evaluates “the extent that the increased cost of treatment [would] be reasonable in terms of the degree of environmental benefits.” *Chem. Mfrs. Ass'n*, 870 F.2d at 205.

Another standard for setting effluent limits under the Clean Water Act is “best available technology economically achievable,” or BAT, which requires selection of technology that is “economically achievable” for the relevant class of polluters, and “will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.” 33 U.S.C. § 1311(b)(2)(A). In particular, EPA must consider the “cost of achieving” the selected BAT limit. 33 U.S.C. § 1314(b)(2)(B). For this program, EPA does not need to ensure that benefits exceed costs, but instead can promulgate BAT limits “whose costs are significantly disproportionate to their benefits” so long as the selected limit is “economically feasible for the industry as a whole.” *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 936 (5th Cir. 1998); *see also Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009) (EPA permitted to use cost-benefit analysis in setting BAT standards for cooling water intake structures for power plants); *Am. Petroleum Inst. v. EPA*, 858 F.2d 261, 265 (5th Cir. 1988) (“a direct cost/benefit correlation is not required, so even minimal environmental impact can be regulated, so long as the prescribed alternative is technologically and economically achievable”); *Nat'l Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 662 n.64 (3d Cir. 1983) (for BAT, “cost is no longer considered in comparison to effluent reduction benefits. Instead, [EPA] only looks at the cost of achieving the requisite effluent reduction”).

It would be exceedingly difficult if not impossible for EPA to set common definitions that could apply across these three programs given their different cost focuses, let alone to set common definitions that could apply to these programs as well as others under the Clean Water Act and other statutes. The statutes EPA implements require flexibility. As noted by the Office of Management and Budget, EPA’s analysis cannot be set by formula; it must be specifically tailored to the statute EPA is implementing:

You will find that you cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis,

depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.”¹⁷

Moreover, if attempted, the development of uniform definitions may well serve no purpose. To apply broadly without running afoul of substantive statutory directives, any definitions of “costs” or “benefits” inevitably would be so generic as to provide little actual guidance in the context of very different programs, technologies, and industries, and interpreting such generic definitions might result in creating the perceived inconsistency or transparency concern(s) that they were designed to address. Use of such generic terms would also make it difficult for EPA to perform rigorous, evidence-based analysis consistent with its legal mandate.

Another approach contemplated by the Administrator’s notice is the development of definitions that might only apply to a limited number of programs under a specific statute. But that task might not be much easier, as even within a single statute, such as the Clean Air Act, there are different programs that consider costs in different ways, as noted above. The development of multiple definitions, each of which applying to only a few programs under a single statute, could be resource intensive for no identified benefit.

- ***The Administrator’s notice does not establish that uniform definitions of statutory terms are even possible.***

Second, assuming that EPA did seek to develop such cross-program definitions, nothing in the Administrator’s notice suggests, let alone establishes, that any more specific, cross-program definition of costs is advisable or even possible. For example, as regards the term “costs,” as noted above, the chapter entitled “Analyzing Costs” in the Guidelines is 21 pages long, and identifies and discusses a wide variety of categories and types of costs. As discussed below, the same difficulty applies to each of the other terms identified in the Administrator’s notice – “benefit,” “economic factors,” “reasonable,” “appropriate,” and “weight of scientific evidence.”

With regard to defining “reasonable” in particular, the Supreme Court has explained what constitutes unreasonable, or “arbitrary and capricious” agency action under the Administrative Procedure Act. That standard makes clear that “reasonable” is entirely context-dependent, and will vary based on the statute in which it appears and the factors that Congress has directed the agency to consider:

[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not

¹⁷ Circular A-4 at 3 (Sept. 17, 2003).

intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 42-43 (1983) (internal quotations and citations omitted). Thus, what might be “reasonable” in one context may not be so in another, based on, for example, the factors that Congress has directed EPA to consider. Consequently, committing EPA to a single definition of “reasonable” (or any of the statutory terms listed in this question) would be at best unhelpful and will likely run contrary to many or all of the laws that EPA implements.

- c. *To what extent should standard benefit-cost analysis principles (e.g., setting a standard to maximize net benefits) guide the selection of specific statutorily required metrics and thresholds (e.g., “reasonableness”) against which to measure the effects of a proposed regulation?*

This question suggests that EPA might be required to interpret statutory terms such as “reasonableness” to mean application of formal benefit-cost analysis. As noted above, in the *State Farm* decision, the Supreme Court has already set out a standard for what constitutes unreasonable, or “arbitrary and capricious” agency action. The *State Farm* standard does not require use of benefit-cost analysis or reliance on any evaluation of numeric benefits or costs to guide EPA’s decision making.

As regards the meaning of the term “reasonableness,” or any other statutory standard that Congress may have enacted, if Congress had intended that a given statutory program rely on strict benefit-cost analysis or a maximization-of-net-benefits standard, Congress would have instructed EPA accordingly by using those terms in the statute, or by leaving some indication in the legislative history. *See Michigan*, 135 S. Ct. at 2711 (where Congress did not “unambiguously require[] [EPA] ... to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value,” EPA had the discretion to account for cost without doing so).

More generally, as the Supreme Court noted in *Michigan*, the extent to which EPA may lawfully consider benefits and costs in rulemaking varies depending on the language used in a particular statute. Given the different language Congress has used in various statutes, there are many ways in which EPA may consider benefits and costs in various regulatory programs, and attempting to harmonize such consideration across different statutes would conflict with the language or interpretation of the statutes.

Assuming, for the sake of argument, the existence of agreement on what a term means, there may not be a consistent understanding of how to implement that term. As noted above, the Office of Management and Budget has spoken approvingly of EPA’s use of different interpretations of a statutory term in one rulemaking. The Supreme Court, in turn, has endorsed

EPA's use of different interpretations of the same statutory term when used in different parts of the Clean Air Act. *See Env'tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 573-81 (2007) (upholding different interpretations of the term "modification" as applied to separate programs in the statute). Use of different interpretations may well be required and is likely to be even more appropriate when evaluating a term under different statutes.

Even within the context of consideration of benefits or costs, the Office of Management and Budget and EPA both acknowledge that in some circumstances approaches other than maximization of net benefits – use of cost-effectiveness analysis, for example – may be appropriate.¹⁸ The Administrator's notice does not acknowledge this, and provides no basis for choosing one particular economic evaluation approach or another under any particular statutory program, let alone a basis for choosing a criterion that would somehow be consistent with a number of widely differing statutory standards.

- d. What improvements would result from a general rule that specifies how the Agency will factor the outcomes or key elements of the benefit-cost analysis into future decision making? For example, to what extent should EPA develop a general rule on how the Agency will weigh the benefits from the reductions in pollutants that were not directly regulated (often called "co-benefits" or "ancillary benefits") or how it will weigh key analytical issues (e.g., uncertainty, baseline assumptions, limited environmental modeling, treatment of regulating multiple pollutants within one regulatory action) when deciding the stringency of future regulations? In addition, frequently scientific understanding is not adequate either to quantify or to monetize the effects of some pollutants or other impacts. How should these potentially important but non-quantified and/or non-monetized effects be included in decision making?*

Here, the Administrator's notice poses essentially two questions: whether to set general rules for using particular elements of benefit-cost analysis in decision making; and whether to incorporate in its decision making effects that are not quantifiable or reduced to a specific financial benefit or cost.

As a general matter, it is difficult to identify broad proposals responsive to the first question for a number of reasons. As noted above, different statutory programs require consideration of different factors in different contexts. Thus, attempting to impose uniformity is impractical and would likely create conflicts with the laws that EPA implements.

With regard to the specific issue of co-benefits, also known as ancillary benefits, the Administrator's notice identifies no reason to preclude EPA from considering them in its rulemaking, except to the extent the relevant statute would indicate otherwise. Circular A-4 and the Guidelines already address the issue of co-benefits, indicating that co-benefits should be

¹⁸ *See, e.g.*, Circular A-4 at 9, Guidelines at 7-1 n.1, 11-2, A-14.

included in formal cost-benefit analysis.¹⁹ This approach is consistent with the purpose of cost-benefit analysis as articulated by economists: the purpose is to sum up the monetary value of all consequences of the action that can be given a monetary value, whether positive or negative.²⁰ The standard economic theory of cost-benefit analysis does not exclude some costs or some benefits.²¹

Adhering to these guidelines, EPA has for decades taken co-benefits into account when evaluating Clean Air Act regulations.²² Further, in evaluating EPA rules, courts have specifically required the agency to consider similar ancillary or indirect effects. *See Am. Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, 1051-52 (D.C. Cir. 1999) (Clean Air Act's protective public health purpose required EPA to consider all beneficial health effects when setting NAAQS, rather than only "half of a substance's health effects"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1224-25 (5th Cir. 1991) (EPA's ban of asbestos-based brakes under Toxic Substances Control Act not supported by substantial evidence where it failed to consider indirect safety effects of substitute options).

Importantly, EPA's consideration of co-benefits in evaluating Clean Air Act regulations has led to dramatic improvements in public health and demonstrable economic benefits.²³ Overall, according to a 2016 report by the Office of Management and Budget, EPA's major rulemakings between 2005 and 2015 brought an estimated \$175 to \$678.1 billion in benefit,

¹⁹ Circular A-4 at 26; Guidelines at 11-2.

²⁰ *See, e.g., Boardman, A.E. et al., Cost-Benefit Analysis*, at 2, Prentice Hall (4th Ed. 2011).

²¹ *See, e.g., Gramlich, E.M., A Guide to Benefit-Cost Analysis*, at 8, Waveland Press, Inc. (1990).

²² *See, e.g., 75 Fed. Reg. 51,570, 51,578, 51,582-83* (Aug. 20, 2010) (considering indirect benefits from reducing carbon monoxide, volatile organic compounds, and nitrogen oxides in regulating hazardous air pollutants from reciprocating internal combustion engines); *72 Fed. Reg. 8428, 8430* (Feb. 26, 2007) (finding that "[a]lthough ozone and PM_{2.5} are considered criteria pollutants rather than 'air toxics,'" their reductions as "are nevertheless important co-benefits" of proposed controls on mobile sources to reduce emissions of benzene and other section 112 pollutants); *63 Fed. Reg. 18,504, 18,585-87* (Apr. 15, 1998) (discussing the indirect benefits of reducing co-pollutants like volatile organic compounds, particulate matter, carbon monoxide, and SO₂ through section 112 standards for pulp and paper producers); *56 Fed. Reg. 24,468, 24,469, 24,473* (May 30, 1991) (justifying section 111(b) performance standards and section 111(d) emission guidelines for municipal solid waste landfills based in part on "the ancillary benefit of reducing global loadings of methane"); *52 Fed. Reg. 25,399, 25,406* (Jul. 7, 1987) (considering "the full spectrum of the potential impacts of regulation," including "indirect benefits accruing from concomitant reductions in other regulated pollutants" in deciding to regulate emissions from municipal waste incinerators under sections 111(b) and (d)).

²³ *See, e.g., EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, EPA-452/R-11-011, at 5-1 (Dec. 2011), available at: <https://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf>; *EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule*, EPA-452/R-15-003, at 4-27 (Aug. 2015), available at: https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-planexisting-units_2015-08.pdf; *see also* Castle, Kimberly M. and Revesz, Richard L., *Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations* (April 2, 2018). *Minnesota Law Review*, Vol. 103, 2018, Forthcoming; NYU School of Law, Public Law Research Paper No. 18-22; NYU Law and Economics Research Paper No. 18-12; available at: SSRN: <https://ssrn.com/abstract=3154669>.

measured by factors including the number of preventable deaths, hospital visits and lost work and school days, and \$43.2 to \$50.9 billion in costs.²⁴

As for nonstatutory analyses pursuant to Executive Order 12866 or otherwise, we know of no reason to exclude co-benefits, and again, the Administrator's notice identifies no reason to do so. With regard to its Executive Order 12866 formal cost-benefit analyses in particular, EPA has no basis on which to exclude any monetizable benefits to human health or the environment from the analysis, and for EPA to adhere to its mission of protecting human health and the environment, co-benefits must be considered in cost-benefit analysis. In sum, absent some prohibition on consideration of a particular type of benefit or cost, EPA should incorporate all benefits and costs in its nonstatutory formal cost-benefit analyses.

In addition, guidance documents already instruct EPA and other agencies on how to weigh "key analytical issues" in the future regulatory actions. Uncertainty could affect virtually every aspect of an analysis of costs and benefits. Many different types of uncertainty arise in environmental rulemaking, including scientific uncertainty, economic uncertainty, and uncertainty about inputs, processes and outputs.²⁵ EPA may not be able to quantify all types of uncertainty, and even for different types of uncertainty that EPA is able to quantify, it may not be able to quantify them all in the same way or to the same extent.

That is not to say, however, that such uncertainties should not fall within consideration of EPA's consideration of benefits and costs. Indeed, many areas where costs or benefits are difficult to quantify—such as benefits of limiting contaminant exposure to humans and ecosystems—are essential in considering the costs and benefits of any particular regulation. The existing guidance documents already provide direction on how to address uncertainty in evaluating benefits and costs of proposed EPA rules. Circular A-4 devotes four pages to the subject of uncertainty.²⁶ The Guidelines address uncertainty as regards many specific aspects of evaluating benefits and costs, including setting the baseline against which the regulation's benefits and costs are evaluated, setting a discount rate to address future benefits and costs, and analyzing the benefits and costs themselves.²⁷ The Administrator's notice does not address any of this existing guidance applicable to EPA rulemaking, let alone explain why this existing guidance is inadequate, how this existing guidance could be improved, or in what instances EPA has failed to abide by this guidance.

²⁴ See "2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," Office of Management and Budget, *available at*: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

²⁵ See, e.g., A. Myrick Freeman, III, *The Measurement of Environmental and Resource Values: Theory and Methods* at 40-41 (2nd Ed. 2003).

²⁶ Circular A-4 at 38-42.

²⁷ See, e.g., Guidelines at 5-5, 5-13, 5-14, 6-16, 6-17, 6-19, 7-5, 7-6, 7-45, 7-49, 8-12, 10-16, 11-1, 11-3, 11-4, 11-9 through 11-12.

As regards “baseline assumptions,” it is not clear what the Administrator’s notice means by that term: the Administrator may be referring (a) specifically to the assumptions underlying the choice of the baseline against which the benefits and costs of the proposed regulation would be measured, or (b) more generally to all foundational assumptions for the analysis of benefits and costs.

If the Administrator is referring to the latter, more specificity would be necessary to provide a meaningful response. If the Administrator is referring to the former, both Circular A-4 and the Guidelines already provide full discussions – an entire chapter in the Guidelines – of the “wide range of potential factors” that EPA may need to consider to set an “appropriate baseline.”²⁸ Since “developing a baseline is not a straightforward process, and analysts must make many decisions on the basis of professional judgment,”²⁹ there seems little room for any greater specificity than already provided in Circular A-4 and the Guidelines. In any event, the Administrator’s notice provides no examples of instances where EPA has failed to abide by the existing guidance on the subject of baselines, no reason why the existing guidance is not adequate, and no description of ways in which the existing guidance could be improved or made more specific.

Limited environmental modeling would also seem to be a poor candidate for rigid, standardized treatment. The term “limited” is itself not specific, so EPA would first have to determine what exactly “limited” means in the context of environmental modeling, assuming that would be possible. Moreover, uniformity in the nature or degree of modeling across different programs may be detrimental, as the appropriate scope of modeling might well depend on the regulatory context. For example, relatively simple air emissions modeling for a single stationary source might use a model such as HYSPLIT, while another modeling problem involving multiple sources and photochemical reactions in the atmosphere might use a more complicated model such as CAMx. The former could be considered more “limited” modeling, but may nonetheless be entirely appropriate in the circumstances, and a definition suggesting that one was somehow inadequate or inappropriate would do more harm than good.

As for how EPA should treat regulation of multiple pollutants, the analysis and outcome is much the same as for the question of co-benefits above: the purpose of benefit-cost analysis is to evaluate all benefits and costs, so unless the statute directs otherwise, all benefits from regulation should be included.

The second broad question posed by this paragraph concerns the extent to which EPA should consider nonquantifiable or nonmonetizable effects in decision making. The short response is that EPA should consider such effects in decision making unless the statute says otherwise, and should include them in nonstatutory analyses unless the governing executive order or other directive says otherwise.

²⁸ Circular A-4 at 15; Guidelines at 5-1 through 5-16.

²⁹ Guidelines at 5-16.

In environmental regulation in particular, proposed regulatory actions often have benefits to human health or the environment that cannot be monetized, or can at best only be partially monetized, but are still important. For example, in the Cross-State Air Pollution Rule Update, EPA was not able to monetize several human health benefits, various ecosystem effects and visibility impacts.³⁰ Similarly, EPA's amendments to the Risk Management Program regulations under the Clean Air Act (which EPA has delayed and now proposed to revise), could not quantify important benefits such as avoiding catastrophes, lost productivity, significant emergency response costs, transaction costs caused by accidents, property value impacts in nearby neighborhoods, and environmental damages from an accident.³¹ Nonetheless, these were all important effects of the rule that were appropriately factored into the regulatory analysis regarding this rule.

More generally, OMB has warned of the dangers of failing to consider benefits that cannot be quantified or monetized: "When important benefits and costs cannot be expressed in monetary units, [benefit-cost analysis] is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."³²

Accordingly, in situations in which there are nonquantifiable and nonmonetizable effects, Circular A-4 already directs agencies to include them in their cost-benefit analysis. Specifically, the guidance directs agency staff to:

exercise professional judgment in determining how important the non-quantified benefits or costs may be in the context of the overall analysis. If the non-quantified benefits and costs are likely to be important, you should carry out a "threshold" analysis to evaluate their significance. Threshold or "break-even" analysis answers the question, "How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?" In addition to threshold analysis you should indicate, where possible, which non-quantified effects are most important and why.³³

The Guidelines echo this, stating that "[n]on-monetized and unquantifiable benefits and costs" should be included in presentation of formal benefit-cost analyses and that "an economic analysis should assess the likelihood that non-monetized benefits and costs would materially

³⁰ See EPA, Regulatory Impact Analysis of the Cross-State Air Pollution Rule (CSAPR) Update for the 2008 National Ambient Air Quality Standards for Ground-Level Ozone at ES-13, ES-19, 5-5, 5-39 through 5-43 (Sept. 2016), *available at*: https://www3.epa.gov/ttnecas1/docs/ria/transport_ria_final-csapr-update_2016-09.pdf.

³¹ See EPA, Regulatory Impact Analysis, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7), at 88-92 (Dec. 16, 2016), *available at*: <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734>.

³² Circular A-4 at 10.

³³ *Id.* at 2.

alter the net benefit calculation for a given regulation.”³⁴ The Administrator’s notice does not explain why this existing guidance is erroneous or is not sufficient to address the issue of nonquantifiable, nonmonetizable effects, and does not identify any instances in which EPA has taken action inconsistent with this guidance.

- e. To what extent would it be helpful for EPA to require consideration of cumulative regulatory costs and benefits of multiple regulations during the rulemaking process, including how such consideration may affect the design or implementation of a regulation (i.e., longer or different compliance timeframes)?*

We are not providing comments on topic II.B.1.e at this time because of the lack of specificity as to what EPA means by “cumulative regulatory costs and benefits of multiple regulations” and what possible regulatory action EPA might propose to take regarding consideration of such cumulative effects. Should EPA provide additional specificity, we reserve the right to respond substantively.

2. What would improved transparency look like?

As noted above, the Administrator’s notice identifies no instance in which EPA’s consideration of benefits and costs has not been transparent. Accordingly, it is difficult to envision what increased transparency would look like. For example, the Guidelines state that “[t]ransparency requires that the analyst clearly state all assumptions.”³⁵ The Administrator’s notice does not identify any instance in which EPA has failed to meet this standard or otherwise has provided insufficiently clear analyses of benefits and costs.

- a. How might the documentation of how EPA considered costs and benefits in a regulatory decision be improved from current practices?*

The Administrator’s notice does not cite any problems in EPA’s documentation of how it considered costs and benefits in a regulatory decision under previous Administrations. To the extent that EPA’s reference to “current practices” is meant to include rulemakings undertaken during this Administration, as noted above, the agency’s overemphasis of compliance costs to industry and discounting of the benefits to society of regulations could be addressed through consistent use of longstanding guidance on the consideration of costs and benefits in rulemaking.

- b. In what ways can EPA increase transparency about the decision-making process in cases where the decision was based on information that is barred from release by law?*

The Administrator’s notice has identified no instance in which EPA has failed to adequately discuss its reliance on information that could not be made public. However, we note

³⁴ Guidelines at 11-2 through 11-3.

³⁵ *Id.* at 5-13.

that the suggestion being raised in the Administrator's notice, that confidentiality concerns that limit the full public release of information may somehow compromise EPA's decision making, overlaps substantially with the concerns raised recently in EPA's proposal to limit the use of scientific evidence in rulemaking.³⁶ We respectfully refer the Administrator to the comments that many of the states here expect to submit in response to that proposed rulemaking,³⁷ for a full and detailed comment on why EPA should not proceed with any rulemaking on this issue.

With that said, one context in which such transparency problems can arise, however, is when EPA uses confidential business information submitted by regulated entities, which by its nature is not subject to verification. The transparency problems are particularly troubling if regulated entities are reporting the magnitude of compliance costs, because the regulated entities may have an incentive to overstate such costs. EPA can limit the transparency problems in this context by, to the extent allowable by statute or regulation, both (a) minimizing the amount of information EPA deems to be confidential business information, so that more information can be disclosed to the public, and (b) minimizing the amount of properly designated confidential business information on which EPA relies.

Limitations on public disclosure of information may also arise when EPA relies on peer-reviewed scientific studies based on confidential individual health records. Nonetheless, for at least two reasons, EPA should impose no bar on consideration of such studies in this proposed rulemaking or otherwise. First, such studies can constitute the best or latest available science, and various statutes that EPA administers require consideration of such science without any limitation based on data availability. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1314(a)(1) (requiring development of water quality criteria based on "the latest scientific knowledge"); Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(A)(i) (requiring development of drinking water standards based on the "best available, peer-reviewed science"); Clean Air Act, 42 U.S.C. 7408(a)(2) (requiring development of air quality criteria based on "the latest scientific knowledge"). Second, it is the accepted practice of the scientific community to consider such studies.

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? Such a requirement might provide a more regular and systematic approach to ex-post (i.e., after regulations have been promulgated and become effective) evaluation of the costs and benefits of EPA regulations, as compared with the periodic regulatory reviews the EPA has historically conducted. This might help identify needed revisions, inform future regulatory approaches, and improve methods of ex ante analysis.*

We are not providing comments on topic II.B.3 and its subtopics at this time because of the lack of specificity as to what EPA means by "systematic retrospective review" and what

³⁶ "Strengthening Transparency in Regulatory Science," 83 Fed. Reg. 18768 (Apr. 30, 2018).

³⁷ Comments to be submitted in Docket ID No. EPA-HQ-OA-2018-0259.

possible regulatory action EPA would propose to take regarding consideration of such retrospective review. Should EPA provide additional specificity, we reserve the right to respond substantively.

C. Potential for Issuing Regulations to Govern EPA's Approach in Future Rulemakings

- 1. What are the most pressing economic or legal considerations that should be taken into account when deciding the appropriate level of specificity (all activities, by statute, by specific statutory provision) at which to formulate regulations?*

As noted above, we see no need for the type of regulations suggested in the Administrator's notice. But if EPA were to proceed with developing such regulations, the most pressing legal consideration is the range of statutory standards that EPA implements and enforces. It seems unlikely that the widely varying statutes would allow for an agency-wide standard or definition for a particular subject relating to analysis of benefits and costs. Determining whether such broadly applicable standards would in fact be possible would itself be a time-consuming effort that would likely in the end prove to be unsuccessful or serve very little, if any, purpose.

It is unclear what the Administrator means by "economic . . . considerations" that should be taken into account when deciding the appropriate level of specificity. While uniform standards across some or all EPA programs might help to ensure comparability between economic analyses prepared for those programs, EPA's primary consideration must be in compliance with statutory criteria, and thus any such uniformity would have to be subordinated to statutory requirements.

- 2. What are the opportunities and challenges with issuing regulations to govern EPA's practice when statutory provisions do not mention costs or imply these are factors to be considered alongside benefits and other factors when setting pollution standards?*

If a statute is silent or ambiguous about considering costs, then EPA could have some discretion whether to consider costs under the second step of the standard set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Statutory structure, purpose, or legislative history could constrain such discretion. The challenges and opportunities would thus depend on the statutory language and particular context: there may be situations where consideration of costs would be appropriate and others where such consideration would be inappropriate.

3. *How can EPA best promote more consistency and predictability while still leaving room for consideration of regulatory context and for flexibility to adapt to new information and methodological advances?*

Promulgating a regulation with specific, uniform definitions or requirements would necessarily limit flexibility. Any deviation from those regulatory requirements would then require promulgating a new regulation to accommodate the deviation.

If, consistent with relevant statutory requirements, a regulation were to provide multiple options for a definition or requirement, or to set criteria that would allow for deviation from a set definition or requirement, creating such flexibility would reduce consistency and possibly transparency. In addition, providing such options would increase the complexity and difficulty of preparing and applying the regulation.

The Administrator's notice does not identify what kinds of new information and methodological advances might develop. Once particular definitions or methodologies were set by regulation, attempts to adapt to new information and methodological advances would require further EPA rulemaking to amend those definitions or methodologies. That, however, would unnecessarily add more resource-intensive tasks to EPA's duties and would likely hinder EPA from fulfilling its mission to protect human health and the environment.

4. *In cases where current EPA practice reflects prior judicial decisions, a change in course may come with significant burden to the Agency. Is there a way to address this concern in regulations governing the consideration of costs and benefits?*

It is unclear what the Administrator's notice means by "a change in course." It is also unclear what the notice means by the "significant burden" of changing course when EPA's practice reflects prior judicial decisions. To the extent it is possible for EPA to change course under those circumstances, the burden would seem to be the standard burden associated with any rulemaking proceeding. Whether EPA can change course, however, would depend on the nature of the judicial decision. Of course, a way to obviate any burden to the agency caused by future judicial decisions is for the agency to forgo this proposed rulemaking.

5. *Are there ways to improve consistency and transparency using methods other than a regulatory approach (e.g., additional guidance)? What are the opportunities and challenges associated with these approaches?*

As noted above, there is already guidance from the Office of Management and Budget and EPA itself setting guidelines for analyzing benefits and costs in EPA actions. The Administrator's notice does not establish any need for further direction to EPA to assure whatever degree of consistency and transparency is appropriate in light of the variety of statutory standards to which EPA is subject. If further direction were appropriate, use of guidance documents might be more appropriate than a formal regulation since guidance is more flexible

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