NAFEM
North American Association of Food Equipment Manufacturers

161 N. Clark St., Ste. 2020
Chicago, IL 60601 USA
+1.312.821.0201
info@nafem.org | nafem.org

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U.S. Environmental Protection Agency
Leif Hockstad
Office of Air Policy and Program Support, Office of Air and Radiation, Environmental Protection
Agency, Mail Code 6103A,1200
Pennsylvania Avenue NW, Washington DC 20460
hockstad.leif@epa.gov.

Re: Comments Regarding Notice of Proposed Rulemaking - Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process (85 Fed. Reg. 36512, June 11, 2020)

The North American Association of Food Equipment Manufacturers (NAFEM) submits the following comments to the U.S. Environmental Protection Agency's (EPA) Notice of Proposed Rulemaking – Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process (85 Fed. Reg. 36,512, June 11, 2020) (the "Proposed Rulemaking"). The Proposed Rulemaking relates to whether EPA should ensure that its regulatory actions and decision-making is based on a consistent and transparent methodology for how costs and benefits are considered in its regulatory process under the Clean Air Act.

The Proposed Rulemaking follows the 2018 Advanced Notice of Proposed Rulemaking – Increasing Consistency and Transparency in Considering Costs and Benefits in Rulemaking Process (83 Fed. Reg. 27,524; June 13, 2018) that reviewed the process generally across EPA. NAFEM submitted comments on this ANPRM to the docket No. EPA-HQ-OA-2018-0107. NAFEM supports this Proposed Rulemaking for many of the reasons that it explained in detail in those prior comments (attached).

NAFEM is a trade association of more than 550 commercial foodservice equipment and supplies manufacturers – a $13 billion industry. These businesses, their employees and the products they manufacture, support the food away from home market – which includes more than one million locations in the U.S. and countless more around the world. These member companies and their products are subject to regulation by EPA, as well as other federal agencies, such as the Department of Energy's (DOE) Energy Conservation Standards program. NAFEM supports, and its members actively seek, opportunities to increase consistency and transparency in regulatory activity that will allow them to continue to provide the products, performance and reliability consumers need to operate their businesses.

NAFEM provides the following comments to the Proposed Rulemaking regarding EPA's cost-benefit regulatory review process under the Clean Air Act. NAFEM is familiar with EPA's (and other agencies') use of cost-benefit analyses, including those established for small businesses (*i.e.,* the Regulatory Flexibility Act).

NAFEM supports that Agency's rationale underlying the Proposed Rulemaking's establishment of binding procedural requirements to ensure transparency and consistency in benefit – cost analyses (BCA). As EPA states:

> This proposed rulemaking seeks to ensure consistent adherence to best practices for BCA of future CAA regulations by codifying these requirements into regulation. The EPA proposes that BCAs for significant proposed and final CAA regulations be developed in accordance with the best available scientific information and best practices from the economic, engineering, physical, and biological sciences. Specifically, the EPA proposes to codify into regulation several best practices for the conduct and presentation of BCA. In addition, the EPA would require that a reasoned explanation be provided for any departures from best practices in the BCA, including a discussion of the likely effect of the departures on the results of the BCA.

85 Fed. Reg. at 36,617.

NAFEM believes that EPA's proposed "key elements" of a BCA are consistent with NAFEM's prior comments, including: (1) a statement of need; (2) an examination of regulatory options; and (3) to the extent feasible, an assessment of all benefits and costs of regulatory options relative to the baseline (no action) scenario. In particular, NAFEM supports EPA's "Principle of Transparency" that ensures detailed and clear explanations of the BCA, how benefits and costs were evaluated (and, if necessary estimated), and how all non-monetized and non-quantified benefits and costs were assessed. *Id*. at 35,621.

NAFEM supports EPA's proposal to apply the BCA process to all "significant rulemakings" subject to the Regulatory Flexibility Act (RFA) (greater than $100 million economic impact), and NAFEM believes that EPA must err on the side of undertaking the BCA process if in doubt. This includes undertaking BCA for rulemakings with inconsistent application of the RFA, such as, for example, Significant New Alternatives Policy (SNAP) rulemakings under the CAA.

Finally, as set forth in its prior comments, NAFEM supports the requirement to ensure appropriate "retrospective review" is included in any final rulemaking. In the past, EPA has undercut its BCA type of analyses by grossly underestimating impacts in an initial rulemaking and then relying solely on an "incremental" BCA type of analysis for all related future rulemakings. A retrospective review would help to correct for those past mistakes and provide appropriate transparency for the actual cost of implementing regulatory mandates under the CAA.

NAFEM encourages EPA to develop and follow a BCA approach under this Proposed Rulemaking related to CAA regulations that the agency can also apply under other regulatory programs.

Please contact me if you have questions or need any additional insight or assistance related to these comments. We would also be willing to meet to discuss NAFEM's comments.

Respectfully submitted,

Charlie Souhrada, CFSP
Vice President, Regulatory & Technical Affairs
North American Association of Food Equipment Manufacturers (NAFEM)
161 N. Clark Street, Suite 2020
Chicago, IL 60601
Phone: (312) 821-0212
Email: csouhrada@NAFEM.org

Attachment

NAFEM
North American Association of Food Equipment Manufacturers

161 N. Clark St., Ste. 2020
Chicago, IL 60601 USA
+1.312.821.0201
info@nafem.org | nafem.org

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U.S. Environmental Protection Agency
Elizabeth Kopits
National Center for Environmental Economics, Office of Policy
1200 Pennsylvania Avenue NW, Mailcode 1809T
Washington, DC 20460

Re: Comments Regarding Advance Notice of Proposed Rulemaking – Increasing Consistency and Transparency in Considering Costs and Benefits in Rulemaking Process (83 Fed. Reg. 27,524; June 13, 2018)

The North American Association of Food Equipment Manufacturers (NAFEM) submits the following comments to the U.S. Environmental Protection Agency's (EPA) Advance Notice of Proposed Rulemaking – Increasing Consistency and Transparency in Considering Costs and Benefits in Rulemaking Process (83 Fed. Reg. 27,524; June 13, 2018) (the "Cost/Benefit ANPR"). The Cost/Benefit ANPR relates to whether EPA should ensure that its regulatory actions and decision-making is based on a consistent and transparent methodology for how costs and benefits are considered in its regulatory process.

NAFEM is a trade association comprised of more than 550 foodservice equipment and supplies manufacturers providing products for food preparation, cooking, storage, and table service for the food away from home market. These member companies and their products are subject to regulation by EPA, as well as other federal agencies, such as the Department of Energy's (DOE) Energy Conservation Standards (ECS) program. NAFEM supports, and its members actively seek, opportunities to increase consistency and transparency in regulatory activity that will allow them to continue to provide the products, performance and reliability consumers need to operate their businesses.

NAFEM provides the following comments to the ANPRM regarding EPA's cost-benefit regulatory review process. NAFEM is familiar with EPA's (and other agencies') use of cost-benefit analyses, including those established for small businesses (*i.e.,* the Regulatory Flexibility Act) and represents an industry that has suffered direct impacts from what it argued was a misuse of overblown "social cost of carbon" justifications in past challenges to federal regulatory actions and related litigation.

a. Consistency in cost-benefit analyses is important not only for EPA rulemaking, but across agencies.

The Cost/Benefit ANPRM provides an excellent summary of the many issues relating to agency cost-benefit analyses. Typically,

Congress provides a general scheme within each environmental statute that includes factors and issues that must be considered in EPA regulatory actions; but EPA is also provided wide latitude (as are other federal agencies) in interpreting and analyzing factors that fit within that general scheme.

Given that wide latitude, there are at least three major consistency challenges for EPA: 1) ensuring consistency for regulations promulgated within any given environmental statute; 2) maximizing consistency across the Agency regardless of particular statute authorizing agency action; and 3) developing efficient procedures for working with its fellow federal agencies to ensure consistency regarding overlapping statutes or authorities.

For the first challenge, many environmental statutes are extremely broad and regulate thousands of activities and sources of pollution. Unless Congress has clearly stated otherwise, EPA should ensure consistent cost-benefit principles and procedures within such statutes. EPA properly references the *Entergy Corporation et al. v. Riverkeeper, Inc*. Supreme Court decision and the Court's general holding that the Agency should never be prohibited from conducting a cost-benefit analysis unless specifically prohibited by statute.[1] The *Entergy* case is an excellent reflection on the need for consistency within a given statute, in that case the Clean Water Act.

To address the second challenge, EPA, as an Agency, also should ensure certain cost-benefit processes and procedures are considered regardless of statute, unless specifically prohibited by Congress. Consistency across statutes may best be achieved through more uniformly implementing the concepts in OMB's Circular A-4,[2] its own *Guidelines for Preparing Economic Analyses,* but also through various other guidance documents created to support Executive Order 12866, Regulatory Planning and Review (and subsequent related Executive Orders),[3] including the Small Business Administration's Office of Advocacy's *A Guide for Government Agencies How to Comply with the Regulatory Flexibility Act.*[4] Executive Order (E.O.) 12866 - Regulatory Planning and Review - was issued by President William J. Clinton in 1993. It provides that significant regulatory actions be submitted for review to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

Finally and in part due to the expansion of the number of federal agencies and their regulatory overlaps, EPA must consider cumulative regulatory costs and benefits of its actions ***and*** those of its fellow federal agencies that are regulating the same or similar products, processes, or industries. Without OMB's help, EPA will be challenged to ensure consistency across agencies, especially in situations in which different agencies are responsible for regulating various aspects of the same issue. A perfect example is EPA's regulation of refrigerants for use in commercial refrigeration equipment under its SNAP program, while DOE sets energy efficiency standards directly impacted by which refrigerants may or might be used in that product. NAFEM members continue to suffer great harm from EPA's most recent SNAP rule and DOE's ECS rule for Commercial Refrigeration Equipment rule that relied upon certain

[1] 83 Fed. Red. 27,536, June 13, 2018.
[2] *See* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf (last accessed July 26, 2018).
[3] *See* https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf
[4] *See* https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf (updated August 2017).

refrigerants to generate maximum efficiency, only to have EPA restrict the use of those particular refrigerants, making the DOE standards in many instances unattainable.

Unfortunately, developing procedures and policies that demand consistent cost-benefit analyses does not ensure that such procedures and policies are implemented in good faith. EPA must be committed to setting the example for an agency's consistent approach and implementation of cost-benefit analyses. Perhaps only Congress can ensure consistency across agencies and one significant improvement would be to allow judicial review of regulatory review processes, such as those required under Executive Order 12866. Too often, some EPA offices and many other agencies merely play lip-service to the types of analyses set forth in OMB's Circular A-4 and SBA's RegFlex Guidance because there is no concern about judicial or independent review of those analyses.

NAFEM suggests that EPA create a task force to review the various guidance documents and develop a unified methodology and guidance that EPA will rely upon that is streamlined, efficient, and ensures consistency and transparency. EPA's methodology and guidance should be simple and straightforward enough that regulated parties and the public can grasp the issue to ensure that regulators are, in fact, abiding by and committed to appropriate cost-benefit considerations in their decision-making.

b. Transparency is a key way to help ensure appropriate cost-benefit reviews are conducted fairly and based on real facts.

Absent judicial review of many cost-benefit analyses, transparency is the only way to help ensure appropriate cost-benefit reviews are conducted fairly and based on verifiable data. Too often agency analyses are hidden behind the veil of internal agency deliberation and decision-making. Often, studies being relied upon are still considered "draft" or have not been subject to peer review. In other instances where direct regulation of an issue would fail a cost-benefit analysis, EPA finds secondary ways of indirectly regulating parties to achieve its original (although not cost-effective) goal. As set forth in the OMB Circular A-4,[5] cost-effectiveness analyses also can generate valuable insight into the impacts of various regulatory actions that compliment pure cost-benefit analyses and improve transparency.

Transparency also is improved if EPA would not merely assess the incremental cost-benefit of minor regulatory modifications, but had to revise an ongoing cost-benefit of the entire regulation. EPA has, in the past, grossly underestimated the regulatory costs and impacts of various regulations. Those errors are never corrected if EPA is allowed to only factor the increased costs of amending such regulations in isolation from the true cost a company might face implementing that revised regulation for the first time. Incremental cost-benefit evaluations do not truly reflect the actual cost of implementing the revised regulation as a whole.

c. Retrospective reviews are critical to sound rulemaking

Retrospective reviews are critical and, to some extent, required by law. For example, Section 610 of the Regulatory Flexibility Act (RFA)[6] requires that federal agencies review each

[5] *See* n. 2, *supra*
[6] 5 U.S.C. 601 *et seq*.

rule that has or will have a significant economic impact on a substantial number of small entities within ten years of publication of the final rule. Additionally, the Small Business Regulatory Enforcement Fairness Act (SBREFA)[7], which amended the RFA, requires agencies to develop post-regulation small business implementation guides. Too often that mandate is ignored (*i.e.,* no judicial review opportunity), but in cases where EPA has developed such guidance, the Agency has learned about the challenges that businesses face complying with regulations that EPA may not have fully appreciated during the rulemaking process. The public also might gain additional insight into how complex regulatory mandates are becoming and the economic impacts on small or other businesses that result, for little benefit. Combined with retrospective cost-benefit analyses, regulations could be improved more efficiently and effectively, hopefully based on experience and facts, and not conjecture or political whims.

Retrospective review is especially important when a statute contains anti-backsliding provisions. NAFEM members have most recently encountered this with DOE ECS rulemaking. The statute does not allow new standards to be set at levels to allow more energy use than prior standards; however, there is nothing in the statute that specifies the DOE must review the prior rule to determine if previous standards actually saved energy use. If a regulation has been promulgated that later turns out to not achieve its goals, there is no way for DOE to effectively evaluate this and make course corrections on the next set of standards. As a result, industry has been increasingly facing poor regulation built upon poor regulation, with costs and benefits not accurately being assessed. Eventual compliance with standards are, at best, not as good as they could be and, at worst, unrealistic and unachievable. There are analogous anti-backsliding provisions in regulations administered by EPA. Conducting retrospective cost-benefit review of regulations is critical to the integrity of future rules.

In sum, EPA could go a long way in increasing consistency, transparency, and effective retrospective review by better utilizing existing cost-benefit procedures in all of its rulemakings, or better yet to synthesize those tools into a standardized, but not overly complex, procedure. The Agency, its co-regulator federal and state agencies, the regulated community, and the public would all be better informed and better served by such a process. NAFEM appreciates EPA's attention to these comments. Please contact us if we can provide additional insight or assistance.

Respectfully submitted,

Charlie Souhrada, CFSP
Vice President, Regulatory & Technical Affairs
North American Association of Food Equipment Manufacturers (NAFEM)
161 N. Clark Street, Suite 2020
Chicago, IL 60601
Phone: (312) 821-0212
Email: csouhrada@NAFEM.org

[7] Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub Law No. 104-121, March 29, 1996.