

August 3, 2020

Re: EPA–HQ–OAR–2020–0044, Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process; Filed at www.regulations.gov

We are pleased to submit comments on the Environmental Protection Agency’s proposal titled “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process” (40 CFR 83). We strongly support EPA’s continuing efforts on regulatory reform. Numerous regulations, rules or other requirements include costs that drastically outweigh small or nonexistent gains in environmental quality. Good government relies on reasonable regulations that are supported by sound science and provide certainty and clarity for industry. An important part of rulemaking is public notice and comment, and this process can only be improved if stakeholders have access to good quality data and information, including benefits and costs.

As the National Stone, Sand & Gravel Association (NSSGA) is the leading advocate for the aggregates industry, we make the following recommendations that are certain to assist our industry, have a positive impact on the economy and create jobs. The aggregates industry employs more than 100,000 highly skilled men and women. Our industry generates \$27 billion in annual sales and supports \$122 billion in national sales in affiliated industries. Every job in the aggregates industry supports an additional 4.87 jobs throughout the economy. Our members – stone, sand and gravel producers and the equipment manufacturers and service providers who support them – are responsible for the essential raw materials found in every home, commercial building, road, runway and public works project from schools to hospitals. This industry works diligently to protect the health of our workers, the public and the environment, but burdensome regulations and red tape that do not improve worker health or environmental quality can only hinder business and adversely affect the communities in which those businesses operate.

Many of EPA’s standards and requirements have been based on inaccessible scientific research and questionable cost-benefits analyses. We support the administration’s efforts to standardize and improve the quality of these important functions by providing independent researchers with access to the underlying methods and data. NSSGA supports a transparent and consistent benefit cost analysis (BCA) and EPA’s proposal to forward these goals. NSSGA offers specific input as requested by EPA with the request in bold italics and NSSGA’s response following:

In this proposal, the EPA solicits comment on how the Agency could take into consideration the results of a BCA in future rulemakings under specific provisions of the CAA. The EPA also solicits comment on approaches for how the results of the BCA could be weighed in future CAA regulatory decisions. For example, the EPA solicits comment on whether and under what circumstances the EPA could or should determine that a future significant CAA regulation be promulgated only when the benefits of the intended action justify its costs. The EPA also

solicits comment on whether and under what circumstances the EPA could determine that a future significant CAA regulation be promulgated only when monetized benefits exceed the costs of the action.

NSSGA supports the proposed consistency and transparency of BCA. The public has a right to understand the benefits and costs of regulations and requirements. EPA should only use the BCA when promulgating a regulation in a manner consistent with the Clean Air Act.

Applicability. EPA is requesting comment on whether this rulemaking should apply only to the subset of CAA significant regulations that are determined to be economically significant, which the EPA could define, consistent with E.O. 12866 Section 3(f)(1) and OMB Circular A-4, as those that are likely to have an effect on the economy (benefits, costs or transfers) of \$100 million or more in any one year (that is, a consecutive twelve-month period) 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. These economically significant regulations are the same set of regulations for which E.O. 12866 requires the preparation of a BCA. The EPA also requests comment on whether the threshold of \$100 million in benefits and/or costs in any given year should be adjusted for inflation going forward, and, if so, whether such adjustments should be made assuming a base year of 1995 (as is done with the \$100 million expenditure threshold set forth in the Unfunded Mandates Reform Act). The EPA is requesting comment on whether certain elements of the proposed action should consider resource constraints when being implemented for CAA significant regulations, under the reasonable proposition embedded in EO 12866 that the intensity of the resources dedicated to an analysis should be coordinated and consistent with the level of impact of a decision.

NSSGA supports limiting this analysis to only the most significant subset of regulations and risk analysis. A BCA should not be required for every minor update. NSSGA suggests that safeguards be put into place so that EPA cannot shirk this requirement by claiming a proposed regulation has minimal impact. NSSGA suggests that EPA consider a process where the Small Business Administration or Department of Commerce “sign off” on EPA’s analysis that a regulation is not economically significant.

Best Practices for the Development of BCA. The EPA is requesting comment whether it is appropriate to codify best practices for the development of BCA in this rulemaking and, if so, whether specific additional best practices should also be so codified. For example, the EPA solicits comment on whether this rulemaking should specify best practices related to assumptions about technological change and/or learning effects in BCA. The EPA further solicits comment as to whether any additional proposed requirements for BCAs would improve BCA consistency.

It is especially important for EPA to standardize and provide public access to the methods and data used in cost-benefit analyses by the agency, as its regulations are the most expensive for the regulated community (and the costs of which are ultimately passed on to consumers). It has

appeared in some cases that EPA has started with an answer, then worked backwards to provide the cost and benefit data to support it. Abuses include double and triple counting the same benefits¹ across different regulations, such as National Ambient Air Quality Standards. While counting co-benefits may sometimes make sense, it needs to be clear when co-benefits are included.

One of the areas that EPA should include with cost-benefit analyses are the effects of unemployment. These can include numerous stress-related health effects, including stroke, heart attack, arthritis and mental health issues, but the adverse effects of unemployment have not been considered by EPA in the past. In areas of the country where there may be only one or two major employers, regulations can cause offshoring that can devastate communities.

The 2015 Waters of the U.S. Rule is an example where the economic study overstated the benefits and drastically understated the costs in order to bolster support for the rule. It relied on incomplete data, flawed methodology, and outdated studies to conclude that acreage covered by Clean Water Act Section 404 permits would increase only a fraction of what it would have in reality caused. The study did not consider the decreases in land values where the economic activity is outweighed by the costs, rendering the land worthless for its intended and planned use. It used anecdotal data and ignored a myriad of costs including permit applications and mitigation expenses. For aggregates operations, these cost increases would be considerable, estimated to be a \$1,000,000 more in mitigation costs per expansion or new operation. These costs would be primarily related to increased stream mitigation with some wetland mitigation. Assuming only 1 percent of the aggregates operations in the U.S. attempted to expand, these costs would be an additional \$100 million dollars. However, the final economic study for the 2015 WOTUS rule estimated increased costs for all industries AND government administration to be \$158.4 million to \$306.6 million total. Furthermore, the study did not bother to calculate increased costs for stream mitigation, despite it being the greatest driver for increased costs.

EPA solicits comments as to whether non-domestic benefits and costs of regulations, when examined, should be reported separately from domestic benefits and costs of such regulations, just as this proposed rulemaking would provide for a separate presentation of benefits limited to those targeted by the relevant statutory provision or provisions.

EPA should strive to keep domestic and non-domestic costs and benefits separate where possible and be as clear as possible about the boundaries and limits of data.

The EPA is requesting comment as to whether requirements related to risk assessments used in BCAs should be applied more broadly than as described in the proposed rulemaking and, in particular, whether such requirements should apply to all risk assessments used in CAA significant rulemakings. For example, should EPA codify into regulation the proposed

¹ [Smith, 2011](#): An Evaluation of the Pm2.5 Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations

selection criteria for selecting among studies characterizing concentration-response relationships and the proposed requirement for synthesizing evidence across the literature?

Globally, the tide has turned towards a demand for greater transparency and reproducibility in scientific research.² NSSGA believes the proposed action by EPA is thoughtful, appropriate, consistent with best management practices, and long overdue. It provides the necessary structure, process, and flexibility to significantly improve the Agency's benefit-cost analyses. The requirements will also help buffer the rulemaking process from shifting political winds that accompany each new administration.

EPA should expand these requirements to all benefit-cost analyses the Agency conducts. Moreover, the requirements should not strictly be tied to risk assessments conducted as part of a regulatory BCA. We specifically urge EPA to clarify that, irrespective of a need for BCA, the proposed requirements apply to all risk assessments, including those performed under Section 6(b) of TSCA, and to assessments performed by the Agency's Integrated Risk Information System (IRIS) Program.

As with all significant changes, a measured approach will better allow the Agency to improve and fine tune its day-to-day risk assessment efforts under the new requirements. Accordingly, NSSGA believes the proposed rule should include an additional requirement, with a specific timetable, to (1) expand the BCA provisions to all Agency activities for which it conducts a BCA; (2) expand the risk assessment requirements to all Agency risk assessments; (3) require the EPA administrator annually to publish a report in the *Federal Register* detailing the Agency's progress in meeting the timetable; and (4) ensure that any changes to the codified requirements must follow formal rulemaking procedures.

NSSGA believes the proposed selection criteria are eminently sensible and they must be codified into the proposed regulations. Claims that these or similar criteria create impossible standards of reproducibility fly in the face of the National Academies of Sciences recommendations, the 2007 OMB and OSTP *Updated Principles for Risk Analysis*, and widely available, modern analytical and statistical techniques for causal analysis. Incorporating causal analysis into the Agency's risk assessment structure is critical since the whole purpose of its regulations is to induce "external interventions"³ aimed at improving public health.

² Recent examples include Howes, C., 2019. Making Chemistry Fair. *Chem. Eng. News*, Sept. 9, 2019, pp. 22-25; and Petyuk, V. et al., 2019. Reproducibility and Transparency by Design. *Molecular & Cellular Proteomics* 18: S202–S204.

³ "The aim of standard statistical analysis is to assess parameters of a distribution from samples drawn of that distribution. With the help of such parameters, associations among variables can be inferred, which permits the researcher to estimate probabilities of past and future events and update those probabilities in light of new information. These tasks are managed well by standard statistical analysis so long as experimental conditions remain the same. Causal analysis goes one step further; its aim is to infer probabilities under conditions that are changing, for example, *changes induced by treatments or external interventions.*" Pearl, J., 2010. An Introduction to Causal Inference. *Int. J. Biostatistics*, 6(2) Article 7, p. 2 (emphasis added).

As correctly noted in the proposal (85 *Fed. Reg.* 35622), the risk assessment process provides “appropriate protection for information claimed as confidential business information (CBI), personally identifiable information (PII), and other privileged, non-exempt information.”

The EPA also solicits comment on whether to impose additional requirements for risk assessments. For example, should the EPA impose requirements for best practices related to any weight-of-evidence (WOE) frameworks that the Agency uses in the developments of CAA significant rulemakings? Should EPA impose additional requirements to ensure consistency and transparency in the assessment of bias and uncertainty in risk analyses (e.g., requirements relating to the use of quantitative bias analysis, or requirements intended for consistency purposes such as requirements relating to the use of probabilistic risk analysis for reducing uncertainty in risk analysis)? The EPA also solicits comments on whether additional requirements within the study selection criteria are necessary to ensure a high-quality and appropriately reliable characterization of air quality and risk.

To improve the rigor of the risk assessment process, NSSGA believes the weight-of-evidence framework should be updated to include a more complete toolbox, including requirements for causal discovery techniques (especially manipulative causation). Event tree analysis and fault tree analysis techniques should be among the options available to the Agency’s risk assessors.

Retrospective Analysis. EPA requests comment on whether EPA should include a requirement for conducting retrospective analysis of significant CAA rulemakings. As discussed in the ANPRM, many previous administrations have periodically undertaken programs of retrospective review or issued executive orders urging agencies to reassess existing regulations and to eliminate, modify, or strengthen those regulations that have become outmoded in light of changed circumstances. But for the most part retrospective review has not become institutionalized practice as has prospective review (such as ex ante benefit-cost analysis conducted under Executive Order 12866) within EPA. The EPA received many comment letters on the ANPRM voicing support for increased retrospective review of Agency rules or programs to be able to evaluate the effectiveness of regulations and to design future improvements to increase efficiency. In this NPRM the EPA requests more specific comments on this issue. In particular, what form should a requirement take in the case of CAA regulations? For example, should the requirement pertain to analysis of an individual rule or a review of the cumulative burden of a set of rules regulating the same or related entities? Should it be applicable to all parts of CAA or just some provisions? What are the advantages and disadvantages of such a requirement? How can the Agency overcome the challenges conducting retrospective analysis in cases where the EPA’s ability to collect information about the costs of compliance is limited or otherwise influenced by other statutes?

NSSGA believes the Agency should phase-in the requirements for retrospective assessments, starting with Agency actions having the most widespread effects and the least transparent by the modernized criteria. (However, ordinarily there should be no need for the Agency to retroactively assess NAAQS that are subject to scheduled reviews.) We recognize that the effort

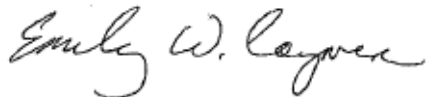
to uncover the original data for existing regulations may be difficult, costly and infeasible. In such cases, where new studies would provide at least the same information, EPA should begin anew under the modernized risk assessment and CBA requirements.

Definitions. The EPA is requesting comment on whether there are additional terms that it should define to increase consistency and transparency in the development of BCA to support CAA rulemaking actions.

NSSGA believes BCA consistency and transparency would be significantly improved by working towards standardized definitions for the risk assessment portion of the Agency's benefit-cost analyses. For example, see Goodman et al., 2016.⁴

In summary, NSSGA believes that there are numerous areas where the methods for developing costs and benefits can be improved. NSSGA supports this effort by EPA to increase consistency and transparency in analyzing costs and benefits of air regulations. Thank you for your consideration of these comments. I can be reached at (703) 526-1064 or at ecoynere@nssga.org.

Sincerely,

A handwritten signature in cursive script that reads "Emily W. Coyner".

Senior Director, Environmental Policy

⁴ Goodman et al., 2016. What Does Research Reproducibility Mean? *Science Translational Medicine*, 8: 341.