Flexible Packaging Association

August 3, 2020

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Docket No. EPA-HQ-OAR-2020-00044
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460
***Attn**: hockstad.leif@epa.gov*

Re: "Notice of Proposed Rulemaking (NPRM)" - "Increasing Consistency and Transparency in Considering Benefits and Costs in the "Clean Air Act (CAA)" Rulemaking Process;" 85 Fed. Reg. 35,612 (June 11, 2020), as amended by 85 Fed. Reg. 37,507 (June 19, 2020).

Dear Mr. Hockstad:

Introduction **–** The Flexible Packaging Association (FPA) appreciates this opportunity to support the EPA's proposed rule to increase agency consistency and transparency in considering benefits and costs in the CAA Rulemaking Process. Our members are heavily regulated by the CAA and other federal environmental programs.

The FPA was established in 1950 and is a national trade association comprised of manufacturers and suppliers of flexible packaging. The industry produces packaging for food, healthcare, and industrial products using coating and lamination of paper, film, foil, or any combination of these materials. Examples of flexible packaging include roll stock, bags, pouches, labels, liners, wraps, and tamper-evident packaging for food and medicine. Flexible packaging, a $31 billion industry, employs approximately 79,000 people in the United States and is now the second largest segment of the U.S. packaging market estimated at $162 billion.

FPA Comments

Background - The June 11, 2020 Notice of Proposed "Rulemaking (NPRM)" invites public input on EPA's proposed requirements, applicable to the agency, for the agency's conduct of "benefit-cost analysis (BCA)." 85 Fed. Reg. 35,612. If finalized, the rule would apply only to "significant regulations" see 40 C.F.R. proposed § 83.2, which the proposed definitions define as

a proposed or final action considered by Executive Order 12866 to be "significant" (i.e., has a likely impact of more than $100 million on the economy or "adversely affect the economy in a material way"[1]), or which "is otherwise designated as significant" by the Administrator." See proposed § 83.1. The NPRM sets forth a procedure for preparing a BCA in proposed § 83.3, and lays out in proposed § 83.4, how, going forward, the preambles of affected rules would be required to set forth a summary of total costs, benefits, and net benefits.

1. FPA urges EPA to apply BCA to *all* "future" significant CAA rulemakings, but it does not believe that BCA should be the only factor that the agency considers when deciding to promulgate a significant rule.

The proposed rule requests comment on how the Agency could take into consideration the results of a BCA in future rulemakings under specific provisions of the CAA. 85 Fed. Reg 35,612, at 35,623-35,624. The NPRM also requests input 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. On a related issue, the agency requests public input on whether CBA should be applied retrospectively. *Id.* at 35,624.

a. Even if the CAA restricts how economic information and/or a BCA is utilized in setting a CAA emissions standard, CAA Sections 101 and 301(a) justify using a consistent procedure for considering the benefits and costs of future regulations, and sharing that information with the public.

FPA agrees that the Administrator has broad legal authority under CAA Section 301(a) to decide that general procedures are necessary to provide consistency within the agency and transparency to the public with regard to CAA rulemakings. See 85 Fed. Reg. at 36,613/1. Indeed, CAA Section 101(b)(2) to balance environmental costs and benefits and in Section 1010(c), to "encourage and promote reasonable CAA actions," consistent with other provisions of the law both support this rulemaking. Thus, even if a specific CAA statutory provision like section 109 prevent the agency from factoring cost into setting a CAA standard, the Act itself underscores the need for BCA, and the transparency of BCA to the public, especially for rules that will have a "significant impact."[2]

[1] See E.O 12866, Section 3(f)(1).

[2] FPA also does not believe that the Administrator's authority to adopt the BCA rule is obviated by Executive Orders related to regulatory impact assessments, existing agency "guidance" on regulatory impact analysis, or OMB's current methodology for performing economic impact assessments. None of these documents invite public comment or establish withing the public's view, a set of *requirements* that is binding on the agency, regardless of Administration, for establishing BCA regulations. If anything, in FPA's view, the existence of a consistent BCA procedure is even more important to guarantee that various potentially significant environmental regulatory actions have been evaluated consistent with each other, which enhances the public's ability to understand agency regulations. To further enhance this understanding, EPA should consider adding a provision to proposed 40 CFR 83.3 rule summary for final actions to discuss how EPA's BCA analysis compares with the RIA done by OMB

Even for standards, for which the CAA declares EPA shall not take cost into consideration when setting a standard, the BCA will provide public information for other purposes. Above all, the public should be able to weigh and compare the benefits and costs of EPA's significant decisions on a rule specific, and comprehensive CAA basis. the states, local agencies, and tribes, which do have discretion in implementing many CAA rules, likely can use this information. Also, a BCA may provide insights for the Congress to evaluate how the Act is performing.

b. FPA believes that a BCA should never be the sole basis for not finalizing a rule.

FPA believes that there is no instance under the CAA, that would justify the agency's determination that a rulemaking should not be finalized on the basis of a BCA finding that costs exceed benefits.[3] If the Congress had intended that to be the case, we would not be talking about EPA's authority to adopt BCA, in the first place. Moreover, as discussed above, the Congress intended the agency to balance health and environmental protections with the economic vitality of the country.

c. A BCA should never be applied retrospectively and its use should be confined to "significant rules."

The NPRM solicits public input on the applicability of the BCA regulation. The proposed rule, at 83.2(a) provides that it will apply to all future "significant CAA regulations," and others that the Administrator designates as "significant." A significant rulemaking would mean one that has $100 million in impact on the economy, as defined by E.O. 12866. FPA supports this definition. Further, we do not believe that EPA should deviate at any time, for any reason, not to perform a BCA for significant rules.

With regard to the application of BCA retrospectively, which we understand would be akin to what EPA just did in addressing the "appropriate & necessary" finding required by Section 112(n) ordered by the Supreme Court in *Michigan v. EPA,* 135 U.S. 2699, 2707 (2015), FPA is hesitant to support any retrospective use of CBA. The potential for turmoil and political finger-pointing is a waste of resources in the case of retrospective analyses. There also is a huge potential for compliance costs to be stranded if the analysis concludes that the costs of prior rule well-exceeded its benefits, suggesting it never should be adopted, much less revised. Even if EPA were to retrospectively address a regulation it must revise, per the CAA (e.g. periodic technology reviews for the NSPS and NESHAPs), the exercise would be interesting, but could

[3] But we also note, that with the exception of CAA Section 109, EPA is directed to consider benefits and costs of all rulemakings, and the failure to do so, would render such rules arbitrary and capricious or unreasonable. What the proposed BCA procedures add is a guide rails for how such analyses should be performed in a consistent manner.

result in similar turmoil. As a result, FPA urges the agency to limit BCA to future significant CAA regulations, which also could include revisions of significant CAA regulations to add monitoring or performance testing.[4]

d. FPA supports reporting domestic benefits and costs of significant impacts separately from non-domestic benefits and costs of regulations.

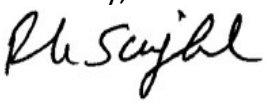
FPA does support separating the assessment of domestic benefit and costs of significant impacts from non-domestic benefits and costs of regulation. Since Americans are paying for the benefits of the regulations, they need to be able to differentiate domestic benefits from international benefits. We assume that the question comes up in the context of regulations related to global warming (a topic on which FPA has no official position). We are not implying that EPA should separate domestic and international benefits and costs because Americans do not stand to gain from international benefits, only that analytically, the public should understand the costs. That being said, we also have no idea how EPA intends to do this, and likely a supplemental rulemaking would be helpful in evaluating a methodology for doing this.

2. Business must comply with regulatory standards for financial reporting, and EPA should too.

In conclusion, FPA urges the agency to finalize and promulgate these rules. FPA's members must comply with business best practices for evaluating costs and benefits of their enterprises, so it is not a stretch for EPA to do the same by "self-regulating" itself when it does rulemakings with potentially significant impacts or other significant rulemakings that the Administrator determines should be evaluated for the agency's and the public's respective benefit.

FPA appreciates having this opportunity to comment on the proposed BCA rule. If you have questions for FPA, or its members, or would like to discuss our comments or suggestions, please feel free to contact me.

Sincerely,



Ram Singhal,
Vice President Technology & Environmental Strategy
Flexible Packaging Association

[4] By adding future amendments to "significant rules," the agency would not be able to easily avoid adding costly compliance requirements like periodic testing or continuous monitoring on a sector by sector basis to "significant rules," without analysis of benefits and costs.