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EPN's Comments on EPA's Proposed Rule entitled "Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"
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The Environmental Protection Network (EPN) is an organization comprised of more than 500 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health, and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current administration efforts to undermine public health and environmental protections.

The EPN respectfully submits the comments below in response to this proposal. We note that other commenters are providing more detailed comments on how the proposal is inconsistent with provisions of the Clean Air Act and long agency practice, and commend those comments to EPA's attention as well.

There Is No Justification for Promulgating a Rule on Benefit-Cost Analysis for Clean Air Act Rules. The Only Purpose Is to Create New Grounds for Litigating to Block or Delay Future Rules.

The Clean Air Act (CAA) does not require this rule. In fact, cost-benefit analysis is not even mentioned in the CAA. It is illegal under some sections of the CAA (e.g., those regarding National Ambient Air Quality Standards) to even consider costs. EPA's argument that the regulation is justified by administrative housekeeping provisions is specious. Other commenters are discussing this in detail elsewhere.

Further, the existence of definitive guidance on cost-benefit analysis totally obviates the need to promulgate a rule:

- Presidential Executive Orders over the past 40 years have required such analyses, particularly E.O. 12291 by President Reagan in 1981 and E.O. 12866 by President Clinton in 1993.
- OMB Circular A-4 on Regulatory Analysis, issued in 2003 by OIRA head John Graham, spelled out in 30 detailed pages how cost-benefit analysis should be done.
- EPA adopted its own economic analysis guidelines starting in 2000. The last version, updated in 2010, is 430 pages in length. It is now being updated again and is in the last stages of review by an elite panel of economists appointed to EPA's Science Advisory Board. That panel is chaired by the same John Graham who issued OMB Circular A-4.

So with procedures for how EPA should do cost-benefit analysis for all of its rules spelled out in exhaustive detail, why is a regulation needed? There is only one apparent reason. This set of requirements, which

duplicate existing guidance for EPA and the entire Executive Branch, is being pushed by EPA to create an inflexible set of legal requirements not found in the statute nor current guidance and practice.

If this rule were adopted, EPA could be sued by opponents of any new regulation on the grounds that EPA, in the view of those opponents, has fallen short in complying with this new regulation.

So if this rule is finalized, EPA regulations could be delayed or blocked on the illogical grounds that analysis that the statute does not call for (and cannot even legally be considered for some regulations) has not been completed properly. In other words, it is a time bomb created to hamper future administrators from implementing CAA rules.

It is a waste of taxpayers' funds. The proposal should be withdrawn.

Counting and Considering Ancillary or Co-Benefits is Not "Dishonest." It is Essential.

Other commenters will detail the issues involved with EPA consideration of ancillary or co-benefits. However, given public statements and regulatory actions of EPA leadership in the past year, EPN is compelled to insist that analyzing and considering co-benefits of its regulatory actions is mandatory. And it is essential to legitimate policy analysis.

The concept is very simple. EPA proposes a regulatory action. Measure the state of the world before and after that proposed action. The difference between those two states serves as the basis for estimating the benefits and costs of the regulation. If there are reductions in, for example, the amount of mercury and fine particle precursors emitted as a result of the regulation, all those changes are direct results of the regulatory action and must be considered in measuring benefits. Though Administrator Wheeler has suggested in his public comments that counting the ancillary or co-benefits is "dishonest" [EPA News Release, June 4, 2020], the converse is true. It would actually be dishonest and deceitful not to count the fine particulate reductions as a benefit of that regulatory action.

In fact, EPA's own Science Advisory Panel criticized EPA for ignoring its previous advice and failing to consider the full health benefits of reducing mercury and fine particle exposures when finalizing the agency's 2020 Mercury and Air Toxics (MATS) rule.

Now in this proposed rule, as well as in its most recent draft of EPA's economic guidelines (sent to the SAB panel for review), EPA says that an economic analysis of a regulation must address alternative ways of capturing the co-benefits using measures other than the proposed rule under consideration. The implication is that it may be possible to get the same benefits at lower cost by regulating the targeted and ancillary pollution reductions separately. In taking this position the agency appears to be seeking an outcome that is both analytically ungrounded and could deprive the public of full net benefits.

We must warn EPA that it will not suffice to point out other ways to reduce the ancillary pollutants if those alternative means are not implemented. That does not provide a justification for regulating neither the targeted nor ancillary pollutant(s). (EPA's approach could be called the mañana school of regulatory policy.)

A glaring case in point is the MATS rule. The Administrator said it was "dishonest" to count reductions of fine particles when regulating mercury emissions, suggesting by this logic that fine particles should be regulated separately in some other way instead. Then, within months, when given the opportunity to gain huge benefits by revising the fine particle air quality standard, the Administrator chose not to revise the standard to further protect public health, as recommended by EPA's own science policy experts.

EPA should not repeat this shell game in the future. Pointing out an alternative way to get ancillary benefits (presumably at lower cost) is of no use if no action is taken to attain those benefits. That shell game is itself dishonest.

History Shows that Clean Air Control Costs are Systematically Overestimated

One of EPA's justifications for the clean air benefit-cost proposal is that regulatory impact analyses tend to underestimate the costs of control requirements. That claim appears to be based on stakeholder assertions as opposed to any analysis done by the agency. Not surprisingly, regulated sources often claim that the costs of control programs are underestimated. However, history shows that EPA's cost projections are typically **over**estimates—primarily as a result of "learning by doing" and technological advances occurring after regulations are promulgated.

To cite just a few examples:

- The cost of phasing out chlorofluorocarbons was far less than anticipated because the chemical industry developed cost-effective substitutes.
- The auto industry has consistently met new standards at lower cost than predicted thanks to continuing improvements to catalytic converters and related emission control strategies.
- Nitrogen oxide (NOx) emissions from power plants were reduced at lower cost than forecast because of improvements in low-NOx burner technologies.
- The refining industry learned to tune its processes in ways that enabled it to reformulate gasoline at much lower cost than predicted.
- Industry innovations led to low- or even zero-emitting paints, consumer products and cleaning supplies at little or no incremental cost.
- Switching to lower-sulfur fuels and flue-gas desulfurization technology ("scrubbers") cut sulfur dioxide emissions at a fraction of predicted costs for both power plants and industrial boilers.
- Cost-effective water and powder-based coatings were developed to replace petroleum-based formulations.

With respect to more recent regulations that EPA is determined to weaken, the costs have again been lower than predicted:

- Mercury control costs for power plants have been far below industry and EPA estimates due to rapid improvements in carbon absorber technologies and declines in the price of natural gas.
- The midterm evaluation of the automobile greenhouse gas standards showed that technologies the auto industry is deploying to comply with the first phase of the greenhouse gas standards are less costly and more effective than predicted.

Although the regulatory proposal solicits comment on the effect of technology innovation, it does not propose to incorporate the concept into future cost analyses despite its amply-demonstrated relevance. It appears the proposal is intended to throw sand in the gears of efforts to advance beyond the current cost analytic framework, which generally relies on fairly static projections of technology and pollution control processes. Even though analyses that incorporate more robust innovation scenarios would typically be more realistic, they would subject a rulemaking to additional litigation risks based on claims that the methodology does not represent the "best practices" described in the agency's Clean Air Act Benefit Cost Analysis rulemaking.

Court proceedings are not the appropriate way to consider what constitutes best practices. They should be developed through periodically updated guidance informed by publicly-available, peer-reviewed advice from well-regarded economists with expertise regarding the use—and abuse—of benefit-cost analysis. Unfortunately, EPA has cut off a primary avenue for that advice by eliminating the Environmental Economics Advisory Committee. This regulatory proposal demonstrates the need for the Committee to be reconstituted so that the Agency can consider these methodological concerns in a far more transparent way than burying them in individual rulemakings and subsequent litigation.

EPA lacks a statutory basis for this rulemaking

The statutory basis EPA provides for this rulemaking is § 301(a)(1) of the CAA, which gives the Administrator authority to "prescribe regulations as are necessary to carry out his functions under" the Act. Because, EPA says, the rule "would not regulate the conduct or determine the rights of any entity outside the federal government," it asserts that this is a rulemaking of "agency organization, procedure or practice," governing "internal agency procedures that increase the Agency's ability to provide consistency and transparency to the public in regard to the rulemaking process under the CAA." The Notice solicits comment on "whether additional or alternative sources of authority are appropriate bases" for the proposed regulation. The Notice also asserts that, as a procedural rule, it is exempt from the Notice and Comment requirements of the Administrative Procedure Act, see 5 USC § 553(b)(A), but then goes on to say that the agency "voluntarily seeks comment because it believes that the information and opinions supplied by the public will inform the Agency's views."

§ 301(a)(1) does authorize the Administrator to prescribe such regulations as are necessary to carry out his functions under the CAA. However, the proposal does not explain why after 50 years of implementation the agency suddenly believes it is necessary to promulgate these rules, essentially tying the agency's hands in all future rulemaking involving benefit-cost analyses. For many years the agency has had ample detailed guidelines relating to economic analysis. These have served the Agency well in considering economic issues in rulemaking development. Further, many specific provisions of the CAA explicitly provide for benefit-cost analyses, while other provisions essentially forbid them. This proposed rule could conflict with both types of statutory authority, as further outlined below. Consequently, since the rule is not necessary and could conflict with clear statutory authorities, § 301(a)(1) does not provide adequate statutory authority for this proposed rule, nor does any other provision of the CAA.

Characterizing proposals as mere procedure, affecting only internal agency processes, appears to be a preferred approach for the agency. In its March 18, 2020, Supplemental Notice of Proposed Rulemaking, *Strengthening Transparency in Regulatory Science*, EPA relies on another "housekeeping" statute, 5 USC § 301, that authorizes agencies to create internal procedures. In both this case and that, EPA is proposing major substantive changes to the way it considers material inputs to the development of a regulation—in that case scientific information and in this case the economic analysis of costs and benefits. In both cases, changes in the way EPA considers these issues can dramatically change the outcome of the rulemaking process. Indeed, if that were not the case, there would be little reason for EPA to be promoting the rule changes at all.

Additionally, even though EPA is offering an opportunity for the public to comment, by asserting that it believes the rule to be exempt from notice and comment procedures, it appears to be setting itself up to not have to respond to substantive comments it receives. This proposal is much more than a rule of process or procedure. How cost-benefit analyses are done can absolutely impact whether a rule is finalized at all or what requirements it includes—far more substance than process.

Many provisions of the CAA require EPA to consider cost. EPA cannot by rule declare certain things to be allowed or not allowed. Policies and best practices with regard to economic analysis, which EPA has used for decades, are appropriate to guide agency practice with respect to these analyses, not a regulation that would rigidly require EPA to adhere to a set of analytic procedures that could be inconsistent with best practices or with specific provisions of the Act. While the proposed rule references "best industry practices" in several instances, in many places it is prescriptive. See § 83.3. These prescriptive provisions are likely in conflict with one or more provisions of CAA. For example, § 112(d)(2) states that in setting standards for sources of hazardous air pollutants, EPA must consider "the cost of achieving such emission reduction, and *any non-air quality health and environmental impacts* and energy requirements" (emphasis added). It is difficult to see how a rulemaking that requires EPA to not consider or to minimize certain categories of benefits would not be in conflict with the underlying statutory requirements or be fairly characterized as merely a matter of internal agency process.

The proposal also attempts to bring into the cost-benefit analysis process a constrained view of what scientific information the agency can consider, paralleling its efforts in the *Strengthening Transparency in Regulatory Science* rulemaking referenced above. See, for example, § 83.3(a)(9). To the extent that this rule would constrain the type of scientific materials the agency can consider in a rulemaking under CAA, it is inconsistent with the Act.

Lastly, the rule improperly inserts a substantive requirement into the cost-benefit analysis—that EPA must provide in its statement of need a "clear description of the problem being addressed, the reasons for and significance of any failure of by private markets or public institutions causing this problem and the *compelling need for federal government intervention in the market to correct the problem*." (emphasis added). § 83.3(a)(2). This requirement implies that EPA must justify rulemaking under CAA by identifying a compelling problem that cannot be addressed through private markets, which is in conflict with many, if not most, of EPA's rulemaking responsibilities under the Act. It was Congress, in the 1970 and 1990 CAA statutes, that determined the compelling need to reduce air pollution in the United States and established a framework of regularly updating regulations that would depend on scientific and technological innovations, but would not require EPA to demonstrate a compelling need or a failure of private markets or public institutions. See, for example, § 109 (NAAQS), § 111 (New Source Performance Standards), § 112 (Air Toxics), and many others.

EPN urges EPA to consider these comments, and those from other commenters, thoughtfully and not go forward with this unnecessary rulemaking that is contrary to statute, will increase litigation, and only serve to delay the public health protections that are EPA's missions and Congress' mandate on behalf of the American people.

Specific Comments and Questions on the Preamble and Proposed Rule

The following are some specific comments and questions on the preamble and proposed rule. Page numbers refer to the PDF version of the rule. To the extent a comment addresses language in the preamble that is included in the proposed regulatory language, the comment addresses both.

Pg 35613.

EPA Text: "This is a proposed rulemaking of agency organization, procedure or practice. This proposed procedural rule would not regulate any person or entity outside the EPA and would not affect the rights or obligations of outside parties. As a rule of Agency procedure, this rule is exempt from the notice and comment requirements set forth in the Administrative Procedure Act. See 5 USC 553(b)(A)."

EPN Comment: We question whether this is in fact a rule of process in the sense meant by the Administrative Procedure Act. Even though EPA is offering an opportunity for the public to comment, by asserting that it believes the rule to be exempt from notice and comment procedures, it appears to be setting itself up to not have to respond to substantive comments it receives. This proposal is much more than a rule of process or procedure. As we have noted above, how cost-benefit analyses are done can impact whether a rule is finalized at all or what requirements it includes—indeed, it is hard to understand why EPA would be doing this rulemaking if that were not the case.

Pg 35617.

EPA Text: "The EPA opened a public docket[18] in April 2017 to solicit feedback and identify regulations that "impose costs that exceed benefits." Among the public comments received, a large cross-section of stakeholders stated that the agency either underestimated costs, overestimated benefits, or evaluated benefits and costs inconsistently in its rulemakings. Per E.O. 13777 and based on these public comments, the EPA decided to take further action to evaluate opportunities for reform."

EPN Comment: These statements further undermine EPA's assertion that this is a rule of process or procedure that does not require notice and comment under the Administrative Procedure Act. EPA started this process three years ago, seeking broad comment about EPA's evaluations of costs and benefits, with the specific aim of evaluating opportunities for reform.

Pg 35617.

EPA Text: "The EPA is proposing to codify the procedural requirements governing the development of BCA, including risk assessments used as inputs to the BCA, for significant rulemakings conducted under the CAA, and proposes additional procedural requirements to increase transparency in the presentation of the benefits resulting from significant CAA regulations. Together, these requirements would ensure a consistent approach to the EPA's CAA benefit-cost analyses under the CAA and would provide transparency by requiring the generation of relevant information in all significant rulemakings."

EPN Comment: As noted in EPN's cover letter, a key concern with codifying the process for cost-benefit analysis in regulation, rather than the policies that have successfully governed the process for decades, is that a regulation is more rigid and harder to change to accommodate changes in analytical methods or other practices. This could be either a benefit or detriment to stakeholders on any side of an issue (the regulated entities or environmental/public health advocates) depending on the circumstances.

Pg 35617.

EPA Text: "As one example, some commenters contend that some BCAs have double-counted benefits that arise from another regulation. The EPA agrees that there is a risk of such a misestimation if the pollution concentration levels resulting from existing regulations are not carefully accounted for in the baseline of the analysis. In other words, this type of double-counting can be avoided if the Agency follows the best practices for BCA of correctly specifying the baseline."

EPN Comment: It is highly significant to insinuate that EPA has double-counted benefits in prior rulemakings, and echoes accusations that have been raised over time by opponents of proposed rulemakings without corroboration. In this case, EPA provides no specific cases to support its assertion that there is a "risk" of double-counting. OMB and EPA policies already establish the process for establishing a baseline, for assuring that benefits will not be double-counted, and for being transparent in those explanations.

Pg 35618.

EPA Text: "Each regulatory BCA should include a statement of need that provides (1) a clear description of the problem being addressed, (2) the reasons for and significance of any failure of private markets or public

institutions causing this problem, and (3) the compelling need for federal government intervention in the market to correct the problem."

EPN Comment: Many rules under the Clean Air Act are required by individual provisions of the statute, so EPA should not have to provide a separate justification or explanation of the problem to be solved and why the market cannot be counted on to correct the problem. A citation to the provision of the statute that requires the rulemaking should be sufficient for any statement of need.

Pg 35619.

EPA Text: "Measuring Benefits and Costs. A BCA evaluates the favorable effects of a policy action and the opportunity costs associated with the action. It addresses the question of whether the benefits from the policy action are sufficient for those who gain to theoretically compensate those burdened such that everyone would be at least as well off as before the policy. "

EPN Comment: Is EPA establishing an expectation that it should have to show in any given rulemaking that "everyone would be at least as well off as before the policy?" If so, this expression of a standard is extremely vague and subject to misinterpretation. If taken literally, it would be a very difficult standard to meet, as regulations almost by definition are intended to change the status quo, and in many cases may impose costs on certain activities that create benefits in other parts of the economy. EPA should be clear that this is not an expectation of a CAA rulemaking. Further, to meet statutory requirements to develop many types of environmental controls by definition EPA must impose certain costs on polluting sources as necessary to produce the desired statutory result. A discretionary rule of agency practice cannot alter these types of statutory demands.

Pg 35619.

EPA Text: "A general equilibrium approach, which captures linkages between markets across the entire economy, is most likely to add value when both relevant relationships among sectors and pre-existing market distortions are expected to be significant. Market distortions are factors such as pre-existing taxes, externalities, regulations, or imperfectly competitive markets that move consumers or firms away from what would occur in the absence of such distortions. For example, when an environmental regulation affects the real wage such that individuals opt to work fewer hours, it can exacerbate pre-existing inefficiencies in the labor market due to taxes, regulatory barriers, or other market imperfections. This represents a welfare cost not captured by compliance cost estimates. The impacts of a regulation also may interact with pre-existing distortions in other markets, which may cause additional impacts on welfare either positively or negatively. In cases such as these, a general equilibrium approach may be capable of identifying how the costs of complying with a regulation flow through the economy, such as through changes in substitution among factors of production, trade patterns, and demand for goods and services. These effects are partially or wholly missed by compliance cost and partial equilibrium approaches. For further discussion, see Guidelines (2010/2014), Chapter 8, Analyzing Costs, 8.1. The Economics of Social Cost."

EPN Comment: This discussion implies that there are reliable ways to analyze the impacts of a rulemaking on the entire economy, but systems are so large and complex that evaluative tools are not adequate for these types of analyses to be accurate and useful for decision-making. As EPA notes, general equilibrium models

are only useful for assessing actions that have a significant impact on the economy. The compliance costs of EPA rulemakings have rarely, if ever, been as large as $10 billion per year; i.e., less than 5/100th of a percent of the U.S. Gross Domestic Product. The uncertainty ranges of general equilibrium models dwarf this level of impact, which means it would be a travesty to use them for this purpose.

Pg 35620.

EPA Text: "The EPA proposes to select the endpoints for which the scientific evidence indicates there is (a) a clear causal or likely causal relationship between pollutant exposure and effect, and subsequently, (b) an anticipated change in that effect in response to changes in environmental quality or exposures is expected as a result of the regulation under analysis. EPA takes comment on an alternative approach that would select all endpoints for which there is a positive WTP conditional on the available scientific literature."

EPN Comment: Can EPA please explain whether and how this approach differs from EPA's current practice and how it is consistent with the variety of CAA provisions requiring EPA to consider scientific data in rulemaking?

p. 35620, Footnote 28

EPA Text: "As a practical matter, the value of any adverse public health or welfare outcomes (sometimes referred to as "disbenefits") resulting from the regulatory requirements are usually also included on the benefits side of the ledger in regulatory BCAs, although it is theoretically appropriate to include them on the cost side. Such adverse outcomes could include adverse economic, health, safety, or environmental consequences that occur due to a rule (e.g., adverse safety impacts from vehicle emission standards) and are not already accounted for in the direct cost of the rule."

EPN Comment: EPA should clarify whether it intends to require that adverse public health or welfare outcomes be considered on the costs or benefits side of the analysis. The absolute math does not change, but by including them as a cost, it will make the costs of the rule seem larger. Cost is generally considered as the cost to comply, so it is more appropriate to include adverse public health and welfare benefits as a negative on the benefits side of the ledger. To the extent there are negative benefits, that will reduce the total amount of benefits, which is a more straightforward approach for the analysis.

Pg 35620.

EPA Text: "Quantifying Health Endpoints in a BCA: Decisions about whether and which changes in the health endpoints should be quantified should be informed by the Agency's evaluation of the relevant scientific literature establishing a link between chemical exposure and health endpoint and the nature of the concentration-response function (i.e., the amount of change in the frequency or severity of the health endpoint expected as the distribution of air quality changes.) In its evaluation, the Agency should explicitly state when scientific judgments or assumptions were used and their effect on the concentration-response function, if known. The Agency would select among concentration-response relationships from studies that satisfied the following minimum standards: (1) the study was externally and independently peer-reviewed consistent with Federal guidance; (2) the pollutant analyzed in the study matches the pollutant of interest in the regulation; (3) concentration-response functions must be parameterized from scientifically robust studies; and (4) when an epidemiological study is used, further criteria include: (a) it must assess the influence of confounders; (b) the study location must be appropriately matched to the analysis; and (c) the

study population characteristics must be sufficiently similar to those of the analysis. When multiple studies satisfy these criteria, the EPA would characterize multiple concentration- response functions reflecting the full set of studies as a means of providing a broader representation of the effects estimate, including high quality studies that do not find a significant concentration-response relationship."

EPN Comment: This is a classic example of the fundamental flaw in attempting to specify a one-size-fits-all regulation to address the multiple evolving scientific and policy issues inherent in assessing the effects of various air pollutants on public health. Addressing these issues has, until now, primarily been the purview of multiple agency guidelines and science-policy review processes, e.g., cancer risk assessments and reviews of air quality standards. These so-called minimum standards for using scientific information, including the additional requirements on epidemiology, are more like a selective cartoon version of the broader and more nuanced approaches that current assessments in air programs already require. Apparently, this is health sciences interpreted by economists. The use of terms like "chemical" or elsewhere "biological sciences" (a far more narrow category) in the rule betrays a lack of understanding.

Approaches to assessing the scientific information, in for example, residual risk determinations for cancer and NAAQS reviews, have evolved over time and will continue to evolve. Why not continue to use those processes to guide BCA? While the preamble to the rule at least suggests that BCAs can "reference" EPA's assessment of scientific criteria as in the NAAQS, neither the preamble nor the rule suggests why EPA's more rigorous approaches that lead to quantitative risk assessments for criteria pollutants would not be enough for a BCA. Instead, on page 35621 (see below), the rule over-specifies minutia such as the inclusion of negative studies and a potential requirement to use all relevant epidemiology studies. In the case of the obviously most relevant pollutant in the history of all of EPA's air BCAs, $PM_{2.5}$, this could require a new meta-analysis of 40 or more studies. This surely would lead to opportunities for frivolous lawsuits regarding how well EPA followed its own rules.

As noted above, it is easier to adapt to new scientific information in guidance and practice than in a fixed regulation. It is much better to allow EPA's more comprehensive assessments to drive the criteria needed for selecting the most useful studies for benefits assessment supplemented, where needed, by *ad hoc* external scientific reviews of methodology, as was done by a special SAB subcommittee for CAA § 812(a) and (b). The current leadership of EPA has so far evidenced a profound disregard for a sound external peer review process in multiple areas. Once again, they are offering a solution looking for a problem – in this case the clear intent is to confound, not improve, the process.

Pg 35621.

EPA Text: "Once the Agency has identified the concentration-response functions to be used for quantifying the selected health endpoints, the Agency proposes that the BCA, or related technical support document, must characterize:
• the variability in the concentration-response functions across studies and models, including plausible alternatives;
• the assumptions, defaults, and uncertainties, their rationale, and their influence on the resulting estimates;
• the extent to which scientific literature suggests that the nature of the effect may vary across demographic or health characteristics;
• the potential variability of the concentration-response function over the range in concentrations of interest for the given policy;

• the influence of potential confounders on the reported risk coefficient;
• the likelihood that the parameters of the concentration-response differ based on geographic location; and
• attributes that affect the suitability of the study or model for informing a risk assessment, including the age of the air quality data, and the generalizability of the study population."

EPN Comment: Can EPA please explain if and how these requirements improve on what EPA currently does without a rule? If there are differences, why is EPA proposing to include (or in some cases exclude) them? If there are not, why is it necessary to codify them in a regulation?

Pg 35621.

EPA Text: "Where probability distributions for relevant input assumptions are available, characterize significant sources of uncertainty in the assessment, and can be feasibly and credibly combined, the EPA proposes that BCAs characterize how the probability distributions of the relevant input assumption uncertainty would impact the resulting distribution of benefit and cost estimates. The EPA should report probability distributions for each health benefit whenever feasible. In addition to characterizing these distributions of outcomes, it is useful to emphasize summary statistics or figures that can be readily understood and compared to achieve the broadest public understanding of the findings. If this proposed rulemaking is adopted, there will be instances when calculating expected values is not practicable due to data or other limitations. In such instances, the EPA would strive to present a plausible range of benefits and costs. Additional discussion of these best practices related to uncertainty analysis is provided in OMB's Circular A-4, Treatment of Uncertainty, and throughout EPA's Guidelines for Preparing Economic Analyses Guidelines."

EPN Comment: As above, please explain if and how these proposed requirements are different from what is already expected in OMB and/or EPA guidance for conducting CBA, why it is appropriate to deviate from existing guidance, and why it is necessary to enshrine these requirements in regulatory form.

Pg 35622.

EPA Text: "One theme raised by many commenters on the ANPRM was that the EPA does not clearly distinguish benefit categories in its regulatory documents. These commenters stated that EPA's BCAs generally present benefits as an aggregate total, and that insufficient effort is made to clearly distinguish between the public health and welfare benefits attributable to the specific pollution reductions or other environmental quality goals that are targeted by the specific statutory provision or provisions that authorize the regulation, and other welfare effects of the regulation that are not the primary objective of the statutory provision or provisions. For example, some commenters pointed to reports that show that for regulations for which a BCA is available, the majority of the monetized benefits for CAA regulations were attributable to reductions in fine particulate matter ($PM_{2.5}$) even though the regulation did not target $PM_{2.5}$. This issue did not arise with respect to costs in the public comments received on the ANPRM."

EPN Comment: EPA is confounding two issues here: the clarity of EPA's discussion of benefits and the inclusion of benefits associated with reductions in pollutants that are not the primary objective of the rule. EPA's consistent approach has been to separate and clarify which benefits are associated with which reductions—indeed that is where stakeholders get the data to object to rules on this basis.

Pg 35622.

EPA Text: "Disaggregating benefits into those targeted and ancillary to the statutory objective of the regulation may cause the EPA to explore whether there may be more efficient, lawful and defensible, or otherwise appropriate ways of obtaining ancillary benefits, as they may be the primary target of an alternative regulation that may more efficiently address such pollutants, through a more flexible regulatory mechanism, better geographic focus, or other factors. This may be relevant when certain benefits are the result of changes in pollutants that the EPA regulates under a different section of the CAA or under another statute."

EPN Comment: EPN appreciates that this proposed rule does not explicitly disallow the consideration of ancillary benefits, but this language comes pretty close to suggesting that they should be discounted. It is ironic to see EPA suggesting that it might look to other ways to regulate ancillary pollutants, when in rulemaking after rulemaking, it has provided for less reduction in pollutants like fine particles, which frequently provide ancillary benefits.

Pg 35623.

EPA Text: "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."

EPN Comment: EPN strongly objects to including in a regulation that EPA could determine that a regulation's benefits would need to exceed its costs. EPA should provide a thorough legal analysis for how such a requirement would be consistent with EPA's obligations under CAA and allow an opportunity for public comment on that analysis before moving forward with such an addition.

Pg 35623.

EPA Text: "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. 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."

EPN Comment: As noted above, for EPA to codify current best practices in a regulation—even if all were agreed on what those are—simply ties its hands to accommodate future improvements in analytical

methods. Future constraints are just as likely to be frustrating to the regulated community as to the advocacy community.

Pg 35625.

EPA Text: "Benefit-cost analysis (BCA) means an evaluation of the favorable effects of a policy action and the opportunity costs, associated with the action. It addresses the question whether the benefits for those who gain from the action are sufficient to, in principle, compensate those burdened such that everyone would be at least as well off as before the policy. The calculation of net benefits (benefits minus costs) helps ascertain the economic efficiency of a regulation."

EPN Comment: See above comment on this point.

Pg 35626.

EPA Text: "(1) In preparing the BCA, the Agency must include:
(i) A statement of need;
(ii) An examination of regulatory options; and
(iii) To the extent feasible, an assessment of all benefits and costs of these
regulatory options relative to the baseline scenario."

"(2) In preparing the BCA, the Agency must include a statement of need that provides: a clear description of the problem being addressed, the reasons for and significance of any failure of by private markets or public institutions causing this problem, and the compelling need for federal government intervention in the market to correct the problem."

EPN Comment: See above comment on this point.