



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

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U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OA-2018-0107
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted via regulations.gov **Docket ID No. EPA-HQ-OA-2018-0107**

RE: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking process

To Whom it May Concern:

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to the June 30, 2018 *Federal Register* notice “*Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process.*”¹ ASWM represents states and tribes in promoting the sound management of wetlands and aquatic resources. Our technical support of states and tribes includes state dredge and fill permit programs; development of water quality standards for wetlands; Section §401 Certification of federal permits and licenses including Section §404 of the Clean Water Act; and coordination with other state and federal programs impacting aquatic resources as well as water quantity issues related to natural hazards such as floods, hurricanes and wildfires – all related to wetlands, aquatic resources and the programs across agencies that impact them. Thus, although we recognize the broad scope of the proposed Advance Notice of Proposed Rulemaking (ANPRM) extends beyond water resource concerns, our comments are focused largely on the potential impact of the proposed rule on these areas of public policy examining trends in cost benefit analyses not only in EPA water programs but also across agencies such as the U.S. Army Corps of Engineers, the Federal Emergency Management Agency, etc.

The Association of State Wetland Managers does not support the issuance of a rule by EPA requiring and defining methods across all statutes for a cost benefit analysis. OMB application of Executive Order 12291 to EPA rulemaking has ensured cost/benefit analyses are a part of most EPA rules, because most EPA rules are considered significant. Rather, EPA should issue a memorandum from the Administrator’s office to the Regions and States committing EPA to continued use of the *Guidelines for Preparing Economic Analyses* (the Guidelines). The Guidelines provide an appropriate approach to laying out a process for conducting an economic analysis because they allow for greater flexibility than a rule for situations where a specific set of challenges associated with completing a cost benefit analysis has not been anticipated, but needs to be addressed.

¹ U.S. Environmental Protection Agency Guidelines for Preparing Economic Analysis 2010 (updated 2014) available at: <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>

ASWM's comments below respond to the questions posed in Section II of the ANPRM.

A. The nature of potential concerns regarding perceived inconsistency and lack of transparency

While cost benefit analyses have typically evaluated costs to industry and benefits to society, they generally do not identify new costs to states and other entities for implementing new regulations. For example, implementation of the NPDES eReporting rule led to the requirement for municipalities, industries and other facilities to provide the states with of a great deal of new data which in turn resulted in much higher compliance and enforcement costs to the states. These increased costs were not part of EPA's cost benefit analysis. The failure to identify and include a holistic analysis of state costs and benefits in the cost benefit analyses places burdens on state agencies that cannot easily be recovered in the absence of documentation that, in fact, more than minimal costs will be incurred. In the absence of recognition of costs to states, state administrations and their program offices are burdened with independently developing and justifying their own estimates of costs and either absorbing these into their existing budgets (to the potential detriment of carrying out other program activities) or requesting increases in permitting fees, general funds etc. for a regulation that EPA has indicated can be implemented at 'no cost' by the state. The lack of recognition of costs to states in the cost benefit analysis, even when in part considered in the Paperwork Reduction Act analysis, has the unintended consequence of underestimating overall costs and benefits and handicapping implementation by the states. EPA should work directly with state regulatory agencies when performing cost benefit analyses.

B. Potential approaches for increasing consistency and transparency in considering costs and benefits in the rulemaking process

1. What would increased consistency look like?

Flexibility is needed to carry out cost benefit analyses based on the different statutes EPA is charged with implementing. EPA carries out programs to protect human health and the environment and addresses a wide variety of media (air, water, landfills, etc.) and some environmental statutes lay out different economic tests that would conflict with a rule requiring strict consistency across all programs. Further, different statutes address different challenges involving different media and allow for a variety of solutions including combinations of regulatory and non-regulatory actions. For example, Best Available Technology Economically Achievable, as described under Section 304(b)(2)(B) of the Clean Water Act does not require a cost/benefit analysis but rather a cost only analysis. It should not require a cost benefit analysis in response to a new overarching regulation.

To support consistency, it is important to identify benefits as well as costs in ways that make sense in the context of different statutory authorities. Thus, consistent with The Guidelines, considering the costs to wastewater treatment plants for reduced lead in drinking water should require evaluating the human health, social and ecological impacts of continued exposure, as well as the benefits (or cost savings) from reduced exposure, in order to ensure the goals of the statute are achieved. This includes an evaluation of both quantified and monetized costs and non-quantified non-monetized costs). This approach is consistent with Executive order 12866.

It makes sense to adopt common definitions for economic terms and factors except for those specified by statute, provided EPA gives consideration to how those terms are used. For example, 'benefit' has one meaning for public health and another meaning for ecological health

(wetland acres restored, decreases in fish mortality). Many of these definitional issues are currently addressed in The Guidelines.

For the reasons discussed above, a regulation on how to carryout cost benefit analysis applied to a diverse variety of statutes would likely lead to inconsistency rather than consistency. In other words, adherence to the lowest common denominator in a regulation may not be consistent with the law.

In order to improve on cost benefit analysis approaches and guidance, there are benefits to carrying out analyses of whether cost benefit analyses were correct. This information would support improving future cost benefit analyses for future EPA activities. To achieve this, there should be clear criteria about how to adhere to the baseline that was established, and the costs and benefits considered as well as how to evaluate additional costs and benefits that would have been useful to include for a robust analysis. ASWM opposes retroactively changing cost benefit analysis for existing regulations as a basis for changing regulations. This type of action has the potential to adversely affect investment decisions made by the regulated community, states, and others. Rather, ASWM recommends carrying out this type of analysis to identify potential improvements to The Guidelines every five years.

In addition, it appears that, at least in part, the basis for issuing the ANPRM was in response to public comments that EPA received in the past. We believe a regular five-year review and update of the Guidelines would provide an opportunity for these and other comments to be considered.

EPA should not apply a strict maximum net benefit standard for rulemaking. Although such an approach sounds reasonable, it ignores the uncertainties in cost and benefit analyses. A regulatory approach with the maximum net benefits but the greatest uncertainty may provide less real benefits than an approach that has less net benefits and greater certainty. Also, not all benefits, especially ecological benefits, can be monetized which means that using a strict maximum net benefit standard (which would be based on monetized benefits) would have a bias against regulatory options with many non-monetized benefits. In recent years ASWM has published two reports examining how ecosystem valuation can be applied to wetlands: 1) A Comparative Analysis of Ecosystem Service Valuation Decision Support Tools for Wetland Restoration (2016) https://www.aswm.org/pdf/lib/ecosystem_service_valuation_032116.pdf; and 2) Ecosystem Service Valuation for Wetland Restoration (2014) https://www.aswm.org/state_meeting/2014/ecosystem_service_valuation_for_wetland_restoration.pdf.

Economic analyses should consistently consider all (both direct and indirect) costs and benefits related to a rulemaking. As stated in the Guidelines:

An economic analysis of regulatory or policy options should present all identifiable costs and benefits that are incremental to the regulation or policy under consideration. These should include directly intended effects and associated costs, as well as ancillary (or co-) benefits and costs.

For EPA to consider only the costs for regulatory actions would be like a homeowner considering only the costs of installing a new roof and ignoring the improvement in the overall value of the house as well as the improved quality of living derived from residing in a house that doesn't leak when it rains. Therefore, the costs of a rule should not be limited to the cost of compliance but should also include human health and ecosystem benefits as well as the number and type of jobs created and increased revenues of businesses that could benefit such as

companies that provide pollution control services. In recent years studies have indicated that the benefit of job creation arising from pollution prevention approaches is significant¹. In addition, when compliance approaches for a specific pollutant also reduce the emissions of other harmful pollutants, there is a benefit to public health and the environment that should be attributed to the rulemaking. A benefit of this approach is that it evaluates the potential of the proposed rule to reduce the need for other rulemakings to address those ancillary pollutants.

It also makes sense for economic analyses to consider compliance times in a rulemaking. Currently, the compliance dates in proposed rules appear to be selected ad hoc, without consideration of the actual necessary time to allow the regulated community to smoothly plan for and carry out pollution abatement investments. Having a standardized approach for setting compliance dates would provide for more consistency in this area.

EPA should not consider the costs and benefits of the cumulative body of regulations in its economic analyses. It is generally impractical, if not impossible, to determine the baseline date from which such analysis would be conducted. As an example, for Clean Water Act effluent guideline rulemakings, would such an analysis be conducted from: 1) the date preceding the adoption of the Clean Water Act, 2) the date of adoption of Best Practical Technology, or 3) the date of adoption of Best Available Technology Economically Achievable?

2. What would improved transparency look like?

EPA currently has Information Quality Guidelines compliant with the 2001 Data Quality Act, which require transparency for all information disseminated by EPA, including economic analyses. Thus, economic analyses conducted by EPA should specify the methodological process and data that EPA used in the analysis.

Where EPA uses external party information in its economic analyses, EPA should only use such information when it specifies the type of data used; the methodological process; and provides the results of external peer review on both the methodology and results. EPA should not be prohibited from using external party information when that party does not provide the data used in its analyses but should consider the unavailability of such data as part of the uncertainty discussion on the economic analysis.

EPA should not be constrained from using an external study or data based solely on the date of such study or data, especially when such study or data may be the only relevant one available. Instead, EPA should explicitly discuss the age of the study or data in the uncertainty discussion

¹ The impacts of environmental regulations on competitiveness http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/11/Impacts_of_Environmental_Regulations.pdf
Energy Efficiency as a Pollution Control Technology and a Net Job Creator under Section 111(d) Carbon Pollution Standards for Existing Power Plants https://www.edf.org/sites/default/files/edf_laitner-mcdonnell-energy-efficiency-as-a-pollution-control-technology.pdf
Job Creation from Gulf Coast Wetlands Restoration <http://www.mississippiriverdelta.org/files/2012/07/Mather-Economics-Job-Creation-from-Gulf-Coast-Wetlands-Restoration.pdf>
The Economic Case for Restoring Coastal Ecosystems https://www.americanprogress.org/wp-content/uploads/2014/04/CoastalRestoration_report.pdf
Restoring Coastal Ecosystems Creates More Jobs Than Offshore Oil Development <https://thinkprogress.org/restoring-coastal-ecosystems-creates-more-jobs-than-offshore-oil-development-ad7304a3bb80/>
Investing in nature: Restoring coastal habitat blue infrastructure and green job creation <https://www.sciencedirect.com/science/article/pii/S0308597X12001182>

of the economic analysis. In this way, EPA can consider all relevant information and provide an assessment on the use of aged data and studies.

EPA should not be constrained from using business confidential information in conducting an economic analysis. Sometimes the only source of relevant information on treatment costs or industrial process changes is from the regulated community, and at times that information is confidential to the business. EPA currently has stated procedures for how it uses that information, and what parts of that information can be made transparent. EPA should continue those processes, including disclosing in rulemaking when such business confidential information is used.

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?

EPA should not require a systematic retrospective review as part of new rulemaking. To conduct such a review means determining the baseline date from which such analysis would be conducted, and that can be impractical as discussed above. Instead, EPA should commit to reviewing the Guidelines every five years and update it to reflect new economic methods. This approach would keep EPA cost benefit analysis approaches up-to-date. This should be undertaken in consultation with the state regulatory agencies. In addition, after EPA conducts its review, any change to its guidance should be peer reviewed and available for public comment.

C. Potential for issuing regulations to govern EPA's approach in future rulemakings

As discussed previously, ASWM supports the EPA issuance of a Memorandum from the Administrator which states that the EPA shall follow its own guidance. Guidance lays out a process for conducting an economic analysis but allows for flexibility when the available data are insufficient to precisely follow the guidance. ASWM does not support creation of a cost benefit analysis rule to govern future rulemaking.

IN CLOSING

ASWM appreciates the opportunity to review and comment on this ANPRM. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please contact me should you wish to discuss these comments.

Sincerely,



Jeanne Christie
Executive Director

CC: ASWM Board of Directors