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Elizabeth Kopits
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Aug. 13, 2018

RE: Docket ID No. EPA-HQ-OA-2018-0107 Advance Notice of Proposed Rulemaking: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process

Ms. Kopits,

I am writing on behalf of the Pennsylvania Chamber of Business and Industry (PA Chamber), the largest, broad-based business advocacy organization in the Commonwealth of Pennsylvania, in response to the Environmental Protection Agency's advance notice of proposed rulemaking that would establish by regulation how to provide consistent and transparent consideration of costs and benefits to future rulemakings (Docket ID No. EPA-HQ-OA-2018-0107). The membership of the PA Chamber constitutes nearly 10,000 member companies of all sizes and commercial and industrial categories. As a matter of policy, the PA Chamber advocates for environmental laws, regulations and policies that:

- are based on sound science and a careful assessment of environmental objectives, risks, alternatives, costs, and economic and other impacts;
- set environmental protection goals, while allowing and encouraging flexibility and creativity in their achievement;
- allow market-based approaches to seek attainment of environmental goals in the most cost-effective manner;
- measure success based on environmental health and quality metrics rather than fines and penalties; and
- do not impose costs which are unjustified compared to actual benefits achieved.

We believe that that environmental excellence and economic growth are mutually-compatible objectives, and that environmental and natural resources laws and programs should be framed and implemented to concurrently meet these twin objectives. As such, we support EPA's objectives as outlined in the ANPR, and will support a full rulemaking proceeding to establish how to consider costs and benefits. We recognize that the guiding statutes, such as the Clean Water Act and the Clean Air Act, contain, both between and among them, varying degrees of how and to what extent the agency must consider economic factors in rulemaking. As such, we encourage the agency to proceed with separate rulemakings to establish a transparent, consistent approach to the consideration of costs and benefits for each of the acts – that is, the agency ought to first craft a targeted, thoughtful approach guiding future rulemakings to implement the Clean Air Act, and then, second or concurrently, establish a similar approach for the Clean Water Act.

We also recognize that case law constrains the agency in implementing certain provisions of the Clean Air Act – most notably, the Supreme Court's 2001 decision in the *Whitman v. American Trucking* case. This case involved a challenge from industry to EPA's 1997 National Ambient Air Quality Standards for ozone and particulates. The Court found that Section 109 of the Clean Air Act prohibited EPA from considering

economic costs in establishing NAAQS – only health impacts alone may be considered, and the standards should be set at levels requisite to protect the public health “with an adequate margin of safety.” However, EPA is not prohibited from considering costs in regulations to implement NAAQS, nor to implement other sections of the Clean Air Act. As the Supreme Court also made clear in the 2015 decision in *Michigan v. EPA*, involving implementation of Section 112 of the Clean Air Act via a mercury rule for power plants, that EPA must consider costs prior to making a decision to regulate existing electric generating units. The Court’s majority opinion also viewed with some measure of skepticism claims that any measure of regulation that has a net benefit is appropriate, noting that a hypothetical rule that costs \$11 billion with a net public health benefit of \$5 million “would not by itself make regulation appropriate.” While the opinion does not clearly ascribe to EPA a manner in which to account for costs and benefits, it is clear from the opinion that EPA is in need of guidance for future rulemakings, and thus a regulation establishing how costs and benefits should be considered is appropriate and necessary.

As EPA works on crafting such a rulemaking, as is our hope, we encourage the agency to contemplate whether future air quality rulemakings that deal with NAAQS criteria pollutants should consider any public health benefit at all from the reduction of those emissions from sources that are in or downwind of areas that are in attainment. After all, NAAQS standards are to be established to be protective of public health plus an adequate margin. If emissions of criteria pollutants are further reduced below this threshold, is there any additional public health benefit?

In addition, while there has been a considerable amount of controversy and litigation around specific rules, one element of federal environmental rulemaking has been left out of the conversation – and that is the burden for state and local agencies to implement these rulemakings (in addition to implementing state environmental law, which in Pennsylvania’s case is often more expansive than federal requirements). While EPA in past administrations has been wont to hand down significant new rulemakings to state agencies to administer, support in the form of increased grants and funding has not followed in a proportional manner. Instead, the burden to implement these rules is then most often carried directly by the regulated community in the form of higher permitting fees – to say nothing of the delays in major projects that occur as federal regulators second-guess the work of state agencies. With this in mind, we encourage EPA, in its rulemakings to establish how costs and benefits are considered, to codify a requirement that it must, to the greatest extent practical, estimate the expected costs for state agencies to implement the rule and to what extent there is a gap between that cost and existing resources – and, if such a gap exists, how EPA intends to fill it.

We also encourage EPA to establish in its cost-benefit rulemaking requirements that the supporting data and science used to justify the rulemaking be made public and transparent, so that the public and all interested stakeholders are on an even playing field with respect to available information informing the proposal.

These are but a few suggestions to inform the agency’s thinking on this matter, and we appreciate your consideration of them. We look forward to continuing to engage with the agency on this matter as it works to establish a more open, transparent and consistent approach to implementing the nation’s environmental laws.

Sincerely,



Gene Barr
President and CEO
Pennsylvania Chamber of Business and Industry