U.S. Environmental Protection Agency

Public Hearing on the Proposed "Strengthening Transparency in Regulatory Science" Rule

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Good day. My name is Jodi Feld; I am Chief Scientist with the New York Office of the Attorney General's Environmental Protection Bureau. I am one of seven full-time scientists at the office; the only state Attorney General's office in the nation that employs on-staff scientists.

On behalf of New York Attorney General Barbara D. Underwood, I thank you for the opportunity to speak on the proposal by the Environmental Protection Agency (EPA) to limit use of science by the Agency in developing regulations.

While Attorney General Underwood with other Attorneys General will be submitting extensive, detailed comments on the proposal at a later date, I would like to provide brief comments on it today on her behalf.

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Ostensibly proposed to strengthen the foundation of EPA's regulatory actions, the "Strengthening Transparency in Regulatory Science" proposal would do the opposite. It would exclude from EPA decision-making relevant, probative scientific studies, models, and other information that have been validated by peer review simply because not all underlying data are available to the public.

The Office of the New York Attorney General strongly opposes the proposal. It is vague, poorly reasoned, deeply flawed, and violates fundamental legal requirements for a valid rulemaking.

The proposal broadly and squarely conflicts with core EPA statutory duties, violating the very federal laws the Agency is required to uphold.

Moreover, it is bad science. Owing to its total absence of independent scientific input, the proposal departs abruptly from the best practices of the scientific community and ignores the well-established reasons why public sharing of all study data is not possible.

The result of the proposed rule would be to profoundly weaken EPA's science, its regulatory decision-making, and, ultimately, its protection of public health and the environment in New York and elsewhere across the nation.

Congress and the courts have rejected virtually identical efforts to limit EPA's use of science. We urge EPA to abandon this damaging, misguided effort as well.

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The Proposed Rule is Bad Science

As mentioned previously, as far as we are able to determine, the proposed rule was developed with a total absence of independent scientific input. It is perhaps unsurprising, then, that as a scientific matter; the rule also makes very little sense.

The fundamental premise of the proposed rule is that only studies for which the underlying data are publicly available are valid for decision-making.

However, the proposal offers no rationale for this premise, nor evidence that EPA's current approach to selecting studies for decision-making is resulting in scientifically unsound regulations – or those that are overly protective of public health and the environment.

Hence, at its core, the proposal is a solution in search of a problem.

Enforcing "transparency" as the paramount determinative of scientific validity at EPA would represent an abrupt and unprecedented break from well-established best practices of the scientific community.

The scientific community recognizes what the proposal ignores: that there are often very good reasons – such as the protection of personal privacy and confidentiality, and proprietary interests and property rights – why some research data simply cannot be made fully available to the public.

Within the scientific community, the validity of research are judged on multiple grounds, including how well studies are designed, how clearly data are collected, how carefully analyses are described, and how thoroughly findings of related studies are cited.

In other words, within the scientific community, studies are validated through rigorous expert peer-review – they are not summarily judged invalid and discarded simply because all underlying data cannot be fully shared.

The Proposed Rule Would Directly Harm States and our Residents

EPA asserts that the proposed rule would not affect states, so there are no federalism implications. Nothing could be further from the truth.

EPA standards and regulations are of fundamental importance to states, and actions that affect these standards and regulations directly impact us.

For example, EPA standards – such as National Ambient Air Quality Standards – not only form the backbone of New York's efforts to ensure the quality of our air, water, and

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land, and protect the health, safety, and welfare of our residents, but also serve as a backstop to prevent pollution from out-of-state sources from undercutting our efforts.

Further, many states' environmental laws and regulations explicitly adopt EPA standards, or at the very least, require an express justification for any deviation.

Even those states – such as New York – that are not statutorily required to apply federal standards may not always have the institutional capacity to develop their own standards and thus, must rely on the standards set by EPA.

As such, the proposed rule – which would undermine EPA standards and regulations by undermining their scientific basis – would likely have direct, damaging impacts on New York and other states' ability to protect the health and environment of their residents.

These impacts would be felt most starkly by our most vulnerable – the young, the elderly, and the sick – and those living in communities that have borne a disproportionate share of environmental hazards, including communities of color and low-income communities.

The Proposed Rule Is Unfounded and Unsupported, and Contrary to Federal Law

The proposed rule's direct and damaging impact on New York and the residents of our state is aggravated by the proposal's failure to meet the most fundamental of legal requirements for a valid rulemaking.

The proposal is exceedingly vague, creating many more questions than it answers. For example, the actual parameters of the rule are unclear, the alternatives under consideration are open-ended, and critical information, such as its actual cost, is entirely missing.

Further, few of the statutory provisions cited in the proposal actually support EPA's ability to pick and choose among valid scientific information, studies, and techniques in its formation of environmental standards and modeling. None authorizesfba precluding consideration of probative, relevant studies.

In fact, no federal environmental statute so much as suggests that EPA can ignore the "latest" or "best" or "appropriately designed and conducted" scientific studies whenever the underlying data are not public.

By limiting EPA's access to the latest, best available, and generally accepted science, the proposed rule would violate the very federal laws that EPA is required to uphold.

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For example, the Safe Drinking Water Act – which, among other things, serves to protect children from lead poisoning – mandates that EPA develop rules based on "the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."

Besides the Safe Drinking Water Act, the proposal violates specific provisions of the Clean Water and Air Acts, CERCLA, TSCA, and EPCRA, at the very least.

Disturbingly, the proposed rule's only exception to the exclusion of studies for which underlying data are not publically available is wholly at the EPA Administrator's discretion. The rule would allow the Administrator – without standardized, objective, or even science-based criteria – to determine on a case-by-case basis that compliance is "impracticable" where making data publically available is "not feasible."

Clearly, such an insular, open-ended exemption "process" is ready-made for arbitrariness, if not misuse and abuse.

Independent Scientific Organizations Do Not Support the Proposal

The strongest indicator that the proposal is flawed as a matter of science is the overwhelmingly negative reception it has received from the scientific community.

In fact, we are not aware of a single major independent scientific organization that has expressed support for the proposal.

The American Association for the Advancement of Science stated, "[t]his proposal appears to be an attempt to remove valid and relevant scientific evidence from the rule-making process."[1]

The editors of the several prestigious journals, including Science, Nature, and the Proceedings of the National Academy of Sciences, issued a joint statement in response to the proposal in which they stated, "[e]xcluding relevant studies simply because they do not meet rigid transparency standards will adversely affect decision-making processes."[2]

Incredibly, EPA's own scientific advisors – the Scientific Advisory Board – were not consulted by the Agency on the rule. (SAB members became aware of the rule only when it was announced by then-Administrator Pruitt announced at a press event).

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[1] American Association for the Advancement of Science. AAAS Statement on EPA Administrator's Plan to Disallow Use of Scientific Evidence in Decision-Making. (April 20, 2018).
[2] Jeremy Berg, Philip Campbell, Veronique Kiermer, Natasha Raikhel, and Deborah Sweet. Joint Statement on EPA Proposed Rule and Public Availability of Data. Science. (April 30, 2018).

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The SAB subsequently wrote to the then-Administrator observing that the proposed rule deals with "a number of scientific issues that would benefit from expert advice and comment from the SAB."[3]

The advisory group's letter urged the Agency to "request, receive, and review" scientific advice from the SAB before moving further ahead with the proposed rule.

The Proposal Should Be Withdrawn And EPA Should Consult With Scientific Organizations On Agency Science Needs

The State of New York believes that the proposal is vague, ill-supported, and deeply flawed; it broadly and squarely conflicts with core EPA statutory duties, and is directly contrary to federal law.

Coupled with the Administrator's directive prohibiting EPA grant recipients from serving on scientific advisory panels, the proposal appears to reflect a deliberate effort to undermine well-founded Agency scientific practices – which is particularly egregious given EPA's critical mission and its responsibilities to the residents of New York and other states across our nation.

In May, the New York Attorney General, joined by seven other Attorneys General, wrote to then-Administrator Pruitt, expressing strong opposition to the proposed rule and calling for it to be withdrawn.

Today, the State of New York renews our call to withdraw the proposed rule to Acting Administrator Wheeler.

After withdrawing the proposed rule, if the Acting Administrator is genuinely interested in the "transparency" of science at EPA, he should familiarize himself with the many ongoing efforts within EPA, the federal government, and the scientific community itself to promote transparency and data sharing. He should then work with independent scientific organizations – such as the National Academy of Sciences – to both support and build on these efforts.

On behalf of Attorney General Underwood, I thank you for your time and attention, and for providing me an opportunity to speak on this important matter.

[3] Letter from SAB Chair Michael Honeycutt to Administrator Pruitt (June 28, 2018).

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