From: Malave, Maria

Sent: Wednesday, May 16, 2018 02:35 PM

To: Mia, Marcia

Subject: RE: EPA Science Plan Skirted Usual Process, Raising Finalization, Legal Doubts | InsideEPA.com

Marcia,

Thanks for sharing such relevant article.

Maria

From: Mia, Marcia

Sent: Tuesday, May 15, 2018 8:22 PM

To: Ayres, Sara <Ayres.Sara@epa.gov>; Cox, John <cox.john@epa.gov>; Lischinsky, Robert <Lischinsky.Robert@epa.gov>; Malave, Maria <Malave.Maria@epa.gov>; Owens, Katharine <Owens.Katharine@epa.gov>; Sanchez, Rafael <Sanchez.Rafael@epa.gov>; Yellin, Patrick <Yellin.Patrick@epa.gov>

Subject: FW: EPA Science Plan Skirted Usual Process, Raising Finalization, Legal Doubts | InsideEPA.com

FYI, regarding ADP.

Marcia B Mia, Acting Chief

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Office of Compliance

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U.S. Environmental Protection Agency

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From: Vyas, Himanshu

Sent: Tuesday, May 15, 2018 6:04 PM

To: Topinka, Natalie <topinka.natalie@epa.gov>; Beeler, Cindy <Beeler.Cindy@epa.gov>; Mia, Marcia <Mia.Marcia@epa.gov>; Lawrence, Rob <Lawrence.Rob@epa.gov>; Kaleri, Cynthia <kaleri.cynthia@epa.gov>; Durkee, Stanley <Durkee.Stan@epa.gov>; Sorrell, Virginia <Sorrell.Virginia@epa.gov>; Branning, Amy <Branning.Amy@epa.gov>

Subject: EPA Science Plan Skirted Usual Process, Raising Finalization, Legal Doubts | InsideEPA.com

The commentary on the formal rulemaking ADP will be very familiar territory for you

all…not that the uptiering has helped matters any in the "Policy Rule" segment of NSPS OOOOa reconsideration.

https://insideepa.com/daily-news/epa-science-plan-skirted-usual-process-raising-finalization-legal-doubts

Daily News

EPA Science Plan Skirted Usual Process, Raising Finalization, Legal Doubts

May 14, 2018

The Trump EPA's controversial plan requiring use of publicly available research to justify rules appears to have been developed by political appointees without following the agency's usual action development process (ADP) for crafting important rules, leaving career staff and program offices out of the loop but raising doubts about how it will be finalized without them.

Sources tell Inside EPA that the science transparency rule is categorized as a "tier 3" measure, the lowest of three tiers in EPA's ADP, and therefore received the least scrutiny in the intra-agency review process before rules or actions are made public.

But the sources say that the measure appears to have all the hallmarks of a tier 1 rule that requires significant intra-agency review from career staff and others, usually in a special work group. But without their involvement, it is uncertain how the agency will be able to review and respond to the thousands of comments the agency is likely to receive on the draft rule.

The tier 3 status "means it gets the lowest amount of attention in terms of review and management attention. Tier 1 and 2 have to go through a formal workgroup process," one agency source says. "You can slip a tier 3 out without getting the sign off of all the offices."

A second source says that one of the reasons the rule needs a regular staff work group is that each action's work group is charged with reviewing and determining how to address issues raised in public comments.

"It's very unclear" how the rule will move forward, the second source says, "because none of the career staff was involved in its writing."

The source adds that by not following the usual ADP, the rule may also face legal vulnerabilities. "To be defensible, actions need to go through all of the steps to provide the judge" that defense, the source adds.

EPA spokespeople did not respond to a request for comment by press time.

EPA's proposed rule, signed by Administrator Scott Pruitt April 24, generally bars the use of studies that do not disclose underlying data but also provides broad authority for the administrator to waive the requirement.

The measure cleared formal White House review, a process that usually take weeks or months, in less than four days, according to the Office of Management and Budget.

Critics charge it is intended largely to block the use of long-standing confidential medical studies that the agency has relied on when setting strict air quality and other health-based standards, though the chemical and pesticide industries also fear it could

block the use of confidential business information.

Many observers have warned the measure faces significant legal hurdles, including vague or undefined terminology, statutory mandates likely at odds with the rule and potential violations of administrative law.

The proposal was published in the Federal Register April 30 for a 30-day public comment period, though environmentalists and states have urged the agency to withdraw the proposed rule to consult with the National Academy of Sciences or, in the alternative, to extend the comment period by as much as 150 days to allow for such NAS consultation.

Action Development Process

Both agency sources say that the proposed rule appears to have skirted criteria in internal agency guidance that clearly places the measure outside of the tier 3 category.

The criteria are spelled out in a guidance document, "Guidance for EPA Staff on Developing Quality Actions," that was last updated in March 2011.

The document describes the ADP as "a method for producing quality actions. It serves as a comprehensive framework to ensure the use of quality information to support our actions and an open process. It also makes certain that scientific, economic, and policy issues are adequately addressed at the appropriate stages in action development. It provides opportunities for senior management to get involved early and to provide guidance and direction to staff at key points in the process."

The document also explains the criteria for determining an action's tiering. The document describes tier 1 rules as "Administrator's Priority Actions" which "include top actions that demand the ongoing involvement of the Administrator's office and extensive cross-Agency involvement on the part of the [assistant administrators (AAs)/regional administrators (RAs)]."

A chart in the ADP adds that staff should deem an action tier 1 if "science issue(s) are precedent setting and controversial; it is economically significant per E.O. 12866 (i.e., > $100 million). It should be placed in Tier 1 unless the program office can justify placement in Tier 2; economics issue(s) are precedent setting and controversial."

The chart also lists factors to review when considering placing an action in tier 1 status, among them "potential for major or precedent-setting implementation issues; potential for major cross-Agency, cross-media, or inter-agency controversy; ... highly controversial in terms of external interest; ongoing, formal involvement of the Agency's highest level of management (Administrator, Deputy Administrator) is necessary or desired; presents a significant opportunity for the Agency to advance the Administrator's priorities."

By contrast, tier 3 actions are called "Lead Office Delegation." The guidance describes such actions as "those for which there is little or no need for cross-Agency participation. A workgroup may not be needed. For the most part, lead offices have the flexibility to design their own processes. While there are few system requirements, the lead AA/RA is responsible for cross-Agency staff linkages and external stakeholder involvement to produce a quality action."

The guidance chart adds that actions should be considered tier 3 if "it generally involves the routine use and application of science; use of science is new, but minor and not controversial; use of economics is well known and accepted; it generally involves the routine use and application of economics; use of economics is new, but minor and not controversial."

The second agency source explains that EPA has a regulatory steering committee that manages the ADP process. Generally, those authoring the action get to suggest its

tiering, though the first source says that the ultimate decision is made by EPA's policy office.

Essentially, the second source says, the title of the individual signing off on the action signifies its tiering. "If the administrator signs, it's tier 1. If an AA or office director signs, it's tier 2."

Pointing to Pruitt's closed-press April 24 signing ceremony for the science transparency proposed rule, the source adds, "This is clearly tier 1."

"Tier 3 is really low. With something of [the science transparency rule's] nature, it's laughable," the second source says. It probably will be asked to be uptiered." -- Maria Hegstad (mhegstad@iwpnews.com)

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