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Testimony of Northeast States for Coordinated Air Use Management
On Notice of Proposed Rule: Strengthening Transparency in Regulatory Science
[EPA–HQ–OA–2018–0259]
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Washington, D.C.

My name is Paul Miller, and I am the Deputy Director of the Northeast States for Coordinated Air Use Management (NESCAUM). NESCAUM is the regional association of air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

I offer today NESCAUM's comments on EPA's Proposed Rule "*Strengthening Transparency in Regulatory Science*." These comments reflect the majority view of NESCAUM members, and individual members may hold some views different from the NESCAUM states' majority consensus.

We present this testimony today out of our concern that should this proposal lead EPA to not fully consider the best available science in rulemakings, it will endanger public health and the environment.

The EPA invokes "strengthening transparency" as a primary driver for this proposal, but fails to describe how a perceived lack of transparency has hampered past rulemakings. It provides no examples of where "EPA has not previously implemented these policies and guidance in a robust and consistent manner" nor what are the specific "agency culture and practices regarding data access" that require changing. The Agency also provides no cost analysis of the proposal.

Without additional clarity from EPA, we are having difficulty identifying the problem EPA seeks to address. Therefore, for the following reasons, we request that EPA withdraw this Proposed Rule.

First the proposal is too vague as written to provide the public with a meaningful opportunity to comment.

The Proposed Rule lacks credible specificity and is overly vague in its terms and scope. Under the Administrative Procedures Act (APA), EPA is required to articulate the specifics of its proposed rulemakings in a manner that provides a valid opportunity for public comment.

In this proposal, however, EPA solicits comment across a long list of topic areas, but fails to provide the Agency's own "sufficient detail and rationale" [APA § 553(b)(3)] on the solicited comment areas. We are left in the position of speculating on EPA's views and on those of other commenters that would presumably shape EPA's final rule. It is well settled law that this approach fails to provide adequate notice for informed public comment.

Second, EPA must describe how the proposed text in sections 30.5, 30.7, and 30.9 affect current practice.

Sections 30.5 and 30.7 of the Proposed Rule respectively say: "the Agency shall ensure that dose response data and models underlying pivotal regulatory science are publicly available in a manner sufficient for independent validation," and "EPA shall conduct independent peer review on all pivotal regulatory science used to justify regulatory decisions[.]" EPA does not describe its approaches for "independent validation" and "independent review."

Furthermore, the Proposed Rule in section 30.5 also includes qualifying language that "The agency shall make all reasonable efforts to explore methodologies, technologies, and institutional arrangements for making such data available before it concludes that doing so in a manner consistent with law and protection of privacy, confidentiality, national and homeland security is not possible." EPA provides no examples of where and how, in the agency's view, past rulemakings specifically failed to make these efforts, and how EPA would change past practice in this context.

Adding to the vagueness of sections 30.5 and 30.7, section 30.9 would provide the Administrator with broad authority to exempt regulatory decisions from the proposed disclosure provisions "on a case-by case basis if he or she determines that compliance is impracticable." The Proposed Rule fails to provide specific criteria for determining when "compliance is impracticable." Lacking clear guidelines for transparent decision-making, the Administrator's discretion would appear to be unbounded in application and potentially based on haphazard non-transparent rationales.

Third, EPA has provided no meaningful cost estimate for the Proposed Rule.

The costs are likely quite significant, however, based on a Congressional Budget Office (CBO) cost estimate of a similar legislative proposal in Congress.[11] From that analysis, costs could range between a few million dollars to more than one hundred million dollars per year. In addition to lack of cost information, EPA offers no accounting of foregone benefits should a broad application of this proposal limit the use of the best available science in setting public health standards and preventing adverse health outcomes.

In conclusion, EPA's proposal has far-reaching consequences on the future use of science by the agency. These consequences, however significant they may be, are indeterminate in light of the proposal's vagueness. The proposal fails to clearly articulate the problem EPA seeks to address, the specific Proposed Rule requirements, and its costs and benefits. These are well understood and basic elements that federal agencies must include to ensure informed public comment. Given that these elements are completely missing from this proposal, EPA should withdraw it.

Thank you.

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[11] Congressional Budget Office, "Cost Estimate: H.R. 1430 Honest and Open New EPA Science Treatment (HONEST) Act of 2017" (March 29, 2017), at https://www.cbo.gov/publication/52545 (accessed May 14, 2018).