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Administrator Andrew Wheeler
1000 Pennsylvania Avenue, NW
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Washington, DC 20460

Re: Supplemental Notice of Proposed Rulemaking: Strengthening Transparency in Regulatory Science, 85 FR 15396 Docket EPA-HQ-OA-2018-0259 – Request for Extension of Comment Period

Dear Administrator Wheeler:

On March 3, 2020, the U.S. Environmental Protection Agency (EPA) announced that it was issuing a supplemental notice of proposed rulemaking to the Strengthening Transparency in Regulatory Science proposal issued in April 2018. The supplemental notice was published in the Federal Register on March 18, 2020. Despite the complexity of the supplemental notice, EPA is allowing the shortest public notice period legally permitted under the Administrative Procedure Act by requiring comments by April 17, 2020.

This letter, on behalf of Environmental Protection Network (EPN), requests an extension of time to file comments on the supplemental notice. We have two reasons. The first is the uncertainty in all aspects of national life caused by the coronavirus disease (COVID-19) and how that impacts our capacity to prepare and file comments. The second is the confusion and ambiguity created by the supplemental notice, which raises a host of complex and difficult legal issues that those commenting must address in this very short time. Accordingly, we seek a 60-day extension of the 30-day comment period, which would begin 90 days after the danger from COVID-19 has been managed sufficiently. Comments would, therefore, be due 90 days after the danger has passed so that we can be sure that the volunteers who do our analytic work are well and available to research, consider and write comments on behalf of EPN. We also request at least three public hearings during that comment period.

We are a virtual organization that depends on volunteers who, for the most part, are retired from EPA and live across the country. We do not know at this time how many of those volunteers might become ill; how many will be called on to attend to children or grandchildren out of school; and how many will be called on to attend to sick spouses or other family.

Also, as elaborated below, not knowing the availability of their personnel to research and write comments, we are aware that organizations with which we work and low-income communities and communities of color could have great difficulty during this time of national emergency putting together complete comments in this brief time period. Similar to our situation, some may be called on to attend to children out of school or to care for sick relatives. This uncertainty hangs over everyone who wishes to file comments.

This, in addition to the complexity of the issues raised by the agency's supplemental notice and the lack of appropriate detail in the notice, means that 30 days for comment is completely inadequate. We note that Executive Branch policy is that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less

than 60 days" (Executive Order (EO) 12866). Because this supplemental notice raises a number of difficult issues, we request an extension of 60 days beyond the proposed comment period of 30 days, and we request that this 90-day period not begin until the end of the current state of emergency.

As is common these days, the supplemental notice cites no exigency to justify an abbreviated comment period. We note the agency's delay of nearly two years after the original proposal to issue this supplemental notice, even though it mostly addresses defects in that proposal that became apparent almost immediately after it was issued. There are numerous reasons beyond the COVID-19 emergency for granting an extension: the uncertain meaning or implications of new provisions in the supplemental notice, how the new and older provisions will interact, and the unprecedented proposed reliance on the federal Housekeeping statute (5 U.S.C. § 301) as legal authority for limiting the use of science in rulemaking (and in an unspecified range of other circumstances) under eight EPA statutes.

COVID-19

Most obviously, prescribing an abbreviated comment time, the bare legal minimum allowable for any rulemaking for this complex and ambiguous proposal during the current national emergency, will make providing timely comments uniquely challenging and burdensome. That alone should compel an extension in light of the goals adopted in EPA's 2018-2022 Strategic Plan "to increase transparency and public participation" and "provide effective platforms for public participation and meaningful engagement." Those would seem to require, at a minimum, that EPA accommodate public participation in this rule by adjusting the comment period to give the public the same opportunity it has historically had to comment on comparable rules in normal times (i.e. when there is no ongoing public health emergency), which has been 90 days.

Beyond the particular circumstances of EPN members listed above, an abbreviated comment period during this emergency will impose particular hardships on numerous potential commenters. We submit this request on our own behalf and on behalf of persons in low-income communities and communities of color.

First, it will make commenting much harder for public health workers who have important roles in responding to the emergency. It is both impractical and unwise for them to take time away from their public health protection responsibilities to review and comment on this notice. The abbreviated comment period effectively forces such public health workers to forfeit their opportunities to comment on a matter of great public health concern due to their other more pressing duties.

In addition, the burden of an abbreviated comment period during a health emergency will create logistical challenges that will fall particularly heavily on communities with limited internet access, often low-income communities and communities of color. In order to participate at all, people in such communities will need to leave the safety of their homes and go to places that are still open to the public and providing public access, often communal and in shared spaces where maintaining adequate social distance may be challenging. We note that across the country, many libraries are closed. As a practical matter, potential commenters likely will need to do this three times: first, to go to a place where there is public access to read the supplemental notice; second, to return to such a place as necessary to undertake research and analysis (and perhaps use the internet to communicate with other interested persons) and to prepare comments; and third, to draft, edit, and then formally submit comments.

In other words, people in communities with limited internet access will need to choose between maximizing their physical safety and commenting on this rule. Creating such a dilemma for potential commenters—or

imposing such a burden on the ability to comment—would be intolerable in any event, but creating such a dilemma for communities with limited resources, including minority and low-income communities, is reprehensible. Instead of facilitating participation in decision-making, the abbreviated comment period makes commenting dangerous and imposes that danger on communities least able to bear it. No one should be forced to forfeit their right to comment to ensure their personal safety.

Until commenting can be done safely, it should not be required at all. And it is evident that creating a burden focused on persons without private internet access, which typically means low-income communities and communities of color, clearly violates the policy commitment to environmental justice set forth in EO 12898. Under the circumstances, EPA has both a legal duty and a moral obligation to extend the comment period.

Complex Legal and Factual Issues

Even a cursory review of the supplemental notice demonstrates any number of unique legal and factual issues that must be unraveled in order to comment adequately. To illustrate, EPA proposes to expand the scope of its newly proposed definition beyond the rulemaking context, and suggests "tiering" use of science, without fully explaining what, in practical terms, either of these would mean or what their impacts would be.

We also note the peculiar and unprecedented reliance on the federal Housekeeping statute (5 USC § 301) as authority for this rule establishing what appear to be binding requirements on regulatory decision-making. Multiple subsidiary issues flow from this assertion that are difficult to sort out properly. Aggravating the uncertainty, the rule is evidently intended to apply to—and impose substantive limits on—the use of science in rulemaking under no fewer than eight environmental laws[1], and in unspecified other contexts. Responsible comments will need to consider the implications of rule applicability in each of these contexts.

Commenters will also need to address EPA's novel claim that it can use the Housekeeping statute based solely on its unilateral and unsupported assertion that this rule only establishes internal agency procedures. Thus, EPA claims the rule does "not regulate the conduct or determine the rights of any entity outside the federal government." Nevertheless, in both this supplemental notice and in the original proposal, EPA clearly indicates its intent to "preclude" the use of what it calls non-public science in decision-making. EPA leaves it to commenters to sort out these apparent contradictions and incongruities; to assess the lawfulness and the effectiveness of its attempt to use the Housekeeping statute as authority (perhaps the sole authority; the supplemental notice is unclear on this point) for a rule to govern the use of science in decision-making under, apparently, the eight statutes, although even this is not spelled out that out clearly. Commenters will need to puzzle out the novel questions posed by reliance on the Housekeeping statute and not under the rulemaking authority of any of the other statutes to establish legal standards that govern the use of science under any or all eight statutes.

Other Ambiguous Provisions

Among the other potential sources of confusion and uncertainty is the proposal, or alternative proposal, to assign different weight to scientific information depending on how "public" the underlying information is.

[1] EPA lists the following statutes, here, and in the original proposal: the Clean Air Act; the Clean Water Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Federal Insecticide, Fungicide, and Rodenticide Act; the Emergency Planning and Community Right-To-Know Act; and the Toxic Substances Control Act.

Here, as elsewhere, the supplemental notice seems to suggest that if it asks for comment on an issue, without indicating where it is leaning, anything it does in that regard can be finalized without further public input. This throws a heavy burden on commenters. In some places, the notice seems to treat as an open question whether the rule's requirements should apply only to data generated after the rule is issued, or can preclude use of information generated earlier. But in other places, the supplemental notice seems to suggest it has already resolved this question, for example, in regulatory text that would authorize the Administrator to exempt a study from this rule upon determining that sharing the information is "impracticable" "because the development of the model or data was completed or updated before" the effective date of the rule (supplemental notice § 30.9). That, of course, presumes that without an exemption, such information would be excluded.

Whether the supplemental notice can be characterized as disingenuous or duplicitous or is genuinely confused or uncertain, it certainly does not provide sufficient information to enable commenters to understand the substance and basis of the rule. This confusion imposes a significant burden on potential commenters, who are given only 30 days to try to sort all this out, so that they can raise all potential legal issues with the required clarity and specificity to challenge the rule in litigation.

Programmatic Impacts

Like the initial proposal, the supplemental notice is devoid of any discussion of its potential programmatic impacts. This omission is especially problematic given the supplemental notice's evidently dramatic expansion of scope to include all "influential scientific information," and the use of the Housekeeping statute rather than any substantive rule-making authority to issue the rule (and spell out what statutes it covers). Given the basic purpose of EPA's statutes—to authorize regulations to protect the public health and the environment—one would expect EPA to consider those impacts before adopting a per se rule that dramatically affects such decisions.

A few of the other issues we immediately see that warrant careful analysis include apparent violations of procedural requirements in the rulemaking process. Assuming the Housekeeping statute is not the sole claim of legal authority for this supplemental notice, and other authorities are in play, has the agency improperly avoided various procedural requirements in some of those authorities? One example would be the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which at sec. 25 requires the agency to transmit a copy of all proposed rules to the Departments of Agriculture and Health and Human Services and to the FIFRA Scientific Advisory Panel prior to publication of the supplemental notice for public comment, as well as to the Senate and House Agriculture Committees, and articulates other procedural requirements related to comments from those bodies. None of those requirements appear to have been followed.

We and other members of the public need adequate time to consider the implications of these far-reaching claims, particularly as the agency has provided no help to commenters to assess numerous gaping deficiencies. The agency's failure to conduct this essential task makes informed comment well nigh impossible, but in any case, requires far longer than 30 days to do what was legally incumbent on EPA to have done itself.

A comment period of 30 days would be inadequate in normal times; it is clearly inadequate in a time of national medical emergency. EPN joins many concerned organizations and individuals across the country in urging that the comment period minimally be 90 days, dating from the end of this current state of emergency.

EPN is an organization of over 500 EPA alumni volunteering their time to protect the integrity of EPA, human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide insights into regulations and policies proposed by the current administration that have a serious impact on public health and environmental protections.

Respectfully submitted,

Michelle Roos
Executive Director, Environmental Protection Network