Science Transparency: Not a New Concept for EPA

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"Science and the scientific process must inform and guide decisions ... The public must be able to trust the science and the scientific process informing public policy decisions."

Former EPA Administrator Scott Pruitt introducing the 2018 proposal he championed on “Strengthening Transparency in Regulatory Science”? Nope, this is the opening statement of President Obama's 2009 memorandum on "Scientific Integrity." That Obama-era policy further instructed “[t]o the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.” These fundamental transparency issues, which were not particularly controversial when addressed by the prior administration (or in myriad other incarnations over the past 30 years), are at the core of EPA’s present efforts.

Who doesn't agree with the assertion (this time from the current Science Transparency proposal) that “[e]nhancing the transparency and validity of the scientific information relied upon by EPA strengthens the integrity of EPA’s regulatory actions and its obligation to ensure the Agency is not arbitrary in its conclusions”? Indeed, this principle is neither controversial nor new. Under the Administrative Procedure Act, as the D.C. Circuit held in 1973, "it is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data or data that [in] critical degree, is known only to the agency." Likewise, a decade later the premier regulatory appellate court in the country stated:

In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.

To avoid the "hunt the peanut" game, guidelines adopted by EPA in 2002 to implement the Information Quality Act require that "influential information" be subject to a high degree of transparency, including that findings must be "reproducible" (within a reasonable degree of accuracy) by third parties. Reproducibility by others is a critical check on the quality of the study process and reported data, as well as on the inherent bias (unintentional as it may be) of researchers to find "significant" results.

Curiously, the current EPA proposal omits discussion of the ample existing legal authority specifically related to the transparency and reproducibility of public health research sponsored by the Federal Government. As set forth in OMB guidance for financial assistance to non-Federal entities, federal agencies have unfettered legal authority to “[o]btain, reproduce, publish, or otherwise use the data produced under a Federal award,” or to “[a]uthorize others to receive, reproduce, publish, or

otherwise use such data for federal purposes." In addition, any public health research data (a) produced under a Federal award, and (b) used by the Federal Government in developing agency action that has the force and effect of law, must be released to the public if a request for the data is made pursuant to the Freedom of Information Act (FOIA). (Of course, anyone who has sought such information under FOIA knows well the exemptions/excuses that often are employed to inhibit release of data to which the public has a fundamental right to access. For more, see my previous post addressing privacy concerns: https://www.kelleygreenlawblog.com/2018/06/epa-science-transparency-policy-enable-stakeholder-access-study-data/.)

Because the federal government has sponsored a substantial majority of the public health research conducted in the United States over the past 50 years, the EPA and other agencies are well positioned, using existing legal authority, to facilitate release of public health research data if they are inclined to do so as a matter of policy.