Oral Presentation for Censored Science Supplemental Proposal

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My name is James Goodwin, and I am a Senior Policy Analyst with the Center for Progressive Reform (CPR).

I thank the organizers for holding this shadow public hearing, but I also appear today as a form of protest against EPA for its unconscionable decision to continue working on this dangerous rulemaking at all, let alone in the middle of a massive global pandemic.

I appear today because I am among the few Americans fortunate enough to endure the hardships brought on by COVID-19 and still be able to participate in non-emergency government processes such as these. I also feel obligated to appear because as the father of two young children, I am extremely troubled by the harm this rule might cause to them and others in their generation. And I feel obligated to appear since I have closely studied EPA's claimed legal basis for this contemptible rulemaking.

The failure of EPA to identify a colorable legal basis for this rulemaking is emblematic of this administration's brazen disregard for the rule of law. The original proposal laughably gestures at EPA's various authorizing statutes as legal authority. The ridicule this claim engendered appears to have spurred one of the most significant aspects of the supplemental proposal – namely, the new claim that this rulemaking is authorized by the Federal Housekeeping Statute.

This argument has two critical flaws, though. First, the Federal Housekeeping Statute doesn't apply to EPA – only Executive Departments. Second, even if the statute did apply to EPA, it would not supply the legal basis for something like this rulemaking.

EPA acknowledges that it is not an "Executive Department" but argues that it was nonetheless brought within the scope of the Federal Housekeeping Statute through Reorganization Plan No. 3 of 1970, which created the agency. The essay appended to my oral presentation explains in greater detail why this argument should be rejected. For now, I'll emphasize 2 points:

1. Reorganization Plan No. 3 conspicuously makes no mention of the Federal Housekeeping Statute. Instead, EPA is left to infer a transfer of that authority through a vague "catchall" provision. In essence then, the agency claims Congress implicitly intends for EPA to be considered a department but just hasn't gotten around to officially declaring it.
2. While Congress has updated the list of Executive Departments several times since 1970, it has never included EPA. Most recently it did so with the Department of Homeland Security, which, like EPA, was pieced together from several existing agencies.

Even if the Federal Housekeeping Statute did apply to EPA, it would not supply the authority for something as radical and controversial as this rulemaking. While the appended essay addresses this argument in greater detail, I'll emphasize 2 points now:

1. The censored science rule is a far cry from the kind of modest and non-controversial internal operating procedures that Congress envisioned for the Federal Housekeeping Statute. To wit, the original censored science proposal is so controversial it attracted over 600,000 public comments.
2. Even the Supreme Court case that EPA cites to support its argument that the rulemaking is covered by the Federal Housekeeping Statute, *Chrysler Corp. v.*

Brown, makes clear that the censored science rule exceeds the modest authority that the law provides. Among other things, the Court in *Chrysler Corp.* was troubled by how the rule at issue affected the relationship between the government and private sector entities. Significantly, the operative function of the censored science rule is to affect the relationship between EPA and members of the public. Specifically, it would fundamentally alter how the public participates in the development of new rules by limiting the kinds of views they can share on the scientific basis for those rules.

Today, you will hear many reasons for why EPA should abandon the censored science rule. As I have explained, the lack of a legal basis for the rule provides one more reason.

Thank you for your attention.

Union of Concerned Scientists
Science for a healthy planet and safer world

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The EPA's 'Censored Science' Rule Isn't Just Bad Policy, It's Also Illegal

JAMES GOODWIN, GUEST COMMENTARY, | NOVEMBER 22, 2019, 2:32 PM EDT

The Environmental Protection Agency (EPA) appears poised to take the next step in advancing its dangerous "censored science" rulemaking with the pending release of a supplemental proposal. The EPA presumably intends for this action to respond to criticism of the many glaring errors and shortcomings in its original proposal, hastily released in 2018. Unfortunately, if the leaked version of the supplemental proposal is any indication, the agency is no closer to curing one of the 2018 proposal's biggest defects: identifying a plausible legal authority to issue the rule in the first place. As such, if and when it's finalized, the rule is doomed to easy rejection on the judicial review that is certain to follow.

The censored science rule—perhaps more than any other action of the Trump-era EPA—has come to epitomize the administration's agenda of putting polluter profits ahead of the public interest. The clear goal of this rule—officially known as the "Strengthening Transparency in Regulatory Science" rule—is to make it harder for the EPA to issue effective public health and environmental safeguards by making much of the science that would provide the empirical basis for those safeguards off limits to agency decision-makers, all under the otherwise laudable pretext of

improving scientific integrity. In its desperate flailing to find legal authority for this rulemaking, the EPA has now landed on an obscure law from 1958 known as the "Federal Housekeeping Act." The problem—and no small one at that—is that this law does not cover the EPA, and even if it did, it certainly was not meant to provide a legal foothold for something as extreme as the censored science rule.

The operative provision of the Federal Housekeeping Act reads: "The head of an *Executive department* or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property" (emphasis added). A related law provides a definitive list of the "Executive departments" covered by the Federal Housekeeping Act. The EPA is conspicuously absent from this list. Indeed, it was not then and is not now an "Executive department" of the federal government.

The agency asserts that despite this clear language it is nevertheless covered by the Federal Housekeeping Act. Notably, a 2008 memorandum opinion from the EPA's general counsel concerning an unrelated regulation argues that the agency effectively absorbed the Act's rulemaking authority when the EPA was formally established via what was known as Reorganization Plan No. 3. The Reorganization Plan laid out all the programs and authorities that were being transferred from the Department of the Interior and the Department of Health, Education, and Welfare to the newly formed EPA.

While the Reorganization Plan never directly mentions the Federal Housekeeping Act, the general counsel's 2008 opinion contends that Section 2(a)(9) of the Plan implicitly confers this authority by providing for the transfer of "So much of the functions of the transferor officers and agencies referred to in or affected by the foregoing provisions of this section as is incidental to or necessary for the performance by or under the Administrator of the functions transferred by those provisions or relates primarily to those functions."

This argument—that Congress intends for EPA to be considered a department but just hasn't gotten around to officially declaring it—is unpersuasive. For one thing,

Congress has amply demonstrated that it knows how to update the list of "Executive departments" to include newly created agencies. Much like the EPA, the Department of Homeland Security was created through the transfer and consolidation of various existing programs and authorities spread across several federal agencies into a single new agency. Like Reorganization Plan No. 3, the Homeland Security Act of 2002, adopted in response to the September 11th terrorist attacks, lays out in exquisite detail those functions and authorities that were being transferred to the new Department of Homeland Security from where they had previously existed at agencies like the Departments of Agriculture, Energy, and Treasury.

Significantly, in transferring these functions, the Homeland Security Act also specifically provides in Section 101 that the Department of Homeland Security was being "established . . . as an executive department of the United States within the meaning of [the title of the U.S. code that contains the Federal Housekeeping Act]." Congress has had nearly 50 years to take a similar step with regard to the EPA, and it has not done so despite the many obvious opportunities. For example, Congress could have done so when it updated the list of "Executive departments" to reflect the 1979 reorganization of the old Department of Health, Education, and Welfare—from which many of the EPA's original functions and authorities had sprung—into the new Departments of Education and Health and Human Services, respectively. The fact that Congress has yet not updated the "Executive departments" list to include the EPA despite ample opportunities to do so cannot be wished away by a memo from the agency's general counsel.

For another thing, the evolution of the EPA as an agency since its creation introduces intractable problems related to its present day application. Through various reauthorization acts, the EPA is no longer the same agency that was established via Reorganization Plan No. 3, and it now carries out functions and authorities that were not contemplated at the time the Plan was drafted. Under the general counsel's theory, it stands to reason that these new functions and authorities would not benefit from the implicit transfer of the Federal Housekeeping Act authorities. That result would put EPA officials (and potentially

reviewing judges) in the awkward position of policing the lines between those agency functions and authorities covered by the Federal Housekeeping Act and those that are not. Such a bizarre result weighs further against accepting the general counsel's theory.

To be sure, the EPA has for decades issued regulations under claimed authority from the Federal Housekeeping Act and the appropriateness of the legal basis for these regulations appears to have gone unchallenged. But a legal wrong cannot be made right through simple repetition. If it did, then agencies would face strong incentives to break the law as much as they could before getting caught. In any event, as discussed in greater detail below, the nature of the Federal Housekeeping Act is to authorize the kind of uncontroversial regulations governing routine matters that are unlikely to attract legal scrutiny that might have revealed the EPA's lack of statutory authority.

Even if we were to accept that the EPA is somehow covered by the Federal Housekeeping Act (at least for the purposes of something like the censored science rule), we can safely reject the notion that the modest authority that the Act affords is sufficient to support something as radical, harmful, and controversial as the censored science rule. Indeed, it was the modest and noncontroversial nature of the Act that ultimately compelled the Supreme Court in *Chrysler Corp. v. Brown* to reject a Department of Labor regulation that sought to compel the public disclosure of reports provided to the government by government contractors concerning their workforce composition as insufficient to overcome the bar placed on such disclosures by the Trade Secrets Act.

In reaching this decision, the Court emphasized the "'housekeeping' nature" of the Federal Housekeeping Act and characterized it as "simply a grant of authority to the agency to regulate its own affairs." This understanding of the Act contrasted sharply with the Department of Labor regulation at issue, the primary effect of which was to alter the application of a law managing the relationship between the government and private sector entities. Accordingly, the Court concluded that the Federal Housekeeping Act was not designed to authorize something like the Department of Labor's workforce composition disclosure regulation.

If the inappropriateness of the Federal Housekeeping Act was clear for the Department of Labor regulation in *Chrysler Corp.*, then it should be especially so for the EPA's censored science rule. The purpose of the EPA's rule is to drastically overhaul what kind of science the agency will consider when deciding whether and how to regulate to protect public health and the environment. Using what amounts to a "funhouse mirror" version of the scientific principles of reproducibility and independent verification, the rule would presumptively exclude entire categories of high-quality, cutting-edge science—science that not coincidentally has served as the backbone for many of the agency's most successful public health and environmental protections. At the same time, the rule would grant the EPA administrator broad and nearly irrevocable authority to grant exemptions from this new test for scientific "quality," all but ensuring that this power will be wielded to advance political agendas rather than advancing the agency's science-driven mission.

Remarkably, the supplemental proposal would go even further by making it clear that the EPA could reopen its existing rules so that their science can be retroactively examined according to this new regime. The bottom line is that this rule would give the EPA's political officials free rein to block new safeguards under the corrupted mantel of "transparency," as well as to eliminate those existing safeguards that politically powerful interests—large companies that pollute for profit—find too inconvenient.

Properly understood, then, the censored science rule is directly and inextricably tied to the implementation of the Administrative Procedure Act (APA)—one of the single most important federal laws in existence for managing the relationship between the government and the private sector—just as was the case with the Department of Labor's disclosure rule and the Trade Secrets Act. In relevant part, the APA directs agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." It further directs them to develop a final rule based on the "consideration of the relevant matter presented."

As noted above, the censored science rule would fundamentally alter how the EPA constructs the record for its notice-and-comment rulemakings and how interested

members of the public might interact with that record to affect the outcome of any final rules that the EPA is developing. The rule would sharply constrain what kinds of "written data, views, or arguments" the public would be eligible to share with the EPA as part of a rulemaking. And it would give the EPA Administrator virtually unquestioned authority to define what fits within the scope of the agency's consideration as it works toward a final rule by determining what is and is not "relevant."

Given these effects on how the public is able to participate in the rulemaking process, it is no wonder the EPA's censored science rule has attracted such widespread and intense criticism. The original proposal received nearly 600,000 public comments, nearly all of which were in opposition. At a recent House Science Committee hearing on the rulemaking, none of the committee members present and none of the non-agency invited witnesses appeared to support the proposal in its current form. It is also noteworthy in this regard that legislation that would specifically grant the EPA authority similar to what is being pursued in the censored science rule has been introduced several times in Congress in recent years but has failed to move.

In short, the censored science rule is a far cry from the kind of uncontroversial, "housekeeping" regulations that the Supreme Court contemplated in *Chrysler Corp*.

The only thing that could be said for the EPA's belated assertion that the censored science rule is grounded in the Federal Housekeeping Act is that it is less laughable than its first attempt to identify a legal authority in its original 2018 proposal – but only just. There, the EPA made what could only be described as a Hail Mary, spaghetti-against-the-wall approach, feebly claiming that it was pursuing the rulemaking "under authority of the statutes it administers, including provisions providing general authority to promulgate regulations necessary to carry out the Agency's functions under these statutes and provisions specifically addressing the Agency's conducting of and reliance on scientific activity to inform those functions." The proposal went on to "solicit[] comment on whether additional or alternative sources of authority are appropriate bases for this proposed regulation."

For something as reckless and contrary to the public interest as the censored science rule, perhaps it should be no surprise that the EPA is struggling so mightily to find supporting legal authority. The EPA should abandon this misguided effort. But if they don't, reviewing courts should have no trouble rejecting this plainly illegal rulemaking.

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