

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6301

(202) 225-6375
www.science.house.gov

May 6, 2020

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Wheeler:

I write to you regarding the need for a further extension of the public comment period for EPA's supplemental notice of proposed rulemaking (SNPRM) to its "Strengthening Transparency in Regulatory Science" proposed rule. On March 20, 2020, I sent you a letter requesting an extension to the original 30-day comment period, which was set to end on April 17.¹ On April 2, you replied to my letter and informed me that EPA would extend the comment period for an additional 30 days until May 18. I support this initial extension, and I am glad that the Agency understands the need to accommodate the public's ability to participate in the rulemaking process in light of the widespread disruptions caused by the COVID-19 pandemic. However, I do not believe a 30-day extension sufficiently accommodates the public in general and the public health community in particular. May 18 is now less than two weeks away and the upheaval in American society – which was the Agency's rationale for the extension in the first place – has barely begun to ease. I urge you to forego an arbitrary timeline for the SNPRM and provide an additional extension of the public comment period, so that the public can have the meaningful opportunity to comment to which it is legally entitled.

As EPA itself acknowledges, the impact of the pandemic on the public's ability to participate in the rulemaking process must be one of the primary factors in determining the length of the comment period for the SNPRM. In your April 2 letter, you described COVID-19 as a "significant health crisis" and noted that President Trump declared a National Emergency due to the crisis on March 13, 2020. You also stated explicitly that the comment period would be

¹ House Committee on Science, Space, and Technology Chairwoman Eddie Bernice Johnson, Letter to EPA Administrator Andrew Wheeler, March 20, 2020, accessed here: <https://science.house.gov/imo/media/doc/2020-03-20%20EJ%20to%20EPA%20re%20SNPRM.pdf>.

extended in response to widespread concerns regarding the impact of the pandemic. Since then, the disruption caused by the pandemic has only intensified and the presidential National Emergency declaration remains in effect. The Agency's rulemaking cannot proceed as if it exists in a vacuum. It must continually respond to the broader circumstances impacting the country.

EPA's accommodation of the public's ability to comment on the SNPRM is not only the right thing to do; it is also required by law. Under the Administrative Procedure Act, EPA must provide "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."² In accordance with the statute, Executive Order (EO) 13563 mandates that "to the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."³ Federal courts have similarly embraced the principle of a "meaningful opportunity" as the required standard for comment periods in federal rulemaking. As a particularly relevant example, an appellate court previously concluded that a federal agency "did not provide a meaningful opportunity for comment" on a rule due to the "exceedingly short duration of the comment period" and a sharp reduction in the duration of the comment period between different rulemakings for the same regulation.⁴

Amidst this extraordinary global pandemic, the Agency's 60-day comment period denies the public a meaningful opportunity to comment on the SNPRM. Even under normal circumstances, a 60-day comment period represents the minimum standard for major rulemaking set forth in EO 13563 and is far shorter than the 109-day comment period for the original proposed rule. These are far from normal circumstances. As individuals isolate themselves at home to slow the spread of the virus, the necessities of social distancing have disrupted professional life for many Americans. Young children require constant care due to the suspension of child care services; family members require assistance, particularly those belonging to at-risk populations; and, of course, over one million Americans – more than in any other country in the world – have contracted the virus. Under these conditions of personal and professional turmoil, it is unreasonable for EPA to expect the public to meaningfully participate in the federal rulemaking process on a 60-day timeline that coincided almost exactly with the domestic outbreak of the pandemic. The public has the right to make its voice heard on this important rule, as does the scientific community, which has the expertise to inform the SNPRM. But neither the public nor the scientific community are in a position to properly participate in the rulemaking process while the virus continues to spread, loved ones are at risk, and organizations are disrupted.

The end of the SNPRM comment period on May 18 would be particularly damaging to the public health community's meaningful opportunity to comment. Public health organizations are among the key stakeholders for the "Strengthening Transparency" rule, as the Agency's public health regulations would be dramatically impacted by the rule's implementation. Public health

² 5 U.S. Code 553, "Rule Making," accessed here: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section553&num=0&edition=prelim>.

³ Executive Order 13563, "Improving Regulation and Regulatory Review," Issued on January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>. See also: Executive Order 12866, "Regulatory Planning and Review," Issued on September 30, 1993, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

⁴ North Carolina Growers' Association v UFW, 702 F.3d 755, 770 (4th Cir. 2012), <http://www.ca4.uscourts.gov/Opinions/Published/112235.P.pdf>.

researchers, including medical doctors, are also best equipped to provide feedback on EPA's proposed data transparency standards, as their work relies on Personally Identifiable Information that would be subject to the contentious new publication requirements being proposed by EPA.

But public health organizations, researchers and medical practitioners are now leading the country's emergency response to COVID-19. Many of the public health experts who are best qualified to understand the implications of the rule are working on the front lines of the emergency response, putting their lives on the line to save the lives of others. As hospitals around the country manage a surge in sick patients, public health experts and advocates cannot be expected to redirect their attention and resources to federal rulemaking. If EPA insists on ending the SNPRM comment period during the peak of the crisis, the public health community will be forced to choose between saving lives and exercising its legal right to comment on a rule that carries serious implications for its work. It is wrong for the Agency to force this choice upon public health practitioners on the front lines of a pandemic when a simple extension would solve the problem. EPA must extend the public comment period for the SNPRM until conditions in the country afford public health experts a genuine opportunity to register their views.

I am also aware of EPA's recent decision to relax pollution monitoring and reporting standards for businesses impacted by the pandemic. According to new Agency guidelines retroactive to March 13, any business unable to comply with monitoring and reporting requirements due to COVID-19 will not be subject to non-compliance penalties unless an imminent threat exists to the environment or public health.⁵ Even as the Agency intends to close the SNPRM comment period, these emergency enforcement guidelines remain in effect indefinitely. It is inexplicable that EPA's pandemic response would do more to accommodate polluters than the general public.

A wide range of stakeholders implored the Agency to extend the initial public comment period for the SNPRM due to the rule's complexity and COVID-19's sweeping disruption of American society. I supported the calls from the attorneys general of 13 states and the District of Columbia, the city attorneys of 6 of the largest cities in the United States, and dozens of scientific and environmental organizations for EPA to extend the comment period.⁶ I believe their arguments are as powerful today as they were in March, because the circumstances that prompted them persist. Additionally, I joined 13 of my fellow Committee Chairs in the House of Representatives on April 1 in urging OMB to provide long-term extensions for the public comment periods of all ongoing rulemakings, including the "Strengthening Transparency" rule.⁷ As I recommended in my March 20 letter to the Agency, this comment period should be no less than 109 days, which would match the length of the comment period offered for the proposed rule in 2018. More broadly, the comment period must be responsive to the course of the COVID-19 crisis. EPA must do this in order to fulfill its legal obligation to provide the public with a meaningful opportunity to comment on the SNPRM. I urge you to grant a further extension and to allow public health conditions to dictate its length, rather than an arbitrary timeline set by the Agency.

⁵ Lisa Friedman, "E.P.A., Citing Coronavirus, Drastically Relaxes Rules for Polluters," *New York Times*, March 26, 2020, <https://www.nytimes.com/2020/03/26/climate/epa-coronavirus-pollution-rules.html>.

⁶ Letter from State Attorneys General and City Attorneys to EPA Administrator Andrew Wheeler, "Request for Extension of Comment Period for EPA Supplemental Notice of Proposed Rulemaking to Limit Use of Scientific Evidence in Rulemakings," March 19, 2020, accessed here: https://www.eenews.net/assets/2020/03/20/document_gw_14.pdf.

⁷ Letter from House of Representatives Committee Chairs to OMB Acting Director Russell Vought, April 1, 2020.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Eddie Bernice Johnson". The signature is written in a cursive, flowing style.

Eddie Bernice Johnson
Chairwoman
Committee on Science, Space, and Technology