

Podcast Script for EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking

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Libby: Hello and welcome to this podcast hosted by the U.S. Environmental Protection Agency's Office of Inspector General. My name is Libby John and joining me today is Alicia Buchanan, a program analyst in the OIG's Office of Evaluation Environmental Research Directorate. Thank you for joining me.

Alicia: Thanks Libby, I'm happy to be here.

Libby: Your team recently released a report concerning the EPA's action development process for rulemaking. First off, can you explain what the ADP is and why it's important for rulemaking?

Alicia: The intent of the ADP is to equip rule writers with the necessary tools to write regulations. While it is a flexible process, it outlines major stages and milestones a proposed rule or draft action should meet before it is finalized – particularly for Tier 1 or Tier 2 actions that may apply new science, have policy implications, or potential economic considerations. The EPA uses its ADP Tracker database to monitor the status and milestones of rules and actions. This database also contains key decisions and information on Agency rulemakings.

Libby: What are the benefits of using the ADP?

Alicia: The process encourages collaboration by assembling a workgroup with interested program and regional offices to share information and draft documents. Bringing together a diverse group of Agency professionals will ensure that Agency actions are based on science, promote economic efficiency, and are implementable and enforceable. Collaboration also ensures that quality information is used to support EPA actions as well as provides opportunities for senior management involvement and guidance to staff early in the process.

Libby: Why is it important for the Agency to use the ADP during rulemaking?

Alicia: The EPA is one of the most active regulatory agencies in the federal government and writing regulations is one of the most significant tools the Agency has to protect human health and the

environment. The EPA rule workgroup chairs and policy analysts we interviewed during this audit said that when the ADP is followed and the Agency leadership treats the ADP as necessary and important, the resulting rules are consistently high quality.

Libby: What did this performance audit look at?

Alicia: We reviewed the EPA's ADP Guidance and other Agency materials to determine whether the EPA followed the process during 58 rulemakings from fiscal years 2015 through 2019. We also examined the ADP Tracker database, relevant statutes and executive orders, and materials from the Office of Management and Budget.

Libby: And what did you and your team determine?

Alicia: Using a checklist we developed from the ADP Guidance, we found approximately 81 percent average adherence to the checklist steps and 14 percent average nonadherence. We were unable to determine adherence for about 6 percent of the checklist steps because of lack of documentation.

Libby: Were there any rulemakings that stuck out from the sampling you looked at?

Alicia: Yes. The Science Transparency rule is one. For this rule we only analyzed the supplemental notice of proposed rulemaking, which was the second public notification. We determined that this rulemaking had higher than average nonadherence and undetermined adherence to the ADP.

Libby: Did the analysis show why it had higher than average nonadherence?

Alicia: There were documents missing and instances of misunderstanding within the EPA from the first notice of proposed rulemaking, which was outside the scope of this audit, to the supplemental notice of proposed rulemaking. Some of the major milestones listed in the ADP Guidance were either not performed or there was no documentation that the milestones were completed.

Libby: Did you discuss these concerns with the EPA?

Alicia: Yes. The Agency said that the milestones we highlighted should have been performed at the initial proposal stage. However, the initial proposal was developed in the Office of the Administrator and then handed over to the Office of Research and Development after the milestones had already passed.

Libby: Was this a common occurrence in the rules that you reviewed?

Alicia: We did see some examples where decisions were made at a high level and no documentation regarding those decisions. Some of the people we interviewed were not aware of the status of milestones reflected in ADP Tracker database. In fact, this was one of several data quality issues we identified in relation to ADP Tracker. Other issues we saw included outdated, missing, and incorrect information; confusion on whether milestones were waived or moot; and difficulty in locating and retrieving documentation. We also saw one instance where a milestone was backdated.

Libby: Backdated? What do you mean?

Alicia: While analyzing the Affordable Clean Energy Rule, also known as the ACE rule, which was implemented in September 2019, we found that one of the milestones had been recorded as being completed at a past date, which actually was the date of another milestone meeting. There was no indication other than the date that the milestone in question had been completed.

Libby: So this rule also did not follow the ADP?

Alicia: It did to some extent. This rule had an expedited timeline. Two of the milestones were waived in accordance with the ADP. But missing and incomplete milestones were the main reasons for nonadherence. For example, one of the milestones was marked as complete in the tracking database but staff told us that the milestone had been waived by Andrew Wheeler, who was the EPA administrator at that time, without going through the proper waiver procedure.

Libby: You mentioned earlier that milestones can be waived or moot. Can you explain what moot means in this context?

Alicia: That is actually a term or a practice used in the ADP Tracker database but not defined in the ADP Guidance. In fact, one of our recommendations to the Agency is to determine whether the moot designation is necessary and if so, define moot in the guidance. But since it's not currently defined in the guidance, we calculated milestones designated as moot as nonadherent because the milestone was not

completed, and the waiver process was not followed. Fourteen of the 58 rules we reviewed had higher nonadherence rates because of moot designations.

Libby: Are there any rules that come to mind that used moot designations?

Alicia: Yes. One is Waters of the United States, commonly known as WOTUS, which was a joint rulemaking with the Army Corps of Engineers. This rule had higher than average nonadherence because three of the four milestones during the proposal phase were designated as moot. There was also a lack of documentation for milestones during the final phase which contributed to the rule's higher than average undetermined adherence.

Libby: How can the Agency more properly follow the ADP during the rulemaking process?

Alicia: The EPA, especially the Office of Policy, which oversees the ADP, should reinforce the expectation that it be used for all regulatory actions. The office should also clearly define what decisions and information program offices should include in the ADP tracking database and periodically review the database to make sure those decisions and information are included. Additionally, the Agency should ask EPA staff about the adequacy of existing training regarding the ADP and make any necessary improvements in that area.

Libby: Alicia, thank you so much for taking the time to speak to me today. Listeners: To learn more about the findings from this audit, as well as other OIG work, please visit www.epa.gov/oig.