

The Honest Act Inches Forward Amid Controversy

By William J. Walsh, Kenneth von Schaumburg, Jane C. Luxton, Karen C. Bennett / May 03, 2017

The latest development in the consideration of H.R. 1430, the Honest and Open New EPA Science Treatment Act of 2017 ("HONEST Act")^[1], introduced by Rep. Smith, Lamar [R-TX] and strongly supported by the new Administration, is that Senator Carper (D-DE), the ranking member on the Senate Committee on Environment and Public Works (Committee), sent a letter to the Administrator of the U.S. Environmental Protection Agency (the "EPA"), E. Scott Pruitt, strongly opposing the House passed version of the bill now being considered by the Committee.^[2] Various environmental groups have also expressed similar concerns.^[3] Other Democratic Senators are likely to follow suit. These developments raise the specter that a 60 vote supermajority may be necessary for passage in the Senate.

The Honest Act, if enacted, will require, among other things, that:

- "[A]ll scientific and technical information relied on" in promulgating a regulation or EPA guidance must be based on the "best available science"^[4] and
- Studies relied upon by the Agency in issuing the regulations and guidances must be "publicly available online in a manner that is sufficient for independent analysis and substantial reproduction of research results, except that any personally identifiable information, trade secrets, or commercial or financial information obtained from a person and privileged or confidential, shall be redacted prior to public availability."

Opponents argue that the Honest Act will hamper EPA's ability to issue health protective regulations. First, they claim it will be difficult to protect private information on participants in health studies. Second, opponents fear that regulated companies might prevent the use of company-sponsored scientific studies by asserting health studies are trade secrets or confidential business information. Finally, there is concern that implementation of the requirement for online publishing of the underlying data will be unduly expensive -- \$250 million per year according to a 2015 Congressional Budget Office (CBO) cost estimate -- effectively paralyzing EPA.

Supporters of the bill note that Congress previously required the use of "best science" by an overwhelmingly bipartisan vote in amending the Toxic Substance Control Act in June of 2016 and in prior statutes. Also, other statutes, EPA rules and guidance, and generally accepted principles of good science favor transparency in science. Additionally, the Honest Act has specific provisions to protect personal information in health studies. Supporters say that historically, toxicological information has not been considered either a trade secret or confidential business information. Finally, they argue that the two-page 2015 Congressional Budget Office (CBO) cost estimate is conclusory and relies on unverified assumptions and cost estimates provided by EPA (using assumptions of 50,000 studies times a cost of \$10,000 to \$15,000 per study).^[5] Other, more detailed economic studies estimate costs of \$18 million or less.^[6]

Both sides have concerns that warrant serious consideration. Since dynamics in Congress remain in flux, observers must stay tuned to determine if consensus can be reached.

Clark Hill attorneys are experienced in working with clients to develop effective legal strategies and advocacy approaches to address regulatory and deregulatory initiatives. For more information, please contact Karen C. Bennett at kbennett@clarkhill.com | (202) 572-8676; Jane C. Luxton at jluxton@clarkhill.com | (202) 572-8674; Kenneth von Schaumburg at kvonschaumburg@clarkhill.com | (202) 772-0904; William J. Walsh at wwalsh@clarkhill.com | (202) 772-0924; or another member of Clark Hill's Environment, Energy & Natural Resources practice group.

^[1] Available [here](#).

^[2] Letter from Senator Tom Carper to EPA Administrator E. Scott Pruitt (April 4, 2017), available [here](#).

^[3] The Blog of Martha Roberts, Environmental Defense Fund, Less Science, More Cost: Why the Misguided "Secret Science" Bill Is Bad Policy, available [here](#).

^[4] See discussion of the competing meanings of "best science." William J. Walsh, Honestly, What Is The Best Science?, Law360. Expert Analysis (April 27, 2017), available [here](#).

^[5] Available [here](#).

^[6] R. Lutter and David Zorn of the Mercatus Center, On the Benefits and Costs of Public Access to Data Used to Support Federal Policy Making (September 2016), available [here](#).