

Comment from Andrew Simons, EPA
August 19, 2020

This is responsive to the request that we provide comments on the preamble in advance of the Aug. 31 meeting. We may have additional comments, but I can share the following:

On page 1, lines 10-13 is the following sentence: “Broadly speaking, public rulemaking dockets serve three purposes: providing the public with the information the agency considered in a rulemaking, providing courts with a record for evaluating challenges to the rule, and satisfying agency recordkeeping requirements.”

We have two comments. The first is that the second clause “providing courts with a record for evaluating challenges to the rule” conflates the rulemaking docket (information the Agency considered or was submitted) with the administrative record (what courts use to evaluate challenges). While there is often significant if not complete overlap between the two, that is not always the case (both TSCA and the CAA have provision that direct EPA to include certain information in the docket, but also exclude the information from administrative record). So I suggest we be more precise in that the docket is the information the Agency considered and it also is the source for information the agency uses to compile the Administrative Record in the event a rule is challenged (I’m sure there is a more elegant way to describe it, but that is the gist).

The second comment has to do with the third clause (satisfying agency record keeping requirements). I will reach out to our information law attorneys, but I’m not aware of how including information in a rulemaking docket satisfies agency record keeping requirements or that it is commonly thought of as serving that purpose, i.e., I’ve never heard of this in connection with or rationale for having a rulemaking docket, and that seemed to make it an odd fit here.

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