Today, on behalf of 68 environmental and administrative law professors affiliated with 47 universities around the country, Sean Hecht and I filed a comment letter urging EPA's Acting Administrator Wheeler to withdraw the misleadingly-named "Strengthening Transparency in Science" proposed rule. My Legal Planet colleague, Dan Farber, has written here and here about some of the proposed rule's defects. Many thanks go to Dan, Amanda Leiter, and Justin Pidot for their invaluable contributions to the comment letter!

Under the auspices of promoting increased transparency, the proposed rule would make sweeping changes to the way that EPA uses science in regulatory decision-making processes. More specifically, the rule, as written, would foreclose EPA's ability to rely on important peer-reviewed scientific studies that inform key environmental protections, like safe drinking water standards and pesticide regulations, because the underlying data supporting those studies are not publicly available. This approach overlooks a few critical facts: scientific studies are often supported by personal health data that cannot legally be disclosed; EPA must already follow robust peer-review and science vetting processes to comport with federal law, including the Information Quality Act, with which the proposed rule is at odds; and EPA failed to consult with scientists, including its own internal Science Advisory Board, before proposing the rule. In fact, a group of nearly 1,000 scientists has commented that this rule is simply not the right way to approach transparency issues.

There are also legal deficiencies with the proposed rule, which, considering the magnitude of the changes it is proposing, is incredibly brief and vague. EPA does not cite to applicable statutory authority for the rulemaking, and even asks commentors to supply suggestions as to where the agency might find authority to promulgate the rule—ironic, given that the rule was proposed by former Administrator Pruitt, who himself criticized the Obama Administration for what he perceived as a failure to ground EPA rulemakings in statutory authority. Nor does the rule address the many inconsistencies between its language and the requirements of existing federal law.

And the rule also declines to address significant policy concerns associated with its proposed approach, like its lack of implementation phase-in time, the cost to taxpayers to set up additional data collection infrastructure, challenges in protecting personal and confidential business information, and, most importantly, the health and public safety costs of preventing EPA from using the best scientific information to regulate.

We believe that transparency is an important value, and we are aware that many in the scientific community, as well as legal scholars like Wendy Wagner and Rena Steinzor, are working on efforts to improve the use of science in agency rulemaking proceedings. But we find this proposed rule, issued in the name of transparency, to be troubling and ill-suited to improve EPA's use of science. It is our hope that EPA will withdraw the rule, and instead work productively with the scientific community to advance transparency goals in a way that respects existing federal law.