

Over a year ago, EPA issued a [proposed rule](#), ostensibly to promote transparency in the use of science to inform regulation. The proposal, which mirrors [failed legislation](#) introduced multiple times in the House, has the potential to dramatically restrict EPA's ability to rely on key scientific studies that underpin public health regulations. The rule, on its face, would require EPA to take actions inconsistent with statutory mandates, including requirements to use the best available science in its regulatory processes. Robinson Meyer of the Atlantic provided an [informative discussion of the proposed rule](#) last year. The latest draft proposed update to the proposal, discussed at a [House Science Committee hearing](#) this week, further confirms that the Trump Administration isn't really interested in reining in agencies' power relative to Congress, or in other professed conservative values. In this bizarre apparent move (which, to be fair, is only in draft form at this point), EPA makes clear it's relying on a manifestly inapplicable law as its only legal authority. By doing so, the administration is making clear its goal is just to make it harder for EPA to use science to justify more stringent regulation—even where that outcome is manifestly at odds with Congress's will.

My colleague Julia Stein and I drafted a [comment letter](#) that we submitted to EPA on behalf of 68 legal scholars, pointing out many deficiencies in the proposed rule. At the time, Julia summarized our concerns this way:

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 commenters 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.

For context: 23 state Attorneys General also pointed out the flaws in this proposed rule. So did [Wendy Wagner and Rena Steinzor](#), legal scholars closely focused on the use of science in regulation (& involved in recommendations wrongly cited by supporters of the proposed rule); the [editors of the leading scientific journals](#); and [almost 100 Harvard faculty](#) (including the university president and the deans of public health & medicine). This [insightful interview](#) that Isaac Chotiner of the New Yorker did with a leading public health researcher contains a good distillation of some of the rule's flaws.

Lisa Friedman of the New York Times received and [published](#) a leaked draft [supplement to the proposed rule](#), apparently near release by EPA (which in turn has [criticized the Times](#) for its coverage).

In the draft supplement, EPA abandons the idea that there might be statutory authority to issue the rule within EPA's rulemaking authority. Instead, it now relies solely on the [Federal Housekeeping Statute, 5 U.S. Code section 301](#), a little-noticed law that says an "executive department" can create internal rules to govern "the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

This statute cannot serve as legal authority for EPA's proposed rule, which would substantively limit EPA's future ability to comply with the duties Congress has given it. The rule would limit EPA from using some peer-reviewed scientific studies that inform environmental protections, like air & water quality protection, where data supporting those studies are private or unavailable for public review (including in some cases where the data are subject to privacy laws or other protections).

From a legal perspective, the draft supplement's legal justification fails. The proposed rule would make it impossible for EPA to meet the basic policy goals and to comply with the letter of the statutes Congress has enacted. For example, Congress said ambient air pollution standards must be set at level "requisite to protect public health," based on criteria that have to comply with [Clean Air Act section 108](#), which says:

Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.

But under the new rule, EPA would be forbidden from considering major public health studies when it sets the standards, if the studies did not comply with its science rule—even where scientists widely accept the results of those studies. As we pointed out in our comment letter:

Courts have recognized EPA's need to rely upon studies based on publicly undisclosed underlying data when considering the best science. *American Trucking Ass'n*, 283 F.3d at 372 (explaining that curtailing EPA's ability to rely on published studies would exclude "plainly relevant scientific information" from regulatory decision-making processes); see also *Coalition of Battery Recyclers Ass'n*, 604 F.3d at 623 (finding that EPA is entitled to rely on published study results as "raw data is often unavailable due to"). Even EPA's current mission statement explains that EPA works to ensure "[n]ational efforts to reduce environmental risks are based on the best available scientific information." See EPA, About EPA, available at <https://www.epa.gov/aboutepa/our-mission-and-whatwe-do>.

Forcing EPA to ignore high quality science controverts EPA's statutory obligations and will impair EPA's ability to protect public health and the environment.

So EPA is proposing to use the Federal Housekeeping Law—which by its terms is designed to authorize agencies merely to set up internal procedures—to artificially limit the science EPA relies on to set pollution standards that Congress said EPA must base on public health criteria.

EPA cites only one legal authority, the U.S. Supreme Court case [Chrysler v. Brown](#), to justify its reliance on the Federal Housekeeping Statute as authority to issue this rule. But the case doesn't support the agency's action at all. On the contrary, it points in the exact opposite direction, as the Supreme Court stated clearly that the rule can't support withholding information from the public, and isn't a grant of substantive power to the agency. From this case:

The antecedents of § 301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal departmental affairs. Those laws were consolidated into one statute in 1874. and the current version of the statute was enacted in 1958.

Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority to the agency to regulate its own affairs. What is clear from the legislative history of the 1958 amendment to § 301 is that this section was not intended to provide authority for limiting the scope of § 1905.

The 1958 amendment to § 301 was the product of congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public. Congressman Moss sponsored an amendment that added the last sentence to § 301, which specifically states that this section "does not authorize withholding information from the public." The Senate Report accompanying the amendment stated:

"Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive

departments to withhold information from the public or to limit the availability of records to the public."

S.Rep. No. 1621, 85th Cong., 2d Sess., 2 (1958). The logical corollary to this observation is that there is nothing in the legislative history of § 301 to indicate it is a substantive grant of legislative power to promulgate rules authorizing the *release* of trade secrets or confidential business information. It is indeed a "housekeeping statute," authorizing what the APA terms "rules of agency organization, procedure or practice," as opposed to "substantive rules."

While EPA's proposal states that "[t]he rule would not regulate the conduct or determine the rights of any entity outside the federal government. Rather, it exclusively pertains to the internal practices of EPA," the [proposal itself](#) makes clear this isn't the case. The proposed rule states:

When promulgating significant regulatory actions, the Agency shall ensure that dose response data and models underlying pivotal regulatory science are publicly available in a manner sufficient for independent validation.

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EPA shall conduct independent peer review on all pivotal regulatory science used to justify regulatory decisions, consistent with the requirements of the OMB Final Information Quality Bulletin for Peer Review (70 FR 2664) and the exemptions described therein. Because transparency in regulatory science includes addressing issues associated with assumptions used in models, EPA shall ask peer reviewers to articulate the strengths and weaknesses of EPA's justification for the assumptions applied and the implications of those assumptions for the results.

This mandatory language is designed to limit substantively the science on which EPA relies when it makes decisions. It's absurd for the agency to contend otherwise, given the scope of the initial proposed rule, the agency's clear intent that it be a binding rule, and the lack of any changes narrowing the proposed rule's scope. It's

not just "housekeeping." It's possible that characterizing the agency's action here that way, as a way to govern internal agency procedure, the administration may be trying to insulate the proposal from judicial review, since the [Administrative Procedure Act exempts "matter\[s\] relating to agency management or personnel"](#) from ordinary rulemaking requirements (though the agency is following those requirements here so far).

Even worse, the housekeeping law doesn't seem even to apply to EPA. Rather, it [applies to a list of "executive departments"](#) that omits this agency.

One notable thing: there's nothing conservative about this proposal—in the important sense that conservatives conventionally take [the position](#) that agencies' actions should be more closely bound by Congress's policy judgments and commands. This administration has [embraced that rhetoric](#), where it suits the administration's ends. The proposed rule would allow agencies to circumvent clear congressional policy directives—and it would accomplish that through the pretext of setting internal rules about data management or other "housekeeping."

By law, when an agency issues a regulation, the regulation must take into account all all the factors Congress intended it to consider. Based on Supreme Court precedent under the Administrative Procedure Act, courts [overturn agency action that "entirely fail\[s\] to consider an important aspect of the problem."](#) Ignoring scientific studies because of an internal agency decision to ignore science where the data aren't publicly available (as this rule would do) would unquestionably lead EPA to ignore public health evidence Congress ordered it to consider. As noted above and in various comment letters, it would also cause the agency to ignore the substance of the policy decisions Congress has made within the Clean Air Act and other environmental laws.

EPA's proposal would lead inexorably to looser and ultimately ineffective regulation of pollution—surely the whole point of the proposal, from an administration that is committed to those results. But even those who want looser regulation should think twice before supporting this effort: it's a massive power grab by the Trump EPA. If they support it, it shows they're serious only about loosening regulation, not about reining in agencies' policy discretion.