

**Testimony of Surbhi Sarang, Legal Fellow, EDF for July 17, 2018 public hearing on EPA’s Proposed Rule: “Strengthening Transparency in Regulatory Science,” 83 Fed. Reg. 18,768, Docket ID No. EPA-HQ-OA-2018-0259**

My name is Surbhi Sarang, and I am a legal fellow at the Environmental Defense Fund. I appreciate this opportunity to provide public testimony on the proposal—and hope that everyone who wishes receives an opportunity to be heard. We urge EPA to hold hearings in additional locations to allow affected Americans in other communities who could not travel to be here today an opportunity to provide input as well. I am testifying here today to raise our serious concerns with the proposed rule and to ask that EPA withdraw the proposed rule immediately.

Communities across America rely on EPA safeguards to protect their health and well-being. But this rule would greatly restrict the body of scientific information that EPA draws on when setting these safeguards. Instead of being informed by all available science, in many cases, EPA would be forced to operate in the dark. By obliging EPA to disregard scientific research that would otherwise alert the agency to taking strong protective actions, this rule endangers the health of all families and communities. Had this rule been in place previously, we would likely currently be facing greater exposures to air pollutants, water contaminants, and toxic chemicals.

In the proposal, EPA completely ignores the practical effects of the proposed rule and how it fundamentally conflicts with EPA’s mandate to use the best available science as it develops safeguards. Agency decisions must be informed using the best available science—the public deserves nothing less when health and safety are on the line. This value is core to EPA’s mission, and should be placed at the forefront.

But the proposal takes an unsupported and unprecedented leap by suggesting that this mission allows EPA to only use science where the underlying data and models can be made, and are made, publicly available for independent validation. Much of the data underlying scientific studies concerning human health cannot be made publicly available for legitimate privacy and

confidentiality reasons. In many cases, it is impossible even to redact information in a manner that allows independent validation while respecting privacy and confidentiality. Thus, the proposal would seriously restrict EPA's ability to use the best available science as it sets critical safeguards.

Nor does EPA explain why such restrictions on the use of science are necessary. EPA does not point to any instance in which a failure to disclose data resulted in an EPA decision or standard that lacked scientific integrity. EPA does not explain why other means of vetting that are used by the scientific community, and that protect privacy and confidentiality—such as review by EPA's independent science advisory boards, peer review, and corroboration through independent studies—are insufficient to ensure the integrity of the science EPA relies on. And EPA does not explain why it is appropriate for an agency tasked with basing its decisions on best available science to now discard otherwise valid science simply because data disclosure is not possible. Indeed, courts that have examined the issue have made clear that it is entirely reasonable for EPA to rely on scientific studies for which data cannot be disclosed.<sup>1</sup>

While EPA states in the proposal that many organizations have endorsed data disclosure as a means to increasing transparency, the reality is that the proposed rule completely departs from good scientific practice. None of the organizations EPA identifies in the proposed rule have endorsed the practice of disregarding studies for which data disclosure is not possible or that have been subjected to other means of validation or suggested that regulatory agencies should exclude such studies when using science to inform regulatory actions. To the contrary, organizations that are deeply committed to transparent science have come forward to stress that policies to promote transparency must be developed within the scientific community, and to

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<sup>1</sup> *Coalition of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613, 623 (D.C. Cir. 2010); *American Trucking Ass'ns v. EPA*, 283 F.3d 355, 372 (D.C. Cir. 2002).

oppose the notion of disregarding otherwise valid science simply because the underlying data cannot be disclosed.<sup>2</sup>

Indeed, EPA’s own Science Advisory Board—which it failed to consult before issuing this proposal—has raised concerns similar to those we raise here, noting that EPA provided no analysis of the impact of losing the ability to rely on these studies and that there are other ways to assess the validity of studies without access to data.<sup>3</sup> Not only did EPA skip over review by the Science Advisory Board, but then EPA allowed for only a four-day OMB review process for the proposal. This hastened process seriously calls into question the validity of the proposal.

The proposal would not even increase transparency. By allowing the Administrator to grant exemptions based on vague and discretionary criteria, the proposal would allow EPA to selectively apply this disclosure policy, with no public record of the decision or its basis. The risk that the rule will artificially restrict and distort the scientific basis for EPA’s decisions is only heightened by its many gaps. The proposal fails to explain critical details such as what mechanisms would be used to make data public, what the costs to the agency and to researchers would be, and how the peer review provision would fit into EPA’s existing peer review requirements. It is not even clear how EPA would determine that a given study’s data is “publicly available in a manner sufficient for independent validation.” This underscores concerns that this proposal would undermine the integrity and transparency of EPA decisions rather than enhance them.

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<sup>2</sup> See, e.g., Jeremy Berg et. al., *Joint statement on EPA proposed rule and public availability of data*, Science (Apr. 30, 2018), <http://science.sciencemag.org/content/early/2018/04/30/science.aau0116>; John P.A. Ioannidis, *All science should inform policy and regulation*, PLOS (May 3, 2018), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002576>.

<sup>3</sup> Memorandum from Alison Cullen, Chair of Science Advisory Board Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to the Members of the Chartered SAB and SAB Liaisons (May 12, 2018), [https://yosemite.epa.gov/sab/sabproduct.nsf/E21FFAE956B548258525828C00808BB7/\\$File/WkGrp\\_memo\\_2080-AA14\\_final\\_05132018.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/E21FFAE956B548258525828C00808BB7/$File/WkGrp_memo_2080-AA14_final_05132018.pdf).

It is also important to note that this rule was proposed under former Administrator Pruitt who actively obscured transparency goals by directing the removal of scientific information from EPA's websites, refusing to publicly release his full and accurate schedule, using secret email addresses, and spending taxpayer money in violation of federal laws on a soundproof phone booth.<sup>4</sup> While Pruitt is now gone, this Proposal unfortunately suffers from the same disregard for scientific integrity and transparency that infused the former Administrator's tenure. We thus call on Acting Administrator Wheeler to recognize the irredeemably flawed basis for this proposed rule and withdraw it immediately.

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<sup>4</sup> Lisa Friedman, *The Investigations That Led to Scott Pruitt's Resignation*, N.Y. Times (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/climate/scott-pruitt-epa-investigations-guide.html>; EDF Press Release, *Newly Released Records Refer to Pruitt's Personal Involvement in Removal of Climate Information from EPA Website* (Jan. 29, 2018), <https://www.edf.org/media/newly-released-records-refer-pruitts-personal-involvement-removal-climate-information-epa>.