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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

April 24, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue NW
Washington, DC 20004

Dear Administrator Pruitt,

We write to inquire about recent reports regarding your intention to limit the ways in which EPA uses scientific information. Your proposed new policy likely violates several laws with which EPA must comply as the agency writes rules to protect our air, water and land from harmful pollution. The proposed new policy would require EPA to use only data that are public and reproducible. It is very similar to Congressional efforts to require that all raw data from scientific studies is available to the public before EPA can use it to act.[1] In April 2017, Senator Carper sent a letter to you regarding your staff's analysis of one of these efforts, H.R. 1430, the HONEST Act. In that letter, Senator Carper shared his concerns regarding reports that EPA's leadership prevented analysis conducted by EPA career staff analysts from being transmitted to the Congressional Budget Office. That staff analysis found that the HONEST Act would cost $250 million per year to implement. You have yet to respond to the April 2017 letter.

The proposed new policy will require EPA—when developing rules—to rely only on scientific studies where the underlying data have been made public and are available to be reproduced. Such a policy would likely violate several laws that mandate the use of "best available science," including the Toxic Substances Control Act[2] and Safe Drinking Water Act[3] because it would require EPA to ignore some of the "best" scientific studies. Courts have explained that "best available science" means that agencies '"should seek out and consider all existing scientific evidence relevant to the decision'" and '"cannot ignore existing data.'"[4]

In addition to potentially violating statutory requirements, EPA's proposed new policy would also likely run afoul of the Administrative Procedure Act (APA), which requires agencies to consider and respond to all information presented to it pursuant to a rulemaking. Were a comment that contained scientific information that the proposed new policy would exclude from consideration to be submitted as part of a rulemaking, the APA would require that you consider it, setting up a direct conflict between the APA and the proposed new policy.

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[1] https://blogs.scientificamerican.com/observations/scott-pruitt-will-restrict-the-epas-use-of-legitimate-science/
[2] 15 U.S.C. 2625(h)
[3] 42 U.S.C. § 300g-1(b)(3)(A)
[4] *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1194 n.4 (10th Cir. 2006)

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What's more, this proposed new policy could force EPA to choose whether to ignore non-public information submitted by companies, or to disclose it publicly. For example, EPA might not be able to consider confidential business information when determining whether to allow a chemical company to manufacture a new chemical. Further, the agency might not be able to use proprietary information submitted by auto companies intended to aid in determining appropriate greenhouse gas tailpipe standards unless the data were made public.

Finally, under the new policy's requirement that the underlying data used to develop regulations must be reproducible, EPA could not use unique research study data collected following pollution events. Such a requirement would exclude valuable information, such as the studies done after the BP oil spill[5] or the human health studies done to study the effects of nuclear weapons,[6] or the Framingham Heart Study (a 70-years-long cardiovascular study of the residents of Framingham, Massachusetts).

To help us better understand this anticipated policy and how it will be implemented in a manner consistent with EPA's other statutory obligations and responsibility to make sound and informed policy decisions, we respectfully request that you respond to the following questions by May 24, 2018:

1. Please provide a copy of the new policy.

2. The anticipated policy, as well as the HONEST Act and Secret Science Act, were born from the allegation that EPA's work is often based on secret science—i.e., scientific studies whose data has not been made available to and vetted by the public. However, in reality, scientific studies—whether they and the underlying data are made publicly available or not—are subject to rigorous peer review to ensure that the science is sound before agencies rely on it to make policy. In fact, courts have recognized that the best available science required under the law must be peer-reviewed.[7] Please explain why you believe that the peer review process used in the scientific community is not sufficient to be relied upon for agency policy-making.

3. Please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) related to this new policy and its development.

4. Please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) containing any discussion or analysis regarding how it will be possible to comply with both this policy and the Administrative Procedure

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[5] https://www.eenews.net/stories/1060076559

[6] https://www.smithsonianmag.com/smart-news/how-bombings-hiroshima-and-nagasaki-still-inform-health-today-180956185/

[7] Chlorine Chemistry Council v. EPA, 206 F.3d 1286 (D.C. Cir. 2000) ("When EPA relies in any way on scientific information to set SDWA standards, the agency is required to use 'the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices . . . ."); Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1194 n.4 (10th Cir. 2006) ("While the agency's scientific judgments are viewed deferentially it 'must be good science that is reliable, peer-reviewed, or otherwise complying with valid scientific methods.'")

Act. How will EPA treat a study that is ineligible for consideration under the new policy but must be considered and responded to under the Administrative Procedure Act because, for example, a member of the public has submitted it to the Agency during notice and comment on a proposed rule?

5. Please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) containing any discussion or analysis regarding how it will be possible to comply with both this policy and statutory mandates to use the best available science (or other statutory requirements that guide EPA's use of scientific information).

6. Please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) containing any discussion or analysis regarding how EPA will handle confidential personal health information, confidential business information, trade secrets or other information required to be kept non-public under this new policy. How does EPA intend to handle confidential information submitted to it by companies? For example, will EPA reject chemical safety data submitted by chemical companies from being considered under the Toxic Substances Control Act because that data contains confidential business information? Will it disclose proprietary data submitted by car companies, or simply decide not to use it?

7. Has EPA conducted an analysis of the cost of implementing the new policy? If so, please provide a copy of the analysis as well as all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) related to the analysis. Does EPA plan to redact confidential information before the science is made public, or will it just eliminate the study from being utilized completely? If EPA intends to redact the information, has EPA calculated the cost of redacting thousands of documents and ensuring that each page made public is in compliance with EPA's own privacy policy?[8]

8. Have EPA and the White House Office of Information and Regulatory Affairs discussed this new policy? If so, please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) containing any discussions between EPA and the Office of Information and Regulatory Affairs regarding this new policy.

9. Did EPA communicate with scientific advocacy organizations or academies, such as the American Association for the Advancement of Science or the American Geophysical Union, while formulating this new policy? If so, please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) evincing these discussions.

10. Did EPA communicate with any regulated entities or trade associations, such as the American Chemistry Council, about the policy at any time before its release? If so, please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) evincing these discussions. Will the new policy

[8] https://www.epa.gov/sites/production/files/2015-09/documents/2151.1.pdf

apply to all regulated areas (air, water, and land) and regulated industries equally? If not, please explain any differences.

11. Please provide all documents (including emails, comments, memos, white papers, meeting minutes and correspondence) containing any discussions or analysis about how EPA will treat data collected in unique research studies that cannot or should not be reproduced. Will EPA exclude these important studies under the reproducibility prong of the new policy?

Thank you very much for your attention to this important matter. If you have any questions or concerns, please ask the appropriate members of your staff to contact Michal Freedhoff, of the Environment and Public Works Committee staff, at 202-224-8832.

Sincerely,

Thomas R. Carper
Ranking Member

Sheldon Whitehouse
United States Senator

Jeffrey A. Merkley
United States Senator

Kirsten Gillibrand
United States Senator

Cory A. Booker
United States Senator

Edward J. Markey
United States Senator

Chris Van Hollen
United States Senator