



Institute for
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

Oral Comments to EPA’s Science Advisory Board on Planned Actions and Their Supporting Science

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I am here on behalf of the Institute for Policy Integrity, a non-partisan think tank based at New York University. Policy Integrity has participated in a number of rulemakings that are on SAB’s discussion agenda, and we have submitted written comments on three different issues to which I direct your attention.

First, in the proposed Waters of the United States Rule, the agencies’ analysis of forgone wetland benefits is inconsistent with best economic practices and best scientific evidence. The SAB should look into this analysis.

Second, EPA’s proposal to flatline vehicle emissions’ standards relies on new deeply flawed economic modeling conducted by the National Highway Traffic Safety Administration—modeling that is not supported by economic theory and that has been sharply criticized by economic experts and EPA staff. The SAB should recommend that EPA not rely on such flawed models in any final rule.

Third, in EPA’s proposed withdrawal of its 2016 finding that regulating power plants’ emissions of mercury is “appropriate and necessary,” the agency unreasonably ignores co-benefits from particulate matter reductions that occur as a consequence of the plants reducing their mercury emissions. The SAB should not support this approach.

My colleagues at Policy Integrity have submitted lengthy written comments on each of these topics and I direct the Board’s attention to those comments.

Finally, I'd like to turn to EPA's Proposed Science and Transparency Rule. The proposed rule would bar regulators from relying on scientific studies that fail to meet proposed data availability standards.¹ Purporting to comply with executive orders that require economic impact analysis, EPA claims that "the benefits of this proposed rule justify the costs."² In reaching this conclusion, however, the agency both drastically underestimates the costs of compliance with the rule, and more importantly, neglects to consider how the "[e]xclusion of relevant studies... will adversely affect decision-making processes."³

For support of its conclusion, EPA cites to a single working paper issued by the Mercatus Center at George Mason University.⁴ But this paper estimated the economic impacts of a policy with a very different scope: it assumes that while 80 percent of studies will fail to meet transparency criteria, these studies will nevertheless continue to be relied upon in agency rulemaking. Under the proposed rule, however, such studies would be excluded entirely from agency consideration. The Mercatus paper, therefore, fails to capture the Proposed Rule's far-reaching costs.

These costs stem from the fact that ignoring this category of studies will lead to a worse regulatory outcome than including the studies and accounting for concerns about verifiability. If the agency's genuine aim is the scientific integrity of its rulemaking

¹ Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768 (Apr. 30, 2018); These comments draw from Madison Condon, Michael Livermore & Jeffrey Shrader, *The Costs and Benefits of "Strengthening Transparency in Regulatory Science"* (forthcoming REV. ENV. ECON. & POLICY 2020).

² 83 Fed. Reg. at 18,772; see Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation> (referring to Executive Order 12,866 as "the primary governing [Executive Order] regarding regulatory planning and review").

³ Jeremy Berg, Philip Campbell, Veronique Kiermer, Natasha Raikhel, & Deborah Sweet, *Joint statement on EPA proposed rule and public availability of data*, 360 SCIENCE 6388 (2018) (an open response to the proposed rule by the editors-in-chief of five leading scientific journals).

⁴ 83 Fed. Reg. at 18,771, citing Randall Lutter & David Zorn, *On the Benefits and Costs of Public Access to Data Used to Support Federal Policy Making*, Mercatus Working Paper, Mercatus Center at George Mason University (2016).

processes, there are good-faith alternatives to the wholesale exclusion of studies with unavailable data. The agency could, for example, differentially weight those studies in meta-analysis. EPA's own review of meta-analysis techniques encourages accounting for the evidentiary value of different estimates, and federal agencies have successfully applied evidentiary weighting techniques in past rulemakings.⁵

The downsides of blanket information-exclusion policies can be seen in the recent proposals to repeal and replace the 2015 Clean Water Rule. The agency excluded studies for reasons such as study age, wetland type, sample size, and lack of summary statistics.⁶ But each of those issues could have been addressed by weighting the studies appropriately as part of a meta-analysis. Excluding the studies severely reduces the agencies' total sample size and increases the risk of econometric errors.

Additionally, removing these studies leads to large changes in estimated net benefits, opening the agency to charges of manipulating the data to reach a predetermined outcome.⁷ The transparency rule itself enables such manipulation, as it provides that exemptions from compliance may be granted "on a case-by-case basis."⁸

Lastly, the agency does not adequately explain the expected benefits of the proposed rule. Applying this rule retroactively does not alter the incentive for papers that have

⁵ EPA, Report of the EPA Working Group on VSL Meta-analysis, Report EE-0494, National Center for Environmental Economics (2006) (recommending the use of weighting by sample size or level of significance which would "account for differences in the uncertainty surrounding each primary estimate both within and across studies"); U.S. Food and Drug Administration, Food Labeling: Health Claims and Label Statements; Antioxidant Vitamins and Cancer (1992) (placing more weight on studies that met certain criteria such as the use of appropriate statistical controls, or proper storage conditions for test samples); EPA, Economic Analysis of the EPA-Army Clean Water Rule 2015 (weighting studies by sample size).

⁶ See An Evaluation of the Revised Definition of "Waters of the United States," by Peter Howard, PhD, Institute for Policy Integrity at NYU School of Law and Jeffrey Shrader, PhD, School of International and Public Affairs (SIPA) at Columbia at 2-7 (April 11, 2019), https://policyintegrity.org/documents/Shrader_Howard_Expert_Report_FINAL.pdf.

⁷ See Jason Schwartz & Jeffrey Shrader, *Muddying the Waters: How the Trump Administration is Obscuring the Value of Wetlands Protection from the Clean Water Rule*, Institute for Policy Integrity at New York University School of Law, (2017).

⁸ 83 Fed. Reg. at 18,772.

already been published, while penalizing the agency and public by excluding potentially valuable information from the regulatory process.⁹ EPA also does not assess the rule’s redundancy given that many peer-reviewed journals have already updated their data transparency policies to encourage data availability.¹⁰

Transparency in research is desirable, and efforts to promote the release of data to the public are laudable. But ignoring valid and potentially valuable information in rulemaking with profound public health and economic consequences is a steep cost to pay—and at odds with the agency’s mandate to use the “best available” science.¹¹ I encourage the Science Advisory Board to consider these costs, and better alternatives, in today’s discussion of the rule.

⁹ Timothy Vines *et al.*, *The Availability of Research Data Declines Rapidly with Article Age*, 24 CURRENT BIOLOGY, 94 (2014).

¹⁰ Over 1000 journals have implemented policies in line with the Transparency and Openness Promotion Guidelines developed by the Center for Open Science. These guidelines promote the sharing of data while also providing for the protection of confidential or proprietary information. *See* Center for Open Science, <https://cos.io/top/>.

¹¹ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).