EPA still moving to limit science used to support regulations

Enlarge / Environmental Protection Agency Administrator Andrew Wheeler.

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Former Texas Congressman Lamar Smith may have retired in January, but his ideas still stalk the halls of the US Environmental Protection Agency. The New York Times reported Monday that the latest incarnation of Smith's quest to change the science the EPA can use for its rule making is moving forward.

Smith had unsuccessfully pushed a bill called the "Secret Science Reform Act," which would have required the EPA to consider only those studies with data that is "publicly available in a manner sufficient for independent analysis and substantial reproduction of research results." He claimed that opponents of regulations were often unable to audit the science underlying the regulations—although those opponents could, of course, have done their own science.

Limiting science

The scientific community noted that this requirement would have the effect of excluding quite a lot of relevant science

published in peer-reviewed journals. In particular, research on the public health impacts of pollutants is only possible through the use of confidential health data. There are systems in place to give researchers controlled access to that data, but releasing it to the public is simply not an option, and doing so very well might violate other federal rules.

Smith couldn't get his bill through Congress, but he worked with former EPA Administrator Scott Pruitt to get it rolling as an internal agency rule change. A 2018 E&E News story reported that this collaboration ran into an unlikely opponent: the pesticide industry. Those companies must provide safety studies when registering a new pesticide, so they were concerned about the cost of making all their data publicly available, and they were unclear on what form that would take.

The rule change was not finalized before Pruitt's resignation, and current EPA Administrator Andrew Wheeler appeared to take it back to the drawing board. But in a surprising twist, a new draft has appeared that The New York Times described as "headed for White House review." The twist is that the new draft doesn't do much to refocus the rule in a more narrow way that minimizes industry objections. Instead, it has been made broader in some ways.

The first version of the rule only covered the research that quantifies toxicity of things like pollutants and pesticides. This draft removes that limitation. "EPA is modifying the regulatory text initially proposed in the 2018 proposed Rule[…]" it reads, "so that these provisions would apply to all data and models, not only dose-response data and dose-response models."

Retroactive

What's more, the rule isn't just for new studies—it could end up applying retroactively. The draft contains multiple options on a couple points, one of which is setting a date *after* which

research would have to comply with these requirements. But if that isn't the option chosen, it would mean that all past research for which data has not been made publicly available would be found to fail the test. If a regulation comes up for renewal or updating, the science on which it was based could then plausibly be excluded from consideration.

Options are also listed for the issue at the heart of the rule—what to do with data that isn't sufficiently public. There are two alternatives to simply dropping that data in the trash bin. One would be to make availability part of the *weighting* of a study's value. This might not immediately disqualify a study if other characteristics of the work are seen as redeeming. However, the draft reads, "EPA would reserve the right to place less weight on the studies, to the point of entirely disregarding them, if the data and models underlying pivotal regulatory science are not made available in full to EPA."

The other alternative would recognize several tiers of data, from publicly available to "confidential business information" to "personally identifiable information that cannot be anonymized." Access would be different for each tier, with proprietary or personal information only required to be available to "authorized officials and researchers" rather than the general public. It's not clear how many privacy problems that would solve, although it would be easier for companies to navigate, as they would only have to respond to requests rather than publishing their data somewhere permanent.

Assuming this draft goes forward, it will once again be opened to public comment. When Pruitt's version went to public comment last year, more than 590,000 such comments were submitted.

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