

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION**

ENVIRONMENTAL DEFENSE FUND;  
MONTANA ENVIRONMENTAL  
INFORMATION CENTER; and CITIZENS  
FOR CLEAN ENERGY,

*Plaintiffs,*

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY; and ANDREW R. WHEELER, in  
his official capacity as Administrator of  
the U.S. Environmental Protection  
Agency,

*Defendants.*

Case No.

**COMPLAINT**

**EXPEDITED RELIEF  
SOUGHT**

**INTRODUCTION**

This is an action under the Administrative Procedure Act challenging the lawfulness of a sweeping new rule published in the Federal Register last Wednesday, January 6, 2021. The new rule will cripple the Environmental Protection Agency's ability to protect public health and the environment by fundamentally transforming the ways in which the agency may consider and rely on scientific evidence. Under the guise of promoting "transparency," the rule will limit the EPA's discretion to consider research for which the underlying data are not publicly available. Because legal and ethical rules prevent making data involving human subjects available to the

public—or available through “restricted access”—the rule hinders consideration of exactly the sorts of epidemiological and other studies that are most critical to the development of public-health standards. Overriding the objections of the EPA’s own top scientists, the agency’s leadership pushed the rule through in the administration’s waning days and took the unusual step of making it effective immediately upon publication. Both the rule itself and its immediate effective date exceed the agency’s statutory authority.

*First*, as authority for enacting the rule, the EPA relied solely on the Federal Housekeeping Statute, 5 U.S.C. § 301, which the agency claims gives it the “authority to promulgate housekeeping regulations governing its internal affairs.” *Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information*, 86 Fed. Reg. 469, 471 (Jan. 6, 2021). Although the EPA is not one of the Executive departments listed in that statute, it contends that such authority was later extended to it. *Id.* Moreover, the statute only authorizes agencies to enact rules that “govern internal ... affairs.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979). The EPA’s authority under the statute thus depends on two assumptions—that the rule “is a procedural rule within the scope of the EPA’s housekeeping authority,” and that the EPA has that authority in the first place. *Id.* at 472. But both assumptions are wrong. The critical question in determining whether a rule is procedural is whether it leaves the agency with discretion to

disregard the rule in an individual case. The entire purpose of the EPA’s new rule here is to *constrain* the agency’s discretion to consider scientific research—a substantive restriction. And EPA lacks housekeeping authority in any event. Because the agency thus lacked authority to enact the rule under the housekeeping statute—the only source of authority it invoked—the rule is unlawful and this Court should set it aside.

*Second*, the agency took the unusual and unlawful step of making the rule effective immediately upon its publication in the Federal Register last Wednesday. But the Administrative Procedure Act requires that, absent a showing of “good cause” or another specified exception, the publication of a new “substantive” rule “shall be made not less than 30 days before its effective date.” 5 U.S.C. § 553(d). In concluding that the rule is exempt from this requirement, the EPA repeats its error of treating its sweeping and transformational rule as just “procedural” rather than substantive. It also claims to have established the requisite “good cause” under section 553(d)(3) because the rule’s “goals of ensuring transparency and consistency” in scientific research are “crucial for ensuring confidence in EPA decision-making.” 86 Fed. Reg. 472. But merely claiming that a rule has important goals cannot demonstrate good cause for depriving the public of notice. All agency regulations purport to advance some beneficial purpose; if that were enough, they would all be exempt from the APA requirement. Instead, the question under section 553(d) is

whether the EPA has evidence of some crisis in confidence that urgently required it to put this rule into effect, following more than two and a half years, on the eve of a change in administration. It does not. To the contrary, the overwhelming scientific consensus reflected in the record is that the rule *itself* threatens confidence in the EPA's decisions by forcing the agency to regulate without giving due weight to the best available scientific evidence. Because the agency's decision to make the rule immediately effective thus violates the APA, the Court should declare that it will not become effective until February 5, 2021—30 days after its publication date. And the Court should ultimately set the rule aside.

### **PARTIES**

1. Plaintiff Environmental Defense Fund is a national membership organization that relies on science, economics, and law to advocate for informed policy and decision-making to restore the quality of air, water, and other natural resources nationwide. Its members include scientists who conduct cutting-edge scientific research into the determinants of human health. It also employs its own scientists who conduct epidemiological and public-health research, and upon whose research EDF relies for its science-informed advocacy.

2. Plaintiff Montana Environmental Information Center is a member-supported advocacy and public-education organization that works to protect and restore Montana's natural environment, including through assuring that state and

federal officials comply with and fully uphold laws designed to protect the environment and Montana citizens from pollution and fossil-fuel development.

3. Plaintiff Citizens for Clean Energy, Inc. is a nonprofit organization of Montana citizens whose objective is to convince decisionmakers to adopt clean-energy solutions in order to preserve Montanans' health, lifestyle, and heritage, and to protect Montana's land, air, water, and communities from the consequences of fossil-fuel development.

4. Defendant U.S. Environmental Protection Agency is an agency of the United States within the meaning of the APA. Defendant Andrew R. Wheeler is Administrator of that agency. He is sued in his official capacity.

### **JURISDICTION AND VENUE**

5. Because this case arises under the APA, this Court has jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. § 1331.

6. Venue is proper in this Court because plaintiffs Citizens for Clean Energy and Montana Environmental Information Center maintain their principal place of business in this district and are thus residents of this district for purposes of venue. *See* 28 U.S.C. § 1391(e)(1)(C). Divisional venue is proper in the Great Falls Division under L.R. 3.2(b) and Mont. Code. Ann. §§ 25-2-118, 25-2-125 because plaintiff Citizens for Clean Energy resides in this division at the time of the commencement of this action.

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