

## **Regulatory Transparency and the Public Trust: Do EPA’s GHG Endangerment Findings Comply with U.S. Law?**

By Lawrence A. Kogan and Richard D. Otis, Jr.

Ben Franklin used to say that, “[i]n this world nothing can be said to be certain, except death and taxes.” Were he alive today, he would likely add ever more costly new regulations, inadequate transparency, and diminished scientific protocols.

As the power and scope of the administrative state grows larger and the issues it tackles such as climate change become more abstruse, public confidence in the validity of its decisions becomes more critical. The quality and civility of debate along with the public’s willingness to accept government’s subsequent decisions is predicated on our ability to understand the foundation for those decisions and a principled trust that they are based upon a fair and equitable process fully compliant with applicable law.

The Obama Administration’s ostensible focus on open government, transparency and scientific integrity was a clear recognition that transparency had not kept pace with the expansive actions of modern government, its decisions, and the science underlying much of what it does. Despite the promise of “unprecedented transparency” by former U.S. Environmental Protection Agency (“EPA”) Administrator Lisa Jackson, EPA’s 2009 greenhouse gas (“GHG”) endangerment findings are an excellent example of the need for greater transparency. They concluded that carbon dioxide and five other GHGs endangered public health and welfare within the meaning of the Clean Air Act. But the Agency has been far from transparent in showing how the peer review processes used to vet the climate science assessments supporting those findings satisfied the strict peer review *process* standards imposed by U.S. law, namely, the Information Quality Act (IQA).

The IQA is an obscure statute that very few people know very much about. Detailed guidelines interpreting the IQA published by the Office of Management and Budget (“OMB”) direct federal agencies to ensure peer review of all “influential scientific information” or “highly influential scientific assessments” (HISAs) they use and disseminate to the public, particularly if the information may be used as the basis for regulatory action. Federal agencies also are directed to provide adequate administrative mechanisms permitting stakeholders to review the failure of agencies to respond to their requests for correction or requests for reconsideration of such scientific information.

EPA’s endangerment findings had twenty-eight HISAs primarily supporting Agency conclusions. Only four were developed by EPA. Sixteen were developed by five other federal agencies over which EPA lacked jurisdiction. Significantly, the Department of Commerce’s National Oceanic and Atmospheric Administration (NOAA), which serves as the federal government’s lead climate science agency, was responsible for the development of seven of these sixteen assessments. The remaining eight were prepared by three non-U.S. government entities: the Intergovernmental Panel on Climate Change (IPCC), the private nonprofit National Research Council of the National Academies of Science (NRC) and the regional Arctic Council.

Recent research reveals that NOAA's influence in developing the second national climate assessment and EPA's GHG endangerment findings was far greater than had previously been acknowledged. In fact, NOAA's influence had extended far beyond the development of assessments for the White House-operated U.S. Global Change Research Program/Climate Change Science Program (USGCRP/CCSP). Numerous NOAA scientists and university-affiliated scientists participating in NOAA-funded climate research grant programs also contributed to the Working Group I portion of the IPCC's Fourth Assessment Report.

The IQA required EPA to ensure each of the twenty-eight HISAs supporting its endangerment findings had been robustly and properly peer reviewed. This would not have been an insignificant undertaking, but it is an undertaking that may likely have exposed serious systemic flaws violating the letter and spirit of the IQA.

For example, six separate NRC peer review reports reveal that a number of university-affiliated scientists played a key role in NRC peer reviews of the same climate assessments that they, as NOAA-funded scientists, helped develop. On several occasions, without explanation, NRC repeatedly used the same reviewer(s) in multiple assessments.

Granted, OMB's IQA guidelines presume NRC's scientific peer review processes usually fully satisfy IQA requirements. However, this presumption is *rebuttable* where the facts show such processes had likely been compromised on conflict-of-interest, independence/bias, peer review panel balance, and non-transparency grounds. At the very least, these OMB guidelines require NRC and NOAA to publicly disclose and resolve apparent conflicts-of-interest (at both the personal and institutional levels), as well as bias and panel imbalance issues. This should have occurred *before* a hand-selected NRC committee proceeded to peer review the NOAA-developed assessments, in order *to avoid a perception of impropriety*.

Freedom of Information Act requests recently filed by the nonprofit [Institute for Trade, Standards and Sustainable Development \(ITSSD\)](#) challenge EPA and NOAA to substantiate *how* the peer review processes they employed to vet the highly influential climate science assessments supporting EPA's 2009 GHG endangerment findings *actually* satisfied IQA requirements. As ITSSD research reveals, this may be quite difficult considering the number of government agencies and other parties involved in this Rube Goldberg-type enterprise.

Comprehensive agency disclosure of these records would contribute significantly to the public's understanding of whether EPA's growing list of climate-related regulations are founded on peer review processes required by the IQA. More importantly, however, a transparent account of the federal government's proper use of regulatory science protocols would go a long way toward defusing public demand for a thorough reexamination of EPA's endangerment findings.

These revelations regarding past agency behavior raise an interesting question. Do the peer review science processes NOAA employed to vet the climate assessments supporting the Administration's third national climate assessment likely suffer from similar shortcomings?

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