The Information Quality Act and the Post-Modern Precautionary Principle

A number of IQA critics have insinuated that the objective, in part, of buttressing federal agency peer review standards was to prevent the nuanced incorporation within ISI reports and HISAs, including risk assessments that agencies use as support for strict environment, health and safety regulations, of the diminished scientific, legal and economic evidentiary thresholds associated with Europe's "strong" post-modern precautionary principle.[1]

As one such critic previously lamented,

> "A concerted effort is now underway to block application of the precautionary principle to the protection of public health, workplace safety, and the environment. An assault on the precautionary approach is one of the battlegrounds for that effort, as is the debate over the use of good science versus bad science, as well as the efforts to implement the Data Quality Act in ways that will burden agency decision-making and reduce public access to information."[2]

Indeed, the post-modern precautionary principle challenges the fundamental tenets of Enlightenment era empirical science, and sets forth a new evidentiary paradigm for scientific burdens and thresholds of proof.

> "The precautionary principle's adverse implications are their most visible in its 'strongest' version, which is triggered once 'there is at least *prima facie* scientific evidence of a hazard," rather than a risk. This PP version challenges Enlightenment era regulatory science protocols, and the rationalist approach of risk regulation, in the face of scientific uncertainty. As scientific uncertainty, unfortunately, is ubiquitous, its potential scope of application is enormous. In this version, the PP creates an administrative presumption of risk that favors *ex ante* regulation, and tends to reverse the administrative and adjudicatory burden of proof (production and persuasion) from government to show potential harm to industry to show no potential of harm. Consequently, since it is impossible to prove the absence of risk, the outcome invariably is that the hazard is regulated. Where the burden of proof initially rests on the regulator, the strict reliance on peer-reviewed scientific evidence is replaced with use of broader, qualitative, rather than quantitative, evidence, and a 'weight-of-the-evidence,' rather than 'strength-of-the-evidence' approach at the regulatory level. This PP-driven process equates a precautionary inference with the best explanation. Where quantitative evidence is not available, the standard of proof for the government shifts from causation to correlation. In this process, scientific experts are to facilitate greater understanding of the multiple 'dimensions of mixed questions of fact and law that frequently characterize

> scientific disputes. Furthermore, regulatory decisions remain open, non-final and subject to continuous reassessment pending new scientific developments.'"[3]

IQA opponents believe that a rigorously applied IQA prevents the incorporation of the precautionary principle into federal agency regulations by further "centralizing regulatory authority" at OMB, and thereby "displacing the expertise of agency personnel on a wide variety of complex regulatory issues, ranging from air pollution to workplace safety."[4] Indeed, they are concerned that judicially reviewable agency IQA peer review practices could ultimately jeopardize the 'super deference' (i.e., judicial deference to agency interpretation of uncertainties in scientific evidence as well as ambiguous provisions in organic statutes)[5] federal agencies have long enjoyed pursuant to the U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.,[6] which imposes a rather high evidentiary threshold to show that disputed agency regulations based on third party scientific assessments were "arbitrary and capricious."

---

[1] *See* Lucas Bergkamp and Lawrence A. Kogan, Trade, *The Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, European Journal of Risk Regulation 4/2013, pp. 493-507, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376753.

[2] *See* Christopher Schroeder, *CPR Perspective: The Precautionary Principle*, Center for Progressive Reform, http://www.progressivereform.org/perspPrecaution.cfm%20 (last visited Oct. 30, 2014) (emphasis added). *Id*.

[3] *Id., at* at 499-500.

[4] *See* John S. Applegate, Robert L. Glicksman, Tom O. McGarity, Sidney A. Shapiro, Amy Sinden, Rena I. Steinzor, and Robert R.M. Verchick, *Reinvigorating Protection of Health, Safety, and the Environment The Choices Facing Cass Sunstein*, Center for Progressive Reform, CPR White Paper #901 (Jan. 2009), at pp. 10-11, available at: http://www.progressivereform.org/articles/SunsteinOIRA901.pdf.

[5] *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011), available at: http://www.michiganlawreview.org/assets/pdfs/109/5/meazell.pdf (referring to how courts tend to defer more strongly to agency scientific determinations as "super deference"). ("This 'super-deference' principle seems appealing because it is supported by basic notions of institutional competence and accommodates a natural judicial tendency to avoid deep encounters with science. But it stands in stark tension with the expectation that courts must reinforce administrative-law values like participation, transparency, and deliberation. And it fails to further the legitimizing function of incorporating the best possible science into institutional decision making.") *Id*., at Abstract, p. 733.

[6] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).