

Ensuring Regulatory Agency (EPA) Transparency and Accountability via the U.S. Information Quality Act

- A federal procedural statute - Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-154 (2000), §515, codified at 44 U.S.C. § 3516 note
 - Implements Paperwork Reduction Act of 1995 - Chapter 35 of Title 44, United States Code [44 Page | 1
USCS § 3501 et seq.]
 - Policy objectives *inter alia*:
 - To minimize and reduce the paperwork burdens for individuals, small businesses educational and nonprofit institutions and other persons resulting from the collection of information by or for the federal gov't;
 - Burdens include those on time, effort or financial resources to comply with prior, existing or prospective rules & requirements (i.e., regulatory compliance burdens)
 - To maximize the utility of information created by or for the federal gov't;
 - To improve the quality and use of federal information;
 - To strengthen accountability and openness in gov't.
- Requires OMB to require all federal agencies to enact guidelines ensuring the proper peer review of “influential scientific information” (“ISI”) and “highly influential scientific assessments” (“HISAs”) that are publicly disseminated as support for economically significant agency regulations.
 - *OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* 67 FR 8452 (Feb. 22, 2002)
 - *OMB Final Information Quality Bulletin for Peer Review* 70 FR 2664 (Jan. 14, 2005)
 - ISI, including assessments of risk, that have a clear and substantial impact on important public policies or private sector decisions;
 - HISAs are ISI:
 - Having a potential impact of more than \$500 million in any year (tied to E.O. 12866 – economic cost-benefit analysis); *or*
 - Are novel, controversial, or precedent-setting; *or*
 - Generate significant interagency interest
- Requires OMB to require all federal agencies to provide ‘adequate’ administrative review mechanisms that permit stakeholders to seek correction of such scientific information upon presentment of credible scientific evidence of error, prior to such information’s dissemination by the agency.
 - These mechanisms must not only address due process concerns under the Administrative Procedure Act, but must also be sufficient to address the complex scientific and technical issues raised.
- EPA’s IQA Obligations – EPA was required, but failed to ensure that the many scientific assessments supporting its 2009 Clean Air Act Greenhouse Gas (“GHG”) Endangerment Findings, including those developed by the UN IPCC and other federal agencies (especially NOAA) under the interagency U.S. Global Change Research Program, had been peer reviewed in conformance with IQA’s most rigorous & least discretionary peer review, transparency, objectivity, independence, & conflicts-of-interest standards applicable to ISI/HISAs.
 - ITSSD Seeks to Ensure EPA’s IQA Compliance - In 2013, ITSSD U.S. Supreme Court *amicus curiae* brief in the *Coalition for Responsible Regulation v. EPA* case, requesting judicial review of IQA compliance of EPA’s peer review of such scientific assessments. The Court refused to grant judicial review on such grounds because the litigants’ pleadings had not raised that issue in the D.C. Circuit Court of Appeals (lower court).

- In March and April 2014, ITSSD filed detailed and annotated Freedom of Information Act (“FOIA”) requests with EPA and NOAA seeking public disclosure of agency records substantiating agency IQA compliance with respect to their peer review of such assessments. The agencies responded by requesting that ITSSD redraft its FOIA requests more narrowly.
- In June 2014, ITSSD filed a new detailed and annotated FOIA request with EPA identifying four distinct levels of IQA legal compliance obligations which EPA has not publicly shown it has satisfied.
 - EPA failed to scientifically validate the climate assessments it developed, including climate computer models and their applications;
 - EPA failed to scientifically validate the climate assessments, including computer modeling & applications, that IPCC and other agencies had developed; Ten peer reviews of NOAA assessments suffered from conflicts-of-interest, bias, no independence, etc.
 - EPA failed to provide an adequate administrative review mechanism to address stakeholder requests for correction
- In July 2014, ITSSD received from EPA an “I don’t understand” response, a rejection of its request for a FOIA fee waiver, and a request for payment assurance in the amount of approx. \$27,000 if ITSSD chose to keep its FOIA request ‘as-is’.
- In August 2014, ITSSD filed an Appeal with EPA’s Office of General Counsel contesting EPA’s denial of its FOIA fee waiver request.
- In August 2014, ITSSD filed comments with EPA in response to its proposed existing power plant rule, contesting agency reliance upon the IQA non-compliant scientific assessments grounding the Endangerment Findings
- In September 2014, ITSSD filed a new detailed and annotated FOIA request with NOAA, once again seeking substantiation of IQA compliance with respect to the NOAA-developed assessments upon which EPA had relied as support for its 2009 Clean Air Act GHG Endangerment Findings.
- Using the IQA to Remove the ‘Root of the Poisonous Tree’ - An IQA legal challenge is critical to stopping many economically costly and burdensome EPA regulations that have since been enacted based on the EPA’s 2009 Clean Air Act GHG Endangerment Findings.
 - The IQA does not expressly provide for judicial review.
 - BUT, The Kogan Law Group, P.C.’s litigation strategy and analysis of IQA and APA case law, ITSSD’s development of a rich factual record of EPA/NOAA IQA noncompliance, and State AG resort to doctrine of *parens patriae* would likely produce a highly successful outcome without judicial *Chevron* deference being accorded to EPA regulatory expertise.
- Additional Food for Thought – EPA’s IQA compliance failures extend beyond the Clean Air Act to other federal environmental statutes:
 - EPA did not properly peer review the ‘water-connectivity’ scientific assessment it now relies on as the foundation for proposed ‘US navigable waters’ regulations under Clean Water Act;
 - EPA did not properly peer review the scientific assessment(s) supporting proposed endangered species ‘listing’ regulations under Endangered Species Act.
- Useful ITSSD FOIA Weblinks:
 - <http://www.itssd.org/itssd-iqa-focused-foia-requests-filed-with-usepa.html>
 - <http://www.itssd.org/itssd-iqa-focused-foia-requests-filed-with-doc-noaa.html>
 - <http://nebula.wsimg.com/9293ff84df35eecd25e73a03499114?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>
 - <http://www.itssd.org/industry--trade---professional-references--2013-2014-.html> and
 - <http://www.itssd.org/mainstream-news---editorial-media-references--2014-.html>