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Revitalizing The Information Quality Act as a Procedural Cure For Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study

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Executive Summary:

Congress passed the Information Quality Act (IQA) in 2000 to implement and amend the Paperwork Reduction Act. The law requires federal agencies to ensure the quality, objectivity, utility, and integrity of the scientific, technical, and statistical information that federal agencies adopt and disseminate to the public. Although the law is nominally a procedural statute, this WORKING PAPER explains how regulated entities and other stakeholders can successfully seek judicial enforcement of the IQA when agencies rely upon flawed science for federal rules, and those rules impose paperwork, compliance, and other burdens.

The Office of Management and Budget (OMB) is responsible for implementing the IQA. OMB's IQA Guidelines required that each federal agency develop and adhere to their own IQA guidelines, and set out minimum criteria for scientific peer review of agency-drafted and third-party studies and scientific assessments, as well as criteria for the selection of peer reviewers. OMB dictated that these peer-review standards be especially rigorous for "highly influential scientific assessments." Federal agencies must also provide an administrative review mechanism that will allow affected entities to seek correction of agency-disseminated information that was not adequately validated. Agencies routinely carry out this mandate by addressing requests for correction as part of their responses to public comments in a final regulation—an approach, the paper argues, that does not afford sufficient due process to stakeholders.

The Environmental Protection Agency's (EPA) 2009 greenhouse gas Endangerment Findings, and the decision-making process underlying them, offers an instructive IQA case study. A review of the extensive record and the peer review activities underlying the Findings reveals extensive violations of conflict-of-interest and other IQA-related standards. EPA also did not consider stakeholders' challenges regarding these violations in a timely or sufficiently specialized manner. Stakeholders' requests for reconsideration of the Findings were also rejected.

Stakeholders faced with such adverse, final agency actions would traditionally consider legal action against the responsible federal agency. As the WORKING PAPER explains, however, federal courts have been generally

skeptical of regulated entities' private causes of action to redress agencies' noncompliance with IQA standards. Those complaints have foundered on plaintiffs' standing to sue, as well as their assertion of a positive right to properly peer-reviewed government information.

This paper proposes an alternative approach to judicial enforcement of the IQA, one which addresses past lawsuits' shortcomings. It explains this alternative approach in the context of a challenge to EPA's violation of IQA during its development of the Endangerment Findings. The contemplated cause of action is based on the theory that Congress intended that the IQA, as an implementation of the Paperwork Reduction Act, protect the negative right of a designated class of persons not to be burdened, financially or otherwise, by poor quality science that agencies disseminate in support of major regulations. The lawsuit would formally be brought as an action under the Administrative Procedure Act (APA).

Private entities, such as regulated businesses could establish standing to sue based on the particularized economic injuries they have suffered from regulatory burdens. State governments could take advantage of U.S. Supreme Court precedents that convey standing under the doctrine of parens patriae when such public actors are suing in their quasi-sovereign capacity. A narrowly-pled, factually-supported challenge utilizing the APA would not only be consistent with the longstanding presumption that Congress intends judicial review of administrative action, but it would also be sufficient to overcome some federal courts' presumption against implied causes of action.

Fueled by decades of ineffective oversight, federal agencies' respect for science and the scientific process has severely diminished. For that reason, one can easily foresee many potential applications of the enforcement framework offered in this paper. Other actions by EPA where stakeholders have strongly questioned the supporting science could be particularly inviting targets as well. They include: EPA's "Waters of the United States" proposal; its social cost of carbon proposal; its proposed ozone regulations; its NEPA review of the Keystone XL pipeline; its study on the impacts of hydraulic fracturing; and EPA and NOAA disapproval of state coastal nonpoint pollution control programs. Another possible target could be the Fish and Wildlife Service's threatened or endangered species designations.<<<Get Full Study>>>