H.R. 5952: A Message from Congress to OSTP—Enforce Presidential Directives

On June 18, Congressman Don Manzullo and six co-sponsors introduced H.R. 5952.[1] This bill is especially notable because (a) it would establish for all agencies substantive standards for the science on which they rely in issuing regulations, guidance, risk assessments, and hazard listings, (b) it has deadlines, and (c) the guidance required to be issued under the bill would be judicially enforceable.

The bill would make the Director of the Office of Science and Technology Policy ("OSTP") responsible for approving agency guidance issued pursuant to its provisions, and any agency policy decision – broadly defined – issued without such guidance in place and not in compliance with such guidance would be found "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." The agency guidance, required to be approved and issued by January 1, 2013 in order to support agency policy decisions issued thereafter, would have to contain certain content specified by the bill, which includes both substantive and procedural provisions. Echoing the Data Quality Act, the agency guidance would generally have to ensure and maximize the "quality, objectivity, utility, and integrity" of scientific information relied upon by an agency.[2]

There is strong Congressional precedent for specifying the principles that must govern the use of scientific information in rulemaking. The 1996 amendments to the Safe Drinking Water Act contain very specific requirements for the use and description of scientific evidence supporting rulemaking under the SDWA. (42 U.S.C. § 300g-1(b)(3)(B)). H.R. 5952 contains portions of those requirements, but extends them beyond SDWA regulations and EPA to all types of agency policy statements relying on scientific evidence and all agencies. OMB's government-wide DQA guidance of 2002 did not clearly incorporate the SDWA principles because it allowed the agencies to either "adopt or adapt"[3] those SDWA requirements to other programs and types of information.[4]

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[1] http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.5952.

[2] Under the DQA, 44 U.S.C. § 3516 note, OMB, not OSTP, has responsibility for the issuance of agency guidelines to ensure and maximize the "quality, objectivity, utility, and integrity" of all information on which they rely in disseminating information to the public. Also, the DQA and its guidance encompass all types of information, not just scientific evidence.

[3] 67 Fed. Reg. 8452, 8457-58.

[4] EPA, for example, chose to "adapt" these OMB DQA and SDWA guideline principles to provide itself with significant flexibility to follow other existing EPA risk and hazard assessment

In 2007, OMB and OSTP jointly issued "Updated Principles for Risk Analysis," which contained considerable specificity, although it is questionable whether the principles are judicially enforceable because, although they state that they are "intended to complement and support the Information Quality Act Guidelines," they were not issued solely by OMB and they do not state that they were issued pursuant to the Data Quality Act.[5]

In March 2009, President Obama, shortly after taking office, issued an Executive Memorandum[6] ordering OSTP to develop, within 120 days, recommendations for Presidential action designed to guarantee scientific integrity throughout the executive branch based on certain principles, a number of which are reflected in H.R. 5952.

It was not until December 2010, however, that OSTP issued any recommendations. And the OSTP Memorandum to the executive branch[7] does not contain any recommendations for Presidential action; rather, it only provides "further guidance" to the agencies on implementation of the principles set out in the President's March 2009 memorandum.[8] The "further guidance" issued by OSTP does not address any substantive scientific issues, such as elimination of bias and use of the best available data; rather, it addresses issues such as transparency and use of qualified scientific personnel. The OSTP memorandum also contains a disclaimer that nothing in it should be regarded as judicially enforceable.

Upon introducing H.R. 5952, Mr. Manzullo expressed frustration with the lack of follow-through on the President's March 2009 directive, and proposed his bill as a sound alternative that would codify and make enforceable the application of

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principles. http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf, sec. 6.4.

[5] http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/m07-24.pdf.

[6] http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09.

[7] http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

[8] See, http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09.

specific principles for use by all agencies in relying on scientific data in making policy decisions involving hazard or risk determinations.[9]

OMB has done a laudable job in enforcing the Data Quality Guidelines; however OSTP has been remiss in discharging its responsibilities contained in the aforementioned Presidential memoranda; H. R. 5952 is aimed at correcting this non-compliance by OSTP by codifying such principles and ensuring that they are judicially enforceable as in the Safe Drinking Water Act.

OSTP has a long history of turning a deaf ear to requests from the public to ensure that agency decisions are science based. For example in recent weeks OSTP has been advised that more than 200 leading academics have advised CMS that its competitive bidding program is the "antithesis of science";[10] OSTP refuses to take action on this matter.

OSTP has also shunned CRE[11] requests when they were asked to discharge their responsibility for ensuring that decisions within the executive branch were science based. The President's Scientific Integrity Memorandum assigns the Director of the Office of Science and Technology Policy

"the responsibility for ensuring the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes."

HR 5952 is doing through legislation what the President could not achieve through administrative action.

While some might regard H.R. 5952 as simply a starting point in fleshing out principles for the application of sound science by federal agencies, its main thrust is to demand that OSTP comply with Presidential directives is a desirable and overdue.[12]

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[9] Extension of remarks on June 18, 2012, Cong. Rec. E1062.

[10] See, Dilip Abreu, et al., "Letter from 244 Concerned Auction Experts on Medicare Competitive Bidding Program to President Obama," 17 June 2011, p.1, available at http://www.cramton.umd.edu/papers2010-2014/further-comments-of-concerned-auction-experts-on-medicare-bidding.pdf

[11] See, http://www.thecre.com/pdf/HoldrenLetter%20CompetitiveBidding.Signed.pdf.

[12] Despite the D.C. Circuit's 2010 holding in *Prime Time Int'l Co. v. Vilsak*, 599 F.3d 678, 685, that the DQA Guidelines are "binding," there continues to be skepticism and controversy

The present status of Congressional action on H.R. 5952 is referral to the House Committee on Oversight and Government Reform.

concerning judicial reviewability. The Administration in particular takes the position in its annual reports to Congress that the Guidelines do not support judicial review of agency information disseminations under existing law.