Challenging the scientific basis for emissions regulations

"Fuelled by decades of ineffective oversight, federal agencies' respect for science and the scientific process has severely diminished," writes Lawrence Kogan in the Executive Summary of his recent Washington Law Foundation Working Paper 'Revitalising the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: a Greenhouse Gas Rulemaking Case Study', in which he aims to demonstrate a successful strategy for seeking judicial enforcement of the Information Quality Act (IQA) when agencies rely on flawed science to promulgate federal regulation.

As written, the IQA aims to ensure "the quality, objectivity, utility and integrity of the scientific, technical and statistical information that federal agencies adopt," explains Kogan. This includes rigorous standards for peer review – particularly in the case of so-called 'highly influential scientific assessments' – as well as an administrative review mechanism that would allow affected parties to seek correction of data that was not adequately validated.

Yet IQA process standards have been consistently ignored in several cases – as Kogan argued here last year in the case of the Environmental Protection Agency's (EPA) 2009 greenhouse gas endangerment findings – while courts have been generally sceptical of lawsuits (the traditional recourse for stakeholders facing final and adverse regulatory actions) seeking to redress noncompliance with IQA standards. Such complaints as have been brought, have "foundered on plaintiff's standing to sue, as well as their assertion of a positive right to properly peer-reviewed government information".

But taking the greenhouse gas endangerment finding as an example, Kogan has waged a campaign to expose the IQA-noncompliance of the scientific assessments used as the basis of the findings, alleging that: "the EPA's and NOAA's circumvention of and nonconformance with the IQA denied public stakeholders their constitutional and statutory rights to due process. Such circumvention and nonconformance ultimately resulted in the EPA's enactment of costly and burdensome regulations with significant direct economic impacts throughout the nation's industries, states and localities, as well as, in indirect economic impacts upon consumers."

With the latest working paper, Kogan now suggests a legal solution to the previous issues encountered by plaintiffs seeking judicial review of IQA compliance, based on the theory that "Congress intended that the IQA, as an implementation of the Paperwork Reduction Act, protect the negative right […] not to be burdened, financially or otherwise, by poor quality science that agencies disseminate in support of major regulations."

The scientific assessments behind the EPA's greenhouse endangerment findings form the basis for subsequent regulation of carbon-emissions from power plants. If the assessments can be legally challenged on the basis of the flawed processes by which they had been peer reviewed then the whole edifice would be in danger of collapse. Kogan concludes by listing several other areas in which EPA regulatory action is based on contested science developed as the result of a

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flawed peer review process, including the agency's social cost of carbon proposal and its study on the impact of hydraulic fracking, among others.

"This working paper offers a roadmap for precedential action that would establish the IQA's reviewability and, at the same time, ensure that costly agency initiatives are science-based," Jim Tozzi, advisor to the Center for Regulatory Effectiveness and a former Office of Management and Budget regulatory official, concludes in his Foreword to the working paper. "One hopes a regulatory stakeholder will soon utilize Mr Kogan's ideas in a successful court challenge."

Written by Jonathan Rowland.

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