



The Quest for Checks and Balances on EPA Science

Beyond Science and Decision Workshop XIV

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Earth & Water Law
SOLUTIONS FOR BUSINESS AND THE PLANET

Checks and Balances on EPA Science

1. Judicial Review of Factual Support in Administrative Record
2. Science Advisory Committees
3. OIRA Pre-Promulgation (but not Retrospective) Review
4. NAS/BEST Reviews
5. Congressional Oversight
6. Information/Data Quality Act
7. Appropriations Riders

Default vs. Specific Statutory Requirements

- Default review of factual support under APA §706 is not very demanding
 - “Substantial Evidence” (adjudication)
 - “Capricious and Arbitrary” (rulemaking)
- “such evidence as might appeal to a reasonable mind”
 - *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).
- **Less demanding than “preponderance of evidence” in a civil suit**
- Plus **”super” judicial deference** is supposed to be given to issues “on the frontiers of science”
 - *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87, 104 (1983)(“when examining agency determinations at the frontiers of science...a reviewing court must generally be at its most deferential.”)
- Walter-Logan Act (vetoed 1940) was more demanding
 - Specialized administrative courts could set aside findings if “clearly erroneous” (same standard as for juries)

EPA Interprets Statutes Protecting Public Health to be Very Precautionary

- Balancing risk of false negatives against false positives.
- **“The purpose of risk assessment at EPA is to ensure we never underestimate a risk to public health”** -- Paul Gilman, AA for ORD
- *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.)(*en banc*), *cert. denied*, 426 U.S. 941 (1976), <https://casetext.com/case/ethyl-corp-v-epa>
 - Upheld EPA lead in gasoline rule despite weaknesses in exposure data and no evidence of harm from low levels of exposure
 - Often cited as one of EPA’s BEST decisions to protect public health as evidence accumulated of adverse effects at lower and lower blood lead levels
- Conservative “safe” reference levels effectively monetize exposure to very low or non-existent risks for which recovery would not otherwise be available (Mullin).
- However, language in a few statutes does impose more demanding requirements for scientific evidence (Bodine).

A Promising Exception But Not (Yet) the Rule ...

Maine Lobstermen's Ass'n v. National
Marine Fisheries Service, No. 22-5238 (D.C.
Cir. Jun. 16, 2023)

Statutory text and structure [of the Endangered Species Act] do not authorize the Service to “generally select the value that would lead to conclusions of higher, rather than lower, risk to endangered or threatened species” whenever it faces a plausible range of values or competing analytical approaches. The statute is focused upon “likely” outcomes, not worst-case scenarios. It requires the Service to use the best available scientific data, not the most pessimistic.

EPA Currently Has Substantial Discretion to Interpret Most of Its Statutes on a Worst- Case Basis ...

- Under *Chevron v. NRDC*, 467 U.S. 837 (1984), courts are supposed to defer to “reasonable” agency interpretations of statutes absent statutory language or other indicia of Congressional intent to the contrary ...
- BUT the Supreme Court has agreed to consider overruling *Chevron*.
<https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/>
- If *Chevron* were over-ruled, courts would have greater authority to decide how precautionary EPA’s scientific risk assessments should be.

Comprehensive Environmental Response, Compensation, and Liability Act, sec. 102

*SEC. 102. (a) The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 101(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment **may** present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 103 of this title.*

OIRA's Proposed Risk Bulletin (2006)

- Would have required “a range of plausible risk estimates, including central or expected estimates”
https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf
- Withdrawn after adverse comments by a committee of the National Academy of Sciences to the effect that risk assessment should not be standardized across agencies.

Information/Data Quality Act



- Some agency guidelines for influential assessments
<https://www.noaa.gov/organization/information-technology/policy-oversight/information-quality/information-quality-guidelines>
- Generally NOT enforceable thru litigation.

Conclusions: No Effective Checks on EPA Science

- Generalist judges are reluctant to question scientific conclusions about which they have no expertise.
 - Few if any cases even on which EPA has lost on the science.
 - Specialized courts do a better job of reviewing scientific evidence.
- Arthur Kantrowitz proposed a “Science Court” in 1967.
 - *Proposal for an Institution for Scientific Judgment*, 156 SCIENCE 763 (1967).
 - Unfortunately, he imagined a court modeled on criminal trials.
 - Scientists work best in consensus panels like those convened by this program or NAS.
 - FDA uses expert panels of outside advisers.
- But only a few judges have appointed neutral expert panels and none in EPA cases.
 - See Elliott, *The Future of Toxic Torts* (1988),
<https://openyls.law.yale.edu/handle/20.500.13051/4642>
- Published consensus statements by groups such as Science and Decisions can be submitted for the record in comments and cited by the parties and considered by courts in litigation.



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