



Committee on Regulation
Minutes
November 2 – December 15, 2011

The meeting began at 9:00 am on November 2, 2011, when the Administrative Conference staff opened a moderated web forum, available at <http://www.acus.gov/forum>, to allow posting of messages. The web forum represented the first “virtual meeting” of an Administrative Conference committee. The Conference announced the meeting in advance in the October 18, 2011 Federal Register (thereby providing the 15 days advance notice required by the Federal Advisory Committee Act), provided instructions for registering for and using the forum on its website, and trained members of the Committee on Regulation on forum usage. On November 2, 2011, the forum became available for both members of the Committee on Regulation and members of the public to post comments (with members of the public being permitted to register prior to posting or simply to post comments anonymously). As moderator, Staff Counsel Reeve Bull reviewed such comments for compliance with the Conference’s public comment policy (available at <http://www.acus.gov/research/public-comment-policy/>) and then posted the comments that complied therewith.

The topic of the meeting concerned Professor Wendy Wagner’s ongoing research for the Science in the Administrative Process project. Mr. Bull posted a revised project outline in which Ms. Wagner described the modifications to the scope of the project she had adopted following the Committee’s first meeting on May 31, 2011 and offered an overview of her research to date. Ms. Wagner explained that the new focus of the study “is to assess the transparency of the agencies’ use of science, primarily in informal rulemakings.” She noted that transparency is an important issue in its own right and that an examination of how agencies explain their scientific work would serve as a productive initial step in exploring agencies’ usage of science more generally, which subsequent Conference projects might examine. She stated that her research will focus primarily on the experiences of four agencies: the Environmental Protection Agency (“EPA”), Food and Drug Administration (“FDA”), Nuclear Regulatory Commission (“NRC”), and Department of the Interior (“DOI”).

Public member Gillian Metzger suggested that Ms. Wagner might focus on how transparency in agencies’ use of science can promote improved inter-agency coordination. Ms. Metzger also proposed that Ms. Wagner might consider the relationship between transparency and other internal features of agencies’ use of science (e.g., the role of science advisors or the form of internal rulemaking processes). Senior Fellow Peter Strauss suggested that the report might usefully distinguish between agencies’ use of “hard sciences” (e.g., chemistry and physics) and “soft sciences” (e.g., economics or psychology). Mr. Strauss also recommended that Ms. Wagner conduct her interviews orally, in order to permit her to ask follow-up questions and explore topics in depth. Finally, Mr. Strauss urged Ms. Wagner to consider the work of two



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federal advisory committees, the Advisory Committee on Reactor Safeguards (associated with NRC) and the Clean Air Scientific Advisory Council (associated with EPA), as well as a book chapter dealing with potential limits on the politicization of agency science.

Ms. Wagner responded to both Mr. Strauss' and Ms. Metzger's comments. First, she noted that her research suggested that various internal agency processes can promote greater transparency in the use of science. Ms. Wagner stated that the study focuses primarily, if not exclusively, on "hard sciences," and that she will integrate an introduction to the report describing the scope of the study. Finally, Ms. Wagner asked for advice on obtaining criticisms of agencies' usage of science from employees at those agencies, noting that interviewees had been reluctant to volunteer such dissenting views. Mr. Strauss noted that Ms. Wagner might interview past and present members of the Advisory Committee on Reactor Safeguards and the Clean Air Scientific Advisory Committee on their perceived successes and failures in transmitting scientific views to the NRC and EPA, respectively.

Public Member Susan Dudley stated that, in order for agencies to be fully transparent in their use of science, they must make some effort to distinguish scientific-based and policy-based decisionmaking, which distinction the report should analyze. Ms. Wagner noted that she would consider this distinction in the introduction to her report but stated that distinguishing scientific and policy-based decisionmaking is an extremely difficult and controversial process that likely could not be fully addressed in the report. Ms. Dudley responded that she did not believe that addressing that issue in the introduction would be sufficient: distinguishing between policy-based and science-based decisionmaking is critical to the promotion of transparency. Ms. Wagner responded that, though such issues are certainly worthy of consideration, they are beyond the scope of the present study and should perhaps be addressed in a subsequent project.

Richard Belzer, a public participant in the forum, expressed some reservations regarding the methodology Ms. Wagner had proposed to obtain data on agency transparency in the use of science. He recommended that Ms. Wagner clarify whether the report is focused on limiting policy-making officials' efforts to influence scientific decisionmaking or controlling scientists' efforts to impact policymaking (or both). In response to Ms. Metzger's comment, Mr. Belzer noted that he considers inter-agency coordination and transparency to be in irreconcilable tension.

Jamie Conrad, another public forum participant, praised Ms. Wagner's decision to narrow the scope of the study to focus on transparency in agencies' use of science. He noted that Ms. Wagner might wish to examine whether or not sessions in which stakeholders are invited to discuss the state of the relevant science prior to the commencement of a new study are useful and should be promoted at other agencies. He also offered some thoughts on the various factors Ms. Wagner proposes to consider in examining how well agencies explicate their use of science. He noted that senior career staff, like political appointees, can "suppress or misrepresent the scientific work of the staff they supervise," and their power to do so may be greater than that of



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political appointees given that they often enjoy a longer tenure at the agency. Ms. Wagner noted that the resource limitations of the study might prevent delving into the level of detail that Mr. Conrad proposes.

Peter de la Cruz, yet another public participant, attached a document to the forum that examined, *inter alia*, the relationship between science and governance, the definition of “science,” the comparison between the scientific and administrative processes, and the promotion of greater internal agency communication regarding scientific issues.

Shortly after the close of business on December 15, 2011 at 5:00 pm, the time for the conclusion of the forum announced in the Federal Register, the Administrative Conference staff ended the comment period for the forum. Conference members and members of the public will continue to be able to view all postings on the forum while the Science in the Administrative Process project proceeds, but they will no longer be able to submit comments.