



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

To: Committee on Regulation
From: Reeve T. Bull
Date: September 18, 2012
**Re: Overview of September 10, 2012 National Academies-ACUS Workshop on
Improving the Use of Science in the Administrative Process**

On September 10, 2012, the National Academies, in collaboration with the Administrative Conference, hosted a workshop on improving the use of science in the administrative process. The workshop examined the draft ACUS recommendation under consideration by the Committee on Regulation at its March 7, 2012 meeting, the draft report that Professor Wendy Wagner prepared in connection with the Science in the Administrative Process project, and other ideas for improving administrative agencies' use of science in their decisionmaking processes. The following memorandum provides a very general overview of the major issues explored during the workshop. The workshop was also transcribed, and the transcript will be posted on the Administrative Conference's website (www.acus.gov) as soon as it is available (likely in the next two weeks). In addition, a program from the workshop that provides each participant's name and a brief biography is included as an appendix to this document.

A few primary themes emerged from the four panel discussions conducted at the workshop. First, the panelists expressed general support for the best practices in agencies' use of science identified in Professor Wendy Wagner's report. They affirmed that the issues Professor Wagner selected were important, and they generally supported the mechanisms she identified for resolving those problems. At the same time, they proposed a number of refinements to Professor Wagner's recommendations to account for complexities in agencies' scientific research. Second, the panel discussions and public comments revealed no hard evidence that the Office of Information and Regulatory Affairs (OIRA) or other components of the White House interfere with agencies' scientific factfindings. Though some panelists and public commentators advocated enhanced transparency of the Presidential review process, other participants suggested that such questions were outside the scope of a project dealing with agencies' use of science. Finally, the panelists identified additional recommendations for improving administrative science.

Professor Richard Zeckhauser (Professor of Political Economy, Harvard Kennedy School) opened the session by noting that an unalloyed commitment to transparency can result in increased costs and unintended consequences. Professor Zeckhauser noted that mandated "disclosure of everything" can often result in "disclosure of nothing," as agencies will often exploit loopholes to avoid triggering applicable transparency requirements. Further, excessive transparency can stifle compromise, as decisionmakers zealously adhere to their preconceived perspectives to avoid appearing unprincipled. As such, any effort to enhance the transparency of agency decisionmaking must consider the downstream effects of such changes.



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For the first panel, Professor Wagner provided an overview of her research and recommendations, and Dr. Lynn Goldman (Dean, George Washington School of Public Health and Health Services) and Professor M. Granger Morgan (Professor of Engineering, Carnegie Mellon University) offered comments on Professor Wagner's proposals. Dr. Goldman agreed in principle with most of Professor Wagner's recommendations, but she offered a series of refinements. For instance, with respect to Professor Wagner's suggestion that agencies explicitly identify the steps by which scientific findings inform policy decisions (including identifying policy questions, assessing the available evidence, applying the evidence to the policy questions, and identifying plausible alternatives), Dr. Goldman recommended that a missing step is a description of the study design. Professor Morgan stated that scientific decisionmaking does not always proceed directly from scientific analysis to policy formation; there is generally an intermediate step of policy analysis, which is often mischaracterized as scientific analysis. Professor Morgan also suggested that a "one-size-fits-all" approach to regulation can be counter-productive in some circumstances. For instance, subjecting all rules to rigorous, mathematically precise cost-benefit analysis may be inappropriate when benefits are not easily quantified.

For the second panel, Professor David Korn (Professor of Pathology, Harvard Medical School) moderated a discussion with panelists Professor Susan Dudley (Professor of Public Policy and Public Administration, George Washington University), Dr. Paul Gilman (Senior Vice President and Chief Sustainability Officer, Coventa Energy), and Dr. Francesca Grifo (Senior Scientist and Science Policy Fellow, Union of Concerned Scientists). Professor Dudley highlighted the importance of distinguishing between questions of policy and questions of science: agencies sometimes characterize fundamentally policy-based questions as scientific, and this can complicate the regulatory review process insofar as policy-driven disagreements can be misconstrued as interference with the underlying science. Dr. Gilman emphasized the importance of promoting integrity amongst agency scientists, asserting that "the process will only be as good as the people." Dr. Grifo suggested that the primary authority for making science-based decisions should reside in regulatory agencies insofar as they possess the relevant expertise. She also offered potential ideas for additional recommendations, including whistleblower protection, transparency in the inter-agency review process, logging all ex parte contacts, and providing a better definition of conflicts of interest.

For the third panel, Dr. Joseph Rodricks (Principal, Environ) moderated a discussion with panelists Professor Tracey Woodruff (Professor, Department of Obstetrics, Gynecology, and Reproductive Services, University of California-San Francisco), Dr. David Michaels (Assistant Secretary of Labor, Occupational Safety and Health Administration), and Professor Thomas Louis (Professor, Department of Biostatistics, Johns Hopkins Bloomberg School of Public Health). Professor Woodruff suggested that the project could benefit from considering various insights from the field of clinical medicine. For instance, the methodology for collecting,



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evaluating, and synthesizing scientific evidence should be established a priori. Dr. Michaels lauded the report's focus on sharing best practices, noting that agencies are not always aware of innovations by sister agencies, yet he indicated that agencies must be mindful of the costs associated with adopting programs developed by their counterparts. Dr. Michaels also identified several additional topics that might be addressed in the draft recommendation, including equal disclosure obligations for private science. Professor Louis indicated that he agreed in theory with Professor Wagner's recommendations, but he identified certain principles of which agencies should be mindful in implementing such proposals. For instance, he indicated that there will almost always be some degree of uncertainty surrounding the science on which agencies rely, noted that it is often impossible to separate issues of science from those of policy, and observed that criticism of scientific decisionmaking should be supported by evidence.

In a final panel, Professor Alan Morrison (Professor of Law, George Washington University) invited speakers who served on previous panels and workshop attendees to participate in a wide-ranging discussion of any remaining topics. Professor Morrison offered several observations on the preceding panels; for instance, he noted that approaches to the use of science vary significantly not only from agency to agency but also within individual agencies. The ensuing discussion covered a wide variety of topics, including review of scientific regulations by OIRA. In response to allegations of interference, Michael Fitzpatrick, a former Deputy Administrator of OIRA, noted that he found no evidence of OIRA's tampering with agencies' scientific findings in two stints with OIRA in two separate administrations. Professors Woodruff and Locke observed that any recommendations regarding interference with agency science should be based on hard data rather than anecdotal evidence. Professor Locke commented that it would be possible to design a methodology to study these issues empirically. Professor Zeckhauser suggested that the Conference's project should focus upon improving agencies' use of science rather than issues related to OIRA review.

Ultimately, the workshop proved to be very beneficial not only in terms of offering improvements to the recommendations under committee consideration but also in providing additional areas of study for future Conference projects. The panelists generally confirmed the salience of the issues Professor Wagner has identified and the wisdom of her proposed solutions, but they also offered a number of useful refinements and topics for additional recommendations. The discussions affirmed the appropriateness of focusing on best practices intrinsic to agencies' use of science. Professor Wagner and ACUS staff are currently integrating the insights from the workshop into the draft recommendation.

Improving the Use of Science in the Administrative Process

A Workshop under the Auspices of
The National Academy of Sciences' Committee on Science, Technology, and Law
in Collaboration with
The Administrative Conference of the United States

Monday, September 10, 2012
Auditorium
National Academy of Sciences Building
2101 Constitution Avenue, NW
Washington, DC 20418

Agenda

10:30 Welcome:

David Korn,* Professor of Pathology, Harvard Medical School; Consultant in Pathology, Massachusetts General Hospital; and Co-chair, National Academy of Sciences' Committee on Science, Technology, and Law

Paul R. Verkuil, Chairman, The Administrative Conference of the United States

10:40 Enhancing the Scientific Basis of Agency Decision-Making

Speaker: Richard J. Zeckhauser, Frank P. Ramsey Professor of Political Economy, Harvard Kennedy School

11:00 Session 1: Use of Science in the Administrative Process: A Study of Federal Agency Decision-Making Approaches

Moderator: Paul A. Locke, Associate Professor, Department of Environmental Health Sciences, Johns Hopkins Bloomberg School of Public Health

Speaker: Wendy Wagner, Joe A. Worsham Centennial Professor of Law, University of Texas School of Law

11:20 Commentators:

Lynn R. Goldman, Dean, The George Washington School of Public Health and Health Services

M. Granger Morgan, Lord Chair and University Professor in Engineering; Professor and Department Head, Engineering and Public Policy; also a Professor in the Department of Electrical and Computer Engineering, and the Heinz School of Public Policy and Management, Carnegie Mellon University

11:50 Discussion with Audience

APPENDIX

12:15 Lunch

1:00 **Session 2: Roundtable Discussion of Recommendations – Issues Relate to the Integrity and Transparency of Science-Based Regulation (Presidential Review / statutory and regulatory constraints)**

Moderator: David S. Tatel,* Judge, U.S. Court of Appeals for the District of Columbia Circuit

Speakers: Susan Dudley, Research Professor of Public Policy and Public Administration and Director, Regulatory Studies Center, George Washington University

Paul Gilman, Senior Vice President and Chief Sustainability Officer, Covanta Energy

Francesca T. Grifo, Senior Scientist and Science Policy Fellow, Union of Concerned Scientists

2:00 *Discussion with Audience*

2:30 Break

2:45 **Session 3: Roundtable Discussion of Best Practices – Public Accessibility to Agency Scientific Evidence / Mechanisms to Enhance Scientific Integrity / Mechanisms to Enhance Scientific Transparency**

Moderator: Joseph V. Rodricks, Principal, Environ

Speakers: Thomas A. Louis, Professor, Department of Biostatistics, Johns Hopkins Bloomberg School of Public Health

David Michaels, Assistant Secretary of Labor, Occupational Safety and Health Administration, U.S. Department of Labor

Tracey J. Woodruff, Professor, Department of Obstetrics, Gynecology, and Reproductive Sciences and Philip R. Lee Institute for Health Policy Studies, University of California, San Francisco and Director of the Program on Reproductive Health and the Environment

3:45 *Discussion with Audience*

4:15 **Session 4: Roundtable Discussion – Moving Forward: Other Approaches / Mechanisms / Practices to Improve the Use of Science in Agency Decision-Making Processes**

Moderator: Alan B. Morrison,* Lerner Family Associate Dean for Public Interest and Public Service, George Washington University Law School

5:00 Adjourn

*Member of the National Academy of Sciences' Committee on Science, Technology, and Law