By Peter Montague

Continuing from Rachel's #824: Smokers started calling cigarettes "coffin nails" in the 1920s. Almost 40 years later, science caught up to popular knowledge: In 1956, the U.S. Surgeon General concluded cigarettes cause lung cancer. To prevent regulation of cigarettes, tobacco corporations adopted a strategy of casting doubt on the scientific studies showing harm. Today it is no secret that many industrial chemicals are killing tens of thousands of workers and ordinary citizens each year, making many more sick, altering the sexual behavior of wildlife, and generally wreaking havoc with human health and the natural environment. In response, the chemical industry has honed and sharpened the "manufacture doubt" strategy, essentially paralyzing the U.S. regulatory system.

The Data Quality Act

In December, 2000, a two-sentence law called the "Data Quality Act" was slipped into the 712-page government spending bill, without benefit of public hearings or Congressional debate. The law was written by James J. Tozzi, a consultant to the tobacco and chemical industries.[1] and he says it was intended to "regulate the regulators."[2] President Clinton signed it into law, and it took effect in October 2002. On its face, the Data Quality Act appears to serve a worthy purpose: it requires government to set standards for the quality of scientific information and statistics used and disseminated by government. It requires government to create procedures "ensuring and maximizing the quality, objectivity, utility and integrity" of scientific information and data. Surely, good data is a goal everyone can support.

However the business community recognizes the real importance of the Data Quality Act, which is to give industry an unlimited license to cast doubt on the integrity of government data, and thereby paralyze regulation indefinitely. "This is the biggest sleeper there is in the regulatory area and will have an impact so far beyond anything people can imagine," says William L. Kovacs, vice president for environment, technology, and regulatory affairs of the United States Chamber of Commerce.[3]

The Data Quality Act is overseen by the Office of Management and Budget (OMB), a political agency whose directors are appointed by the White House. As the law has evolved, it has increasingly politicized science within the federal government because every agency of government must now develop procedures and definitions of science that satisfy OMB guidelines. OMB now has a powerful role in distinguishing "sound science" from "junk science."

In the case of atrazine, the second-most popular weed-killer in the U.S., the industry argued that, under the Data Quality Act, EPA (U.S. Environmental Protection Agency) had no right to regulate atrazine as a hormone-disrupting chemical because EPA had not defined a single procedure for determining hormone disruption, and therefore studies of hormone disruption are not "reproducible," and therefore not "reliable," as required by the Data Quality Act.

In the old days scientists knew what "reproducible" meant -- it meant that an experiment's design and methods had to be described in sufficient detail to allow another scientist to reproduce the experiment. It never meant that everyone had to agree that there was only one way to study a problem. But the Data Quality Act seems to have changed that because EPA accepted the atrazine industry's argument and concluded that endocrine [hormone] disruption cannot be considered "a legitimate regulatory endpoint at this time" -- meaning chemicals cannot be regulated in the U.S. just because they turn boys into girls. After a ten-year regulatory battle, atrazine was allowed to remain on the market, and industry had gained a powerful new way of undercutting all future regulations.

But the power of the Data Quality Act does not stop there. Using the Data Quality Act, OMB has now established an unprecedented government-wide "peer review" system for all data that might be used to support a regulation. The fact that a study has appeared in a peer-reviewed journal is no longer sufficient for it to be used for regulatory purposes.[4,5] Additional scrutiny is now required, thus expanding the reach of the Data Quality Act and the authority of OMB to influence government use of scientific information.

But the power of the Data Quality Act does not stop there. Recently, Jim Tozzi's industry group, the Center for Regulatory Effectiveness, wrote letters to every member of the American Association of University Professors, and to the World Health Organization, warning them that the industry group intended to challenge any research sent to the U.S. government that does not meet the standards defined under the Data Quality Act. To an individual researcher, the prospect of a lengthy scientific dispute with a combative and well-heeled industry group might seem daunting, to say the least. Could such a threat have a chilling effect on what scientific studies get considered by federal regulators? You bet it could.

But the power of the Data Quality Act does not stop there. Jim Tozzi says he believes the Data Quality Act will give industry a potent new weapon in court against government regulators: "With a government-set yardstick for quality,' Mr. Tozzi said, 'critics of regulations can now build more convincing cases showing that an agency was arbitrary and capricious in its choice of data.' Until now, such suits have generally failed."[3]
Industry is now developing a new legal tactic based on the Data Quality Act. They are challenging government use of particular scientific studies under the law, and if their challenge is rejected, they are suing in court. Chris Mooney, author of the new book, "The Republican War on Science" (ISBN 0465046754) wrote recently, "Whether companies can sue agencies that reject their 'data quality' complaints, thereby dragging individual studies into the courtroom, is the legal question at the core of the Salt Institute and Chamber of Commerce lawsuit. If the judge in the case writes a precedent-setting opinion, and if higher courts agree, a brand-new body of law could emerge, consisting largely of corporate lawsuits against scientific analyses."[5]

Ultimately the purpose of all these tactics is to paralyze government regulators by manufacturing uncertainty and doubt. Writing recently in Scientific American, David Michaels observes that, "Emphasizing uncertainty on behalf of big business has become a big business in itself."[6] Michaels told a Texas reporter, "Corporations and others who manufacture dangerous products and pollutants have realized that by adding manufactured uncertainty to the equation, they can essentially stop the regulatory process from moving forward."[7]

Michaels was assistant secretary for environment, safety and health in the U.S. Department of Energy (DOE) during the Clinton Administration. In his Scientific American article, titled, "Doubt is Their Product," Michaels describes how the DOE tightened regulations 10-fold to protect federal nuclear workers from exposure to the highly toxic metal, beryllium. And he describes how, in 1998, the Occupational Safety and Health Administration (OSHA) -- the agency charged with protecting the health and safety of private-sector workers -- declared its intention to adopt the new, stricter standard. But three years later OSHA abandoned its effort to enact stricter beryllium regulations.

Michaels describes the OSHA problem this way:

"Out of the almost 3,000 chemicals produced in large quantities (more than one million pounds annually), OSHA enforces exposure limits for fewer than 500. In the past 10 years the agency has issued new standards for a grand total of two chemicals; the vast majority of the others are still 'regulated' by voluntary standards set before 1971, when the newly created agency adopted them uncritically and unchanged. New science has had no impact on them. I conclude that successive OSHA administrators have simply recognized that establishing new standards is so time- and labor-intensive, and will inevitably call forth such orchestrated opposition from industry, that it is not worth expending the agency's limited resources on the effort."[6]

In other words, corporations have now succeeded in getting themselves "regulated" by a set of laws and rules that effectively paralyze government regulators. Regulation of chemicals has effectively ended. The regulatory system now regulates not industry but environmentalists, in the sense that it narrowly defines and restricts the responses that they can make to corporate harms. By channeling environmentalist responses into industry-defined activities, the regulatory system makes environmentalists entirely predictable and therefore manageable.

But all is not lost. Industry's strategy for ending government regulation has an Achilles' heel. The whole strategy rests on the assumption that, when the science is uncertain, we should proceed with "business as usual" until harm can be proven to a scientific certainty. The precautionary principle turns this assumption on its head, saying, "When the science is uncertain, but there is evidence of harm, we have a duty to take precautionary action to prevent harm." If the precautionary principle were adopted, industry's elaborate strategy for paralyzing government would crumble.

Could this be why the chemical industry and the Bush administration have mounted a coordinated campaign to discredit, demonize, and derail the precautionary principle? You think?

Writing the precautionary principle into local laws -- and perhaps more importantly into corporate charters -- would fundamentally change the balance of power between people and money. What a worthy fight this is! [To keep abreast of developments with the precautionary principle, start your own free subscription to our new Rachel's Precaution Reporter by sending a blank E-mail to join-rpr-html@giesel.org. In response, you will receive an E-mail asking you to confirm that you want to subscribe.]

--Peter Montague


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