

RESPONSE

Comment on *In Defense of Regulatory Peer Review*

by Brian F. Mannix

In *Defense of Regulatory Peer Review* by J.B. Ruhl and James Salzman¹ presents a thoughtful, well researched, and optimistic case for the expanded use of peer review in federal regulation (including both rulemaking and administrative adjudication). It is a valuable contribution to the literature, and I believe we owe its existence, in part, to a happy coincidence: that one of its authors (Ruhl) was a member of the National Research Council's Klamath Committee, and that the committee's work resulted in a peaceful and satisfying resolution of the conflict between Oregon farmers' water rights and the endangered fish on whose behalf the government had curtailed those rights. In essence, the committee found that the scientific evidence was not sufficient to support a conclusion that water withdrawals had to be dramatically curtailed to protect the fish.² This example is indeed a good illustration of the value of sound science in making administrative decisions and, in particular, of the value of peer review by disinterested experts.

It is not difficult, however, to imagine the Klamath case with a different narrative. Suppose the U.S. Department of the Interior concluded that water withdrawals did *not* present a threat to endangered species, and that the peer review committee had found that there was indeed a serious threat. Angry Oregon farmers would protest the resulting decision—just as angry Oregon loggers protested the loss of timber to the spotted owl.³ The experience might not have inspired the authors to search for “more Klamaths,” as they propose to do in their article.⁴ Yet the outcome might have been necessary to save the fish, and might still have been a triumph of sound science.

The key distinction between these alternative narratives is not which side the committee came down on. Rather, it is a question of whether a close examination of the available scientific evidence sharpened our perception of a conflict between competing users of the water, or caused us to conclude that the conflict was perhaps an illusion. Conflicting claims and conflicting values are the daily bread of administrative law, and those cases where closer scientific examination causes the conflict to disappear—“Klamath” cases—are more the exception than the rule. Generally, the progress of science and the accumulation of evidence will, over time, give us a clearer picture of the ubiquitous and unavoidable trade offs that confront regulators.

Of course, once the evidence reveals a conflict, the resolution of it becomes a policy choice made in legislation, or in the application of legislation by an administrator or a judge. Science does not make these choices for us. In the Klamath case, the Endangered Species Act (ESA) established a decision framework in which uncertain science favored the farmers, while clear scientific evidence of a conflict would have given a decisive advantage to the fish. It is commonplace for regulatory statutes to be written this way: the administrative agency makes findings of fact, based on a record in which scientific evidence plays a prominent role, and then certain regulatory consequences follow with little discretion. Agencies weigh evidence when they are not permitted to weigh values.

This sort of framework for making decisions places science at center stage, but it is not necessarily a good use of science. Policy choices of enormous social consequence can hinge on the most subtle manipulation of statistical data, or on a particular parsing of an ambiguous phrase. Advocates in regulatory proceedings may debate the sufficiency of evidence beyond the point where such debate is productive, and may favor or disfavor peer review depending on whether they think it gives them tactical advantage under the particular statutory framework in which they are operating. Ruhl and Salzman find some evidence of this in their survey of attitudes toward peer review in the environmental bar.⁵

There is a vast literature on the theory of decisionmaking under uncertainty, and it has much to say about the value of better information. But there is little in that literature to explain or support the use of hair-trigger provisions that are routine in environmental statutes, where a small increment of evidence produces a sudden and dramatic change of policy. Ruhl and Salzman attribute to the “sound science” movement the claim “that procedural safeguards to ensure better use of scientific data will improve agency decisions,” making them more rational and efficient.⁶ But surely the improvement of agency decisions depends on the statutory framework as much as it does on the quality of the science.

Typically, environmental statutes delegate to administrative agencies both a fact-finding and a policymaking function. A good statutory framework, I would argue, will recognize that facts do not always have hard edges, that policy decisions will often need to be made on the basis of uncertain evidence, and that the range of available policy responses ought to be calibrated to the strength of evidence for a problem as well as its likely magnitude.

The administration of President George W. Bush—like the half dozen before it—has embraced what has become a standard set of hortatory principles for making regulatory decisions: a cost-benefit balancing framework to ensure rules do more good than harm; peer review of both scientific evidence and economic analysis; the use of unbiased central

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1. J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 38 ELR (ENV'T'L. & POL'Y ANN. REV.) 10553 (Aug. 2008) (a longer version of this article was originally published at 84 WASH. U.L. REV. 1, 5 (2006)).

2. Ruhl & Salzman, *supra* note 1.

3. *See, e.g.*, Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 482–83, 19 ELR 20277 (W.D. Wash 1988) (holding the decision not to list the owl was arbitrary and capricious in light of the biologists' findings).

4. Ruhl & Salzman, *supra* note 1, at 10554.

5. *Id.* at 10556.

6. *Id.* at 10554.

estimates of key parameters, along with a description of the relevant uncertainty; and a clear separation or distinction between risk assessment and risk management. Within this sort of framework, Ruhl and Salzman's recommendations for enhancing the role of peer review are certainly sound. One has to think, however, that in the context of the ESA and some other environmental statutes, we could make more progress by revisiting the rigid statutory criteria for making decisions, rather than further fine-tune the science. An agency that is trying to determine "how likely is harm" will naturally want to consider "how much harm is likely." It is difficult to understand why the second question should be considered irrelevant and the first dispositive.

If Congress is reluctant to delegate too much policy discretion to administrative agencies, however, there is another approach it can take. David Schoenbrod argues that agencies could perform a robust fact-finding function, using their subject-matter expertise, but then offer regulatory policy prescriptions as bills for Congress to enact, rather than as

rules to be promulgated.⁷ The legislature would thereby reserve to itself the policymaking function, but would make major decisions with the available evidence in hand, rather than attempt to write statutory prescriptions *ex ante*, in relative ignorance.⁸

Under either approach—greater administrative discretion to base regulations on a consideration of the full range of costs and benefits, or congressional enactment following a thorough administrative fact-finding—the authors' proposal for peer review would be likely to improve both the scientific basis for regulatory decisions and the decisions themselves. My only caveat is that good facts are necessary, but surely not sufficient; you also need good law.

7. See David Schoenbrod, *The EPA's Faustian Bargain*, REGULATION, Fall 2006, at 36, available at <http://www.cato.org/pubs/regulation/regv29n3/v29n3-5.pdf>.

8. Whatever other merits this formula may have, it promises at least to reduce the amount of litigation over administrative procedure, with all the costs and delays that it entails.