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The EPA's Faulty Science Can Be Stopped

By John Dale Dunn & Steve Milloy

United States Environmental Protection Agency (EPA)-sponsored and funded "human health effects science" research is unreliable and makes irresponsible and outrageous claims about how air pollution causes thousands of deaths. Then the EPA claims that it can prevent those deaths with its latest set of regulations of emissions. This junk science can be challenged effectively, legally, and politically, as described below.

The science misconduct is the result of the politicization of public health science, something Eisenhower warned about in his farewell speech in 1961. There are political, judicial, and administrative solutions to this perfidy.

First, what is the junk science?

Judging Science: Scientific Knowledge and the Federal Courts (MIT press, 1995), by Peter Huber, Ph.D., J.D. and Ken Foster, Ph.D. -- written two years after the Supreme Court decision in *Daubert v. Merrell Dow* 509 U.S. 579 (1993), is a comprehensive and thorough book on junk science and legal solutions to prevent junk evidence. The book also explains *Daubert* evidentiary dicta, discussed in a previous essay. We also discussed the *Reference Manual on Scientific Evidence* (RSME) (1994, 2000, and 2011), published by the Federal Judicial Center, intended to educate judges on their *Daubert* duty to be gatekeepers for reliable scientific evidence in the courtroom.

Fallacious thinking makes EPA research in human health effects science unreliable, forsaking the most important responsibility of a scientist: be your own most severe critic, and retain a skeptical attitude about your ideas and theories. *The key is to test your hypothesis -- your theory*. If it can't be tested, it isn't science.

The scientific method is based on skeptical experimentation that looks for reliable evidence. Fallacies of scientific inquiry include confusing temporal with causal relationships (*post hoc, propter hoc* fallacy); reporting results that are within normal range of events (noise) or projecting observations of a specific event and projecting it to a general rule without good evidence (inductive error); and relying on a theory by an authority, by consensus, or by popularity without proper evidentiary challenge.

Another fallacy is denigration and rejection of opposing, even minority viewpoints without proper testing and evaluation, or asserting that a pile of weak studies makes for strong evidence, and relying on quantity rather than quality of evidence -- as the good investigators will say, the weakest link measures the strength of the chain of evidence.

Less well-understood fallacies of scientific inquiry are intentional or negligent deception by misuse of relative risk as absolute risk and the more common deceit, misuse of the words "statistical significance" to imply good evidence. Statistical significance is a statistical test that does not address the reliability of the evidence -- just whether the study avoids excess randomness errors.

Some EPA research scientists fail in their professional ethics because they have become propagandists and have succumbed to many of these biases and fallacies.

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Well-paid researchers for the EPA junk science project

Some examples of individuals who corrupt the EPA human health effects science research:

- **Arden Pope**, Ph.D. (study in 1995) and Douglas Dockery, Ph.D. (study in 1993) started the corruption by use of weak associations as proof of causation. The Pope and Dockery Group (they were co-authors in their studies) showed small associations and pushed the bounds of credibility so much that the Clean Air Scientific Advisory Committee (CASAC) of the United States Environmental Protection Agency (EPA), chaired by Roger McClellan, DVM, rejected the studies and advised Carol Browner, the EPA administrator, not to push new ozone and small particle regulations. Browner, a true believer, ignored the advice of the CASAC and many others and pushed the new regulations. Pope and Dockery continue to enjoy fame and success as mavens of air pollution research.
- **Daniel Krewski**, Ph.D. headed a large group whose research showed no air pollution human health effect in California, but they pushed ahead, hiding the results and ignoring the same findings by James Enstrom from UCLA.
- **Michael Jerrett**, Ph.D., a University of California member of the air pollution researcher club sponsored by the EPA, admitted in a symposium conducted by the California Air Resources Board on February 26, 2010 that he couldn't find an air pollution effect in California, but less than a year later he tortured the data to show a minor "association."

Dr. Jerrett's flawed data dredge, which included as co-authors many of the leading lights in the air pollution research club, costing more than 750,000 dollars, was adopted by and then used by the California Air Resources Board to justify more draconian state air pollution regulations.

- **Jon Samet**, M.S., M.D. succeeded Roger McClellan as the CASAC chair. McClellan and the protesting CASAC members were, after the battle in the '90s, eliminated, and others were appointed to the CASAC who were more sympathetic to aggressive regulatory activity without regard to the reliability of the human health science claims. CASAC Chair Jon Samet approves aggressive air pollution regulatory activity on weak research results and is personally committed to the view that there is no threshold for safety of air pollutants. His assertions for no threshold contradict his own research, published in 2000, that showed no negative human health effects for ozone, the ozone precursors nitrous and sulfur oxides, carbon monoxide. Dr. Samet found a weak association for particle pollution that was no better than the Pope and Dockery weak associations.

Does it matter?

- Associations reported in the EPA air pollution research are so small that they do not meet the requirements to prove anything in an observational study, since the uncertainties of the methods cannot be overcome by small associations, *but no matter*.
- The biological plausibility of air pollutants causing deaths is not established in any reasonable and reliable way, *but no matter*.
- Millions of dollars are granted to researchers to repeat and magnify the EPA research with the same methods and unreliable science, *but no matter*.
- The EPA presents the "evidence" of pollution causing thousands of deaths -- though the EPA could easily be harvesting deaths that occur as normal death rate variations (noise) -- without any real medical investigation that shows a plausible disease or cause of death (valid signal), *but no matter*.
- The EPA studies are desktop exercises in death certificate counting using lax rules for cause of death that exaggerate deaths attributed to air pollution, *but no matter*.

It won't matter until industry, business, citizens, and the Congress and the courts start holding the EPA to account. Presently business, industry, and the Congress are intimidated by the well-paid, slick, and arrogant army of EPA scientists who have the media as their shills and don't have to answer hard questions on the reliability of their research. No one asks them even the basic question: how can you be reliable when you rely

on the EPA for a living and career advancement?

Conflicts of professional interest created by millions of dollars in research funded by the EPA and EPA-allied entities are a serious problem that compromises public policy-making.

Legal and Political Strategies to Stop EPA Junk Science

The Administrative Procedure Act provides the means to challenge EPA conduct, actions, and policy-making. The burden of the challenge to an action or ruling or fine or penalty is to prove that the agency was arbitrary and capricious. A commonsense understanding of those words entails actions taken without good justification or rationale. The courts have been inclined to be lazy and deferential and allow Agency hegemony.

Jurisprudence (that's the legal scholarship) shows that the judicial deference to and agency is limited to allowing agency discretion in matters of ambiguous statutory provisions, described by Justice Scalia in the *Whitman v. American Trucking* case as reasonable interpretations of ambiguous statutory provisions.

Obviously, that focused deference has nothing to do with admissibility decisions on junk science and bad science or policy that relies on unreliable research. That brings us back to admissibility of scientific evidence at the trial or hearing level. Once the record is made, the appellate level doesn't offer a remedy for bad evidence unless the admissibility ruling is appealed as error.

Judges and lawyers have been intimidated by the idea of challenging a powerful agency. Lawyers and judges are too often ill-equipped to frame the challenges to junk EPA science well; they are badly advised, and they end up going back to what makes them comfortable -- arguments on the law and economics.

But -- a big but -- judges are, and always have been, the ones to decide what's admissible as evidence. Even before *Daubert*, you could tell whether you were getting a hometown job in court on the basis of admissibility rulings and the attitude of the judge about your expert. The challenges to evidence and testimony can be pursued regardless of whether the evidence is used to argue for or against the agency action. Agency discretion under the jurisprudence of the Chevron case does not allow bad evidence into the record, whether it's a hearing or a trial.

The evidence must be admissible for purposes of proving that the Agency is or is not being arbitrary or capricious, which makes the decision on evidentiary admissibility and reliability separate from whatever tortured idea the court might have about agency authority and discretion. Unreliable scientific evidence is inadmissible and therefore cannot be used to justify inappropriate actions. The admissibility rulings on evidence trump some arcane idea about agency discretion that is all tied up in the jurisprudence on Congressional Delegation. There is no law that the Congress has passed that permits agencies to pursue junk science.

In the political sphere, the Congress can modify the standards of administrative and judicial review to demand good science and a better standard for agency conduct, with more reasonable rules on challenges to EPA actions, similar to the rules for challenges to actions by the Occupational Safety and Health Administration that are civil court evidentiary preponderance of evidence burdens.

However, even without congressional help, responsible, competent, and serious lawyers can force judges and frame evidentiary challenges so that the judges will be required to make clear rulings on admissibility of scientific evidence and even require that the court provide a rationale for the ruling. A bad ruling is a reversible error; a good ruling will nurture good science in the courtroom, the job of conscientious judges, and the responsibility of lawyers. No lawyer but a pettifogger would admit to arguing for bad science that violates the public trust.

In trials involving challenges to EPA actions that interfere with property, cause compliance burdens, and enforce onerous and harassing fines or penalties, parties certainly have been able to provide full-throated challenges to EPA evidentiary submissions, so at the administrative hearing stage, it would be just as

appropriate to challenge the scientific basis of EPA conduct, even if it would force judges or magistrates to be more active, stop acting like potted plants, and start doing their job -- gate-keeping for good scientific evidence.

Changing the EPA agenda means challenging inadequate and unreliable EPA science and demanding reliable and skeptical science in the public interest. It can be done politically and legally by proper use of modifications of law and statutes -- even modification of the Administrative Procedure Act, properly conducted administrative hearings, evidentiary challenges in any number of different forums, and political and legal and political action to modify statutory requirements for agency conduct and to clarify proper process for challenges of agency actions. It can be done if parties in disputes do it right, if lawyers do their jobs, and if politicians work hard to force better rules for sensible agency conduct and fairer rules for citizen challenges of agency decisions and actions.

The EPA can be forced to be more reasonable in its regulatory actions and regimes. It can be done if citizens, politicians, lawyers, and judges have the fortitude -- it's always about the fortitude.

That will bring the heat for the EPA and its well-paid and arrogant research army.

Who knows what might develop from such a thing?

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