

## AN EXECUTIVE ORDER COULD BRING BETTER SCIENCE TO REGULATION

by  
Charles D. Weller and David B. Graham

Four unanimous U.S. Supreme Court decisions, initiated by the 1993 decision *Daubert v. Merrell Dow Pharmaceuticals*, have taken scientific and other expert evidence in the courtroom to a higher level by requiring expert evidence to be reliable, and by excluding speculation, conjecture, and “junk science.”<sup>1</sup> Now it is time to take environmental and other regulatory agency litigation and rulemaking to the same higher level by extending, by Executive Order or otherwise, *Daubert’s* reliable science standard to federal agencies.

Today, the unfortunate reality is that good intentions do not match results in environmental and other vital regulatory areas. “[W]ell-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly,” in the words of regulatory scholar and Supreme Court Justice Stephen Breyer, “can nonetheless bring about counterproductive results.” S. BREYER, *BREAKING THE VICIOUS CIRCLE* 11 (1993). In the environmental area in particular, Harvard University economist and business school professor Michael Porter bluntly points out that we have “squandered” the opportunity for innovative solutions to environmental problems and instead have “spawned an industry of litigators and consultants that drains resources away from real solutions.” M. PORTER,

---

<sup>1</sup>*Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 238 (1999); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000). For more detail, see Weller & Graham, *New Approaches to Environmental Law and Agency Regulation: The Daubert Litigation Approach*, 30 ELR 10557 (2000), available at Bakerlaw.com. For *Daubert’s* application to antitrust law, e.g., rendering the 30 year old concentration presumption in the current merger guidelines unenforceable and advocating Michael Porter’s productivity model as a new basis for antitrust analysis, see Weller, *An Evolution of Merger-JV Analysis*, in Am. Bar Assn., *FUNDAMENTAL THEORY TASK FORCE PERSPECTIVES* (Sept. 2001).

---

**Charles D. Weller** is an attorney in Cleveland whose practice focuses on antitrust, health care, and complex litigation. In July 2001, Mr. Weller founded Next Generation Health Care, Inc., a new health care company. **David B. Graham** is a partner with the law firm Baker & Hostetler in Cleveland. A widely published author on environmental law issues, Mr. Graham formerly was an attorney with the Environmental Protection Agency and, respectively, Corporate Counsel and Deputy General Counsel for two corporations. They formed a new non-profit organization, The Daubert Council, in January 2001.

What can be done to stop diverting businesses' and government's precious time and resources from protracted litigation, lawyers, and consultants towards achieving better results for the public? As a legal matter, *Daubert's* reliable science standard applies to environmental and other federal agencies in both rulemaking and adjudication for two distinct and mutually reinforcing reasons. First, the Federal Administrative Procedures Act (APA) already contains the very word — reliable — the Supreme Court essentially added to the Federal Rules of Evidence in *Daubert* to take federal trials to the next level of scientific and other expert evidence. APA § 556(d) expressly provides that no “sanction may ... be imposed” or “rule or order issued” unless “supported by and in accordance with,” *inter alia*, “reliable” evidence. (Emphasis added). This express APA language has not been interpreted by the Supreme Court since its 1993 *Daubert* decision, but it directly supports extending *Daubert* principles to administrative agencies.

Second, as the U.S. Court of Appeals for the Federal Circuit held in *Libas, Ltd. v. United States*, 193 F.3d 1361 (Fed. Cir. 1999), *Daubert* applies to federal agencies because “[n]either the plain language of the relevant Supreme Court [*Daubert*] opinions nor the underlying principles requiring reliability for expert testimony are narrowly confined in application” to “questions of admissibility” but applies to questions of weight as well. In *Libas*, the Federal Circuit reversed the Customs Service for relying on an expert witness that was not demonstrated to be reliable, and held that *Daubert* applies to agencies even when the Rules of Evidence do not.

The Supreme Court, furthermore, has already provided extensive guidance by word and deed on how courts and agencies can determine what is reliable science or other expertise, and what is not. Most powerfully and elegantly, three rulings in the line of *Daubert* decisions show that scientific and legal thinking are, at an analytical level, the same. In the Court's words in *Daubert*, “judicial interpretation “ shares “basic characteristics of the scientific endeavor;” in the Court's analyses in Part III of *Joiner* and *Kumho Tire*, the Court showed how.<sup>2</sup>

Some may argue that administrative agencies have very liberally admitted expert evidence for decades, and that extending *Daubert* to regulators would be too radical of a change. Federal courts, in fact, just as liberally admitted expert testimony for far longer than agencies before *Daubert* — over 70 years. Federal judges, and many at the state level as well, have adapted quite well to the requirements of the *Daubert* line of cases. Why should environmental or other agencies be different?

An Executive Order compelling agencies to raise the standard for admitting and weighing expert scientific evidence in federal administrative rulemaking and litigation will help ensure that regulators utilize the highest caliber of analysis and maintain an apolitical focus when making decisions that affect all of our lives.

---

<sup>2</sup>*Daubert*, 509 U.S. at 597 n. 13. Scientific and later legal reasoning — the “union of passionate interest in the detailed facts with equal devotion to abstract generalization,” “a vehement and passionate interest in the relation of general principles to irreducible and stubborn facts” — first appeared in the 1600s with Galileo. “Since a babe was born in a manger,” Alfred North Whitehead wrote about this new method of reasoning, “it may be doubted whether so great a thing has happened with so little stir.” A. Whitehead, *SCIENCE AND THE MODERN WORLD* 2-3 (1925). See generally Weller & Graham, *supra*, at 10562-65.