Techniques Agencies Use to Manage Uncertainty

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I. Techniques to Reduce Uncertainty (Minimize Errors)

1. Timing Regulation to Anticipated Literature Developments.
2. Sponsored Research.
4. Notice and Comment vs. “Three Smart Guys in a Room”
5. Weight of theEvidence.
6. Peer Review.
II. Techniques to Reduce Consequences of Errors (Minimize Costs of Errors)

1. Biasing the Direction of Errors [“Precaution”]
2. Periodic/Retrospective Review [“Bayesian learning”]
3. Resilience.
4. Economic Incentive Systems [“Contracting Around”]
   a. User Fees.
5. Redundancy.
6. Stand-By Regulatory Systems [“Triggers”]
   a. Agency Severability Clauses.
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- improve resilience vs. improve anticipation

**Reduce Need for Anticipation (Predictive Information) By Reducing Consequences of Error**
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“The English constitution, in a word, is framed on the principle of choosing a single sovereign authority, and making it good; the American, upon the principle of having many sovereign authorities, and hoping that their multitude will atone for their inferiority.” (1901)
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Severability Generally

Court invalidates a portion of a regulation and must decide what to do with the rest.

The Test:
What did agency intend?
Will the remainder function sensibly? Will it work?
Severability Clauses

Fallback Law: tell the court what to do next

Case study in cross-functional dialogue

- **Interbranch** - agency telling the court how to exercise remedial power
- **Intrabranch** - rulemaking aspect of agency committing the enforcement aspect
Clean Power Plan

1. Make existing coal plants more efficient
2. Increase use of existing gas plants
3. Increase reliance on renewables and nuclear
4. Improve end-use energy efficiency (demand side)

Severability Clause: If court invalidates any of 1-4, keep the rest.
Agency Practice

Dearth of Admin. Severability Clauses

FTC - 6.3%
Forest Service - 3.1%
CFPB - 3.2%
CFTC - 1.2%

Agency either doesn't consider or concerned by appearances. Lawyers at the table drafting CPP.
Judicial Doctrine

"[D]etermination of severability will rarely turn on the presence or absence of [a severability clause]."

*Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990)
Uncertainty

Agency practice & judicial doctrine wrong on both counts.

1. Will the D.C. Circuit strike down the provisions of the rule? Risk for agencies and regulated entities

2. Agency risk / courts uncertainty