

Center for Regulatory Effectiveness

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June 4, 2003

Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Honorable John D. Graham
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Room 262, Old Executive Office Bldg.
Washington, DC 20503

Dear Administrators Whitman and Graham:

In a May 19, 2003 letter to you jointly, Professors Sidney Shapiro and Rena Steinzor of the Center for Progressive Regulation accused the Center for Regulatory Effectiveness of attempting to “chill open scientific debate” and to “censor comments” in the ongoing EPA biosolids rulemaking process. CPR expressed the opinion that certain CRE comments “give credence to the worst fears regarding misuse of the DQA [Data Quality Act].” We feel obligated to respond.¹

CPR attacked a February 27, 2003 letter CRE sent to EPA in which CRE, in its Watchdog Watch role, commented on the merits of certain aspects of scientific and policy analysis contained in NRDC comments submitted in the biosolids rulemaking. CPR characterized the CRE comments as a Data Quality “complaint” and “petition” containing a clear threat to sue EPA before the rulemaking proceeding had run its course, thereby attempting to “pick off comments . . . outside the normal confines of the rulemaking process.” The CPR letter also contains a lengthy explanation of why CPR believes the Data Quality legislation and guidance should not apply to rulemaking proceedings.

The CPR letter misrepresents CRE’s comments, and it certainly would not meet federal Data Quality standards if such standards applied to its commentary. It is surprising that it was submitted by a group of academics.

The CRE letter to EPA was plainly nothing more than comments on NRDC’s comments. It was never indicated to be a “complaint”, a “petition”, or a Request for Correction pursuant to the EPA Data Quality petition procedures. It did not attempt to “quell” or “censor” the NRDC comments; it attempted

¹ The CPR letter can be found at www.progressiveregulation.org. The CRE February 27 letter can be found at www.thecre.com/pdf/20030310_biosolids.pdf

only to urge the Agency to consider carefully certain aspects of the NRDC comments that CRE alleged were not soundly based. As part of its comments, CRE observed that if EPA were to adopt for final rulemaking dissemination certain portions of the NRDC comments which would not meet Data Quality standards, the Agency, not NRDC, could then be subject to a Request for Correction.

It is strange that CPR asserts CRE is attempting to chill scientific debate, when it is CPR who is urging EPA to reject the CRE comments without regard to their validity. Unlike the CPR comments, The CRE comments are an attempt to further legitimate scientific debate, not quell it. This is an aim that academics should cheer. The ordinary rigid administrative process for rulemaking is not often conducive to open scientific debate. Agencies set a comment deadline, and most comments are submitted at the end of the comment period. As a result, there is usually no open debate over the merits of arguments or data advanced by commenters. The CRE February 27 comments on the NRDC comments had to be submitted after the rulemaking comment deadline in order to further the scientific debate. This shortcoming in the rulemaking process highlights the importance of mechanisms such as external peer review and advance notices of proposed rulemaking for allowing open debate when rulemaking involves complex issues.

In reality, CPR appears to be more interested in using the CRE comments as a stalking horse for attempting to revisit the issue of the applicability of the Data Quality legislation and guidance to the information contained in notices of proposed and final rulemaking. That issue was examined carefully during the process of developing both the OMB and individual agency guidelines, and the CPR position was found to lack merit. CRE prepared a careful legal analysis of the issue at that time.² The CRE analysis considered the true legislative history of the Congressional enactments, not materials irrelevant to determining Congressional intent such as are relied on in the CPR letter. And the suggestion by CPR that information contained in the preambles of notices of proposed and final rulemaking is not broadly “disseminated” over the Internet is clearly untrue.

Federal regulatory decisions can only be as sound as the data and analysis on which they are based, and outside parties often submit data and analysis on which agencies rely. The Data Quality legislation and guidelines have been a positive step for ensuring that high standards of quality are applied to both data submitted to agencies and the information disseminated by agencies during the rulemaking process.

Sincerely,

WGK

William G. Kelly, Jr.
CRE Western Representative

² The CRE legal memorandum is posted at www.thecre.com/pdf/20020529_exemption.pdf.

cc via email: Sidney Shapiro and Rena Steinzor c/o CPR
Senators Collins and Lieberman, Congressmen Davis and Waxman