Recent Developments in Environmental Law

An Introduction to the Information Quality Act and Its Application to Environmental Regulation

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I. Introduction

We live in an administrative state where agencies perform the tasks of implementing laws. To perform these tasks agencies use and disseminate information, so it is important that the information is accurate and reliable and that procedures exist for correcting inaccurate information. These issues are seemingly addressed by the Information Quality Act (IQA) adopted as a short, little noticed rider in a large 2001 federal appropriations bill.¹

The IQA directs the Office of Management and Budget (OMB) to issue guidance to federal agencies to ensure the “quality, objectivity, utility, and integrity of information” disseminated to the public.² It further requires agencies to issue their own guidelines, to establish administrative mechanisms to allow affected persons to seek correction of information that does not comply with the OMB guidelines, and to report to the OMB on the number and disposition of requests for information correction.³

The passage and implementation of the IQA has generated controversy. Proponents contend that the Act addresses a lack of “accountability for governmental use of information to accomplish policy goals”⁴ and prevents harm from inaccurate information dissemination.⁵ Oppo-

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² Id.
³ Id.
⁵ Id.
onents worry that the Act is a Trojan horse designed to tie up agency resources, slow proactive agency actions, and allow OMB a politically motivated veto over agency expertise.\(^6\)

This article will describe the IQA and its implementation by the OMB. The question this article addresses is whether the IQA will improve the quality of information used by federal government agencies in an efficient way. In addressing this question, Part II presents the statute, its history, and potential impacts; Part III looks at the implementation of the IQA; and Part IV gives examples of how the Act has operated with respect to environmental issues. To particularize the discussion, examples are given in the context of federal land management decisions that address environmental concerns. Next, Part V reviews recent court decisions on the justiciability of IQA issues, and Part VI discusses potential court review of the IQA and whether the goals of the IQA are achieved in an efficient manner.

II. The Information Quality Act

A. The Statute

The IQA reads in its entirety:

SEC. 515. (a) IN GENERAL.—The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) CONTENT OF GUIDELINES.—The guidelines under subsection (a) shall—

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) require that each Federal agency to which the guidelines apply—

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

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(C) report periodically to the Director—
(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
(ii) how such complaints were handled by the agency.7

B. Legislative and Political Background
The IQA was contained as a rider to the Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106–554 (Appropriations Act), passed by the Congress and signed by the President in December 2000.8 The IQA amends the Paperwork Reduction Act (PRA).9

The IQA was added to the Appropriations Act by Representative Jo Ann Emerson (R-Mo.) and Senator John Shelby (R-Ala.).10 There were no hearings, no floor debates, and no committee reports on the Act,11 and it is likely that only Emerson and Shelby knew the IQA was in the Appropriations Act.12 Hence, there is no record of congressional intent on the scope of the IQA at the time it was enacted.

The vagueness of the terms of the IQA and the lack of indication of legislative intent left gaps for the OMB implementation regulations to fill. Pursuant to the IQA, in mid-2001 the OMB published proposed government-wide guidelines13 and published final guidelines later that year14 with a request for additional public comment on certain issues. These guidelines were republished in early 2002, incorporating changes from the comments received.15 The IQA took effect on October 1, 2002.

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11. CRS report, supra note 8.
On that same date, the individual agency guidelines were due to be issued, and on October 4 the OMB approved the agency guidelines. OMB recently issued controversial additional guidelines governing peer review of federal information that are discussed in Part III.D. of this report.

Authorship and the planning of placement of the IQA into the Appropriations Act are attributed to Jim J. Tozzi. He was an OMB deputy administrator in the Reagan Administration and is now a Washington lobbyist and the head of the Center for Regulatory Effectiveness, a watchdog group funded by trade associations and private firms. Tozzi is a long time critic of the quality of science behind various agency regulations. During his tenure at OMB, the Office of Information and Regulatory Affairs (OIRA), which is part of the OMB, became known as a "black hole" where proposed regulations went in for review and never emerged. Tozzi knows how to work the levers at OMB and had a reputation there for burying regulations. With the IQA, however, the OMB is taking a different approach: it is embracing the Act and issuing guidelines to a degree such that some critics claim the OMB is going beyond the bounds authorized by the statute.

C. What Is Covered by the IQA

The IQA calls for "ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by [f]ederal agencies." The following few definitions from the OMB Guidelines indicate the broad reach of the IQA. The OMB guidelines apply to all

18. Id; CRS report, supra note 8.
19. Id.
22. Id, (quoting Joan Claybrook, President of Public Citizen, a consumer advocacy group).
27. Additional definitions are given infra in Part III.A.
28. OMB Guidelines, supra note 15.
federal agencies subject to the PRA. The PRA defines agencies as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the executive office of the President), or any independent regulatory agency." A few organizations are exempt. 

"Information" is defined by the OMB as "any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page." OMB defines "dissemination" to "mean[] agency initiated or sponsored distribution of information to the public." Agency "sponsored" means an agency has directed a third party to distribute information, or an agency has the authority to review and approve the information before it is distributed. Dissemination does not include information used in agency adjudication, or inter- or intra-agency use or sharing of government information.

The IQA thus reaches virtually all information distributed to the public at large in almost any manner initiated by any federal agency. This is a very broad ambit.

D. Potential Effects of the IQA

The guidelines may affect agency actions negatively in two ways. First, the guidelines impose a significant burden on agency resources.

29. PRA, supra note 8, § 3502.
30. Id. The term "agency" does not include the General Accounting Office, Federal Election Commission, the D.C. government, or the territories and possessions of the United States or their subdivisions, nor does it include "Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities."
31. OMB Guidelines, supra note 15, § V(5). The definition continues "but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views."
32. Id. § V(8). The definition continues:
[d]issemination does not include distribution limited to government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

Id.
33. Id.
34. Id.
35. OMB Guidelines, supra note 15; Peer Review Bulletin, supra note 17.
36. See infra Part IV.D.
Agencies must reallocate resources from existing or prospective activities in order to comply with the provisions of the IQA, particularly in dealing with requests for correcting information (including appeals of denied corrections) and in obtaining extensive peer review of information. This will decrease agency output of new regulations and information. Second, the regulations give OMB direct oversight of contentious questions of data quality. The problem is that while many of the questions involve scientific data on which the agencies possess expertise, the OMB has little or no scientific expertise with which to review information from the wide variety of federal agencies. This lessens the likelihood that OMB changes to agency decisions will be based on scientific data quality criteria.

On the other hand the IQA, as implemented by the OMB, holds the promise of improving the quality of the information used by agencies in issuing regulations in two ways. First, all information must meet certain quality standards. The idea is that better information leads to better decisions. Second, the IQA provides a mechanism for the correction of information thought to be incorrect. This is particularly important because a great deal of agency information is widely and quickly disseminated on the Internet, where erroneous information has the potential to cause great harm.

That sort of widespread distribution of information plays a role in "regulation by publication." For example, the Toxic Release Inventory program issues an annual national list of chemical releases compiled by the EPA. This information may create political and economic pressure on industry to reduce releases without regulations mandating such reductions. IQA proponents hold "another purpose of the [IQA] was to prevent 'regulation by publication,' where federal agencies publish unsupported claims that achieve a regulatory impact without having to go through the regulatory process."

38. But see id. at 2 (The memo mentions a recently expanded Statistical and Science Policy Branch in OIRA).
39. See OMB Guideline, supra note 15. The standards are discussed in infra Part III.
41. OMB Guideline, supra note 15, at 8452.
E. Issues Presented

The question to be addressed here is, given the potential benefits and burdens of the IQA, does it achieve improved information at a reasonable cost? In other words, is the IQA efficient? If not, are there alternate means to achieve the goals of the IQA? To particularize the interaction of the IQA with environmental concerns, these questions are explored in the context of federal land management agencies' compliance with the IQA.

III. Implementation of the IQA

A. Aspects of the OMB Guidelines

In addition to the definitions given in Part 2.C., the OMB Guidelines discuss information "objectivity." Objectivity is comprised of two elements, presentation and substance. Presentation means the information is presented in an accurate, clear, complete, and unbiased manner. This may require that additional information be given to place the initial information in context. Substance means whether the information is accurate, reliable, and unbiased. This may require data sources, supporting data, models, and error sources be identified and disseminated. If ordinary information has been subject to an independent peer review process, the information may generally be presumed to be sufficiently objective; however, this presumption is rebuttable upon a "persuasive showing" by a challenger.

OMB defines a category of "influential" information. This is "[when] the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions." In this case, the agencies must meet higher standards of transparency of the data and analysis.

The OMB views the implementation of the IQA as an "evolutionary process" that will result in refinements of the guidelines as OMB and the agencies accumulate experience and further public comment is obtained.

44. OMB Guidelines, supra note 15, § V(3).
45. Id.
46. Id.
47. E.g., the peer review process used by a scientific journal prior to publication.
48. OMB Guidelines, supra note 15, § V(3). New peer review guidelines are discussed infra in Part III.D.
49. Id. § V(9).
50. Id.
51. Id.
52. Id. at 8458.
B. Agency Requirements Under the IQA and OMB Guidelines

The IQA\(^{53}\) and the OMB Guidelines\(^{54}\) first mandate that every federal agency issue its own information quality guidelines by October 1, 2002, for information they disseminate. These guidelines require approval by the OMB. Second, the IQA\(^ {55}\) and the OMB Guidelines\(^ {56}\) establish administrative mechanisms allowing affected entities to seek correction of information they believe does not comply with OMB and agency guidelines. These mechanisms are to include an agency process to review appeals of correction requests that are denied. The review mechanism is not required by the statute but is a creation of the OMB.\(^ {57}\)

Third, the IQA\(^ {58}\) and the OMB Guidelines\(^ {59}\) require a report to the OMB on the number, nature, and disposition of complaints received by the agency regarding agency compliance with the OMB guidelines.\(^ {60}\)

C. Direct Involvement of OMB in Agency Disposition of Information Correction Requests

The agency guidelines (as per the requirements listed in the previous section) were submitted to the OMB and approved on October 4, 2002.\(^ {61}\) At that time, the director of the OIRA, John D. Graham, requested agencies to provide information to the OMB in addition to that required by the OMB Guidelines.\(^ {62}\) This request included copies of complaints received by an agency involving "major policy decisions" likely to be of interest to more than one agency; involving "influential" information; complaints involving novel procedural, technical, or policy issues in implementing the IQA; and complaints about information disseminated by an agency in a notice and comment process prior to final agency action where the complainant alleges a reasonable likelihood of suffering actual harm.\(^ {63}\)

Further, OMB requested to attend any meetings between agencies and complainants concerning complaints that fall into any of those categories.\(^ {64}\) The OMB said the forwarding of those kinds of complaint

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54. OMB Guidelines, supra note 15, § II.
56. OMB Guidelines, supra note 15, § II.
58. Id. § 3516(b)(2).
59. OMB Guidelines, supra note 15, § II.
60. Id. § II.
61. Graham Memo, supra note 16.
62. Id.
63. Id. at 3.
64. Id.
documents would “enable us to provide the agencies with clarifying
guidance and assistance on applying the OMB guidelines.” Critics of
the IQA contend that these provisions allow OMB veto power over
agency decisions in a manner that is not open to public view and may
not be based on the information quality, but rather based on political
grounds.

D. Peer Review
On December 15, 2004, OMB issued a bulletin governing the require-
ments of the use of peer review of information prior to release by the
federal government. The Peer Review Bulletin requires mandatory
peer review for “influential” scientific information and “highly influ-
ential” scientific information. Influential scientific information is de-
defined in the same way as influential information is defined in the OMB
Guidelines. Highly influential scientific information exists where
“the agency or OIRA Administrator determines that the dissemination
could have a potential impact of more than $500 million in any one
year on either the public or private sector or that the dissemination is
novel, controversial, or precedent-setting or has significant interagency
interest.”

The requirements for review of influential information are relatively
extensive; for example, review panels must be balanced in technical
expertise, reviewers must be shown to be independent of the agency,
and reviewers may not have participated in the production of the in-
formation. The requirements for highly influential information are
more stringent, with tougher standards for reviewer independence and
potential conflict of interest. Both levels of review allow for public
input to the review panel at the time the information goes to review.

The draft Peer Review Bulletins were criticized on several grounds,
yet many of the criticized elements became part of the final Bulletin.

65. Id. at 4.
66. See OMB Watch, supra note 10, at 18.
68. Id. § II.
69. Id. § III.
70. “The agency can reasonably determine that dissemination of the information
will have or does have a clear and substantial impact on important public policies or
important private sector decisions” OMB Guidelines, supra note 15, § I(6).
71. Peer Review Bulletin, supra note 17, § III.
72. Id. § II.
73. Id.
74. Shapiro, supra note 24; Letter from Henry Waxman et al., Ranking Minority
Member, Committee on Government Reform, House of Representatives (Dec. 15,
2003), available at http://www.ombwatch.org/article/archive (last visited May 29,
2006) [hereinafter Waxman Letter].
First, the OMB cites the IQA as legal authority for promulgation of the peer review standards, yet peer review is not mentioned in the IQA. The OMB appears to be creating the peer review requirements out of whole cloth. Second, the peer review process poses a heavy administrative burden, in time and funds, on the agency. Agency actions could be delayed by months. Third, peer review is imposed as a blanket condition, without any showing that the information is suspect or unreliable. Fourth, it generally will not be apparent to an agency when information is "influential" or "highly influential" since most agencies lack the ability to perform the economic analysis to define the category of the information. The OMB can on its own accord declare information "highly influential" and impose the burdens of enhanced peer review on an agency. Fifth, the conflict of interest and independence requirements of the peer review standards will tend to exclude agency and academic scientists (for example, having a research grant funded by the agency) while permitting industry scientists to participate. Industry scientists surely have as great a potential for a conflict of interest. Finally, information in adjudicatory proceedings is exempted from peer review. This kind of information will tend to be industry information submitted for permitting or other regulatory activities. It is not clear why industry information should be treated differently.

E. IQA Guidelines of the Forest Service and the Fish and Wildlife Service

Agency IQA guidelines generally track the OMB Guidelines in goals and definitions, but have specific procedures for petitioners to seek information corrections. Agencies are required to post guidelines on their websites. Aspects of the guidelines of two federal land management agencies—the U.S. Forest Service (Forest Service) and the U.S. Fish and Wildlife Service (FWS)—are discussed here.

The Forest Service follows the IQA guidelines of the U.S. Department of Agriculture (USDA). The guidelines call for USDA agencies

75. Peer Review Bulletin, supra note 17, at 6-7.
76. See IQA, supra note 1.
77. Waxman Letter, supra note 74.
78. Id.
79. Shapiro, supra note 25, at 10,065.
80. Waxman Letter, supra note 74.
81. Shapiro, supra note 25, at 10,067.
82. Id at 10071. Shapiro points out how proprietary data has been successfully reviewed by FDA reviewers while maintaining proprietary information confidential.
83. OMB Guidelines, supra note 15, § IV4. Hence the following few footnotes will be to websites.
to "strive to ensure and maximize the quality, objectivity, utility, and integrity of the information that its agencies and offices disseminate to the public" and say that USDA agencies "will comply with OMB and USDA information quality guidelines."85 With respect to "influential" information, the Forest Service will "[u]se the best available science" and "data collected by accepted methods or best available methods."86 High levels of transparency will be used in analysis and modeling.87

Each agency names a contact person for information correction requests.88 A party seeking a correction must submit to the agency contact official a request that contains adequate information to allow the agency to evaluate the request.89 Included in that information is "The Explanation of the Effect of the Alleged Error"—this may imply that only parties actually harmed by erroneous information may submit a correction request, but this is not spelled out in the USDA guidelines.

The USDA then reviews the information being challenged (and the processes that created the information) for compliance with OMB and USDA guidelines, and then determines if, and what, corrective action will be taken.91 Requestors bear the "burden of proof" with respect to the necessity for correction and with respect to the type of correction they seek.92 Corrections will not be made for requests that are frivolous or in bad faith (these terms are not defined), information that is "stale," or information that is exempt from the IQA under the OMB Guidelines.93 The USDA attempts to respond within sixty days.94

85. fs.fed.us/qoi/ (last visited May 29, 2006) [hereinafter Forest Service Guidelines]. The Forest Service is an agency within the USDA.
86. Id.
87. Id.
88. Forest Service Guidelines, supra note 84.
89. Id. The request must contain the following: Statement that the Request for Correction of Information is Submitted Under USDA's Information Quality Guidelines; Requestor Contact Information; Description of Information to Correct; Explanation of Noncompliance with OMB and/or USDA Information Quality Guidelines; Explanation of the Effect of the Alleged Error; and Recommendation and Justification for How the Information Should Be Corrected.
90. Id.
91. Id.
92. Id.
93. Forest Service Guidelines, supra note 84. Stale information is that disseminated more than one year ago, or that does not have a continuing significant impact. An important example of exempt information under OMB guidelines (but not mentioned in the USDA guidelines) is "intra- or inter-agency use or sharing of government information." OMB Guidelines, supra note 15, § V(8).
94. Forest Service Guidelines, supra note 84.
The USDA guidelines distinguish requests for correction concerning information on which the USDA has sought public comment. In those cases, the correction requests must be received during the comment period, and the agency’s response is included in the next document it issues concerning the matter.

The USDA has set up a process to appeal a corrective action or a denial of a correction request. The disgruntled party submits a Request for Reconsideration containing all the original information plus supplemental information supporting its case to the appropriate agency within forty-five days of the denial. Again, if the matter is one for which the agency sought public comment, it will respond using that comment process. Otherwise, the agency will confirm it made the initial decision using due diligence, weigh the supplemental information, and decide. If the Request for Reconsideration involves “influential” information, the agency will convene a panel of officials to perform the review.

The FWS is subject to its own agency specific IQA guidelines and the department-wide guidelines of the Department of Interior. These guidelines are generally similar to the Forest Service guidelines in the provisions for information correction requests and appeals procedure, but the FWS guidelines provide greater detail. For example, the FWS guidelines spell out exemptions to the IQA whereas the Forest Service defaulted to the OMB guidelines. The FWS guidelines call out that “[a]ny affected person or organization may request a correction of information” and define an “affected person or organization” to be “those who may use, be benefited by, or be harmed by” the information. While this is a broad definition, the Forest Service guidelines are silent on this issue. As with the Forest Service, “frivolous” correction requests will not be considered, but here “frivolous” is defined as

95. Id. These situations include notices of proposed rulemaking (NPRM); advance notices of proposed rulemaking; studies cited in an NPRM; regulatory evaluations or cost-benefit analyses pertaining to a NPRM; environmental assessments, environmental impact statements, and other documents prepared under the National Environmental Policy Act; land and resource management plans and other documents prepared under the National Forest Management Act; and notices of availability and requests for comment on risk assessments.
96. Id.
97. Id.
98. Id.
100. Id. § II(6).
101. Id. § IV(1).
correction requests that could have been filed during a comment period but were not, or requests filed by parties that were not “affected.”

With respect to “influential” information, the FWS guidelines call for the use of “the best available information,” similar to “the best available science” standard of the Forest Service.

IV. The IQA in Action

A. Examples of Information Challenges to the Forest Service

The Forest Service typically receives IQA requests to correct information related to timber harvesting and to habitat protection for endangered species. An example of each is summarized here.

The southwestern willow flycatcher is an endangered species whose habitat covers the southwestern United States. A Forest Service district ranger used guidance criteria to calculate the effects of grazing in an environmental assessment alternative for the petitioner’s ranch. The assessment prohibited grazing within identified potential habitat, and within two to five miles of occupied flycatcher habitat during the bird’s breeding season.

On March 21, 2003, the rancher submitted an IQA petition seeking to correct the guidance criteria used by the district ranger, claiming the grazing restrictions affected the economic viability of the ranch. The petition claimed the information lacked objectivity because it did not include relevant information published by the Forest Service; it cited no studies published after 1996; it was based in part on a draft species recovery plan and the final plan was inconsistent with the draft plan; and the information was not capable of being reproduced. The corrections sought included changes to allow some winter grazing in the habitat area; removal of the two-to-five mile limit during flycatcher breeding season; and recognition that some increase in flycatcher population had been observed.

The Forest Service denied the petition because the identified data did not meet the definition of “disseminated” under OMB and Depart-

102. Id. § IV(4).
103. Id. § III(4).
104. Forest Service Guidelines, supra note 84.
106. Objectivity is one of the qualities that IQA seeks to maintain. IQA, 44 U.S.C. § 3516(a).
108. Letter from Thelma J. Strong, Director, Office of Regulatory and Management
ment of Agriculture IQA guidelines. The Service said the information fell into the "intra- or inter-agency use or sharing of government information" exemption.109

The rancher filed a request for reconsideration110 claiming the guidance information did qualify as "disseminated" under the IQA. The rancher first claimed the intra-agency exemption was incorrect, and second, alternatively, that because the district ranger made the information available to the rancher, the information had been disseminated. The reconsideration request asked that the Service reverse the decision of the first petition and grant the changes requested in the first petition.111

The rancher’s reasoning in the request for reconsideration appears invalid. First, the OMB guidelines exempt intra-agency communications.112 Second, the guidelines clearly distinguish between information that an agency promotes to the public and information that simply becomes known to the public.113

In October 2004, the FWS published a proposed critical habitat designation for the flycatcher.114 Interestingly, only lands currently occupied by the flycatcher were included in the designation—the proposal excludes the potential habitat identified on the petitioner’s ranch,115 granting the petitioner much of what he originally requested.

In March 2003 the Forest Service published a proposal to have a Categorical Exclusion (CE) for limited tree removals.116 The CE would exempt limited tree harvesting operations from the requirements under NEPA to produce an Environmental Impact Statement or Environmental Assessment.117 To develop the criteria needed for the CE, the Forest

109. OMB Guideline, supra note 15, § V(8).
111. Id.
112. OMB Guideline, supra note 15, § V(8).
113. Forest Service Guidelines, supra note 84.
114. Press Release, Service Reproposes Critical Habitat for Endangered Southwestern Bird, U.S. Fish and Wildlife Service (Oct. 12, 2004), http://news.fws.gov/newsreleases/showNews.cfm?newsld=8E823A16-996E-2450-F0C95868AB340F4E (last visited May 29, 2006). The designation was a result of litigation—the FWS believes critical habitat designation is of little use, stating, "In 30 years of implementing the [Endangered Species Act], the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species." Id.
115. Id.
Service monitored 154 limited tree harvest projects; most of the monitoring was done by observation.\textsuperscript{118} A group of environmental organizations submitted an IQA challenge on the data used to develop the CE criteria.\textsuperscript{119} The petitioners' request for correction alleged that the observation technique was not reliable and not replicable; the raw data was not publicly available; certain baseline data was not collected; and the observation technique was not objective because it could not be independently validated or duplicated. The petitioners further asserted that because the disputed information was used to create a new CE, it should be considered as "influential" information, which is subject to the "best science" requirement where data must be collected by "accepted or best available" methods. The petitioners asked the Forest Service to use measurement instead of observation as the monitoring technique, to make public all the raw data, and to re-evaluate the initial conclusions drawn from the existing data.\textsuperscript{120} The Forest Service denied the information correction request.\textsuperscript{121} The Service said the observations constituted expert opinion allowed under the USDA IQA guidelines.\textsuperscript{122} The petitioners appealed the denial on grounds similar to, but more detailed than, the original request.\textsuperscript{123} The Forest Service convened a panel to consider the appeal, which was denied after the panel found that the observation techniques were adequate.\textsuperscript{124}

B. Example of Information Challenges to the Fish and Wildlife Service

The FWS typically receives information correction requests regarding endangered species listings.\textsuperscript{125} An example is summarized here.

\textsuperscript{118} 68 Fed. Reg. 1,027.
\textsuperscript{120} Id.
\textsuperscript{121} Letter from Frederick Norbury, Director, Ecosystem Management Coordination, U.S. Dep't of Agriculture Forest Service (July 29, 2003), available at http://www.ombwatch.org/article/articleview/1665/1.
\textsuperscript{122} Id.
\textsuperscript{123} Request for Reconsideration of Correction of Information Contained in the Initial Data Set for Timber Harvest Effects Monitoring, Earth Island Institute \textit{et al.} (Sept. 10, 2003), available at http://www.ombwatch.org/article/articleview/1665/1
\textsuperscript{125} Requests for Correction Received by the U.S. Fish and Wildlife Service, Dep't of Interior, http://www.fws.gov/informationquality (last visited May 29, 2006).
In 1999 the FWS determined that the slickspot peppergrass, a flowering plant unique to Idaho that grows in small areas within sagebrush habitat, was a candidate for the endangered species list but took no action. The Air Force manages some of the land the peppergrass grows in. A 2001 lawsuit by environmental groups resulted in a federal court order requiring FWS to decide to list the plant by mid-2003. In mid-2002 the FWS published a proposal to list the plant. In connection with that proposal, the FWS held public meetings and notice and comment opportunities that ended in late 2002.

In March 2003, after the close of the notice and comment period, an Air Force official in Virginia filed an IQA petition challenging the information used in the FWS proposed listing of the peppergrass. The information quality challenge alleged that there was a lack of scientific evidence to support the claim that the plant was endangered; a lack of peer review; a misleading presentation of the arguments; and questioned the taxonomy of the species and the sufficiency of the population surveys. It is not clear why the Air Force failed to submit this information during the notice and comment period.

In July 2003 the FWS responded, saying that the date of resolution of the proposal would be extended, and then announced a new notice and comment period. The Air Force challenge prompted the new review. Shortly thereafter, the Air Force submitted a request for reconsideration, claiming that the date extension and new notice and comment period did not correct the proposal to list the peppergrass.

The FWS responded that the new comment process was an adequate response, and no other direct action would be taken on the appeal. In January 2004 the FWS announced that it was withdrawing the proposal to list the peppergrass as an endangered species. It claimed there was a lack of evidence of the plant’s decline, but it did not put forth any new information consistent with that claim, or explain how that view could be reconciled with the initial decision to list the plant. This

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127. Terry Bashore, Chief Ecologist and Range Liaison at Langley Air Force Base in Virginia.
129. Id.
130. Id.
132. OMB Watch, supra at note 128.
appears to be a situation where behind the scenes pressure was brought to bear on FWS.

C. The Number of IQA Information Correction Requests

The IQA requires agencies to periodically report to the OMB the number and nature of the complaints about information quality received by each agency.\textsuperscript{133} The OMB Guidelines call for annual reports starting on January 1, 2004.\textsuperscript{134} In a report to Congress, OMB compiled the number of information correction requests reported by agencies during Fiscal Year 2003.\textsuperscript{135} The reported number of requests received by agencies that have responsibilities for federal land use decisions are: five for the USDA, six for the Department of the Interior, one for the Defense Department, and thirteen for the EPA (note that not all the complaints may relate to land use).\textsuperscript{136}

Of a total of 24,618 correction challenges, the OMB deemed thirty-five as substantive and stimulated by the IQA.\textsuperscript{137} OMB indicated there were a total of sixteen appeals from initial agency responses; those appeals were disposed of in various ways.\textsuperscript{138}

OMB reported that the information challenges were brought by many types of petitioners, including "private citizens, corporations, farm groups, trade organizations, both liberal and conservative nongovernmental organizations . . . [and] other government agencies."\textsuperscript{139}

However, the OMB Report has been severely criticized by OMB Watch,\textsuperscript{140} a nonprofit watchdog group that monitors activities of the OMB.\textsuperscript{141} OMB Watch examined the information correction requests and determined there were ninety-eight significant challenges (instead of thirty-five).\textsuperscript{142} Further, OMB Watch found that, rather than the correc-

\textsuperscript{133} IQA, 44 U.S.C. § 3516(b)(C)(i).

\textsuperscript{134} OMB Guidelines, supra note 15, § IV(6).


\textsuperscript{136} Id. Other agencies' numbers are: Commerce Dept. 4; Education 1; HHS 10; Justice 2; Labor 18; DOT 89; Treasury 19; Veterans Affairs 1; Consumer Protection 4; EPA 13; FEMA 24,433; NASA 1; NARA 8; OSTP 1; Futures Trading 1; FDIC 1.

\textsuperscript{137} Id. at 8. FEMA received the lion's share of challenges because it maintains a database that indicates if a property is on a floodplain, and most of its challenges were to change property floodplain designations.

\textsuperscript{138} Id. at 14. Six of the appeals were still pending at the end of Fiscal Year 2003; four resulted in either full or partial corrections; four were denied; and two were withdrawn.

\textsuperscript{139} Id. at 9.

\textsuperscript{140} OMB Watch, supra note 10.


\textsuperscript{142} OMB Watch, supra note 10, at 5.
tion requests coming from a range of stakeholders, 72 percent came from industry. The industry requests tended to be longer, more comprehensive, and to be prepared by law firms, in contrast to typically short informal requests submitted by individuals via a website. OMB Watch concluded that OMB put a gloss on its report to Congress to downplay the impact of the IQA on agency operations.

D. The Burden of the IQA on Agencies

The OMB Report to Congress stated, "to date, neither OMB nor our engaged stakeholders has noticed or commented on any slowdown of the regulatory process. . . . To our knowledge, the Information Quality Act has not affected the pace or length of rulemakings." The OMB offered these comments to allay concerns that the IQA was a tool to increase agency workloads and slow their regulatory output.

OMB Watch has criticized these statements as well. They point out that the annual agency information correction request reports are submitted on OMB-provided templates that do not include queries on relevant measures of agency burdens, such as man-hours or costs expended on responding to the information correction requests. OMB Watch therefore maintains that the OMB simply has not collected the data needed to evaluate the additional workload imposed on agencies, and has no foundation for asserting an absence of affect on agency output. Similarly, OMB did not collect the data needed to measure any benefits conferred by the operation of the IQA.

In contrast to the statements given above, OMB said in its report to Congress:

Agencies are finding that it takes longer than they expected to respond to correction requests. Similarly, it is also taking longer than expected for agencies to implement

143. Id. at 6.
144. Id. at 8.
145. Id. at 2.
147. Id.
148. OMB Watch, supra note 10, at 8.
149. Id. The templates have spaces for the following: Agency, Requestor, Date Received, Summary of Request for Correction, Description of the requested corrective action, Was the subject of the RFC "influential," [Agency] response to the Request for Correction, Summary of response, Has an Request for Reconsideration been submitted on the [agency] RFC response, and Summary of Request for Reconsideration. OMB Report, supra note 135, at 22.
150. OMB Watch, supra note 10, at 8. OMB Watch further critiques OMB by highlighting the fact that OMB based its report on its own experience overseeing agencies implementing the IQA, instead of reporting on the actual experiences of the agencies dealing with information correction requests. Id. at 4.
151. Id.
the appeals processes. At some of the larger agencies, finding the correct specialist to respond to specific requests has not been an easy task. Furthermore, ensuring that the correct specialist has sufficient time to give priority to an information quality correction request has also been challenging.¹⁵²

This appears to indicate that the IQA does absorb significant resources of the agencies. OMB attributes this burden to the "learning experience" of implementing new legislation.¹⁵³ OMB Watch says the statement proves that dealing with information quality requests is time intensive and delays the regulatory output of agencies that are operating on fixed or declining budgets.¹⁵⁴ That is also the view of Sylvia Lawrence, a former high-ranking civil servant at the EPA, who said the IQA is slowing the publication of reports and release of important information.¹⁵⁵

V. Judicial Review of the IQA

A. Review of Agency Actions

Since the passage of the IQA and the promulgation of agency guidelines, an outstanding issue has been whether agency actions under the guidelines are subject to judicial review.¹⁵⁶ Opponents of the IQA feared agencies would find themselves tied up in endless litigation, making it less likely they would issue similar regulations in the future, while supporters viewed judicial review as an important means of enforcement of the IQA and its associated guidelines.¹⁵⁷

Two recent cases address this issue. The first case,¹⁵⁸ decided in mid-2004, briefly considered IQA related issues. The federal district court, in granting summary judgment, first held that the text of the IQA did not create a private cause of action. Second, the court found that while the Administrative Procedures Act¹⁵⁹ (APA) generally allows judicial review, in this case the statute was written in such broad terms that "there was no law to apply."¹⁶⁰ The court found that such terms as

¹⁵³. Id.
¹⁵⁴. OMB Watch, supra note 10, at 9.
¹⁵⁵. Sylvia Lawrence, statement at the Center of American Progress/OMB Watch release of Special Interest Takeover report (Mar. 25, 2004), cited in id. Lawrence was the director of the Office of Solid Waste, and principal deputy assistant administrator of the Office of Enforcement and Compliance Assistance at the EPA.
¹⁵⁶. See CRS Report, supra note 8, at 15; OMB Watch, supra note 10, at 15; Conrad, supra note 4; Shapiro, supra note 6.
¹⁵⁷. Id.
¹⁵⁸. In re Operation of the Missouri River Sys. Litig., No. 03-MD-1555 (D. Minn., June 21, 2004) (a group of shippers charged the Corps of Engineers with violating the IQA in its plan for maintaining water levels on the Missouri River and in the underlying biological opinion from the FWS).
¹⁶⁰. See supra note 159, at 49.
“quality,” “objectivity,” “utility,” and “integrity” are not defined in the IQA, and the legislative history provided no clues as to the meanings, so “[a]bsent any ‘meaningful standard’ against which to evaluate the agency’s discretion, the [c]ourt finds that Congress did not intend the [IQA] to provide a private cause of action.”161 This conclusion appears to conflate the application of the APA and the question of the suit under the IQA.

The application of the APA is more clearly discussed in the second case, decided late in 2004.162 The court, in dismissing the case, first noted that there is nothing in the IQA to provide a private right of action, and the language of the statute clearly indicates that Congress meant “any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not in the courts.”163

Next the court discussed the APA. There is a strong presumption of reviewability under the APA164 but this presumption holds only if the agency action (1) is not committed to agency discretion by law165 and (2) final agency action has occurred.166 The court found that disseminating the information in this case did not constitute final agency action because it was not an action “‘by which rights and obligations have been determined,’ or from which ‘legal consequences will flow.’”167 Agency action is committed to agency discretion, the court noted, when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”168 The court concluded that neither the IQA nor the OMB guidelines provided “judicially manageable standards” and hence there was no judicial review available under the APA.169 The plaintiffs are appealing.170

161. Id.
162. Salt Inst. v. Thompson, 345 F. Supp. 2d 589 (E.D. Va. 2004) (salt trade association sued the NIH over the release of study results showing salt consumption led to high blood pressure).
163. Id. at 601.
164. Id. at 602 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)).
165. Salt Inst., 345 F. Supp. 2d at 602 (citing the APA, 5 U.S.C. § 701(a)(2)).
166. Salt Inst., 345 F. Supp. 2d at 601-02 (citing Transactive Corp. v. United States, 91 F.3d 232, 236 (D.C. Cir. 1996)).
169. Salt Inst., 345 F. Supp. 2d at 602 (the plaintiffs also completely failed to demonstrate standing).
There are two lessons to be drawn. One, the simple release of information by an agency (e.g., posting on a website) does not constitute final agency action. Two, most importantly, judicial review of agency actions under the IQA—i.e., denial of an information correction request—is precluded because that action is committed to agency discretion by law.

VI. Discussion

A. Judicial Review of IQA Guidelines

While judicial review of agency actions under the IQA is precluded, what about review of the IQA or OMB guidelines themselves? In particular, the conditions of the OMB Peer Review Bulletin\(^{171}\) have drawn heated opposition\(^{172}\) and perhaps a party will challenge them in court.

The IQA says nothing about imposing peer review requirements on information disseminated by federal agencies,\(^{173}\) and setting up guidelines for peer review is not among the duties imposed on the OMB by Congress.\(^{174}\) It could be argued that the OMB is promulgating guidelines outside the scope of the statutory authority granted by Congress in the IQA. The APA states that a "reviewing court shall—hold unlawful and set aside agency actions, findings, and conclusions found to be—. . . otherwise not in accordance with law."\(^{175}\) Agency actions outside the scope of authority are, by definition, not in accordance with law\(^{176}\) and thus would be reviewable by a court.\(^{177}\)

B. Is the IQA Redundant?

The IQA addresses worthy goals—ensuring that federal agencies use and disseminate accurate information and setting up mechanisms to correct information. However, these goals were addressed by legislation pre-dating the IQA in ways that did not raise suspicions of OMB interference with agency decisions based on criteria other than ensuring accurate information.

1. Information Quality. A pre-existing provision of the PRA states “With respect to general information resources management, each

\(^{171}\) Peer Review Bulletin, supra note 17.

\(^{172}\) E.g., Shapiro, supra note 25; Waxman, supra note 74.

\(^{173}\) IQA, 44 U.S.C. § 3516.

\(^{174}\) Shapiro, supra note 25, at 10,065. Furthermore, Shapiro notes that Congress had explicitly rejected imposition of peer review as recently as 1995.


\(^{177}\) Note the distinction between the preclusion of judicial review of agency actions under the statute, and judicial review of the guidelines promulgated under the statute.
agency shall—improve the integrity, quality, and utility of information
to all users within and outside the agency, including capabilities for
ensuring dissemination of public information, [and] public access to
government information.”

This speaks to the same concerns as the IQA, and should cover the situation where an agency disseminates in-
formation outside of rulemaking (e.g., posting on a website).

The so-called “Shelby Amendment” directs the OMB to ensure
that data produced by grantees of federal agencies will be available to
the public under the procedures of the Freedom of Information Act.

This aids the dissemination of information as called for in the IQA and addresses the transparency requirements of the OMB guidelines.

2. Correcting Information. Agency adjudication is exempt from the
requirements of the OMB guidelines. Agency rulemaking is subject
to the IQA. However, the APA requires notice and comment in rule-
making proceedings. The notice and comment process should pro-
vide ample opportunity for stakeholders to point out any problems with
the information used by the agency to support the rulemaking. In
fact, the FWS IQA guidelines define as “frivolous” any information
correction request submitted after the notice and comment period if it
could have been submitted during the period.

The OMB recognizes the redundancy of the requirements of the guide-
lines with respect to pre-IQA agency operations. The OMB Guidelines state:

OMB encourages agencies to incorporate the standards and procedures required by
these guidelines into their existing information resources management and admin-
istrative practices rather than create new and potentially duplicative or contradictory
processes. The primary example of this is that the guidelines recognize that, in ac-
cordance with OMB Circular A-130, agencies already have in place well-established
information quality standards and administrative mechanisms that allow persons to
seek and obtain correction of information that is maintained and disseminated by the
agency.

179. A short rider to the Treasury and Postal section of the Omnibus Consolidated
181. OMB Guidelines, supra note 15, § V(8).
182. This is controversial because of fears that the rulemaking would become
bogged down in the OMB peer review requirements. Shapiro, supra note 25, at 10,064.
184. This is used to argue that Congress could not have intended the IQA to apply
to agency rulemaking. Shapiro, supra note 6, at 369.
185. FWS Guidelines, supra note 99, § IV(4).
186. OMB Guidelines, supra note 15, at 8453.
3. **Peer Review.** The OMB established elaborate guidelines for the peer review of agency information by experts outside the agency, including requirements to avoid reviewer conflicts of interest.\(^{187}\) However, the OMB guidelines ignore the well-established procedures of the Federal Advisory Committee Act\(^ {188}\) that provide for the orderly establishment of panels to give outside advice in a manner open to the public.\(^ {189}\)

Between the exemption for agency adjudication, agency rulemaking handled by the APA, and other disseminated information covered by the PRA, Circular A-130, and the Shelby Amendment, concerns of information quality and correction for all categories of information can be addressed without the IQA.

C. **Is the IQA Inefficient?**

The OMB Report to Congress\(^ {190}\) has a panglossian view of the impact of the IQA on agency resources, yet the OMB failed to even collect the data it needed to evaluate agency effort to comply with the IQA and associated guidelines.\(^ {191}\) Not only are there the direct costs of manpower and money, but there are also the opportunity costs of protective regulatory efforts foregone.\(^ {192}\) Any benefits from the IQA have not been quantified because the necessary information has not been collected.\(^ {193}\)

The FWS, for example, must devote considerable time and effort in deciding to list a plant as an endangered species, or define habitat for an endangered animal. It must spend more effort to subject all the information used in the decision to stringent peer review, whether or not there is any question of the quality of the information. It must then expend more resources responding to information correction requests. If the request deals with "influential" information, the FWS must assemble a panel to review the request and possible appeals. Finally, after all that work, if the request is a contentious one, the decision gets kicked up to the bureaucrats at OMB. There, the response to the request can be shaped by behind the scenes forces, or otherwise disposed of in a manner that overrides the vastly greater expertise of the FWS. The final OMB decision may be arbitrary with respect to the considerations made

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187. As discussed in Part III.D., the conflict of interest guidelines will tend to filter out agency and academic reviewers while leaving industry reviewers untouched.
189. Shapiro, *supra* note 25, at 10,064.
192. Indeed, critics maintain this a reason for the IQA. *Id.*
193. *Id.*
by the agency—the agency has generally considered alternative resolutions, and its decision has balanced stakeholder concerns. This is an inefficient use of agency resources.

D. Conclusion

It is appropriate and necessary for the OMB (and OIRA) to perform regulatory planning, review, and coordination of federal agencies. It is also appropriate for the executive, as a politically accountable branch of government, to impose its political philosophy on agencies. But that is best done in an open manner. Changing the way in which agencies behave in order to fall in line with the political goals of the executive should be done fully in the public eye, so that voters can evaluate the changes and subject the executive to any political consequences.

If the IQA was meant as a good faith effort to achieve better information quality in agency decision-making processes, it is a failure because it achieves only marginal results at a high cost in agency time, effort, and lost opportunity to serve the public. If it was meant as an underhanded way to slow or overturn agency regulations, than it is successful to some degree, but again at a high cost.

The functions of the IQA are adequately addressed by other statutes that have the advantage of operating in the open, and can achieve any benefits of the IQA at lower costs.