



Center for Regulatory Effectiveness

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August 21, 2002

Office of the Chief Information Officer
U.S. Department of Energy
Forrestal Building, Room 8H-089
1000 Independence Avenue, N.W.
Washington, D.C. 20585

RE: CRE COMMENTS ON PROPOSED DATA QUALITY ACT GUIDELINES

Dear Sir or Madam:

I am writing on behalf of the Center for Regulatory Effectiveness (CRE) to share with you the Center's comments on the Department of Energy's ("DOE") recently proposed Data Quality Act Guidelines, issued pursuant to the Data Quality Act amendments to the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3516 historical and statutory notes.

In addition to the following DOE-specific comments, CRE's comments on DOE's proposed guidelines include and incorporate by reference the following attachments.

CRE GENERAL COMMENTS TO ALL FEDERAL AGENCIES RELATED TO DATA QUALITY ACT GUIDELINES

- Attached as Exhibit A is a paper that outlines a number of cross-cutting issues related to Data Quality guidelines which are applicable to all agencies and which contains CRE's recommendations on how such issues should be addressed.
 - CRE strongly believes that proper action on these key issues will help ensure that the guidelines issued by all agencies are workable, effective.

and in keeping with the requirements of the statute.

- In the paper, CRE identifies and evaluates a number of agency approaches to these cross-cutting issues. Such examples include positive agency proposals that might be emulated, as well as problematic agency proposals which should be avoided.

LEGAL MEMORANDUM ON THE DATA QUALITY ACT'S APPLICABILITY TO ALL PUBLIC INFORMATION

- Attached as Exhibit B is a legal memorandum which summarizes an inquiry by Multinational Legal Services, Inc. into the Data Quality Act's applicability. This MLS memorandum concludes:
 - Based on the PRA's Information Dissemination provisions, including the Data Quality Act, and the relevant legislative history, Congress intended the Data Quality Act standards to apply to all information that federal agencies in fact make publicly available.
 - Thus, neither DOE nor any other federal agency has discretion to violate this legislative intent by exempting categories of information from the standards set forth pursuant to the Data Quality Act.

In addition to these two attached documents, CRE offers the following comments on DOE's proposed data quality guidelines.

DOE AND ALL OTHER AGENCIES SHOULD ADOPT THE DEFINITIONS OF "DISSEMINATION" AND "INFORMATION" IN OMB CIRCULAR A-130

Most exemptions from the Data Quality Act Guidelines stem from the definitions of "information" and "dissemination" proposed by DOE, OMB and other agencies. The MLS legal memorandum attached as Exhibit B explains that Congress intended the data quality guidelines to apply to all information that agencies subject to the PRA have in fact made public. DOE, OMB and most other agencies have violated congressional intent by creating numerous exemptions from the guidelines' applicability. Most if not all of these exemptions arise from the definitions of "dissemination" and "information."

For purposes of data quality standard applicability, DOE, OMB and the other federal agencies should adopt and apply OMB's longstanding definitions of "information" and "dissemination" in OMB Circular A-130. These OMB definitions are consistent with congressional intent regarding the PRA's Information Dissemination provisions, including the Data Quality Act amendments. OMB itself has acknowledged that Congress essentially codified

Center for Regulatory Effectiveness

Circular A-130 when it enacted most of the PRA Information Dissemination provisions in 1995. *Memorandum for Heads of Executive Departments and Agencies*, Alice Rivlin, OMB Director (M-95-22, September 29, 1995). The A-130 definitions are also similar to those OMB originally proposed to use for Data Quality Act Guidelines. 66 FR 34489, 34492-93 (June 28, 2001).

PETITIONS FOR INFORMATION FIRST DISSEMINATED BEFORE OCTOBER 1, 2002

OMB's government-wide Data Quality Act Guidelines state: "The agency's administrative mechanisms, under paragraph III.3, shall apply to information that the agency disseminated on or after October 1, 2002, regardless of when the agency first disseminated the information." Application of the administrative correction process to information first disseminated before October 1, 2002, as long as dissemination continues after that date, is required by the express language of the Data Quality Act. The Data Quality Act amendments to the PRA state that DOE and the other federal agencies subject to the PRA must "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 [government-wide] guidelines issued" by OMB. 44 U.S.C. § 3516 historical and statutory notes (section (b)(2)(B))(emphasis added). The term "maintained" means "to keep in existence or continuance; preserve; retain..." Under the plain language of the statute, use of the term "maintained" in conjunction with the past-tense verb "disseminated" requires application of the correction process to information that was first disseminated before October 1, but which continues to be disseminated after that date.

DOE's proposed Data quality Act Guidelines are unclear on this issue. For example, at Section IV (A)(2), they use the phrase "disseminated or redisseminated on or after October 1, 2002."

DOE's final Data Quality Guidelines should clearly state that the Guidelines and the administrative petition process apply to all information that is still being disseminated by DOE on or after October 1, 2002, regardless of when the information was first disseminated.

PUBLIC NOTICE AND COMMENT ON "DOE ELEMENT" SUPPLEMENTAL GUIDELINES

At Section C(1), DOE's proposed Data Quality Guidelines state that "DOE Elements may develop and post on their websites supplemental guidelines for the process they will follow for reviewing the quality (including objectivity, utility and integrity) of information before it is disseminated."

Any supplemental Data Quality Guidelines should be proposed for public comment before they are published as final. Publication and application of supplemental Data Quality guidelines without prior opportunity for public notice and comment would violate the rulemaking

requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

APPLICATION OF THE DATA QUALITY GUIDELINES AND ADMINISTRATIVE PETITION PROCESS TO RULEMAKINGS AND OTHER PUBLIC-NOTICE-AND-COMMENT PROCEEDINGS

At Section IV(A)(1), DOE's proposed guidelines restrict application of the Data Quality Act Guidelines and administrative petition process when the information at issue is subject to public comment. CRE understands these proposed restrictions as follows.

- 1) With respect to information that is the subject of an ongoing public comment period, the public can only file a Data Quality Act administrative petition during the public comment period.
- 2) With respect to information that is "set forth or referenced in a DOE notice of final rulemaking or a final Environmental Impact Statement (and any related Record of Decision)", the public has to file an administrative petition under the Data Quality Act "in the form of a petition for rulemaking under 5 U.S.C. § 553(e) or a petition for supplemental environmental impact statement under 10 CFR Part 1021, whichever is appropriate."
- 3) "If the request for correction [under the Data Quality Act] concerns information in or referenced in a document subject to comment at an early stage of the public comment process (e.g., an advance notice of proposed rulemaking), any response prior to publication of the final document is a preliminary response."

Viewed together, these three restrictions appear to be an attempt to freeze the time that administrative petitions can be filed to two moments: during the actual public comment period and after a final rule or EIS is issued. They also appear in most instances to allow DOE to delay a decision on an administrative petition to the time a final rule or EIS is issued. DOE should not promulgate these restrictions as part of DOE's final Data Quality Guidelines.

Delaying a decision on an administrative petition for years until there is a final rule or EIS would violate the requirement in OMB's government-wide Data Quality Guidelines that DOE "shall establish administrative mechanisms allowing affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by DOE that does not comply with OMB or agency guidelines." 67 FR 8452, 8459 (Feb. 2, 2002). Disseminated information that does not meet Data Quality Guidelines can do significant harm to affected

Center for Regulatory Effectiveness

persons during the often lengthy period before publication of final rules or a final EIS. Congress provided such persons a new way of correcting this information in a timely manner when it enacted the Data Quality Act. *See* Attachment __ (ABA Comments on EPA’s proposed Data Quality Guidelines, which are incorporated herein by reference). In addition, DOE should appreciate being informed at any time that information it disseminates violates the requirements of a federal statute.

The second restriction is also overbroad and unnecessary in those circumstances where the information can be corrected without changing the rule or environmental impact statement.

There will also be many instances when the information in question is not part of a final rule or EIS, yet has been subject to a public comment period that has closed at the time the administrative petition is filed. DOE’s proposed Data Quality Guidelines either do not address this situation, or they impermissibly and arbitrarily preclude an administrative petition in these circumstances.

CRE recommends that DOE’s final Data Quality Guidelines impose no time restrictions on when an administrative petition can be filed, and that they impose firm and reasonable deadlines for DOE action on a petition in all contexts.

BURDEN OF PROOF ON ADMINISTRATIVE PETITIONS

DOE’s proposed Data Quality Act Guidelines state at Sections IV(A)(1)(E), !V(B)(2)(D): “A member of the public who files a request for correction under this paragraph has the burden of proof with respect to the necessity for correction as well as the type of correction requested....” This statement is not objectionable *per se*, but DOE should also add in its guidelines that DOE has the burden of producing an administrative record demonstrating that the information at issue complies with the Data Quality Guidelines. Such a record is an elementary requirement of the Administrative Procedure Act. *E.g.*, *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 764 (1973).

ADOPTION OR ADAPTATION OF SDWA STANDARDS

DOE’s “Supplemental Information” proposes a specific adaptation of the Safe Drinking Water Act risk assessment standards to ecological effects. CRE commends DOE for this proposal and agrees that it should be part of the final Data Quality Act Guidelines for all “DOE Elements.”

DATA QUALITY ACT COMPLIANCE DURING PAPERWORK REDUCTION ACT ICR REVIEW

ater for Regulatory Effectiveness

DOE proposes that “DOE Elements” demonstrate compliance with Data Quality Guidelines for all their Information Collection Request (“ICRs”) sent to OMB for approval under the Paperwork Reduction Act. CRE commends DOE for this proposal and agrees that it should be part of the final Data Quality Guidelines for all “DOE Elements.”

DEFINITION OF INFLUENTIAL INFORMATION

Under OMB’s government-wide Data Quality Guidelines, “influential scientific, financial or statistical information” must meet the most rigorous standards of transparency and reproducibility. 67 FR 8455. OMB’s government-wide Data Quality Guidelines define “influential” to mean “that 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.” 67 FR 8460.

DOE’s “Supplemental Information” explains that DOE’s proposed Data Quality Guidelines define “‘influential information’ as information that DOE routinely embargoes because of its potential effect on markets, information on which a regulatory action with a \$100 million per year impact is based, and other information products on a case-by-case basis.” CRE agrees that the first two categories are “influential information.” CRE is, however, concerned that the last case-by-case category is too vague. CRE recommends that DOE’s final Data Quality Guidelines include the above-quoted language for OMB’s “clear-and-substantial-impact” definition of “influential information” in order to provide more clarity and guidance on this issue.

INTER-AGENCY COMMITTEES

CRE also asks DOE to address an issue that, to the best of CRE’s knowledge, has not been addressed: how do the new Data Quality Act Guidelines apply to information disseminated by interagency committees?

There are many examples of committees comprised of representatives from different agencies subject to the PRA: *e.g.*, Interagency Risk Assessment Consortium; United States Global Change Research Program; and the Human Subjects Research Subcommittee. Many of these inter-agency subcommittees disseminate information subject to the PRA’s data quality requirements. The question is which agency guidelines apply? CRE agrees that this is a difficult issue, but suggests the following resolution of it.

Any information disseminated by a multi-agency committee should have to comply with all Data Quality Act Guidelines for all agencies on the committee. An administrative petition should be filed with the Chairperson(s) and Vice Chairpersons (if any) of the committee at the time the petition is filed, with copies to all agencies on the committee.

Center for Regulatory Effectiveness

GPRA PERFORMANCE GOALS

Finally, CRE believes that in light of the ongoing importance of the Data Quality issue, all federal agencies should adopt Data Quality as a Performance Goal in its Performance Plan under the Government Performance and Results Act. Not only would this assist the agency in regularly monitoring and improving its information quality activities, but it would also serve to increase the transparency of the agency process for Congress and the interested public.

CRE would be happy to answer any questions you might have related to its comments and supporting materials. Please contact us at (202) 265-2383, if we might be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim J. Tozzi". The signature is written in a cursive style with a flourish at the end.

Jim J. Tozzi

Member, CRE Board of Advisors

Attachments