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THE INFORMATION QUALITY ACT: AN ENVIRONMENTAL PRIMER

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Science is one of the soundest investments the nation can make for the future. Strong science provides the foundation for credible environmental decision-making.[1]

I. INTRODUCTION

The Information Quality Act (IQA),[2] also referred to as the Data Quality Act,[3] was most likely enacted at the behest of industry in an attempt to hinder environmental rulemaking.[4] Introduced by Congresswoman Jo Ann Emerson[5] as a legislative rider to the Treasury and General Government Appropriations Act of 2001, the IQA is the result of lobby efforts by Dr.

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[1] National Research Council, Strengthening Science at the U.S. Environmental Protection Agency, Research - Management and Peer - Review Practices, National Research Council, 25 (2000).

[2] Section 515 of the Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554, 144 Stat. 2,763A-153 to 2,763A-154 (2000), is informally referred to as the Information Quality Act or IQA. The Office of Management and Budget (OMB) refers to the Act as the IQA, because it addresses more than just quantitative data. *See* Paul Noe, Frederick R. Anderson, Sidney A. Shapiro, James Tozzi, David Hawkins, and Wendy Wagner, *Learning to Live With the Data Quality Act*, 33 ENVT. L. REP. 10,225 (2003). *See also* Dr. John D. Graham, Speech at the American Bar Association Section on Environment, Energy, and Resources, 11th Section Fall Meeting (Oct. 8, 2003)(transcript available at http://www.whitehouse.gov/omb/inforeg/speeches/031008graham.html) (last visited November 20, 2004).

[3] Frederick R. Anderson, *Data Quality Act*, NAT'L L.J., Oct. 14, 2002, at B9.

[4] Interview by Brooke Gladstone with Alan Morrison, Public Citizen Litigation Group and Dr. James Tozzi, Center for Regulatory Effectiveness, National Public Radio (Apr. 20, 2002).

[5] Congresswoman Jo Ann Emerson filled a vacancy in the 104th Congress when her husband, Congressman Bill Emerson, a Missouri Republican, died on June 22, 1996. Unable to meet the primary filing deadline, she ran in the special election as an independent candidate. She won the special election and subsequently changed her party affiliation to Republican on January 7, 1997. http://www.joannemerson.com/biography.htm (last visited November 20, 2004).

James Tozzi,[6] Multinational Business Services, Incorporated[7] and the Center for Regulatory Effectiveness (CRE).[8] Many commentators believe the true purpose of the Act is to impede rulemaking by providing industry with a venue to attack the science on which environmental regulations are based.[9]

The IQA requires a systemic approach to information quality and requires all federal agencies to implement guidelines that ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) disseminated to the public.[10] Each agency must also establish administrative mechanisms for affected persons to seek correction of the information maintained and disseminated by the agency that is not in compliance with the Act.[11] The public, in addition to exercising its right to

[6] Dr. Tozzi, the former Deputy Administrator, Office of Information and Regulatory Affairs (OIRA), OMB, has extensive experience with reviewing proposed federal agency rulemaking. His federal service at OMB spanned five consecutive presidential administrations from President Lyndon B. Johnson to President Ronald Reagan and included a position as Chief of the Environmental Branch, where he reviewed EPA regulations. Dan Davidson, *Nixon's Nerd Turns Regulations Watchdog*, FEDERAL TIMES, Nov. 11, 2002, at 12.

[7] Multinational Business Services is an industry supported lobbying firm in Washington, D.C. It represents numerous interests including the tobacco and auto industries. Sheldon Rampton and John Stauber, *How Big Tobacco Helped Create the Junkman*, 7 PR Watch Archives 3 (2000), *and* Warren Brown and Cindy Skrzycki, *Opposing Sides Pull Out Statistical Stops in Air Bag Battle; Federal Officials Move Closer to Issuing a Final Rule on Deactivating the Safety Devices*, WASH. POST, Sep. 24, 1997, at C-9.

[8] The CRE was established in 1996 by Dr. James Tozzi to counter what he perceived to be a lack of regulatory review under the Clinton administration. Davidson, *supra* note 6. The CRE's self-stated goals are "(t)o ensure that the public has access to data and information used to develop federal regulations," and "that information which federal agencies disseminate to the public is of the highest quality." http://www.thecre.com/about.html (last visited November 20, 2004). The CRE is "industry-supported" and "conservative and business oriented." JOHN D. ECHEVERRIA and JULIE B. KAPLAN, POISONOUS PROCEDURAL REFORM: IN DEFENSE OF ENVIRONMENTAL RIGHT TO KNOW 2 (2002), *citing* Bureau of National Affairs, Daily Environment Report, at A-1 (November 26, 2001), *and* Cynthia Skrzycki, *The Regulators*, WASH. POST, Apr. 24, 2001, at E-1. CRE represents chemical and utility clients. *EPA Under Increased Pressure to Release Modeling Data For Highly Anticipated Multi-Pollutant Air Controls*, InsideEPA.com, Today (Jan. 29, 2002), *at* http://www.insideepa.com. The CRE maintains the foremost industry oriented website on the IQA at http://www.thecre.com (last visited November 20, 2004).

[9] *See* Anderson, *supra* note 3, *and* Robert Gellman, *What? You Haven't Heard About Section 51?,* GOVERNMENT COMPUTER NEWS 26 (Aug. 20, 2001).

[10] Appropriations Act, *supra* note 2. The IQA guidelines for all federal agencies may be reviewed at http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html (last visited November 20, 2004).

[11] Appropriations Act, *supra* note 2.

participate in rulemaking,[12] can now question the science and data relied upon by an agency before rulemaking[13] commences.

Decision-making at the Environmental Protection Agency (EPA)[14] can now be challenged by questioning: (1) the scientific data upon which the National Ambient Air Quality Standards (NAAQS)[15] are based; (2) the scientific studies and environmental agency statements on global warming;[16]

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[12] The public has a right to participate in rulemaking through public hearings and submission of relevant comments under the Administrative Procedures Act, 5 U.S.C.A. §§ 500 *et seq*. (2004).

[13] Regulations, or rules, are agency statements of general applicability and future effect, which the agency intends to have the force of and effect of law, and that are designed (1) to implement, interpret, or prescribe law or policy, or (2) to describe the procedure or practice requirements of an agency. Rulemaking is synonymous with regulatory action.

Science to Support Rulemaking, EPA's Office of the Inspector General Pilot Study, Report 2003-P-00003, pp. 1-2, and 64 (Nov. 15, 2002). Regulations and rules at the EPA are initiated by executive direction, statute, court order, or citizen petition urging action on a particular issue. *Id.* EPA's Office of Policy, Economics, and Innovation estimated that 1,000–1,300 environmental rules are published in the Federal Register on a yearly basis, with 20 of those rules categorized as "significant" under Executive Order Number 12,866. "Significant" rules are those that have a $100 million or more impact on the economy or adversely affect the economy; create an inconsistency with an action taken by another federal agency; materially alter the impact of budgetary entitlements; or raise novel legal or policy issues. "Significant" rules must be reviewed by OMB unless a specific waiver is granted. Exec. Order No. 12,866, 58 Fed. Reg. 51,740 (Sept. 30, 1993). Approximately 200 rules of national scope, but of lesser impact, are passed by the EPA annually. The most highly regulated statute is the Clean Air Act. *Science to Support Rulemaking*, EPA's Office of the Inspector General Pilot Study, Report 2003-P-00003, pp. 2, 4, and 64 (Nov. 15, 2002). The Small Business Administration estimated that the yearly cost of the "regulatory state" is $8,000.00 per household. Dr. John D. Graham, Speech at the Heinz School, Carnegie Mellon University (Oct. 4, 2002)(transcript available at http://www.whitehouse.gov/omb/inforeg/print/graham_cmu_100402.html) (last visited November 20, 2004).

[14] The Environmental Protection Agency was established by President Richard M. Nixon as an independent agency of the executive branch on December 2, 1970. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623, 84 Stat. 2,086 (1970).

[15] The Air Pollution Prevention and Control Act, 42 U.S.C.A. §§ 7401 to 7671q (1990), often referred to as the Clean Air Act of 1990, authorized EPA to set NAAQS "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare." 42 U.S.C.A. § 7401(b) (1990). EPA established NAAQS for six criteria pollutants to include carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter (10), and particulate matter (2.5). *See also* http://www.epa.gov/air/criteria.html (last visited November 20, 2004).

[16] The CRE petitioned the United States Global Climate Change Research Program and the Office of Science and Technology Policy to withdraw the National Assessment on Global Climate Change, alleging it violated the objectivity requirements of the Act. CRE argued that the report was published without development of the underlying science. CRE criticized and petitioned EPA's global warming website at http://yosemite.epa.gov/oar/globalwarming.nsf/content/index.html (last visited November 20, 2004). Letter from the Center for Regulatory Effectiveness to the Honorable Carol M. Browner, Administrator, EPA (May 26, 2000).

(3) the reports from the EPA's Toxic Release Inventory (TRI);[17] (4) the health summary information on the EPA's Integrated Risk Information System (IRIS);[18] (5) the National Toxicology Program Report on Carcinogens;[19] (6) the Emergency Response Notification System[20] information on oil discharges and releases of hazardous substances; (7) risk information for industrial chemicals reported to the EPA under the Toxic Substances Control Act;[21] and (8) data from the EPA's Aerometric Information Retrieval System (AIRS)[22] regarding the levels of airborne pollution in the United States.[23]

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[17] The TRI, established by the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C.A. §§ 11001 *et seq*. and expanded by the Pollution Prevention Act of 1990, 42 U.S.C.A. §§ 13101, *et seq*., is a publicly accessible, nationwide database maintained by the EPA. It contains over 650 toxic chemicals that are used, manufactured, treated, transported, or released into the environment. The TRI Model contains facility identifications, reported chemical information, known releases to environmental media, information on wastes transferred to off-site locations, onsite treatment, energy recovery, recycling activities, and source reduction. http://epa.gov/enviro/html/tris/ (last visited November 20, 2004). *See also* http://www.epa.gov/triexplorer (last visited November 20, 2004).

[18] The EPA's IRIS database is used by federal, state, and local officials in the risk assessment process, to identify hazards, and as part of the dose-response evaluations. IRIS contains qualitative and quantitative health information outlining EPA's scientific position regarding the adverse human health effects that might result from repeated exposure to a particular chemical. http://www.epa.gov/iriswebp/iris/index.html (last visited November 20, 2004). *See also* Pat Phibbs, *OMB Guideline on Quality of Information Seen As Having Profound Impact On Agencies. Guidance Seeks to Ensure Accuracy, Clarity of Information From Agencies*, 33 ENVTL. REP. (BNA) 152 (2002).

[19] The National Toxicology Program Report on Carcinogens is a congressionally mandated list of known human carcinogens, substances that may reasonably be anticipated to be human carcinogens, and substances to which a significant number of U.S. residents are exposed. National Toxicology Program; Availability of the Report on Carcinogens, Eighth Edition, 63 Fed. Reg. 26,818 (May 14, 1998).

[20] The Emergency Response Notification System is a national system used to respond to the release of oil and hazardous substances that occur above federally mandated trigger levels. Individuals and organizations responsible for the release of oil or hazardous substances must notify the federal government through the National Response Center. http://www.epa.gov/superfund/programs/er/nrs/index.htm (last visited November 20, 2004). *See also* http://www.nrc.uscg.mil/erns/epa.html (last visited November 20, 2004). The EPA established or proposed reportable quantities for approximately 800 Superfund substances designated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601 *et seq*. Reportable quantities were also established for 360 extremely hazardous substances under the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C.A. §§ 11001 *et seq*. (1986).

[21] Toxic Substances Control Act, 15 U.S.C. § 2607 (1976).

[22] AIRS is an air quality system database which contains measurements of criteria air pollutants throughout the 50 United States, Puerto Rico, the District of Columbia, and the Virgin Islands. Criteria pollutants are regulated by EPA based on scientific based health criteria. Primary standards protect human health, while secondary standards prevent environmental and property damage. Air Pollution Prevention and Control Act, 42 U.S.C.A. §§ 7401-7671q. The AIRS system is under the jurisdiction of EPA's Office of Air Quality Planning and Standards. http://www.epa.gov/air/data/aqsdb.html (last visited November 20, 2004).

[23] Phibbs, *supra* note 18, at 146.

Part I of this thesis examines the scant legislative history of the appropriations rider known as the IQA and industry's support of this ambiguous Act. The broad statutory language contained in the IQA was never subjected to Congressional and/or public debate, leaving much of the Act open to question and interpretation. This ambiguity will inure to the benefit of industry, allowing extensive participation in disclosure programs and forcing scarce agency resources to be focused on administrative disputes.[24] A review of the political history reveals extremely close ties to the lobbying efforts of the CRE, Dr. James Tozzi, paying industrial clients, and Congresswoman Joanne Emerson.

Part II discusses the government-wide IQA implementing guidelines issued by the Office of Management and Budget (OMB). These guidelines define the new information quality act standard, outline the IQA regulatory mandates to be followed by all federal agencies, and create an administrative appeals process for non-compliance. The IQA is also examined within the context of a draft peer review standard for regulatory science that was released by OMB in 2003.[25] Citing the need to reduce lawsuits and increase regulatory consistency, OMB proposed "a standardized process by which all significant regulatory documents will be subjected to peer review by qualified specialists in appropriate technical disciplines."[26] This new standard, along with the IQA, will place yet another arrow in OMB's quiver of control over regulations.[27]

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[24] Echeverria, *supra* note 8, at 4.

[25] Press Release, OMB, OMB Proposes Draft Peer Review Standards for Regulatory Science (Aug. 29, 2003)(available at http://www.whitehouse.gov/omb/pubpress/2003-34.pdf) (last visited November 20, 2004).

[26] *Id.* OMB also expressed concern that "too much federal science is being vetted by individuals with close ties to rulemaking agencies." Marty Coyne, *White House Calls For External Review of Science Behind Agency Rules*, Greenwire (Sep. 4, 2003), *available at* http://www.eenews.net/Greenwire/searcharchive/test_search-display.cgi (last visited November 20, 2004).

[27] There is a danger in the Bush administration's focus on "sound science." It can quickly turn into a debate about "what's sound, how sound and who's science." Eryn Gable, *Experts See Diminished Value In International Megaconferences*, Greenwire (Nov. 4, 2002), *available at* http://ncseonline.org/Updates/page.cfm?FID=2239 (last visited November 20, 2004)(quoting Amy Fraenkel, Senate Commerce Committee staff member and former EPA employee). There is even movement afoot by the American Legislative Council to endorse state laws similar to the IQA. The model state information quality bill, as drafted by the CRE, is designed to ensure and maximize the quality, objectivity, utility, and integrity of information provided by State agencies to its citizens, entities who engage in business, or other activities in the state. CRE support for such a measure will depend on the level of interest and the availability of funding. David Stafford, *Drive Under Way to Enact Legislation on Data Quality, Access at State Level*, 34 ENVTL. REP. (BNA) 374 (2003).

The IQA will be the foundation upon which further executive influence is exerted over the regulatory process.

Part III examines the EPA's implementation of the OMB guidelines with a focus on the key principles and the EPA's mechanism to ensure and maximize the quality of influential scientific risk assessment information.[28] The EPA elected to "adapt" rather than "adopt" the principals[29] of the Safe Drinking Water Act (SDWA) Amendments of 1996[30] and has maintained that petition decisions under the Act do not constitute a final agency action and, therefore, are not subject to judicial review.[31]

Part IV examines the type and number of IQA petitions filed at the EPA.[32] A review of the petitions will show that in its infancy, the IQA has yet to produce the onslaught of environmental petitions once predicted. Although a majority of the petitions filed at the EPA were by industry, a cross-section of society has submitted requests for correction.[33] The paucity of petitions filed thus far does not make the IQA a "toothless tiger." Unlike a similar law, the Freedom of Information Act,[34] where public requests for information can easily be submitted, the IQA requires a much more sophisticated and scientifically oriented petitioner to ensure successful challenge. Only members of industry and publicly supported interest groups typically possess the time, scientific resources, and financial backing to initiate a challenge to scientific data. Regulated industry, which is acutely aware of the need to obtain industry favorable precedents, carefully selects the IQA petitions to be filed at the EPA. In fact, the U.S. Chamber of Commerce held meetings with industry associations and company representatives to ensure that petitions were filed in a coordinated manner.[35] The number of IQA requests will likely rise as industry becomes more familiar with the nuances of the petition process.

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[28] EPA's Information Quality Guidelines can be reviewed at http://www.epa.gov/quality/informationguidelines/ (last visited November 20, 2004).

[29] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-008, Oct. 2002 at 22.

[30] Safe Drinking Water Act Amendments of 1996, 42 U.S.C. §§ 300g-1(b)(3)(A) and (B) (1996).

[31] EPA Guidelines *supra* note 29, at 4.

[32] Office of Environmental Information, *Information Quality FY03 Annual Report*, EPA, Jan. 1, 2004.

[33] *See* http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited November 20, 2004).

[34] Freedom of Information Act, 5 U.S.C. § 552 (2003).

[35] *Courts Face Key Test on Jurisdiction of EPA Data Quality Decisions*, 20 Inside EPA Environmental Policy Alert, issue: 29 (Jan. 8, 2003).

The IQA's overall influence on the regulatory state, at the EPA, and within the government as a whole, will depend on OMB's continued proactive role in providing oversight. The use of the IQA by industry to thwart rulemaking through petition and eventually suit, and the court's role in judicially reviewing agency decisions under the Act will also play predominant roles. It is only a matter of time before the IQA becomes an industrial lever by which environmental rulemaking is hindered.

II. ORIGINS OF THE INFORMATION QUALITY ACT

A. Legislative History

The IQA is an unfunded and un-codified[36] legal mandate that amends the Paperwork Reduction Act (PRA) of 1980.[37] Its origins are contained in House Report language[38] that accompanied the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999.[39] The report states:

> Reliability and Dissemination of Information. The committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, *rules* providing policy and procedural guidance

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[36] Appropriations Act, *supra* note 2.

[37] The following "purposes" of the PRA, as outlined in § 3501, contain references to the quality of information disseminated by the Federal Government:

> (2) to ensure the greatest possible public benefit from and maximize the utility of information . . . disseminated by or for the Federal Government; (4) . . . improve the quality and use of Federal information to strengthen decision-making, accountability, and openness in Government and society; (7) . . . provide for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public and makes effective use of information and technology; (9) . . . ensure the integrity, quality, and utility of the Federal statistical system; and (11) . . . improve the responsibility and accountability of the Office of Management and Budget and all other Federal agencies to Congress and to the public for implementing the . . . policies and guidelines established under this chapter.

Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 *et seq*. (1980).

[38] "The conference agreement on the Treasury and General Government Appropriations Act, 1999, incorporates some of the language and allocations set forth in House Report 105-592 and Senate Report 105-251. The language in these reports should be complied with unless specifically addressed in the accompanying statement of managers." H.R. CONF. REP. NO. 105-825, at 1471 (1998).

[39] Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2,681-1 (1999).

> to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104-13). The Committee expects issuance of these rules by September 30, 1999. The OMB *rules* shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the full text of the applicable portions of the House Report is as follows: OMB rules. The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of petitions or complaints regarding Federal, or Federally-supported, information dissemination, and how such petitions and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999.[40]

OMB failed to act on the urging contained in the House Report by the September 30, 1999, deadline.

Representative Jo Ann Emerson, during a House Appropriations Subcommittee markup, introduced an amendment that was adopted by voice vote on July 11, 2000. [41] The amendment, entitled Treasury-Postal Appropriations/Government Website Information, required the "Office of Management and Budget to issue *rules* to allow the public to formally challenge any information disseminated by the government on a website." The Clinton Administration objected to the House Report language directing OMB to develop data quality "rules."[42] In response to White House opposition, the

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[40] This House Report language differs from the IQA in two regards: it urges OMB to issue rules vice guidelines and does not contain references to specific sections of the PRA. H.R. REP. NO. 105-592, at 49-50 (1998)(emphasis added).

[41] *House Panel Puts Stamp of Approval on Treasury-Postal*, CQ Committee Coverage, House Appropriations Subcommittee Markup, Jul. 11, 2000.

[42] "The original version of the rider called for adoption of a government-wide *rule*, but at the insistence of OMB, a requirement for government-wide *guidelines* was substituted for the

Committee on Appropriations changed the language and directed OMB to develop "guidelines."[43] The Committee on Appropriations, as part of the Treasury and General Government Appropriations Act for Fiscal Year 2001,[44] submitted a conference report with the following directive:

> The Committee directs OMB to expedite this review and submit the study, which is now a year late, as soon as possible. Data Quality. The Committee has included statutory language (Section 515) which requires the Office of Management and Budget to develop, with public and federal agency involvement, *guidelines* providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P. L. 104-13). Committee reconfirms its instructions with language directing OMB to issue such *guidelines* no later than the end of the fiscal year 2001, with a copy forwarded to the Committee on Appropriations.[45]

Unlike the report language, the rider does not apply to non-Federal entities receiving financial support from the government.[46]

A political impasse halted passage of the Treasury and General Government Appropriations Act for Fiscal Year 2001, for reasons unrelated to the IQA.[47] On December 15, 2000, the Treasury and General Government

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rulemaking provision." Dr. John D. Graham, Remarks at the Meeting of the Public Working Committee on Information-Quality Guidelines, National Research Council/National Academy of Sciences, (Mar. 21, 2002) (emphasis added)(transcript available at http://www.whitehouse.gov/omb/inforeg/info-quality_march21.pdf) (last visited November 20, 2004). *See also* Noe, *supra* note 2.

[43] Noe, *supra* note 2.

[44] H.R. REP. NO. 106-756, at 216-20 (2000).

[45] H.R. CONF. REP. NO. 106-1033, at 362 (2001)(emphasis added).

[46] *Background on Data Quality Guidelines*, OMB Watch, May 28, 2002. http://www.ombwatch.org/article/articleview/773/ (last visited November 20, 2004).

[47] In an attempt to avoid difficult votes and to speed the process, Republican leaders added a negotiated version of the Treasury and General Government Appropriations Act for Fiscal Year 2001 to the conference report on the legislative branch spending bill. The House adopted the conference report on September 14, 2000. 146 CONG. REC. H7626–27 (daily ed. Sept. 14, 2000). The conference report was rejected by the Senate on September 20, 2000, due to a lack of debate on gun control and the inclusion of a Congressional pay raise. 146 S. CONG. REC S8800 (daily ed.

Appropriations Act for Fiscal Year 2001 was included in the conference report for Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 2001.[48] The House and Senate adopted the House Conference Report[49] and the IQA was passed without debate or change[50] as Appendix C of the Consolidated Appropriations Act of 2001.[51]

With scant legislative history, the Act was signed during the waning days of the Clinton presidency[52] and went virtually unnoticed. A mere 227-word provision[53] in an eight hundred-page appropriations bill,[54] the IQA reads as follows:

> 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 --

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Sept. 20, 2000). The Senate eventually approved a bi-partisan version of the bill on October 12, 2000.
146 CONG. REC. S10333 (daily ed. Oct. 12, 2000). President Clinton vetoed the bill on October 30, 2000, blocking funding for the Congress and the White House when the remaining portions of the appropriations bill remained deadlocked. 146 CONG. REC. H11675–81 (daily ed. Oct. 30, 2000).

[48] Appropriations Act, *supra* note 2. *See also* http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04577:lTOM:/bss/d106query.html (last visited November 20, 2004).

[49] H.R. CONF. REP., *supra* note 45, at 1.

[50] Noe, *supra* note 2.

[51] Appropriations Act, *supra* note 2.

[52] Rebecca Adams, *OIRA Directs Guidelines on Data Quality*, CQ WEEKLY, Mar. 23, 2000, at 827.

[53] Rebecca Adams, *Federal Regulations Face Assault on Their Foundation*, CQ WEEKLY, Aug. 10, 2002, at 2182.

[54] Appropriations Act, *supra* note 2.

> (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
> >
> > (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.[55]

The Act requires the Director, OMB, to issue guidelines in accordance with §§ 3504(d)(1) and 3516 of the PRA. Section 3504(d)(1) outlines the authorities and functions of the Director, OMB "with respect to information dissemination, the Director shall develop and oversee the implementation of policies, principles, standards, and guidelines to – (1) apply to Federal agency dissemination of pubic information, regardless of the form or format in which such information is disseminated."[56] Section 3516 charges the Director, OMB

[55] Appropriations Act, *supra* note 2.
[56] Paperwork Reduction Act, *supra* note 37, at § 3504(d)(1).

with promulgating "rules, regulations, or procedures necessary to exercise the authority provided by this chapter."[57]

B. Continued Congressional Interest

Congressional interest in the IQA continues. The House Appropriations Committee, the same Committee that proposed the IQA and the committee on which Congresswoman Jo Ann Emerson is still a member, questioned the agency-wide implementation of the Act in a 2004 House Conference Report. The Report states:

> Implementation of the Federal Data Quality Act – The conferees are concerned that agencies are not complying fully with the requirements of the Federal Data Quality Act (FDQA). The conferees agree that the data endorsed by the Federal Government should be of the highest quality, and that the public should have the opportunity to review the data disseminated by the Federal Government for its accuracy and have available to it a streamlined procedure for correcting inadequacies. The Administrator for the Office of Information and Regulatory Affairs (OIRA) is directed to submit a report to the House and Senate Committees on Appropriation by June 1, 2004 on whether agencies have been properly responsive to public requests for correction of information pursuant to the FDQA, and suggest changes that should be made to the FDQA or OMB guidelines to improve the accuracy and transparency of agency science.[58]

The legislative language clearly reinforces the power of the Administrator, OIRA,[59] in carrying out the IQA and signals continued congressional interest in the Act.

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[57] *Id.* at § 3516.

[58] Making Appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for Fiscal Year Ending September 30, 2004 and For Other Purposes (2003), H.R. CONF. REP. NO. 108-401 (2003).

[59] The regulatory review function was vested in OMB's OIRA during President Ronald Reagan's presidency. "Intended by Congress to be the primary implementing agency for the Paperwork Reduction Act, it soon became the institutional home of the most ardent anti-regulators in the Administration." Thomas O. McGarity, *Jogging in Place: The Bush Administration's Freshman Year Environmental Record*, 32 ENVTL. L. REP. 10,709 (Jun. 2002).

C. Political Underpinnings Of The Information Quality Act

An examination of the political underpinnings of the IQA revealed strong ties to industry and lobby groups affected by the rulemaking of the EPA. Proposed by Congresswoman Jo Ann Emerson,[60] a Republican from Missouri and a member of the House Appropriations Committee, [61] the Act was primarily the result of lobby efforts by Dr. James Tozzi, [62] Director, Multinational Business Services and Advisory Board Member, CRE.

Theories abound as to the true agenda of those behind the IQA. "The widely accepted explanation is that corporate interests slipped the Data Quality Act through Congress to counter indiscriminate data dumps of corporate information into federal Internet sites."[63]

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[60] Congresswoman Emerson, serving a predominantly agricultural and rural constituency, favors state rights over federal land management decisions and the rights of individual property owners over environmental protection. She believes state and local communities should be more empowered to address environmental issues, as the farmer, rancher, and property owner have a pecuniary interest in protecting the land, guaranteeing environmental stewardship. Congresswoman Emerson did not support the American Heritage Rivers Initiative, implementation of the Kyoto Protocol, wetland protection measures, or the Total Maximum Daily Load rules contained within the Clean Water Act. She supports opening a portion of the Artic National Wildlife Refuge for oil exploration. http://www.vote-smart.org/npat.php?can_id=BC040549#10 (last visited November 20, 2004) and http://www.joannemerson.com/issues.asp (last visited November 20, 2004). Congresswoman Emerson is a native of suburban Washington who for two decades lobbied Congress on behalf of the American Insurance Association and the National Restaurant Association. http://www.cq.com/members.do?memberCode=H2252 (last visited November 20, 2004). She also served as the Deputy Communications Director, National Republican Congressional Committee from 1983-90. http://www.vote-smart.org/bio.php?can_id=BC040549 (last visited November 20, 2004).

[61] The Committee on Ways and Means was first established in 1789 to fulfill the mandate under the United States Constitution, Article I, Section 9, which states, "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." On March 2, 1865 the U.S. House of Representatives bifurcated the Committee on Ways and Means, establishing the Committee on Appropriations and the Committee on Banking and Currency. http://appropriations.house.gov/index.cfm (last visited November 20, 2004). Congresswoman Emerson has served on the United States House Appropriations Committee, United States House of Representatives since her election to office in 1996. http://www.cq.com/members.do?memberCode=H2252 (last visited November 20, 2004).

[62] Dr. Tozzi, and his wife, Barbara Ann Tozzi, donated to Congresswoman Emerson's campaigns, on behalf of Multinational Business Services, in 1999, 2000, 2001, 2002, and 2003. Mr. Charles Fromm, Center for Regulatory Effectiveness, donated to Congresswoman Jo Anne Emerson's campaign in 1999. http://www.opensecrets.org/indivs/search.asp?NumOfThou=0&txtName=tozzi&txtState=%28all+states%29&txtZip=&txtEmploy=&txtCand=&txt2004=Y&txt2002=Y&txt2000=Y&Order=N (last visited November 20, 2004).

[63] Anderson, *supra* note 3.

> Rumor has it that a lobbyist dreamed up the original idea [of the data quality rider] and sold it to a paying client and a gullible member of Congress. The chief beneficiaries of the new rule will be lobbyists. They will now have a new device for sucking money from clients who don't like the latest bit of data from an agency and who are stupid enough to think that filing a complaint will accomplish something other than enriching the lobbyists. The whole process is guaranteed to be meaningless. It is Washington at its worst. Take a disagreement and turn it into a procedural nightmare that will resolve nothing and take forever. Don't forget to include standards like quality, objectivity, utility and integrity that have no clear definitions.[64]

Frank O'Donnell, Executive Director, Clean Air Trust, believes the Act was passed to allow industry polluters access to confidential health records used by the EPA in setting the 1997 fine-particle soot standards.[65] Others argue the Act "advances some key elements of the industry agenda to obtain greater opportunities to intercede in and challenge the administration of disclosure programs.[66] William Kovacs, Vice President of the U.S. Chamber of Commerce, argues that industries subject to the EPA's air pollution regulations, specifically the NAAQS, will now ensure that the EPA follows the information-quality guidelines as outlined by the OMB.[67] Mr. Kovacs believes the close oversight afforded by the IQA might slow the regulation process, but will improve regulations issued by the EPA, because it will ensure that affected parties understand the science, assumptions, mathematical calculations, and other tools used to determine the risk imposed.[68]

The chief beneficiaries of the Act will be lobbyists.[69] Mr. Gary Bass, Executive Director, OMB Watch,[70] believes there is room for "mischief."[71]

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[64] Gellman, *supra* note 9.
[65] Maureen Lorenzetti, *Watching Government, Data Quality*, OIL AND GAS J., Oct. 7, 2002, at 31.
[66] ECHEVERRIA, *supra* note 8, at 5.
[67] Phibbs, *supra* note 18, at 150.
[68] *Id.*
[69] ECHEVERRIA, *supra* note 8, at 2, n.8, *citing* Gellman, *supra* note 9.
[70] "OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability and citizen participation in public policy decisions. Their mission centers on four main areas: the federal budget; regulatory policy; public access to government information; and policy participation by nonprofit organizations." http://www.ombwatch.org/article/archive/269(last visited November 20, 2004). OMB Watch has an outstanding public interest group website on the IQA at http://www.ombwatch.org/ (last visited November 20, 2004).
[71] Phibbs, *supra* note 18, at 150.

He and Mr. Wesley Warren, Senior Fellow, Natural Resource Defense Council, believe a "mosaic of actions . . . will thwart the dissemination of information and federal efforts to protect human health, safety, and the environment."[72] The Shelby Amendment,[73] the information-quality guidelines, and compliance with Executive Order 12866[74] comprise this mosaic.[75] The public is unaware that the sum of these rule-blocking measures, which will be used by industry to slow regulation, will force the EPA and other federal agencies to endlessly analyze data.[76]

Mr. Alan Morrison, Public Citizen Litigation Group, during a National Public Radio interview of Dr. Tozzi on April 20, 2002, stated:

> My real concern is that this bill is aimed largely, but not exclusively at the Environmental Protection Agency. It's a scientific agency; it produces a large amount of information every year. Eventually it bases its regulations and other activities on that information. Much of it is uncertain and sometimes it adversely affects businesses, and my fear is that the industries are going to come in and challenge and drive down the level of information dissemination under the guise that they're getting more accuracy. My understanding is that Jim Tozzia [sic] who is a highly regarded lobbyist for interests that are principally concerned about what's going on at EPA is at least one of the drafters of this legislation. I think the parentage, assuming that it is Jim Tozzia [sic] and his colleagues, gives you a good idea of what the purpose of this law was supposed to be.[77]

Dr. Tozzi, in his capacity as the Director, Multinational Business Services and Board Member, CRE, consistently challenged federal agency

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[72] *Id.*

[73] The "Shelby Amendment" amends the Freedom of Information Act and requires greater public access to research data developed under a federal grant. The IQA and the Shelby Amendment are compatible and mutually reinforcing. Dr. Graham's Remarks, *supra* note 43. Many experts predicted the Shelby Amendment would "unleash a deluge of petitions that will clog the wheels of the federal bureaucracy." The number of petitions filed to date is minimal at best. Noe, *supra* note 2, at 10,227.

[74] Issued in 1993 by President William J. Clinton, the Regulatory Planning and Review Executive Order "enhance(d) planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal regulatory review and oversight; and to make the process more accessible and open to the public." Exec. Order No. 12,866, *supra* note 13.

[75] Phibbs, *supra* note 18, at 150.

[76] *Id.*

[77] Gladstone, *supra* note 4.

action on behalf of his industry clients by linking the procedures of regulatory rulemaking to sound science. In the mid-1990s he promoted the use of "Good Epidemiology Practices (GEP)," a movement initiated by the tobacco industry to shape the scientific standards of proof.[78] The goal was to make it scientifically impossible to "prove" the dangers of secondhand smoke.[79] He drafted a similar "GEP" agenda for wireless technology research on behalf of the Cellular Telecommunications and Internet Association.[80]

> While every practicing scientist agrees that scientific work should be rigorously done, the scientific, public health and regulatory communities need to be more aware that the sound science and GEP movement is not simply an effort from within the profession to improve the quality of science discourse. This movement reflects sophisticated public relations campaigns controlled by industry executives and lawyers to manipulate the scientific standards of proof for the corporate interests of their clients.[81]

Multinational Business Services, at the time of enactment of the IQA, was a registered lobbyist[82] for several companies with interests that run counter to environmental protection and government regulation. These included TRW, Incorporated,[83] Philip Morris Management Corporation,[84] Aventis (formerly

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[78] *How Big Tobacco Defines Wireless and EMF Health Debates*, MICROWAVE NEWS, Nov. 2001.
[79] In 1994, Philip Morris paid Dr. Tozzi as much as $610,000 to promote GEP. *Id.*
[80] *Id.*
[81] Elisa Ong and Stanton Glantz, *Constructing Sound Science and Good Epidemiology: Tobacco, Lawyers and Public Relations Firms*, AM. J. PUB. HEALTH, Nov. 2001, at 1,749.
[82] http://sopr.senate.gov/cgi-win/opr_viewer.exe?2000426160REG~0 (last visited November 20, 2004).
[83] TRW, Incorporated, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Jan. 2, 2001). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/376/000376866|2 (last visited November 20, 2004). TRW, Incorporated provides advanced technology products and services internationally. TRW and its subsidiaries design, manufacture and sell products and perform systems engineering, research and technical services for industry and the United States government in the automotive, aerospace, and information systems markets. http://www.trwauto.com/othertrwsites/home/0,,4^1^4^4,00.html (last visited November 20, 2004).
[84] Multinational Business Services provided Philip Morris Management Corporation with lobbying services in the areas of "Analysis of issues pertaining to risk assessment. Development of paradigm evaluating federal agency compliance with Paperwork Reduction Act, Unfunded Mandates Reform Act, Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act. Information policy issues." Philip Morris Management Corporation, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Aug. 17, 2000). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/367/000367309|5 (last visited November 20, 2004). At the time of enactment of the IQA, Philip Morris Companies Incorporated owned Philip Morris Incorporated; Philip Morris International Incorporated; Kraft

Rhone-Poulenc), [85] Goodyear Tire and Rubber Company, [86] Beverly Enterprises, [87] and the American Forest and Paper Association. [88] The CRE

Foods, Incorporated; and the Miller Brewing Company. They were engaged in the manufacture and sale of various consumer products. Philip Morris U.S.A. was the largest cigarette company in the United States and was a leading exporter of cigarettes abroad. Marlboro, the principal cigarette brand, has been the world's largest-selling cigarette since 1972. Report Securities and Exchange Commission, Philip Morris Companies, Incorporated, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 1999, Commission Number 1-8940. http://www.sec.gov/Archives/edgar/data/764180/0000912057-00-009516-index.html (last visited November 20, 2004).

[85] The Multinational Business Services, Incorporated lobbying disclosure report indicates lobbying activities on behalf of Aventis at the EPA, with a focus on human testing and EPA's establishment of tolerance levels for pesticides. Aventis (formerly Rhone-Poulenc), Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 20, 2001). http://sopr.senate.gov/cgi- win/opr_gifviewer.exe?/2000/01/000/405/000405203|2 (last visited November 20, 2004). Aventis was primarily engaged in the discovery, development, manufacture, and marketing of pharmaceutical products for human use. http://www.aventis.com/main/page.asp?pageid=7785659853127485 68&folderid=2646158680875 4517&lang=en (last visited November 20, 2004).

[86] Multinational Business Services represented Goodyear Tire and Rubber Company in their lobbying efforts with the Department of Labor. Goodyear sought favorable requirements for the approval of a flame-resistant conveyor belt and pursued mining safety issues. Goodyear Tire and Rubber Company, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 20, 2001). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/405/000405205|2) (last visited November 20, 2004). Goodyear Tire and Rubber Company developed, manufactured, distributed and sold tires to industrial, commercial, and consumer markets in the United States and abroad. They also manufactured rubber-related chemicals for varied application and provided automotive repair services at retail and commercial outlets. Securities and Exchange Commission, Goodyear Tire and Rubber Company, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 1999, Commission Number 1-1927. http://www.sec.gov/Archives/edgar/data/42582/0000950152-00-001479-index.html (last visited November 20, 2004).

[87] Multinational Business Services reported lobbying activity on behalf of Beverly Enterprises, Incorporated, which focused on compliance with regulations issued by the Department of Health and Human Services. Beverly Enterprises, Incorporated, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Aug. 17, 2000). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/367/000367316|2) (last visited November 20, 2004). Beverly Enterprises, Incorporated operated nursing facilities, assisted living centers, hospice and home care centers, and outpatient therapy clinics. They also provided rehabilitation therapy and general healthcare services. They are one of the leading operators of nursing care facilities in the United States. http://www.hoovers.com/beverly-enterprises/--ID 10211--/free-co-factsheet.xhtml (last visited November 20, 2004).

[88] Multinational Business Services lobbied on behalf of the American Forest and Paper Association with a specific focus on EPA's dioxin risk assessment and EPA's sector facility indexing project. American Forest and Paper Association, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 20, 2001). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/405/000405200|2) (last visited November 20, 2004). The American Forest and Paper Association sustained and enhanced the U.S. forest products industry

listed as their primary lobbying objective in 1999, "federal data access and quality" and "OMB compliance with (the) Paperwork Reduction Act."[89] It is clear from the political history of the Act that this legislation was proposed and supported by industry principally to further their business interests.

The IQA was enacted during the democratic presidency of President Clinton,[90] with implementation vesting in Dr. John D. Graham,[91] a President George W. Bush political appointee. Narrowly confirmed by the Senate in July 2001,[92] Dr. Graham "is a leading advocate of cost-benefit analysis - weighing the costs of a regulation for business, and ultimately the consumer, against the benefits to society - and risk assessment, which analyzes the likelihood that a particular problem . . . will occur."[93] Many environmentalists and consumer groups feared Dr. Graham would try to "dismantle" vital federal protections on behalf of industry.[94] The Bush administration continues its strong public commitment to vigorous implementation of the IQA[95] and has "moved aggressively to establish basic quality performance goals for all information disseminated by Federal agencies,

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through lobbying and effecting favorable legislative, regulatory, administrative, and trade actions. http://www.afandpa.org (last visited November 20, 2004).

[89] Center for Regulatory Effectiveness, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 14, 2000). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/1999/01/000/291/000291929|2 (last visited November 20, 2004).

[90] Adams, *supra* note 52.

[91] Dr. John Graham, Administrator, OIRA, OMB, supports "cost-effective, science based regulations that promote public health and welfare." He founded the Harvard Center for Risk Analysis, a think tank that consistently argues that government regulations are misguided. The Harvard Center for Risk Analysis is funded by industry groups and business entities. Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, CQ WEEKLY, Feb. 23, 2002, at 520–21. It consistently received extensive funding from industry, including firms faced with dioxin liability for contamination of the environment. Linda Greer and Rena Steinzor, *Bad Science*, Environmental Forum, 38 (January/February 2002). Dr. Graham is aggressive in the regulatory review process, rejecting 17 regulations in his first 6 months at OMB via the "return letter." The return letter contains a summary of the reasons for rejection and has most commonly cited cost considerations. Rebecca Adams, *Graham Reasserts White House Regulatory Review*, OMB WATCH, Feb. 20, 2002. *See also* http://www.whitehouse.gov/omb/inforeg/bio.html (last visited November 20, 2004)(Dr. Graham's biography.).

[92] Dr. Graham was confirmed by a 61-37 margin, facing opposition from Democrats and liberal groups, who viewed him as a regulatory enemy. Michael Grunwald, *Business Lobbyists Asked to Discuss Onerous Rules*, WASH. POST, Dec. 4, 2001, at A-03.

[93] Adams, Regulating the Rule-Makers, *supra* note 91, at 520.

[94] *Id.* at 521.

[95] Dr. John D. Graham, Remarks to the Committee on National Statistics, National Research Council/National Academy of Sciences, (May 10, 2002)(transcript available at http://www.whitehouse.gov/omb/inforeg/graham_infoquality051002.html)(last visited November 20, 2004).

including information disseminated in support of proposed and final regulations."[96]

Under Dr. Graham's direction, the OMB leads three major conservative initiatives which are clearly targeted at the EPA: (1) the role of sound science in risk assessments; (2) the quality of data used to support regulatory decision making;[97] and (3) the role of cost/benefit analysis in shaping environmental programs.[98]

> Below the waterline of politically divisible debate, mid-level bureaucrats, and regulated industries are actively engaged in efforts to change the rules of law and economics that determine whether the government intervenes in pollution-producing commerce. Talk of enacting so-called second generation legislation has subsided to a murmur. But at the administrative level, the debate over how to best streamline the system and eliminate distasteful regulatory requirements proceeds with unchecked vigor and enthusiasm.[99]

The key for the EPA will be to avoid regulatory indecision through a forced over-analysis of data. The EPA must now balance its regulatory mandate to protect health, safety, and the environment[100] with the new statutory obligations created under the IQA.

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[96] Introduction to the Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions, 68 Fed. Reg. 72,409 (Dec. 22, 2003).

[97] Representative Henry Waxman, ranking member of the House Government Reform Committee, charged the Bush administration with "stacking scientific advisory panels with people who hold fringe viewpoints or have ties to industry, and distorting scientific data to suit administration policy objectives." The EPA removed a climate change chapter from their 2003 Report on the Environment after the White House made so many changes that EPA scientists no longer believed the chapter was scientifically sound. The politicizing of science in policymaking will continue to be a heated debate. Andrew Freedman, *House Member Presses White House for Better Explanation of Science Policies*, Greenwire, Apr. 14, 2004, *available at* http://www.eenews.net/Greenwire/Backissues/041404/04140402.htm (last visited November 20, 2004).

[98] Rena I. Steinzor, *Toward Better Bubbles and Future Lives: A Progressive Response to the Conservation Agenda for Reforming Environmental Law*, 32 ENVTL. L. REP. 11,421 (2002).

[99] *Id.*

[100] "EPA's mission is to protect human health and to safeguard the natural environment - air, water, and land - upon which life depends." http://www.epa.gov/epahome/aboutepa.htm#mission (last visited November 20, 2004).

III. INFORMATION QUALITY ACT IMPLEMENTING GUIDELINES OF THE OFFICE OF MANAGEMENT AND BUDGET

A. Government Wide Implementing Guidelines

Implementation of the IQA by OMB will determine whether the Act becomes a government statute that actually improves federal regulatory decision-making or becomes a law that protects stakeholders.[101] The "White House Office of Management and Budget guidance on the quality of information distributed by federal agencies will have the most profound impact on federal regulations since the Administrative Procedure Act was enacted in 1946 . . . ."[102] OMB's final guidelines entitled, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, were issued on February 22, 2002.[103] They direct each federal agency to adopt a basic standard of information quality.[104] Each agency was required to establish their IQA guidelines by October 1, 2002, to create an administrative mechanism for "affected persons" to seek correction of information not in compliance with the guidelines, and to report to the Director, OMB, the number and nature of complaints received and how such complaints were handled.[105] The report to OMB is an annual

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[101] Anderson, *supra* note 3.

[102] Phibbs, *supra* note 18, at 146.

[103] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452–60 (Feb. 22, 2002). The proposed guidelines were published at Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34,489 (Jun. 28, 2001). The final guidelines were published at Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718 (Sep. 28, 2001). The final guidelines requested additional public comment on the "capable of being substantially reproduced" standard and the definition of "influential scientific or statistical information," which were issued on an interim final basis. The supplemented final guidelines were promulgated at Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369–78 (Jan. 3, 2002), but due to numerous errors were corrected at 67 Fed. Reg. 5,365 (Feb. 5, 2002). The final guidelines were reprinted in their entirety at 67 Fed. Reg. 8,452–60 (Feb. 22, 2002). Questions concerning the guidelines may be directed to Brooke J. Dickson, Office of Information and Regulatory Affairs, OMB, Washington, D.C. 20,503. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452 (Feb. 22, 2002).

[104] OMB Guidelines, *supra* note 103, at 8,458.

[105] *Id*. at 8,452-58. Several federal agencies, including EPA, set what the public perceived to be too short of a public comment period on their draft IQA guidelines. OMB extended their deadline for agency submission from July 1, 2002 to August 1, 2002. *Comment Salvos Exchanged in Data Quality War*, OMB Watch, Jun. 10, 2002.

fiscal year report with the first report scheduled for January 1, 2004.[106] OMB will not play a "major" role in resolving case-by-case IQA disputes. Their role will be one of agency oversight with a focus on the design of agency procedures.[107]

1. Key Principles

The OMB guidelines are based on three underlying principles. First, they apply to a variety of government information-dissemination activities ranging in scope and importance.[108] Secondly, the guidelines ensure that agencies can meet basic information quality standards before their information is disseminated. The more important the information, the higher the quality standards to which the information should be held.[109] OMB recognized that information quality comes at a cost, and each agency should conduct a cost/benefit analysis in the development of quality information.[110] Agencies must consider the "social value" of better information in various scenarios.[111] Third, OMB designed the guidelines to allow agencies to apply them in a "common-sense and workable manner."[112] Agencies are encouraged to continue using the Internet and other technologies to disseminate information to the public.[113] Although openness in government can be a great benefit to society, it also increases the risk of harm that might result from the posting of erroneous information on the Internet. There is concern that the Internet allows federal agencies to communicate information quickly and easily to large audiences.[114] OMB "encourages agencies to incorporate the standards and procedures required by these guidelines into their existing information resources management and administrative practices, rather than create new and potentially duplicative or contradictory processes."[115]

OMB provided agencies an awkward flexibility during rulemaking to thwart collateral attacks on the regulatory process via the IQA.[116] If an agency denies a complaint during rulemaking and subsequently on administrative

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http://www.ombwatch.org/article/articleview/820/1/124/ (last visited November 20, 2004). The OMB October 1, 2002 deadline for overall completion remained firm.

[106] OMB Guidelines *supra* note 103, at 8,453-59.

[107] Dr. Graham's Remarks, *supra* note 42.

[108] OMB Guidelines, *supra* note 103.

[109] *Id.*

[110] OMB Guidelines *supra* note 103, at 8,453.

[111] Noe, *supra* note 2.

[112] OMB Guidelines, *supra* note 103, at 8,453.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Noe, *supra* note 2, at 10,230.

appeal, the matter could become subject to judicial review as a final agency action. OMB allows the agencies to apply a two-prong test: (1) agencies can use established safeguards if they allow the timely resolution of IQA complaints and (2) the agency must respond within 60-days if there is a reasonable likelihood that dissemination of the information, during the rulemaking, will harm the petitioner, and if the agency's response will not cause undue delay in issuing the rule.[117]

2. To Whom Does The Information Quality Act Apply?

The IQA, by reference to the PRA,[118] applies to the dissemination of information by all federal agencies.[119] The term "agency" does not apply to the General Accounting Office, Federal Election Commission, the government of the District of Columbia, the governments of the territories and possessions of the United States and their various subdivisions, or government owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.[120]

The IQA does not apply to scientific research conducted by federally employed scientists or by scientists acting under a Federal grant who communicate their research findings similar to their academic colleagues.[121] It is suggested that these scientists provide a disclaimer advising the reader that the materials are expressly their own views and not the views of the United States government.[122] This same information could be subject to the guidelines if an agency "represents the information as, or uses the information in support of, an official position of the agency."[123] The Act also does not include personal opinions provided in agency presentations when the view does not constitute an agency position.[124]

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[117] OMB Guidelines, *supra* note 103, at 8,453.
[118] "[T]he term agency means 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 . . . ." Paperwork Reduction Act, 44 U.S.C. § 3502 (1995).
[119] OMB Guidelines, *supra* note 103. *See also* http://www.thecre.com/quality/agency-database.html (last visited November 20, 2004).
[120] Paperwork Reduction Act, *supra* note 37.
[121] OMB Guidelines, *supra* note 103, at 8,453.
[122] *Id.*
[123] *Id.*
[124] *Id.*

3. What Information Activities Are Subject To The Information Quality Act?

The Act applies to "information" that is "disseminated" by an agency.[125] The term "information" was generically defined by OMB to include communications or representations of knowledge that include facts or data.[126] The information can be presented in any media, including printed, electronic, or other formats.[127] "Dissemination" means the distribution to the public of agency initiated and sponsored information.[128] This includes risk assessments prepared for regulatory decision-making; information prepared by a third party, but disseminated by the agency in a manner in which it appears the agency agrees; information released by a third party at the direction of the agency; and third party information the agency has the authority to review and approve prior to release.[129] Dissemination does not include press releases, archival records, correspondence with individuals, and subpoenas or adjudicative processes.[130]

4. Information Quality Standard

Per OMB guidance, agencies must develop internal processes for reviewing the quality of their data before it is disseminated to the public.[131] The Act further requires "federal agencies to ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies."[132] Some argue the four critical terms of quality, objectivity, utility, and integrity are impossible to define, creating enough ambiguity to adequately arm industry with a new tool to halt environmental rulemaking.[133]

OMB guidance states that "quality" is an "encompassing term, of which utility, objectivity, and integrity are the constituents."[134] "Utility" is the usefulness of the information to its intended user.[135] The term "objectivity" focuses on both presentation and substance.[136] To be objective, the

[125] *Id.* at 8,454.
[126] *Id.*
[127] *Id.* at 8,452.
[128] *Id.* at 8,460.
[129] *Id.* at 8,454.
[130] *Id.* at 8,454, 8,460.
[131] *Id.* at 8,453.
[132] *Id.*
[133] Gellman, *supra* note 9.
[134] OMB Guidelines, *supra* note 103, at 8,452, 8,453, 8,459.
[135] *Id.*
[136] *Id.* at 8,459.

disseminated information must be presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, be accurate, reliable, and unbiased."[137] Information should be presented within the proper context and if it involves a scientific, financial, or statistical context, the supporting data or models should be presented to the public so they may determine whether there is reason to question the objectivity.[138] If information was subjected to "formal, independent, external peer review, the information may be presumed to be of acceptable objectivity."[139] In order to meet the presumption of objectivity, the peer review must include peer reviewers selected based on their expertise, peer reviewer disclosure of technical or policy positions previously taken on the issue, disclosure of private and public funding received by the peer reviewer, and a peer review conducted in an open and rigorous forum.[140] The peer review presumption is rebuttable and journal peer review typically requires additional quality checks.[141] The level and intensity of peer review is defined by the significance of the risk or its management implications.[142]

"Integrity" refers to the protection of the information from unauthorized access, tampering, or corruption.[143] Agencies can rely on the security measures instituted under the computer security provisions of the PRA to ensure the integrity of their data.[144]

The guidelines require a higher quality standard when the information is scientific, financial, or statistical information of an "influential" nature.[145] "Influential information" is that which will have or does have a clear and substantial impact on important pubic policies or important private sector decisions.[146] Each agency is to define "influential" in a way they deem appropriate.[147] Industry supports a broad definition of "influential" and does not want the term tied to the "economically significant" rule under Executive Order 12866.[148]

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[137] *Id.* at 8,452, 8,453, 8,459.
[138] *Id.* at 8,459.
[139] *Id.*
[140] *Id.* at 8,459, 8,460.
[141] *Id.* at 8,454.
[142] *Id.* at 8,455.
[143] *Id.* at 8,452, 8,453, 8,459.
[144] *Id.*
[145] *Id.* at 8,453, 8,460. The definition of "influential" in OMB's draft guidelines was criticized as being too stringent and too broad. 67 Fed. Reg. 372 (Jan. 3, 2002). *See also* Michelle V. Lacko, Comment, *The Data Quality Act: Prologue to a Farce or a Tragedy?*, 53 EMORY S.C.L.J. 305 (2004).
[146] OMB Guidelines, *supra* note 103, at 8,455, 8,460.
[147] *Id.* at 8,455.
[148] OMB Watch, *supra* note 46.

Influential scientific, financial, or statistical information disseminated by an agency shall also include a high degree of transparency and must be capable of reproduction.[149] Independent analysis of the original data and use of identical test methods should generate similar analytic results, subject to an acceptable degree of imprecision or error.[150] Transparency allows the public to determine how much of the agency's decision depended on analytic choices made by that agency.[151] Each agency is to determine which categories of original and supporting data should be subject to the reproducibility standard.[152] The Act does not override privacy, trade secret, intellectual property, and other confidentiality protections.[153]

An even higher standard of quality is required for agency analysis of risks to human health, safety, and the environment.[154] This information requires agencies to adopt or adapt the quality principles outlined in the SDWA amendments of 1996.[155] The SDWA guidelines require an agency, when it proposes a regulation, to outline for the public the risks the rule hopes to thwart. This would include an assessment of the population at risk, how the population would be affected, and the uncertainties surrounding the risk evaluation.[156] Those agencies tasked with the dissemination of vital health and medical information must interpret the peer review and reproducibility standards within the context of the need to forward timely information to medical personnel and the public.[157] The IQA standards can be waived during times of "urgency."[158]

5. Administrative Process For Petition And Appeals To Correct Information

Each agency is to establish an administrative process whereby "affected persons" can submit petitions to correct information maintained and disseminated by the agency not in compliance with the OMB or agency guidelines.[159] "Affected parties" might include private citizens, industry, or

[149] OMB Guidelines, *supra* note 103, at 8,456.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 8,455.
[153] *Id.* at 8,456.
[154] *Id.* at 8,460.
[155] Safe Drinking Water Act Amendments, *supra* note 30.
[156] Adams, *supra* note 53, at 2,184. *See also* OMB Watch, *supra* note 46.
[157] OMB Guidelines, *supra* note 103, at 8,460.
[158] *Id.*
[159] *Id.* at 8,459.

public interest groups. "There is no reason to expect the act to be powered solely by industry; public interest groups can also file data-quality petitions."[160]

An internal administrative appeals process must also be established within the agency to allow appeal of requests when denied.[161] The agency should establish timeframes for both the petition and appeals processes.[162] The agency shall designate an official responsible for overall compliance with the guidelines.[163]

OMB considers implementation of the IQA as an "evolutionary process."[164] An annual fiscal-year report must be submitted to OMB by each federal agency, outlining the number and nature of complaints received and how the complaints were resolved. The first report was due January 1, 2004.[165] OMB also directed federal agencies to develop a "thematic" description of the types of complaints received by the agency and the nature of their resolution.[166] If agencies receive only a few complaints, OMB would like a brief description of each complaint and the ultimate resolution by the agency.[167] If a "substantial volume of complaints" are received, OMB requested a description of the different categories of the complaints and the resolution thereof.[168] The reporting should be more detailed when the information involves "influential, scientific, financial, or statistical information, or [if it] concerns information in an agency's Notice of Proposed rulemaking."[169] In order to gauge public interest in the IQA, OMB directed each agency to provide a copy of every accepted complaint if it is within one of the following categories: (1) petitions involving major policy questions that are likely to be of strong interest to two or more Federal agencies; (2) complaints involving "influential" information when it is alleged that the dissemination violated one or more provisions of the OMB guidelines; (3) complaints involving novel procedural, technical, or policy issues involving the IQA; or (4) petitions in an agency public comment process where the petitioner alleges a "reasonable likelihood of suffering actual harm" from

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[160] Anderson, *supra* note 3.
[161] OMB Guidelines, *supra* note 103, at 8,459.
[162] *Id.*
[163] *Id.*
[164] OMB's Statistical and Science Policy Branch, OIRA, will provide oversight and guidance under the IQA. Memorandum from Dr. John D. Graham, OIRA, OMB to President's Management Council (Oct. 4, 2002)(on file with author).
[165] OMB Guidelines, *supra* note 103, at 8,459.
[166] Graham memo, *supra* note 164.
[167] OMB Guidelines, *supra* note 103, at 8,452, 8,459.
[168] Graham memo, *supra* note 164.
[169] *Id.*

dissemination of the information in question.[170] If agencies meet with petitioners who fall within any of the four aforementioned categories, OMB would like to attend the meeting.[171] If an agency posts the IQA petitions and responses on the agency website, the agency does not have to forward the documents to OMB.[172]

Industry's most thorough and aggressive public comments on the IQA were submitted by the CRE. In a 26-page submission, 16 major points were addressed ranging from retroactive application of the IQA to inclusion of rulemaking data in the petition process to third party petition status.[173] As anticipated, CRE's goals were to make the IQA guidelines legally binding, applicable to a broad range of information, and as encompassing as possible.[174] Citizen oriented groups, such as the Natural Resource Defense Council and Citizens for Sensible Safeguards, submitted comments recommending narrow application of the IQA and reinforcing the fact that the guidelines were not legally binding. These "pro-government" groups also urged agencies to "adapt" vice "adopt" the SDWA principles.[175]

IV. INFORMATION QUALITY ACT GUIDELINES OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

The EPA's IQA guidelines are a balance between the requirements of the Act and the agency's role in protecting human health and safety. There is nothing in the legislative history of the IQA that indicates a congressional intent to alter the agency's substantive mandates.[176]

> Unlike the Office of Management and Budget (OMB), which has no statutory responsibility (or authority) to implement the nation's laws regarding health, safety, the environment and many other objects of public concern, regulatory agencies, including the Environmental Protection Agency, must balance their statutory obligations under the Data Quality Act with their statutory obligations to implement their substantive mandates.[177]

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[170] Graham memo, *supra* note 164.
[171] *Id.*
[172] *Id.*
[173] *Comment Salvos Exchanged in Data Quality War*, OMB Watch, Jun. 10, 2002. http://www.ombwatch.org/article/articleview/820/1/124/ (last visited November 20, 2004).
[174] *Id.*
[175] *Id.*
[176] Letter from Center for Progressive Regulation to EPA (May 31, 2002) (on file with author).
[177] *Id.*

It is crucial that the EPA implement guidelines that avoid regulatory paralysis through the over-analysis of scientific data. The EPA "must take into account the impact of data quality activities on the agency's substantive mission and the role of disseminated data in the implementation of that mission. The potential benefits of administrative procedures, including accuracy and objectivity, must be balanced against the efficient disposition of agency business."[178]

The EPA's guidelines take into account the evolutionary nature of scientific research and policy formulation. Policy decisions are not based upon finite, discrete information sets, but rather involve the integration of numerous data sets, models, and the findings of hundreds of studies.[179] Agencies must act even when the data is incomplete in order to protect the public against risk. This includes taking agency action without knowing everything about a particular matter.[180]

> The absence of uncertainty is not an excuse to do nothing . . . . Environmental policy should always be based on the soundest information available at the time. The reality is, the business community is driven to distraction by the fact that the EPA must make most decisions on the basis of incomplete or uncertain science.[181]

A. The Guidelines

1. Key Principles

The EPA's guidelines start with the premise that it is a core agency mission to disseminate environmental information in order to strengthen environmental protection.[182] "One of our goals is that all parts of society – including communities, individuals, businesses, State and local governments, Tribal governments – have access to accurate information sufficient to effectively participate in managing human health and environmental risks."[183] The EPA's stated performance goals include dissemination of information in adherence to a basic standard of quality, incorporation of information quality

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[178] *Id.*

[179] *Ogmius Exchange: Chuck Herrick Responds*, Ogmius No. 2 (Center for Science and Technology Policy Research, Boulder, Colorado), May 2002.

[180] *Quoting* Sean Moulton, Senior Policy Analyst, OMB Watch. Adams, *supra* note 53, at 2,183.

[181] Greer and Steinzor, *supra* note 91, at 28-29.

[182] *Agency Data Quality Guidelines Issued*, OMB Watch, May 13, 2002. http://www.ombwatch.org/article/articleview/731/1/115/ (last visited November 20, 2004).

[183] EPA Guidelines, *supra* note 29, at 3.

principles into each stage of the EPA's development of information, and use of timely and flexible administrative mechanisms to correct information.[184] The EPA clearly indicates the guidelines are not regulation, but are merely "non-binding policy" not intended to bestow additional legal rights.[185]

2. What Is Quality?

Consistent with the OMB guidelines, "quality" includes the objectivity, utility, and integrity of disseminated information. "Objectivity" requires the information to be disseminated in an accurate, clear, complete, and unbiased manner.[186] "Integrity" refers to the security of the information and its protection from corruption or compromise.[187] "Utility" refers to the information's usefulness for the intended user.[188]

3. When Do The Guidelines Apply?

The guidelines apply when the EPA "disseminates information"[189] to the public. Information is "disseminated" when the EPA prepares the information and distributes it in support of the agency's viewpoint or in support of a regulation, guidance, or decision.[190] Dissemination could also include distribution of information prepared by an outside party if distributed in a manner that suggests the EPA is endorsing it, the EPA does expressly endorse it, or if in the distribution, the EPA proposes to use the information to formulate a regulation, policy, or guidance.[191] The EPA, as a policy matter, will explain the status of the information to users by indicating if the information is being distributed in support of the EPA viewpoints.[192]

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[184] *Id.*
[185] *Id.* at 4.
[186] *Id.* at 15.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* at 15, 16.
[191] Information is not considered "disseminated" if intended only for government employees; it constitutes a response by EPA to a FOIA request; the information is contained in correspondence directed towards an individual; is presented to Congress as part of a legislative or oversight function; is ephemeral in nature (press releases, fact sheets); is background information that implies that EPA has not adopted or endorsed the material; is a distribution of public filings submitted to EPA either voluntarily or as mandated by a statute; or constitutes distribution of information contained in documents prepared for judicial matters or administrative adjudication. The guidelines also do not apply to EPA contract or grant recipients unless the information is disseminated on behalf of EPA. This remains true even if EPA funds the research and retains the intellectual property rights to the information. *Id.* at 16, 17.
[192] *Id.* at 16.

"Information" includes any communication of knowledge in any medium.[193] It does not include employee opinions or Internet hyperlinks.

4. Information Quality Standard

"Influential scientific, financial, or statistical information" is information that will or does have a clear and substantial impact on important public policies or private sector decisions.[194] This includes information disseminated in support of top Agency actions, information in support of economically significant actions[195] per Executive Order 12866,[196] major agency work products subject to peer review as outlined in the *Science Policy Council Peer Review Handbook*, and other information on a case-by-case basis.[197] The information must be used in support of a major agency action, to include rulemakings, policy documents, guidance, and substantive notices.[198] An example of "influential information" could include IRIS documentation or the EPA's review of the NAAQS.

5. How Does The EPA Ensure And Maximize The Quality Of "Influential" Information?

"Influential scientific, financial, or statistical information" is subject to a higher degree of quality. This includes an increased level of transparency and reproducibility in accordance with acceptable scientific, financial, or statistical standards.[199] It is crucial that third parties be able to reproduce the EPA's findings to an acceptable degree of imprecision.[200] "Transparency" of data and methods must exist at a level that would permit a qualified member of the public to conduct an independent analysis.[201] This increased transparency applies to the source data, assumptions employed, specific quantitative methods, analytic methods applied, and the statistical procedures used.[202] However, agencies must continue to protect privacy interests, intellectual property rights, and trade secrets.[203] If other scientists cannot replicate a

[193] *Id.* at 15.
[194] *Id.* at 19.
[195] An economically significant action could include the final rule on the disposal of polychlorinated biphenals.
[196] Exec. Order No. 12,866, *supra* note 13.
[197] EPA Guidelines, *supra* note 29, at 20.
[198] *EPA Guidelines for Information Quality Include Procedures for Influential Data*, 33 ENV'T. REP. (BNA) 2,215 (2002).
[199] EPA Guidelines, *supra* note 29, at 21.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*

study used by the EPA, the study lacks "transparency" and can be challenged under the IQA.[204] The replication of experiments, including peer review of scientific research, is most typically an issue in areas of heightened public interest where the science will have extensive economic impact or is of great social importance.[205]

6. How Does The EPA Ensure And Maximize The Quality Of "Influential" Scientific Risk Assessment Information?

OMB urged federal agencies that assess health, safety, and environmental risks to adapt or adopt the quality principles in the SDWA amendments of 1996.[206] The EPA adapted[207] the SDWA quality principles for human health, ecological and safety risk assessments.[208] This adaptation focuses information "objectivity" on two components: information substance and information presentation.[209] The substance of the information must be accurate, reliable and unbiased; requiring risk assessments to be conducted using the best available science and data collected by accepted methods or the best available methods.[210] The information presented must be done in a comprehensive, informative, and understandable manner.[211] The EPA's guidelines further clarified the SDWA standard by requiring use of the "best available science" at the time the study was completed.[212]

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[204] Adams, *supra* note 53, at 2183.
[205] Greer and Steinzor, *supra* note 91, at 33.
[206] Safe Drinking Water Act Amendments, *supra* note 30.
[207] EPA did not "adopt" the SDWA principles outright, but rather provided for the "adaptation" of the principles. EPA clarified that adaptation as follows:

> (1) by adding the phrase "consistent with Agency statutes and existing legislative regulations, the objectivity of such information disseminated by the Agency;" (2) ensuring increased flexibility by applying the phrase "to the extent practicable" to both subsections (A) and (B) of the SDWA adaptation; (3) creating an emergency exemption whereby a decision must be made based on current information vice conducting additional research; (4) by indicating that all relevant information, including peer reviewed studies, non-peer reviewed studies, and incident information will be considered in the development of the influential scientific risk assessment; and (5) the intent to use terms most suited for influential environmental risk assessments.

EPA Guidelines, *supra* note 29, at 23-27.
[208] Several agencies elected to "adapt" the SDWA principles, including the Department of Labor, the Department of the Interior, the National Oceanographic and Atmospheric Administration, the Department of Transportation, and the Consumer Product Safety Commission. Noe, *supra* note 2.
[209] OMB Guidelines, *supra* note 103.
[210] EPA Guidelines, *supra* note 29.
[211] EPA Guidelines, *supra* note 29.
[212] Adams, *supra* note 53, at 2, 184.

7. Administrative Process For Petition And Appeals To Correct Information

"Affected" parties may submit Requests for Correction (RFC) to the EPA's Office of Environmental Information (OEI).[213] OEI will distribute the complaints to the cognizant information owner within the agency for a decision.[214] The panel at the EPA will consist of assistant administrators from OEI, the Office of Research and Development, and the Office of Policy, Economics, and Innovation.[215] A third party may not appeal or challenge the decision made on a RFC. A three-judge panel will decide IQA petition appeals.

B. Is the Information Quality Act Subject To Judicial Review?

There is extensive debate as to whether an "affected person" can seek judicial review of an agency decision under the IQA. The EPA's final guidelines clearly state they are non-binding, procedural guidance which do not impose legally binding requirements or obligations on the EPA or the public.[216] The OMB guidelines are silent on this issue, but the agency has been very pro-active in warning federal agencies that blanket statements barring judicial review may not be dispositive.[217] Dr. Graham commented at a National Academy of Sciences workshop on March 21, 2002, that "[l]awsuits against agencies are certainly another possibility, and quite frankly, there are as many legal theories about how these issues can be litigated as there are lawyers. My personal hope is that the courts will stay out of the picture except in cases of egregious agency mismanagement."[218]

If the information disseminated fails to meet the information quality standards, as defined by OMB, the agencies are susceptible to suit.[219] Under

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[213] RFCs may be submitted to the EPA, OEI, via the U.S. postal service, Internet, FAX, courier, or by walk-in to the docket center. EPA Guidelines, *supra* note 29, at 30.
[214] *Id.*
[215] *Id.* at 35. *See also* Noe, *supra* note 2, at 10,225.
[216] Inside EPA, *supra* note 35.
[217] James W. Conrad, Jr., *Information Disclosures by Government: Data Quality and Security Concerns Symposium: The Information Quality Act – Antiregulatory Costs of Mythic Proportions*, 12 KAN. PUB. POL'Y 539 (2003), *citing* General Electric Co. v. Envtl. Prot. Agency, F.3d 377, 382 (D.C. Cir. 2002) (the "most important" test is binding effect of agency action) and *Portland Cement Alliance v. Envtl. Prot. Agency*, 101 F.3d 772, 776 (D.C. Cir. 1996) (agency characterization is "not dispositive").
[218] National Academy of Sciences, Transcript of Workshop #1, *Ensuring the Quality of Data Disseminated by the Federal Government*, March 21, 2002, at 22.
[219] Phibbs, *supra* note 18, at 147.

the APA standard of arbitrary and capricious,[220] a proponent often faced an insurmountable burden when attempting to challenge agency rulemakings. The IQA guidelines could now redefine the arbitrary and capricious standard when an issue involves the quality of information disseminated by an agency.[221] If the courts provide standing under the IQA, the new, lower criterion will require a mere showing that the information did not meet the standard of "integrity, utility, quality, and objectivity."[222] A precedent setting case on the issue of judicial review has yet to be decided[223] and only the courts can ultimately resolve this issue. Judicial review may not matter if agencies, fearful of litigation, elect not to take regulatory action as mandated by a particular environmental statute.[224]

C. Improved Use Of Science At The EPA

As a result of the IQA, a new focus on the use of science at the EPA developed. The EPA Inspector General found, during a pilot study conducted from August 2001 to June 2002, "that the role of science in the EPA's regulatory decision-making is not always clear and (that) the agency should begin consistently submitting science-based rulemakings for independent peer reviews."[225] Science at the EPA is used to support regulatory decision-making through in-house scientists analyzing outside studies and by peer review conducted by panels of outside experts convened under the auspices of the EPA's Science Advisory Board.[226] Much of the science used by the EPA has not been peer reviewed and is often based on confidential information or analysis.[227] The EPA's information quality system, which now co-exists with the IQA guidelines, ensures that the EPA's organizations maximize the quality of environmental information.[228] Its multi-faceted approach includes peer

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[220] Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. (2004).
[221] Phibbs, *supra* note 18, at 146.
[222] *Industry Hires Science Advisor to Scrutinize Federal Data Rules*, Inside EPA, Aug. 7, 2002 at p. 38.
[223] For a discussion of the issue of judicial review under the IQA consult Conrad, *supra* note 216 and Lacko, *supra* note 145, at 322-30.
[224] Steinzor, *supra* note 98, at 11449.
[225] Eryn Gable, *Role of Science In Rulemaking Unclear, IG Says*, Greenwire, Dec. 11, 2002. http://www.eenews.net/Greenwire/searcharchive/test_search-display.cgi?q=Role+of+Science&file=%2FGreenwire%2Fsearcharchive%2FNewsline%2F2002%2FDec11%2F12110206.htm (last visited November 20, 2004).
[226] Greer and Steinzor, *supra* note 91.
[227] *Id*. at 34.
[228] EPA's agency wide quality system is implemented by assigning a quality assurance manager to conduct independent oversight of the organization's quality system. This includes ensuring development of a Quality Management Plan, conducting an annual assessment of the organization's quality system, using a systematic planning process to develop performance criteria, development of a Quality Assurance Project Plan, assessing existing data, and providing adequate staff training.

review for major scientifically and technically based work products,[229] use of Action Development Processes[230] for top agency and economically significant actions under Executive Order 12866,[231] an integrated error correction process,[232] implementation of the Information Resources Management Manual,[233] and the Risk Characterization Handbook.[234] Science Advisory Boards and the Science Advisory Panel are consulted when appropriate.[235] The EPA also disseminated the "Assessment Factors for Evaluating the Quality of Information from External Sources," which outlined the EPA's quality controls on information submitted to the agency or obtained by the EPA from non-agency sources[236] for use in policy or regulatory decision-making.[237] The five assessment factors include "soundness," "applicability and utility," "clarity and completeness," "uncertainty and variability," and "evaluation and review."[238] These five factors were developed to complement

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EPA Order 5360.1 A2, "Policy and Program Requirements for the Mandatory Agency-wide Quality System" and EPA Quality Manual for Environmental Programs 5360 A1 (May 2000).

[229] *See Peer Review and Peer Involvement at the U.S. Environmental Protection Agency*, U.S. EPA, Jun. 7, 1994 and Peer Review Handbook, 2nd Edition, U.S. EPA, Science Policy Council, December 2000, EPA 100-B-00-001.

[230] The Action Development Process requires early involvement of senior management officials who are to consider regulatory and non-regulatory options and analytic approaches to be used. The focus is to determine needed analyses and research. EPA Guidelines, *supra* note 29, at 12.

[231] Exec. Order No. 12,866, *supra* note 13.

[232] The Integrated Error Correction Process for environmental data allows members of the public to notify EPA of potential data errors contained in 8 agency-wide data systems. *See* http://www.epa.gov/OEI/quality.htm (last visited November 20, 2004).

[233] The Information Resources Management Manual outlines information policies regarding EPA's collection of information, security, and data standards. It describes how the agency ensures information integrity. EPA Directive 2100, Information Resources Management Policy Manual.

[234] Ensures that critical information from a risk assessment is considered in forming the conclusions about risk. Risk Characterization Handbook, U.S. EPA, Science Policy Council, December 2000. *See also* http://www.epa.gov/osp/spc/2riskchr.htm (last visited November 20, 2004).

[235] EPA Guidelines, *supra* note 29, at 19.

[236] EPA uses and disseminates information from a variety of sources including information obtained through "contracts, grants and cooperative and interagency agreements or in response to a requirement under a statute, regulation, permit, order or other mandate." Information is also voluntarily submitted or collected from external, non-agency sources that could include "federal, state, tribal, local and international agencies; national laboratories; academic and research institutions; business and industry; and public interest organizations." The information is derived from "scientific studies published in journal articles, testing or survey data, such as environmental monitoring or laboratory test results, and analytic studies, such as those that model environmental conditions or that assess risks to public health." *U.S. EPA*, *A Summary of General Assessment Factors for Evaluating the Quality of Scientific and Technical Information*, EPA 100/B-03/001, p. 3, June 2003.

[237] *Id. See also Workshop on EPA's Assessment Factors*, OMB Watch, Jan. 27, 2003.

[238] EPA determines the required level of quality based upon the context and intended use of the information. "Soundness" is defined as the extent to which the scientific and technical procedures used are consistent with the intended application. Is the study based on sound science and

the Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA.[239]

V. INFORMATION QUALITY ACT PETITIONS FILED AT THE ENVIRONMENTAL PROTECTION AGENCY

There has yet to be the predicted onslaught of IQA petitions filed at the EPA,[240] with only thirteen IQA requests for correction (RFC) and two requests for reconsideration (RFR) submitted between October 2002 and September 2003.[241] Five additional IQA RFC, which are currently at various stages of completion, were filed with the EPA subsequent to the filing of the Information Quality FY03 Annual Report.[242] Although a majority of the petitions were filed by industry,[243] private citizens, interest groups, and even members of Congress[244] petitioned the EPA under the Act. The CRE filed two

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econometrics? "Applicability and utility" apply to the "extent to which the information is relevant for the Agency's intended use." How useful is the economic or scientific theory applied in the study to EPA's intended use of the analysis? "Clarity and completeness" of the information is examined to determine if the "data, assumptions, methods, quality assurance, sponsoring organizations and analyses employed to generate the information are documented." Does the documentation describe the scientific and economic theories applied? The "uncertainty and variability" of the information must be evaluated and characterized. The information will also be examined to determine the extent to which the "procedures, measures, or methods" have been subjected to independent "evaluation and review." Assessment Factors, *supra* note 236, at 4.

[239] Developing Assessment Factors for Evaluating the Quality of Information From External Sources; Notice of Public Meeting, 67 Fed. Reg. 174 (Sep. 9, 2002). *See also* EPA Guidelines, *supra* note 29.

[240] The American Bar Association Administrative Law and Legislative Practice Law Conference Panel in October 2001 predicted that a majority of petitions filed would challenge the reproducibility of influential scientific information. Noe, *supra* note 2, at 10224–36.

[241] *Information Quality FY03 Annual Report*, *supra* note 32, at 3. The IQA petitions filed to date at the EPA may be reviewed at http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited November 20, 2004). OMB reported a total of 35 agency-wide requests for correction of information under the IQA, while OMB Watch believes there were as many as 24,618. OMB discounts 24,433 requests submitted to the Federal Emergency Management Agency (FEMA) and 87 filed with the Federal Motor Carrier Safety Administration (FMCSA), as requests that would typically be filed prior to enactment of the IQA. Even discounting the petitions filed at FEMA and FMCSA, there are still 98 unaccounted for petitions. *The Reality of Data Quality Act's First Year: A Correction of OMB's Report to Congress*, OMB Watch, Jul. 2004 at 7-8. *See also* http://www.ombwatch.org/info/dataqualityreport.pdf (last visited November 20, 2004).

[242] http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited November 20, 2004).

[243] Industry submitted 72% of all IQA petitions filed agency-wide. A majority of the petitions addressed environmental, health, and safety issues, as well as, toxicology reports and global warming. Industry sought correction of information that directly affected their business interests. OMB's Report to Congress, *supra* note 242, at 3, 8, 9. *See also* http://www.ombwatch.org/info/dataqualityreport.pdf (last visited November 20, 2004).

[244] Senators Jeffords, Sarbanes, Boxer, and Feinstein challenged EPA's 2003 proposal to impose storm water pollution control standards on construction sites and small cities, because it exempted

requests -- one on behalf of the Kansas Corn Growers Association and the Triazine Network[245] and the second on behalf of the American Chemistry Council Phthalate Esters Panel.[246] The U.S. Chamber of Commerce submitted petitions challenging the numerical properties of chemicals contained in the EPA's databases.[247] The Chamber of Commerce alleged the values vary

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oil and gas well construction sites. Letter from Senators Jeffords, Sarbanes, Boxer, and Feinstein to the Honorable Christine Todd Whitman, Administrator, EPA (Mar. 6, 2003). http://www.epa.gov/quality/informationguidelines/documents/8600_epa2003_0478.pdf (last visited November 20, 2004). The senators questioned the objectivity, accuracy and utility of the Department of Energy's figures relied upon by EPA when determining the number of one to five acre oil and gas construction sites that would fall within the purview of the Phase II storm water regulations. *Senators Use Data Quality Challenge*, OMB Watch, May 21, 2003. http://www.ombwatch.org/article/articleprint/1404/-1/83/ (last visited November 20, 2004). The IQA petition was denied, because it was submitted two days after the final rule was published. Letter from the Honorable Christine Todd Whitman, Administrator, EPA to Senator James M. Jeffords (May 7, 2003)(on file with author)(not the official agency response) and G. Tracy Mehan, III, Assistant Administrator, EPA to Senator James M. Jeffords (Jun. 13, 2003). http://www.epa.gov/quality/informationguidelines/documents/8600response_jeffords.pdf (last visited November 20, 2004) (official agency response).

[245] CRE challenged the preliminary Environmental Risk Assessment for Atrazine, alleging the document erroneously stated that atrazine caused endocrine effects in frogs. Letter from Jim J. Tozzi, Member, CRE Board of Advisors to EPA, Information Quality Guidelines Staff (Nov. 25, 2002). http://www.epa.gov/quality/informationguidelines/documents/2807.pdf (last visited November 20, 2004). EPA treated the RFC as a public comment on the April 2002, Preliminary Environmental Risk Assessment for Atrazine and later denied the document stated that atrazine caused endocrine effects. EPA made editorial changes to the report to clarify any ambiguities. *See also Information Quality FY03 Annual Report*, *supra* note 32, at 6.

[246] The CRE alleged the Diisononyl Phthalate (DINP) Technical Review of August 2000, and the subsequent September 5, 2000, rulemaking proposal to add the DINP category to the TRI did not meet the IQA standards. "The review contains substantial omissions of data and analysis, including significant new data and pertinent consensus scientific views which have been published since August 2000, biased conclusions which are not consistent with the TRI listing requirements, inaccuracies, and reliance on TRI listing guidance which itself cannot meet Data Quality standards." Citing OMB's proposed peer review supplement to the IQA, CRE requested the updated review be made available for public comment and subjected to external peer review. Letter from Jim J. Tozzi, Member, CRE Board of Advisors to EPA, Information Quality Guidelines Staff (Oct. 16, 2003). http://www.epa.gov/quality/informationguidelines/documents/13166rfc.pdf (last visited November 20, 2004). EPA, pursuant to the IQA, treated the RFC as a late public comment on the proposed rule and placed the RFC in the rulemaking docket to be addressed as part of the final agency action. EPA is revising the hazard assessments based upon a recently conducted internal peer review. Letter from Kimberly T. Nelson, Assistant Administrator and Chief Information Officer, EPA to Marian K. Stanley, American Chemistry Council Phthalate Esters Panel (Mar. 15, 2004). http://www.epa.gov/quality/informationguidelines/documents/13166Response.pdf (last visited November 20, 2004).

[247] For example, EPA's CHEM9 database contains a numerical value for the vapor pressure of bis ether, but the chemical is listed in the same database under a different name (dichloroethyl ether) with a different vapor pressure listed. Letter from William L. Kovacs, Vice President, Environment, Technology, and Regulatory Affairs, U.S. Chamber of Commerce to EPA Information Quality Guidelines Staff (May 26, 2004).

between the EPA's own databases and even sometimes within the same database. The numerical values are crucial in preparing health risk assessments.[248]

The types of petitions filed were diverse with no set pattern as to type or IQA category of challenge.[249] Six program offices within the EPA were targeted[250] and a majority of the petitions were denied.[251] The EPA categorized one RFC as "influential"[252] and the congressional storm water petition was the only petition that targeted a major rule.[253]

OMB's congressionally mandated IQA annual report indicated it is premature to "make broad statements about both the impact of the correction request process and the overall responsiveness of the agencies."[254] Due to the shortage of petitions filed, OMB made no substantive recommendations regarding potential legislative changes.[255] OMB surmised the IQA did not

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http://www.ombwatch.org/info/dataquality/EPA_chamber_chemrating.pdf (last visited November 20, 2004).

[248] Letter from William L. Kovacs, Vice President, Environment, Technology, and Regulatory Affairs, U.S. Chamber of Commerce to EPA Information Quality Guidelines Staff, (May 26, 2004). http://www.ombwatch.org/info/dataquality/EPA_chamber_chemrating.pdf (last visited November 20, 2004).

[249] Office of Management and Budget, *Information Quality - A Report To Congress Fiscal Year 2003*, Apr. 30, 2004, at 18.

[250] The EPA program offices petitioned include the Offices of Water; Research and Development; Air and Radiation; Prevention, Pesticides, and Toxic Substances; Environmental Information; and Enforcement and Compliance Assurance. OMB, *Information Quality FY03 Annual Report, supra* note 32, at 4-15. *See also* Office of Management and Budget, *Information Quality - A Report To Congress Fiscal Year 2003*, Apr. 30, 2004, at 16.

[251] EPA did clarify that the pesticide atrazine does not adversely affect hormone levels in frogs once challenged by CRE in an IQA petition. Letter from Jim Tozzi, Member, CRE Board of Advisors to EPA, Information Quality Guidelines Staff (Nov. 25, 2002). http://www.epa.gov/quality/informationguidelines/documents/2807.pdf (last visited November 20, 2004). *See also* Office of Management and Budget, *Information Quality - A Report To Congress Fiscal Year 2003*, Apr. 30, 2004, at 16.

[252] The Chemical Products Corporation challenged the oral reference dose for barium derived in the Barium and Compounds Substance File in EPA's IRIS and the presentation and analysis of the supporting data, alleging that it did not comply with the OMB requirements for objectivity and reproducibility. This RFC was deemed "influential." OMB *Information Quality Report*, *Fiscal Year 2003*, *supra* note 250, at 94-95. *See also Information Quality FY03 Annual Report*, *supra* note 32, at 4-15. "Influential" information is held to a higher standard with greater transparency regarding "the data and methods used to calculate the data, including the sources of the data, assumptions used, and analytic and statistical procedures used." General Policy EPA Guidelines For Information Quality Include Procedures For Influential Data, BNA, Oct. 4, 2002, at A-1.

[253] Marty Coyne, *EPA Reports, Policies Frequent Target of Data Quality Act Challenges*, Greenwire, May 11, 2004. http://www.eenews.net/Greenwire/Backissues/051104/05110401.htm (last visited November 20, 2004).

[254] OMB, *Information Quality Report Fiscal Year 2003*, *supra* note 249, at 5.

[255] *Id.* at 18.

thwart or slow regulatory rulemaking or the dissemination of information.[256] The report did highlight several misconceptions: (1) agencies were not inundated with requests for correction; (2) the IQA process was not used solely by industry; (3) the Act did not delay the regulatory process; (4) the guidelines have not "chilled" agency dissemination of information; (5) the appeals process did add value; (6) the IQA is not aimed primarily at Federal rulemaking information; (7) the IQA applies to more than just numerical data; and (8) universities and colleges do not fall within the purview of the IQA.[257]

OMB noted several agencies, including the EPA, had difficulty responding to petitions in a timely fashion. They recommended that agencies modify their guidelines to increase the allotted response time and examine staffing levels to ensure proper manning.[258] Ironically, OMB received no petitions for correction of information.

VI. ADDITIONAL OFFICE OF MANAGEMENT AND BUDGET OVERSIGHT OF SCIENCE

The Draft Peer Review Standards for Regulatory Science issued by OMB, are yet another initiative meant to control and curtail regulatory rulemaking through the application of science. Legally anchored in the IQA, the Bush Administration recently announced an OMB centralized scientific peer review program that would require OMB to evaluate science before new regulations are issued by an agency.[259] OMB is proposing the centralized peer review approach, because:

> External experts often can be more open, frank, and challenging to the status quo than internal reviewers, who may feel constrained by organizational concerns. Evaluation by external peer reviewers thus can enhance the credibility of the peer review process by avoiding both the reality and the appearance of conflict of interest.[260]

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[256] *Id.* at 8–11. OMB Watch believes this statement is without merit, since OMB did not rely on any data to draw the conclusion. *The Reality of Data Quality Act's First Year: A Correction of OMB's Report to Congress*, OMB Watch, Jul. 2004 at 3-4. *See also* http://www.ombwatch.org/info/dataqualityreport.pdf (last visited November 20, 2004).

[257] OMB, *Information Quality Report Fiscal Year 2003*, *supra* note 249, at 8 – 11.

[258] *Id.* at 18–19.

[259] Rick Weiss, *Peer Review Plan Draws Criticism*, *Under Bush Proposal, OMB Would Evaluate Science Before New Rules Take Effect*, WASH. POST, Jan. 15, 2004, at 11.

[260] OMB's Proposed Information Quality Bulletin for Peer Review, issued under Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) and the Supplemental Information Quality Guidelines, p. 3, *citing Peer Review in Environmental Technology Development Programs: The Department of Energy's Office of Science and Technology*, 3 NRC Report, 1998.

A significant step towards increased Presidential control over the regulatory process, the OMB bulletin[261] calls into question an agencies' ability to address science as it carries out its statutory and congressionally mandated functions. A number of scientific organizations believe centralized peer review will "inject White House politics into the world of science" and will "use the uncertainty that inevitably surrounds science as an excuse to delay new rules that could cost regulated industries millions of dollars."[262] OIRA currently possesses review authority over agency cost-benefit analysis, while the PRA provides review authority over information collection requests, both of which involve economic considerations and analysis.[263] Centralized control of the peer review process will add yet another level of oversight, thwarting the authority of independent regulatory agencies. Agencies possess the requisite scientific expertise, maintain ties with affected portions of the public sector, and have administrative processes in place to adequately address the science at issue.[264]

VII. CONCLUSION

Congressional interest in the IQA is ongoing and has not waned, as evidenced by recent House conference report language which questions implementation of the IQA by federal agencies. Congress mandated that OMB submit a report to the House and Senate Committees on Appropriation by June 1, 2004, outlining whether federal agencies have properly responded to public requests for correction of information under the Act.[265] OMB is proactively

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[261] An OMB "bulletin" is a term for legally binding language used to guide the actions of federal agencies. Weiss, *supra* note 259.

[262] *Id.*

[263] Letter from Reece Rushing, Policy Analyst, OMB Watch to John Morrall, III, Office of Management and Budget, Office of Information and Regulatory Affairs (May 28, 2002) (on file with author).

[264] *Id.*

[265] The conference report language specifically states:

> Implementation of the Federal Data Quality Act. The conferees are concerned that agencies are not complying fully with the requirements of the Federal Data Quality Act (FDQA). The conferees agree that data endorsed by the Federal Government should be of the highest quality, and that the public should have the opportunity to review the data disseminated by the Federal Government for its accuracy and have available to it a streamlined procedure for correcting inaccuracies. The Administrator of the Office of Information and Regulatory Affairs (OIRA) is directed to submit a report to the House and Senate Committees on Appropriations on whether agencies have been properly responsive to public requests for correction of information pursuant to the FDQA, and suggest changes that should be made

overseeing implementation of the IQA and is using it as a catalyst for further executive branch control of the regulatory state through science. Pending Congressional legislation on Capitol Hill also reflects a renewed interest in regulating through science.[266] The courts have yet to enter the fray to determine whether IQA petitions constitute a final agency action subject to judicial review. If judicial review results, a sharp increase in the number of petitions filed by industry is sure to follow.

Many IQA questions will remain unanswered awaiting further agency implementation and perhaps judicial review. Will enactment of the IQA have the intended consequences of its industrial backers and prove to be rulemaking paralysis through data over-analysis?[267] Is the Act just another openness in government law[268] of minor import or will it enhance both the competence and accountability of government? Can one federal agency force compliance of the IQA against another federal agency? Are the IQA guidelines retroactive or do they apply only to new agency actions? What impact will the guidelines have on information generated by the states? Will agency decisions under the IQA constitute final agency action and become subject to judicial review? What does the future hold for the IQA? It could only be a matter of time before the IQA replaces the Freedom of Information Act[269] as the "Taj Mahal of the doctrine of unanticipated consequences."[270]

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to the FDQA or OMB guidelines to improve the accuracy and transparency of agency science.

H.R. CONF. REP., *supra* note 58.

[266] On April 8, 2003, Representative Greg Walden of Oregon, introduced a bill referred to as the Sound Science for Endangered Species Act Planning Act of 2003, that would require the "Secretary of the Interior to *give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed*, and for other purposes." Sound Science for Endangered Species Act Planning Act of 2003, H.R. 1662, 108th Cong. (2003) (emphasis added). Senator Gordon Smith of Oregon introduced a similar amendment in the Senate on January 20, 2004. Sound Science for Endangered Species Act Planning Act of 2004, S. 2009, 108th Cong. (2004).

[267] Letter from Thomas McGarity, President, Center for Progressive Regulation to Docket Clerk, EPA (May 31, 2002) (on file with author).

[268] Openness in government laws include the Sunshine Act, 5 U.S.C. § 552b (2003); the Freedom of Information Act, *supra* note 35; Administrative Procedures Act, *supra* note 12; and the Federal Advisory Committee Act, 5 U.S.C. app. § 1 (2003).

[269] Freedom of Information Act, *supra* note 34.

[270] For example, the lack of specificity and use of broad definitions, such as "quality," "objectivity," "utility," "information," and "dissemination," could subject processes under environmental statutes, like the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. §§ 4321 to 4370f (1969), to more public review than that already mandated by the statute itself. It is unclear whether NEPA mandated environmental impact statements (EIS) or environmental assessments (EA) are considered publicly disseminated documents that must undergo scientific peer review or additional quality assurance measures. Under the current process, the public has an extensive right to provide comments on all federally proposed actions through the EIS and EA

processes. What remains unclear is whether the IQA requirement attaches to the EIS and the EA or just to the studies and analysis that underpin those assessments.