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# COMMENT: THE DATA QUALITY ACT: PROLOGUE TO A FARCE OR A TRAGEDY?

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**BIO:** * J.D., Emory University School of Law, Atlanta, Georgia (2004); B.A., State University of New York at Potsdam (1993). I would especially like to thank Vera Lacko and Edna Harrison, the two smartest and funniest people I know. I would like to dedicate this Comment to the memory of my father, John Lacko, because I think it would have made him proud. Thanks are owed to Amy Clark, Golda Fleischman, and Beth O'Sheasy for their encouragement, advice, and most of all, humor. Finally, I owe a debt of gratitude to Professor William Buzbee, first for convincing me not to drop out of law school and move to Cambodia when things looked bleak, and secondly for his guidance and suggestions throughout the course of writing this Comment.

**LEXISNEXIS SUMMARY:**

... After several failed attempts, conservative factions within Washington succeeded in passing a bill that could substantially curtail agencies' ability to disseminate data. ... " In keeping with this trend, OMB guidelines create a strong presumption in favor of peer-reviewed information by noting that "if data and analytic results have been subjected to formal, independent, external peer review the information may generally be presumed to be of acceptable objectivity. ... Although the Act allows "affected" individuals to "seek and obtain correction of information maintained and disseminated by [an] agency that does not comply with [OMB's] guidelines," the text of the DQA, as enacted by Congress, contains no mention of a right to seek judicial review of an agency decision regarding a data correction request. ... Likewise, the petition objected to EPA's publication of "influential" scientific information, such as the challenged test results, prior to reproduction of the original and supporting data. ... According to the agency guidelines published in the Federal Register, "[EPA's data quality] guidelines may ... apply to ... distribution of ... [third-party] information in which EPA adopts, endorses or uses the information to formulate or support a regulation, guidance, or other Agency decision or position. ...

**HIGHLIGHT:** [*305]

A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives. n1

--James Madison

**TEXT:**

After several failed attempts, n2 conservative factions within Washington succeeded in passing a bill that could substantially curtail agencies' ability to disseminate data. The Data Quality Act (DQA) was a little-known rider to a massive budget bill. n3 I t was enacted without debate but has the potential to undermine the ability of scores of agencies to provide the public with information. More serious still is the possibility that the Act will undercut agencies' ability to promulgate an array of regulations, ranging from the protection of the environment to improved highway safety.

The commands of the DQA were set in motion by section 515 of the 2001 Consolidated Appropriations Act. n4 This section, which amounts to a figurative needle in the haystack of a voluminous document detailing the federal government's budgetary allocations for 2001, directs the Office of Management and Budget (OMB) to issue guidelines "that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the [*306] quality, objectivity, utility, and integrity of information ... disseminated by Federal agencies ... [that are subject to] the Paperwork Reduction Act." n5 Additionally, Congress established a strict deadline that required OMB to issue these wide-ranging guidelines by September 30, 2001. n6

The DQA is comprised of three main parts. The first part requires all federal agencies affected by the guidelines to issue their own comprehensive guidelines "ensuring and maximizing" the quality of their data. n7 The second part directs agencies to establish administrative mechanisms that allow "affected" parties to seek and obtain correction of information that the agency maintains or disseminates when that information fails to meet the standards of the DQA. n8 The third and final part mandates that federal agencies report any and all data correction complaint requests to the Director of OMB. n9 To comply with this obligation, an agency must report the overall number of such complaints, the underlying nature of the complaint, and the action the agency took to resolve the matter. n10 As such, the Act has far-reaching consequences that touch upon a wide range of agencies and agency action.

This Comment discusses the possible repercussions of the DQA. Part I introduces the basic framework of the Act and discusses some of the preliminary skirmishes that occurred between agencies and regulated entities prior to the Act's first wave of regulatory implementation. In this vein, the first Part of the Comment explores issues and problems that were initially identified and ultimately resolved during the notice and comment phase of the DQA. Part II places the DQA in the larger regulatory reform movement of which it is a part. This backdrop provides insight into a number of the dynamic factors that culminated in the DQA's enactment, including the push to force agencies to embrace the principles of "sound science" and the resulting increase in the emphasis on peer review. Part III offers a critique of the DQA, focusing on specific provisions of OMB's guidelines and the potential costs and benefits that these obligations entail. This Part of the Comment focuses on specific agency responses to the DQA and discusses guidelines and implementation strategies that agencies have thus far proposed. Part III further [*307] discusses the agency-specific problems associated with implementing the DQA's commands. Part IV concludes this discussion by offering a normative analysis of the Act. It examines the possible effects of the DQA on various agencies and offers suggestions for improvements. Additionally, Part IV further summarizes the implications of the DQA and highlights the underlying shortcomings of this legislation.

## I. The Basic Framework and Preliminary Skirmishes

### A. Setting the Stage

Shortly before adjourning for the year, the 106th Congress buried a two-paragraph provision within the obscuring tedium of a massive appropriations bill. n11 Unfortunately, because of the dearth of legislative history, the impetus for the DQA is unclear. As noted by members of Public Citizen's Congress Watch (PCCW), a nonprofit public interest organization, n12 "legislative history about the Act is virtually non-existent because it was not the subject of any legislative hearings." n13 However, one need not look far to find the true architect of this legislation. Jim Tozzi, head of

the corporate-sponsored Center for Regulatory Effectiveness (CRE) has boldly taken credit for the development and implementation of the DQA. n14 According to Tozzi, "getting OMB to review regulations was my whole career." n15

The brief language of the DQA instructs the Director of OMB to issue guidelines to all federal agencies subject to the Paperwork Reduction Act by [*308] September 30, 2001. n16 These guidelines were meant to "provide policy and procedural guidance to Federal agencies" that would in turn improve the quality of the agencies' disseminated data. n17 The core of the Act's requirements is in section 515(b)(2)(A), which "requires that each Federal agency to which the guidelines apply - issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information ... disseminated by the agency, by not later than 1 year after ... [OMB] issues ... [its] guidelines." n18

Spurred by Congress's mandate to improve the quality of disseminated information, OMB issued a set of proposed guidelines in June 2001. n19 Following an intensive period of comment by affected parties, OMB revised its preliminary guidelines and issued final rules in January 2002. n20 However, it was during this preliminary period, in which OMB attempted to flesh out the burdens and obligations of the DQA, that a number of significant issues and problems were identified. These initial conflicts between OMB, agencies, and other affected parties illustrate the conflicts that continue to plague the DQA as it exists in its final version.

B. The Initial Skirmishes

1. Correction of Information: Who, Why, and How

A battle that took place prior to OMB's issuance of its final guidelines involved a requirement that directed agencies to establish "administrative mechanisms allowing affected persons to seek and obtain correction of information." n21 OMB guidelines necessitate "administrative mechanisms" to provide "affected persons" with a venue to petition for correction of the information disseminated by an agency. n22 Criticism focused on the fact that the guidelines are ambiguous regarding the criteria that would satisfy the [*309] "affected person" standard. n23 As concerned parties noted, this overbroad definition failed to appreciably narrow the pool of potential challengers in any significant sense. n24

As a result of the numerous comments suggesting that OMB provide language to clarify or limit the term "affected person," OMB clarified its position, stating that the term applied to all people "who may benefit or be harmed by the disseminated information ... . including persons who are seeking to address information about themselves as well as persons who use information." n25 However, several commentators noted that OMB's final guidelines remain unclear regarding the threshold of proof an "affected" party must overcome in order to challenge an agency's disseminated data. n26

Likewise, some early commentators argued that OMB guidelines were vague regarding an agency's discretion to decline to take corrective action after being petitioned for correction. n27 This ambiguity may be especially problematic in instances where an agency is inundated with duplicate petitions for correction of the same or similar information. OMB attempted to address these concerns in its guidelines, stating that "agencies, in making their determination of whether or not to correct information, may reject claims made in bad faith or without justification." n28 However, many commentators noted [*310] that the potential for abusive and frivolous complaints remains, despite OMB's attempts at clarification.

Similarly, during the notice and comment period many participants expressed concern that OMB guidelines offer little guidance regarding the level of sincerity or scientific quality a particular challenger must demonstrate to trigger a corrective administrative response. n29 Although the final guidelines emphasize that the "correction process should serve to address the genuine and valid needs of the agency and its constituents without disrupting agency processes" n30 and that agencies "may reject claims made in bad faith or without justification," n31 no definitive criteria were established by OMB. As such, OMB's guidelines provide little direction to implementing agencies in separating "bad faith" claims from legitimate concerns. Some commentators have opined that this vague definition throws the door open

to baseless and frivolous legal attacks that have the potential to squander agencies' time and resources while providing no counterbalancing benefit of improved information. n32 These commentators worried that individuals or organizations might misuse this right to petition as a strategic tactic to undercut agency action and delay the dissemination of useful information. n33

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2. Battles Over How to Define Influential Information

Additional criticism centered on the fact that the text of OMB guidelines creates especially stringent standards for disseminated information that is deemed "influential." n34 According to OMB guidelines, influential information is "[information] the agency can reasonably determine ... will have or does have a clear and substantial impact on important public policies or important private sector decisions." n35 With respect to information that an agency labels "influential," the Act requires that "agency guidelines shall include a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties." n36

OMB responded to concerns regarding the scope of this term by narrowing the definition of the types of information that it considered "influential." n37 According to the more restricted interpretation contained in OMB's final guidelines, information is "influential" when it "will have or does have a clear and substantial impact on important public policies or important private sector decisions." n38 The purpose of this change, according to OMB, was to lessen the need for guesswork on the part of agencies. n39

However, agencies have continued to wrestle with the term "influential." Because the term remains indistinct, conflicts between agencies and interested parties have erupted regarding both when data should be labeled "influential" and what criteria should be used in making this classification. n40

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3. Safe Drinking Water Act

Finally, OMB guidelines mandate that "with regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the equality principles applied by Congress to risk information ... pursuant to the Safe Drinking Water Act Amendments of 1996 (42 U.S.C. 300g-1(b)(3)(A) & (B))." n41 Under these provisions, agencies are commanded to use the "best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices" when disseminating any information based on scientific findings. n42

OMB's attempt to inject the provisions of the Safe Drinking Water Act (SDWA) "into the large number of statutes that govern agencies and departments with such widely disparate missions as protecting public health and safety, collecting taxes, and conducting the nation's defense" n43 may pose significant administrative difficulties. Initial comments focused on the likelihood that the heightened standards of the SDWA would disrupt the flow of important information from agencies to the general public. n44 Because adherence to the SDWA requires that agencies submit data to peer review and a reproducibility test, some commentators worried that agencies' dissemination of information would be delayed while agencies waited for tests to be replicated by qualified third parties. n45

OMB responded to these concerns by revising its final guidelines. n46 As amended, OMB's guidelines state that "agencies responsible for dissemination of vital health and medical information shall interpret the reproducibility and peer-review standards in a manner appropriate to assuring [*313] the timely flow of vital information from agencies to ... the public." n47 Furthermore, OMB enacted a provision that allows federal agencies to temporarily waive the DQA's information quality standards during urgent situations. n48 However, despite OMB's revisions, critics have continued to express concern that superimposing the strictures of the SDWA will be unduly burdensome and potentially conflict with

agencies' congressionally mandated missions. n49

II. The Regulatory Reform Movement

A. Sound Science and Peer Review - A Brief Overview

Critics of current regulatory regimes have become increasingly vocal in their calls to reform the existing regulatory system. n50 These attacks often center on demands for "sound science" or the increased use of peer review in agency decisionmaking. Similarly, courts in the post-Daubert n51 era have become more willing to police the science admitted into courtrooms. n52 This emphasis on science has been mirrored in Washington, with members of both political parties rallying around the cry for improved regulation through sound science and peer reviewed scientific data. n53

[*314] The DQA can be viewed as a part of this larger push for regulatory reform, heralded by lawmakers and critics alike as a much needed fine-tuning of the way the government does business. This dissatisfaction with the current state of regulatory policies has led many individuals to promote the use of sound science as a cure-all for chronic overregulation. n54 However, some critics have dismissed sound science as a manipulative tool often used by antiregulation forces to interfere with an agency's ability to regulate effectively. n55 According to these critics, this interference is achieved by forcing agencies to present "scientifically irrefutable" data before they promulgate any regulatory standard. n56 Thus, because science is filled with uncertainty and ambiguity, n57 this arbitrarily high standard effectively prevents agencies from acting and interferes with their ability to successfully promulgate regulations. n58

Likewise, an increased use of peer review is regarded by many as a necessary panacea for the ailments of modern regulation. n59 Members of both political parties have become increasingly enamored with the use of peer [*315] review by independent experts to ensure the quality of scientific data. n60 As one scholar noted, "in recent years, lawmakers of all sorts have become interested in scientific peer review, hoping that scrutiny by independent experts can improve the quality of their own decisionmaking." n61

B. The Regulatory Reform Movement and the DQA

The DQA dovetails with this broader scheme of regulatory reform by creating a presumption in favor of peer-reviewed information. n62 Significantly, the text of OMB's guidelines state, "if data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity." n63 Although this presumption in favor of peer reviewed material is rebuttable, n64 the burden falls heavily on the individual challenging the veracity of an agency's scientific data to prove its inadequacy. n65

Likewise, the text of OMB's guidelines requires that agencies promulgate guidelines that provide "sufficient transparency about data and methods [such] that an independent reanalysis could be undertaken by a qualified member of the public." n66 The guidelines explicitly recognize that in some instances an agency will be unable to meet the transparency and reproducibility requirements mandated by the Act due to "other compelling interests." n67 Examples of such "compelling interests" include concerns for privacy, confidential trade secrets, or sensitive intellectual property. n68 In these cases the Act requires "especially rigorous robustness checks to analytic results and documentation [of] what checks were undertaken." n69

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C. The Pitfalls of Relying on "Sound Science"

However, along with the praise for "sound science," there has also been criticism. n70 Sound science has been derided by many as a mechanism by which regulated industry can manipulate science to its advantage. n71 Critics note that the uncertainties inherent in scientific research sometimes allow industry insiders to unduly influence the results.

Furthermore, although this uncertainty is inevitable, it is seldom recognized as such. n72 Instead, "industries use routine scientific data gaps opportunistically, by insisting that until [an agency] has "better science,' it should not act." n73 Commentators have further accused antiregulation forces of using sound science as a delaying tactic to stave off regulation that is often expensive and burdensome. n74 Coupled with the inherent limitations of science, n75 demands for "complete" or "better" data can be a powerful device to halt agencies in their tracts. As one commentator noted, "enough [scientific research] is never enough for those whose true intent is to hold back government intervention." n76

Furthermore, agencies and lawmakers often misuse sound science as a convenient proxy for making difficult policy decisions. n77 Wendy Wagner has described the process by which legislators and agencies continually mischaracterize policy choices as scientific. n78 According to Wagner, by ignoring its limitations, agencies can use science to "camouflage [*317] controversial policy decisions as science ... [and thus] evade various political, legal, and institutional forces" that would threaten a proposed regulation. n79 So-called "science-policy" issues are presented as purely scientific, thus concealing the important value-laden considerations underlying an agency's decision to regulate. n80

Various incentives exist that push agencies to engage in what Wagner terms the "science charade." n81 These motivations include a desire by bureaucrats to prevent unwanted intrusions into an agency's decisionmaking process and a penchant on the part of agency scientists for increasing their authority and research funding. n82 Furthermore, Wagner argues that by characterizing policy choices as scientific rather than political, agencies can severely restrict the number of people who can participate in the notice and comment process that is required by the Administrative Procedure Act. n83 Because scientific knowledge among the public lags significantly behind that of agency experts, "hypertechnical rulemakings impose a high cost of entry on those members of the public who wish to participate in environmental debates and ... significantly limits the number of "unions, consumer groups, or environmental groups [that can] participate in ... regulatory proceedings.'" n84 As a result, scientists habitually misrepresent policy decisions as scientific and, thus, engage in a "scientific charade" to avoid political, legal, and public criticism of regulatory decisions. n85

The "Brave New World" n86 of court-sanctioned scientific evidence that has followed in the wake of the Supreme Court's Daubert decision has further [*318] increased the demands placed on science. n87 Because courts are obligated to undertake a "preliminary assessment of whether the reasoning or methodology underlying the [expert's] testimony is scientifically valid," n88 additional pressure is placed on agency decisonmakers to conceal policy choices under layer upon layer of science. n89 Post-Daubert, scientifically inexperienced judges are pushed to discern "good science" from the methodologically questionable and "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." n90 Thus, "by correlating the survival rate of an agency standard with the extent of technical explanations garnered in support, the courts offer agencies strong and virtually inescapable incentives to conceal policy choices under the cover of scientific judgments and citations." n91

The DQA is an example of legislators' over-confidence in the ability of science to resolve tough policy questions. In mandating that agencies' data conform to a minimum level of "quality, objectivity, utility, and integrity," Congress is providing agencies with a powerful shield to deflect costly legal challenges. As such, the DQA reinforces the cycle of scientific one-upmanship, whereby legislators demand "better" science, agencies manipulate uncertain science, and courts defer to disguised science.

D. Problems with Peer Review and the DQA

OMB guidelines also rely heavily on peer review as a means of ensuring high quality data. n92 As with the widespread endorsement of "sound science," peer review has become a cause celebre in Washington in recent years. n93 According to one leading scholar, "the call for external peer review of [*319] scientific judgments by agency officials represents something of a throwback to the New Deal's enthusiasm for decisionmaking by expert regulators and a repudiation of the more recent conception of agencies as forums open to wide interest group representation." n94 In keeping with this trend, OMB guidelines create a strong presumption in favor of peer-reviewed information by noting that "if data and

analytic results have been subjected to formal, independent, external peer review the information may generally be presumed to be of acceptable objectivity." n95 Although this presumption is rebuttable, n96 it nevertheless may spur agencies to engage in external peer review as a protective mechanism to safeguard their work from attack. n97

Scientific peer review has been defined as "the process by which hypotheses and experimental or observational data are scrutinized by other scientists." n98 As such, peer review is widely used by members of the scientific community as a control mechanism to guarantee a minimum standard of quality. n99 Likewise, "peer review contributes to the advancement of science not merely through the screening of scientific work (its quality control function), but also by helping proponents of new hypotheses improve their research ... by engaging others in a dialogue about important new discoveries." n100 Thus, contemporary thinking generally favors peer review as [*320] an essential forum for the exchange of ideas and views the process as the backbone of scientific progress. n101

However, many commentators have argued that proponents of peer review have overstated its benefits. n102 Critics have noted that although peer review unquestionably represents a valuable tool for the advancement of scientific knowledge, it in no way "purports to anoint particular results as finally settling contested questions." n103 Instead, scientific theory advances in an evolution-like process, with new ideas undergoing a trial period of analysis and appraisal by members of the scientific community before even the most tentative consensus can be achieved. n104 The inchoate nature of science, however, is seldom acknowledged by policymakers in their attempts to cloak regulations in the vestments of science. n105 Instead, "policymakers often seem to conflate peer review with science itself, which in turn may lead them to exaggerate the possible utility of independent expert scrutiny of decisions based on science." n106

Although peer review has been widely criticized as being inherently flawed, n107 OMB attempts to circumvent these limitations by mandating that: (1) the principal criterion for choosing peer reviewers be the expert's technical skill; (2) peer reviewers disclose their previous technical-policy positions; (3) reviewers disclose sources of personal and institutional support; and (4) external reviews be conducted in an "open and vigorous manner." n108 Notwithstanding these provisions, many experts fear that the peer review edict issued by OMB will face the same constraints and shortcomings as peer review [*321] generally. n109 Many DQA opponents are doubtful that the safeguards erected by OMB will provide sufficient protection to avoid the pitfalls that pervade the peer review system. n110

An example of a problem associated with the peer review process is demonstrated by empirical studies showing a significant connection between a researcher's funding and that researcher's scientific findings. n111 One such study revealed that "more than half of the university scientists who received gifts from ... companies admitted that the donors expected to exert influence over their work." n112 Critics of the peer review process point out that biases and conflicts of interest are endemic. n113 These critics are especially disapproving of the role industry plays in funding peer review. According to some commentators, "corporate dominance [of scientific research] affects everything from what is (and what is not) researched to which results are published (and which ones are suppressed)." n114 As such, the value of peer review as an effective safeguard against unsound science is questionable. Instead, many view the process as one more instance where self-interested, moneyed concerns can manipulate the system to better serve their needs. n115

[*322] Likewise, many opponents of peer review have noted that the process is not free of cost. n116 Research and replication of studies can cost tens of thousands of dollars and take years. These costs become especially significant when viewed in light of the fact that the DQA was an unfunded mandate. n117 As such, any additional administrative expenses will be borne by agencies already strapped for cash. n118

## III. Critique of the DQA

### A. Is There Judicial Review Under the DQA?

On January 3, 2002, OMB published its final data quality guidelines in the Federal Register. n119 These guidelines directed federal agencies to establish individual, agency-specific guidelines by October 1, 2002. n120 As of this writing,

more than one hundred federal agencies have complied with OMB's requirements by publishing their final data quality guidelines. n121 Thus, the preliminary implementation of the DQA is largely concluded. What remains to be seen, however, are the affects the Act will have on agency regulation. As William Kovacs, Vice President for Environment, Technology, and Regulatory Affairs at the United States Chamber of Commerce, explained, "[The DQA] is [*323] the biggest sleeper there is in the regulatory area and will have an impact ... far beyond anything people can imagine." n122

The effects of the DQA, however, will not be felt uniformly. Instead, its impact will vary as each agency attempts to coherently adapt the Act's provisions to mesh with the agency's own unique missions and substantive goals. And while the DQA raises a number of universal concerns that cut across agency lines, the Act's implications will likely have a distinct impact on each individual agency that attempts to apply its provisions.

1. Judicial Review (or Lack Thereof) as Provided by the Text of the DQA and OMB Guidelines

One of the most common concerns raised by critics of the DQA is the likelihood that it will result in additional legal challenges to agency regulation. n123 According to Citizens for Sensible Safeguards (CSS), n124 "of critical concern is the issue of whether [agencies' data quality] guidelines are to be legally binding." n125 Underlying this concern is the fear that regulated [*324] industry will use attacks on an agency's data quality as a proxy for decreasing unwanted regulation. n126

Opponents of judicial review under the DQA argue that a right that was neither granted by Congress in the text of the DQA nor expressly conferred by OMB in its guidelines should not be supposed to exist. n127 Although the Act allows "affected" n128 individuals to "seek and obtain correction of information maintained and disseminated by [an] agency that does not comply with [OMB's] guidelines," n129 the text of the DQA, as enacted by Congress, contains no mention of a right to seek judicial review of an agency decision regarding a data correction request. n130

Likewise, the available "remedies" outlined in OMB's guidelines are wholly administrative. According to the guidelines, agencies are directed to "establish administrative mechanisms allowing affected persons to seek and obtain ... timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines." n131 OMB further specifies that agencies must establish appropriate time limits for agency responses and decisions regarding these correction requests. n132 The guidelines also mandate that "if the person who requested the correction does not agree with the agency's decision ... the person may file for reconsideration within the agency." n133 For this purpose, the agency is instructed to create an administrative appeal process to evaluate the agency's initial data correction determination. n134 As with the initial request for correction, the agency is directed to set appropriate time periods in which to resolve appeals. n135 Thus, [*325] the processes by which an individual is allowed to seek correction of disseminated data, according to the guidelines set forth by OMB, are entirely administrative.

2. Judicial Review of Agency Action Under the Administrative Procedure Act

Despite the fact that judicial review is not explicitly granted by the DQA or OMB guidelines, many believe "[judicial review] is very likely to be inferred, once the challenger has exhausted the new administrative remedies in agency rules." n136 In keeping with this reasoning, foes of agency regulation have consistently asserted that the DQA creates a new legal mechanism to challenge agency action. According to Jim Tozzi, n137 "Section 515 [of the DQA] provides "law to apply' to agency denials of petitions [for data correction], provides a process that reaches a final agency decision, and has a clear definition of "dissemination,' facilitating judicial review of ... petition denials." n138 Based on this logic, many proponents of the DQA have insisted that the DQA establishes a "collateral non-cash remedy" that can be utilized by regulated entities to police agency action. n139

Case law under the Administrative Procedure Act (APA) n140 would seem to lend weight to the claim that failed data-correction petitions will, at least initially, lead to review by the courts. n141 According to John Graham, head of the Office of Information and Regulatory Affairs (OIRA), "it will probably take a few critical court decisions before we

know how [the DQA] and the associated [OMB] guidelines will be interpreted by judges." n142

[*326] The APA was passed in 1946 to establish uniform procedures for federal agencies' actions such as rulemaking and adjudication. n143 Additionally, the APA outlined general requirements for judicial review of agency decisions, creating a presumption in favor of review for final agency action. n144 Section 702 of the APA provides a basic presumption of judicial review "to [one] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." n145 Thus, the basic goal of the APA is to establish judicial review as an external limit on administrative agencies to "prevent, and provide a mechanism for fixing, illegal or irrational agency decisions." n146

Before a court may review an agency action, however, a plaintiff must establish that such review is not prohibited by the APA. Section 701(a) of the APA provides that a plaintiff is entitled to judicial review except to the extent that: (1) review is precluded by statute; or (2) the action is committed to agency discretion by law. n147 Thus, the APA provides for certain exclusions to its general presumption in favor of judicial review of final agency action.

Although the APA provides for exceptions, the Supreme Court reinforced the presumption in favor of judicial review in Abbott Laboratories v. Gardner. n148 Relying on legislative history, the Court noted that "the mere failure to provide specifically by statute for judicial review is certainly no evidence of intent to withhold review." n149 Instead, Justice Harlan underscored the idea that judicial review of final agency action was presumed unless "clear and convincing evidence" of converse legislative intent was demonstrated. n150

Thus, it would appear that the lack of explicit language in the DQA providing for judicial review will not be dispositive in determining whether [*327] such a right exists. n151 Under the Supreme Court's broad interpretation of judicial review provided by the APA, courts will likely be called upon to adjudicate matters involving "aggrieved parties" n152 dissatisfied with an agency's resolution of a data correction request.

3. Judicial Review of Petitions for Correction

The Supreme Court has recognized that a grant of judicial review under the APA is not without cost. As it noted in Federal Trade Commission v. Standard Oil Co. of California, n153 "the effect of ... judicial review ... [would] likely ... be interference with the proper functioning of the agency and a burden for the courts." Thus, the Court has been sensitive to the fact that judicial review under the APA creates the potential for significant delay in agency rulemaking and may impose hefty costs on both the courts and agencies. n154

As a consequence, the APA attempts to strike a balance between the need to monitor agencies' decisions and the need to limit judicial review to protect agencies' ability to function. n155 Therefore, although "administrative agencies make thousands, if not millions, of decisions every day ... only a small fraction of that massive output may be challenged [under the APA] immediately in court." n156

Keeping in mind this delicate balance, it is significant that the agency action under question in the DQA involves the denial of a data-correction petition. Previously, courts have held that judicial review of agency information disclosures are generally precluded from review, based on the presumption that such disclosures are not "agency action" within the meaning of the APA. n157 Instead, the agency action in question must be one that [*328] establishes rights or obligations, or one that results in legal repercussions. n158 Furthermore, although courts have recognized that agency disclosure of information may have adverse economic consequences, courts have not held that these effects are sufficient to make the disclosures judicially reviewable under the APA. n159 Thus, some legal scholars have argued that agency dissemination of data may not be reached by the courts under the provisions of the APA. n160 Although "there is no categorical rule that an agency action involving the disclosure of data ... to the public is necessarily exempt from judicial review under the APA," current legal norms dictate that most disclosures will not qualify as "agency action" subject to APA review. n161

Petitions for data correction, on the other hand, may be judged by a different legal standard than mere agency dissemination of information. Numerous attorneys and regulatory experts have argued that agency rulings on petitions are "final agency actions" and should thus be considered judicially reviewable. n162 For example, the court in Tozzi v. United States Department of Health and Human Services, n163 held that a Department of Health and Human Services report designating dioxin as a known human carcinogen was judicially reviewable as a final agency action. According to one commentator, "about 90 percent of administrative law experts believe the petitions, if denied by [an agency] and appealed and denied again, would be considered final agency actions the therefore judicially reviewable." n164 Thus, because agency petition determinations have been found to be "final agency actions" for purposes of the APA, data quality petitioners, having sought agency data correction and failed, may have a second bite at the apple in court.

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B. Does the Right of Judicial Review Under the DQA Matter?

While opponents of the DQA point out that neither the text of the DQA itself nor the guidelines proposed by OMB create any adjudicatory cause of action, n165 a more important question may involve the ultimate effects of judicial review, should this right be found. Groups such as OMB Watch n166 have cautioned that the DQA may be misused by entities that oppose the substance of an agency regulation. n167 OMB Watch expressed concern that judicial review under the DQA may be used as a disruptive tactic to delay or frustrate agency attempts to regulate. n168 As even its proponents admit, "this law affects the regulatory development process because Federal regulations may be based on the findings of scientific or other research studies disseminated by a Federal agency in the course of the rulemaking." n169 Therefore, an opponent of a regulation can now challenge an agency's data using a mechanism that is separate and independent from the challenger's dissenting comments filed during the notice and comment phase of rulemaking. n170 Post-DQA, an agency must fulfill its traditional duty to respond to significant comments under the APA, n171 and may have to respond further to subsequent challenges attacking the quality of the data underlying the promulgated rule. n172

Moreover, the mere possibility of judicial review may have significant consequences. Aside from the outlay of resources associated with implementing the new data quality procedures, the prospect of legal challenges [*330] has the potential of discouraging agencies from disseminating information. n173 As noted by many commentators, the DQA may create an incentive for agencies to withhold information from the public in order to avoid the costs associated with judicial challenges. n174 Thus, the price of additional legal challenges may be paid by the public at large, as agencies elect to withhold information in order to protect themselves from costly legal battles. n175

1. Early Examples of Data Quality Challenges

Despite the relative newness of the Act, several groups have filed petitions requesting changes to agency data. n176 Thus, "if anyone thought the Data Quality Act would be used just by bean counters to quibble over typos and misplaced decimals, they have already been proven wrong." n177

The Center for Regulatory Effectiveness, led by Jim Tozzi, has been quick to lay the ground work for judicial challenges. n178 For example, shortly after the DQA was enacted, CRE filed a petition challenging an EPA publication that suggested that atrazine, a widely used weed-killer, had harmful effects on [*331] frogs. n179 The petition was filed by the CRE on behalf of the Kansas Corn Growers Association n180 and the Triazine Network, n181 both organizations whose members have an interest in ensuring that atrazine is not reclassified by EPA as a "likely human carcinogen." n182

CRE's data correction petition challenged EPA's dissemination of a section of the agency's Environmental Risk Assessment for Atrazine. n183 At issue was a particular study that indicated that frogs exposed to atrazine suffered endocrine-related deformities. n184 Because the study had not yet been replicated, CRE petitioned EPA to "correct" its data by depublicizing the information and issuing a statement that there is "no reliable evidence that atrazine causes "endocrine effects' in the environment." n185

According to the petition submitted by CRE, EPA violated various provisions of the DQA in disseminating this study. Among them was the requirement that disseminated data meet an objectivity standard. n186 Likewise, the petition objected to EPA's publication of "influential" scientific [*332] information, such as the challenged test results, prior to reproduction of the original and supporting data. n187 Finally, CRE accused EPA of violating the DQA's "utility" standard, arguing that information is not useful to its intended users when it is the result of unreproducible tests. n188

As CRE's data correction petition regarding atrazine suggests, "there are as many legal theories about how these [DQA] issues can be litigated as there are lawyers." n189 Furthermore, many have viewed CRE's challenge as more than a mere battle over quality. As one commentator explained, "the CRE challenge ... has a broad[] sweep: It asserts that the government may neither publish nor use scientific studies until government validation protocols are finalized." n190 Thus, agency data that is not scientifically irrefutable may potentially be challenged by opponents of the regulation. More seriously, if a flaw in data is confirmed, the agency may be required by the DQA to remove the information from its websites or publications and re-evaluate any decisions based upon the faulty data. n191

Thus, under the DQA, regulated interests have a potent new device to pare down costly regulations. Challengers are no longer limited to attacking an agency's authority to regulate or the regulation itself. Instead, conservative groups such as CRE may now be able to "tie an agency into knots by challenging every bit and piece of information [upon which a regulation is based]." n192

2. How Uncertain Science May Be Used in Judicial Attacks

Furthermore, as the research at the center of the atrazine debate demonstrates, there is often scientific disagreement regarding a particular subject of study. Researchers can, and often do, consider the same data and [*333] reach opposite but valid conclusions. n193 Likewise, differing points of view regarding risk assessments and margins of error may lead to divergent results. n194 As one commentator noted, varying assumptions regarding risk or uncertainty can lead to results as different as "not knowing whether one has enough money to buy a cup of coffee or pay off the national debt." n195 However, CRE seems to be suggesting that "in the name of "data quality' ... any pesticide that cannot be proven toxic beyond the toughest standard of doubt must be officially declared entirely safe." n196

The flip side of this argument is advanced by groups such as Public Citizen's Congress Watch. n197 PCCW concedes that there may be situations where specific portions of a study are imperfect or nonreplicable but where the study's ultimate conclusions are nevertheless valid. n198 As expressed by Wendy Keegan, a regulatory affairs fellow at PCCW, "If 98 percent of the data say something is bad for you, it makes sense to issue protective regulations." n199 Thus, many agencies base decisions to regulate on the "weight of evidence" provided by a series of "limited" studies. n200 However, this practice may expose these agencies to judicial attack from entities challenging each study in isolation, ignoring the studies' combined weight. n201

Moreover, the evolutionary nature of scientific discovery n202 may work to undercut an agency's position. Dependence on a particular scientific finding or study may present opponents of regulation with an opportunity to challenge a regulation. As Wendy Keegan pointed out, "The problem is that even the most valid scientific study can be nit-picked." n203

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3. Judicial Attacks - Blame Shifting and Unexpected Costs

Judicial attacks under the DQA may be especially troublesome because regulated entities may attempt to shift the burden of proof from those challenging the data to the regulating agency. n204 For example, "if five hundred experts employed in [a regulated industry] are lined up to dispute the accuracy ... of [an agency's] data dissemination based on two consultants' views ... the [agency's] success in defending a rule may decline even more than its pre-[DQA]

experience." n205

This danger may be exacerbated by the fact that regulated industry is almost always better funded than the agencies that they are attacking. n206 And because regulated entities possess a vested interest in seeing a regulation overturned or information withdrawn, they may have powerful incentives to continually challenge an agency's data as a means of undercutting agency action. n207

Aside from the problems associated with judicial review of an agency's data, DQA is also an unfunded mandate. n208 As such, agencies will have to "reallocate scarce resources away from pursuing their respective congressionally mandated missions" in order to fulfill the mandates of the Act. n209 This reapportionment of funds will take place during the preliminary stages, as agencies struggle to develop and implement data quality guidelines. Further costs will likely be associated with the administrative appeals processes. However, the most significant of all the possible fund displacements will likely occur as additional resources are reassigned to defend the quality of an agency's data in expensive and time-consuming legal battles. n210 Based on these concerns, many experts fear that "agencies may lose control over their agendas as they are forced to dedicate more energy towards [*335] reviewing and defending challenged information." n211 Thus, the expense associated with implementing, enforcing, and defending data quality challenges is likely to be significant and will be meted out from limited agency resources.

C. Risk Assessment vs. the Safe Drinking Water Act

There has also been considerable debate regarding OMB's requirement that agencies "adopt or adapt" the principles of the Safe Drinking Water Act n212 (SDWA) when disseminating information regarding analysis of risks to human health, safety, or the environment. n213 As many observers have pointed out, the SDWA's requirements are among the most stringent standards for risk assessment contained within any federal statute. n214 Examples of the SDWA's rigorous requirements include its emphasis on "peer-reviewed science and supporting studies." n215 Additionally, the SDWA stresses the need for detailed information about the risks being examined. n216 As a result, agencies are required to identify "each population" affected, n217 the "estimate of risk" for the specific population, n218 each "upper-bound or lower-bound" approximation of risk, n219 and any "significant uncertainty" that emerges in the risk assessment. n220 As such, using the SDWA to analyze risks to human health, safety, or the environment will likely result in a substantial increase in the amount of time and energy an agency must expend when disseminating such data.

As with the right to judicial review, the text of the DQA nowhere mentions the use of the SDWA standards to measure risks. n221 OMB justifies the use of [*336] the SDWA standards by claiming that Congress embraced a basic quality standard for the dissemination of public information concerning risks of harmful health effects in its 1996 amendments to the SDWA. n222 Opponents, on the other hand, claim that "[OMB] ... went far beyond the congressional mandate [of the DQA]" when it imported the risk assessment standards of the SDWA into its agency guidelines. n223

1. Are the SDWA Standards a Good Thing?

The use of the SDWA has been widely criticized by opponents of the DQA. n224 According to PCCW, Congress neither explicitly stated nor implied that it was adopting a basic standard of quality for the use of science in agency decisionmaking when it implemented the SDWA. n225 Furthermore, PCCW has argued that a plain reading of the text of the SDWA supports the argument that the quality standards listed in the statute apply solely to data disseminated under the SDWA. n226 In particular, PCCW emphasizes that the text of the SDWA states that its quality standards apply "in carrying out this section" of the SDWA only, and are, thus, in no way universal. n227 For these reasons, opponents of the DQA generally endorse a much narrower reading of the SDWA and contest its applicability to the wide range of data disseminated by various federal agencies.

[*337] Conversely, representatives of regulated industries praised the use of the SDWA standards in risk assessment. n228 These same groups have been highly critical of agencies' efforts to lessen the impact of the SDWA

mandate. n229 As evidence of such minimizing tactics, not a single agency chose to "adopt" the SDWA provisions. n230 Instead, every agency, including EPA, which operates under the SDWA, preferred to "adapt" the SDWA and thus tailor its provisions to best suit its needs. n231

2. The Likely Repercussions of Using the SDWA Standards in Agency Risk Assessment

Many commentators have argued that the consequences of using the SDWA may be especially troublesome for agency decisions or regulations that involve risk assessment. Furthermore, because risk assessment commonly serves as the basis for health, safety, and environmental regulation - exactly the type of regulation addressed by the DQA's SDWA mandate - critics are concerned that the effect will be especially harmful. n232

The purpose of risk assessment is to "organize and express what can be stated about [those] risks that are not subject to direct observation and [*338] measurement." n233 Thus, risk assessment can often be a highly subjective process in which an agency is forced to make difficult decisions based on "uncertainty, incomplete data, and genuine differences between scientists in interpretation of and inferences from the available data." n234 Furthermore, due to the inevitable uncertainties that exist in science, agencies are often forced to make certain default assumptions. n235 Frequently, these default assumptions lead an agency to err on the side of caution and promulgate protective standards. n236 Thus, risk assessment is often viewed as a device that assists agencies in making decisions based on numerous factors, including science, policy, and economics. n237

However, some commentators have expressed concern that the use of the SDWA guidelines in risk assessment may allow groups to exploit scientific uncertainty and weaken or delay agency regulation. OMB Watch summed up the effects of using the criteria listed in the SDWA for agency risk assessment with the following analogy:

If someone is being hit over the head with a hammer, the logical thing to do is seize the hammer; it's obvious ... that damage is being done. Under the new data quality regime, however, an agency could be forced to sit on the sidelines measuring the precise extent of the damage. n238

3. The Interplay Between Risk Assessment, Peer Review, and the SDWA

The SDWA creates a presumption in favor of peer-reviewed data. n239 Unfortunately, not all data can be subjected to the rigors of peer review. Risk-based regulations frequently rely on information that has not been peer [*339] reviewed for reasons that range from budgetary and time constraints, to inherent biases, to imperfect scientific knowledge. n240 Instead, agencies are forced to rely on information that is the "best available," rather than perfect or irrefutable. n241 Unfortunately, in doing so, an agency's regulation may become vulnerable to attack because it fails to meet the "peer review" presumption advocated by the DQA and SDWA.

The Occupational Safety and Health Administration (OSHA) is one of many agencies that relies on both peer-reviewed studies and data provided by third parties or collected through more informal means, such as inspections or on-site visits. n242 William Perry, Director of OSHA's Office of Risk Reduction Technology summed up the type of information relied on by OSHA in the following manner: "Is it always peer-reviewed information? No, it can't be. Is it always scientific information in the sense of data collected through hypothesis testing? No, it can't be. If [OSHA] restricts [itself] to that [type of data] we can't tell the decision maker anything." n243 Thus, although OSHA's enabling statute instructs the agency to base its risk assessments on the "best available information," n244 the agency has frequently found that this "best available" standard must be met using various non-peer reviewed methods of information collection.

However, under the new SDWA mandate, such informal, non-peer-reviewed data may prove insufficient to satisfy

the mandates of the DQA. Because the SDWA places particular weight on "peer-reviewed science" and further requires agencies to provide detailed information about the risk being considered, n245 non-peer-reviewed data may become increasingly vulnerable to attack under the stringent provisions of SDWA.

4. Conflicts of Interest Between Agencies' Enabling Acts and SDWA

Additionally, the provisions of the SDWA potentially conflict with the enabling statutes of the agencies charged with applying the provisions. For example, EPA's congressionally-mandated mission under the Endangered [*340] Species Act states that the Secretary "shall make determinations [of whether a species is endangered or threatened] solely on the basis of the best scientific ... data available." n246 As such, EPA's authorizing statute creates the presumption that the agency will, at times, act prior to the possession of complete or irrefutable scientific data in order to protect a species from extinction. n247 Furthermore, because scientific uncertainties make risk assessment "more of an art than a science," an agency is often forced to rely on qualitative analysis rather than quantitative data. n248

EPA's mandate to act despite uncertain or imperfect science stands in stark contrast to the provisions of SDWA. Although agencies such as EPA, n249 the Food and Drug Association (FDA), n250 and OSHA n251 regularly make decisions based on qualitative judgments, the SDWA requires more exacting standards of data collection and reporting. n252 And because some types of agency functions do not fit neatly into the quantitative niche contemplated by SDWA, it may be harder for agencies to promulgate regulations to guard against potential dangers that are not always clearly defined. n253

An example of this problem was illustrated by EPA's attempt to promulgate regulations restricting emission of the finest pollution particles. These particles have increasingly been linked to lung and heart diseases. n254 As such, EPA implemented new regulations that restricted these emissions. n255 However, many industry proponents attacked the regulations as being overly [*341] broad and premature. n256 These same groups have called for additional testing prior to any emission restrictions. n257 Specifically, these groups have demanded that EPA first identify exactly which types of small particles are harmful before issuing any rule restricting their emission. n258 Supporters of the regulations, on the other hand, point out that "it would take years of additional study to pinpoint the exact hazard, but people are dying from such pollution now." n259

Under the new strictures of SDWA, however, industry forces may have a powerful new weapon with which to attack EPA's fine particle regulations. These antiregulation groups may attack the regulations for their failure to comply with the reporting requirements of SDWA, such as identification of "each population" affected, n260 estimation of risk for the specific population, n261 identification of each "upper-bound or lower-bound" approximation of risk, n262 and any "significant uncertainty" that emerges in the risk assessment. n263 Supplying this additional information could delay regulation and conflict with EPA's primary mission of protecting human health and the environment. n264 Failing to supply it, on the other hand, could result in judicial challenges to the regulations and lead to their ultimate defeat.

EPA data quality guidelines acknowledge the necessity of striking the right balance between a need for regulatory action and the agency's desire to obtain and disseminate the highest quality data. n265 Opponents of importing SDWA provisions stress that "meeting the challenge of improving data quality without undermining EPA's policy and legal obligations ... is essential because the goal of improving data quality is only one of several goals that agencies like EPA must achieve." n266 Instead, these groups argue that [*342] responding effectively and efficiently to threats against human welfare and the environment are at the core of EPA's mission and that this goal should not be preempted by any of the data quality requirements imposed by SDWA. n267

D.

"Influential" Information and Its Effects on Regulation

The text of the DQA creates particularly rigorous standards for disseminated information that is labeled "influential."

According to OMB guidelines, influential information is "[information] the agency can reasonably determine ... will have or does have a clear and substantial impact on important public policies or important private sector decisions." n268 With respect to information that the agency deems "influential," the guidelines require that "agencies ... shall include a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties." n269 Thus, when an agency labels information "influential," it must adhere to a higher standard of quality before dissemination. n270

Because the definition of "influential," as provided by OMB, is vague, n271 there is ample room for disagreement as to what information should be subjected to stricter standards of quality. Questions have arisen concerning both when data should be labeled "influential" and what criteria an agency should use in making this classification. Additionally, adhering to the "reproducibility" standard mandated by OMB for influential information can pose unique difficulties for agencies.

1. Finding the Right Time to Label Information "Influential"

There has been considerable disagreement as to when an agency must make its preliminary determination of whether information is "influential." Those arguing that the determination should be made at the time the information is collected, or at the very least early in the life cycle of the information, believe [*343] that doing so will guarantee higher quality for information that has far-reaching impacts. n272 On the other hand, adhering to the stricter standards imposed on "influential" information, such as reproducibility and increased transparency, n273 may be time-consuming and costly and could interfere with agencies' dissemination of information. n274 As such, agencies may want to avoid prematurely labeling data as "influential" to avoid these burdens.

Many commentators have cautioned against over-inclusive determinations of what constitutes "influential" information. The Center for Progressive Regulation, for example, noted that the DQA applies exclusively to information that is "disseminated." n275 Accordingly, large amounts of information collected and utilized by agencies, however significant, will not fall under the umbrella of the DQA until it is actually "disseminated" within the meaning of the Act. n276 As such, an agency could conceivably withhold its decision as to the "influential" nature of a study or piece of information until it is ready to actually disseminate the data as defined by the DQA.

Additional suggestions as to the appropriate timing for categorizing information have included comments by the Natural Resources Defense Council, which proposed that an agency withhold its determination until either a data correction request is filed or final agency action is taken. n277 The delayed determination is justified on the grounds that "establishing a comprehensive system for improving data quality consumes enormous resources." n278 As such, pro-agency groups have almost uniformly suggested that later, rather than sooner, was the more appropriate and cost effective time for designation of data as "influential."

2. What Information Should Be Labeled "Influential"?

The parameters for defining "influential" information are not yet clear. OMB guidelines provide that information that can reasonably be determined to [*344] have a "substantial impact on important public policies or important private sector decisions" should be considered "influential." n279 However, OMB guidelines authorize each agency to define "influential" in a manner appropriate for the "given ... nature and multiplicity of issues for which the agency is responsible." n280 Thus, although the OMB guidelines provide a baseline standard for the types of information that may be considered "influential," they also provide agencies with considerable flexibility in determining the scope of the Act's coverage.

The term "influential," as it applies to data quality, has been clarified or redefined by numerous agencies. FDA, for example, defined "influential" as "disseminated information that results from or is used in support of regulatory actions that are expected to have an annual effect on the economy of $ 100 million or more." n281 Thus, FDA narrowed the definition of "influential" by restricting it to a minimum dollar amount. n282 Likewise, the agency further restricted the

scope of the definition to data disseminated in the context of regulatory actions. n283

As demonstrated by FDA's actions, agencies may have a vested interest in limiting the amount and type of information that it considers "influential." This interest includes avoiding the additional costs and delay that may be incurred by adherence to the "influential" standard, n284 which requires that agencies apply a heightened requirement of reproducibility and transparency. n285 The additional burden of providing third parties with sufficiently transparent data to allow reproduction, along with the resulting delay, may subject agency regulation to what some commentators have termed "death by data quality." n286

[*345] According to CPR, n287 the dangers of "death by data quality" arise from multiple sources. n288 Chief among them is the threat that attempts to disseminate data will be delayed by burdensome procedural requirements. n289 Furthermore, "the more elaborate the procedures the greater the likely delay." n290 This risk is especially pertinent when discussing dissemination of "influential" information. Because of the multiple procedural requirements that arise once information is labeled "influential," there is a greater likelihood that attempts to regulate will become bogged down in costly and time-consuming delays. n291 Moreover, as agencies struggle to prepare data that is sufficiently transparent and then wait even longer while qualified third parties attempt to reproduce the results, the likelihood of delay or defeat of the regulation becomes progressively greater.

Likewise, as CPR points out, "to the extent that procedures invite industry or other interest groups to use them in a strategic manner to slow, or even stop, data dissemination, the more likely it is that less information will be available to the public." n292 Thus, groups like CPR have expressed concern that antiregulation forces may use arguments that data lacks transparency or is nonreproducible to attack an agency decision that would otherwise be unassailable.

3. Attacking "Influential" Information Because It Fails the "Reproducible" Standard

According to OMB guidelines, all "influential" information must be "reproducible." n293 In other words, the same result must be achieved by qualified third parties following careful re-analysis. n294 This reproducibility standard can pose a problem to agencies for a number of reasons. In the first place, analysis that is based on risk assessment can be extremely complex. n295 [*346] Much of this research draws from a wide range of studies, various contributors, and multiple data sets. n296 As such, an agency may interpret information concerning a particular substance and its effects on human health to reach one conclusion, while others, looking at the same data, may interpret the data to reach the opposite result. n297 The question then becomes whether this difference in the interpretation of data provides a party with sufficient grounds to allege that the agency's science fails the "reproducibility" test. n298

As an example of such a divergence in data interpretation, pro-industry groups have already filed a petition for data correction with EPA regarding the chemical atrazine. n299 A major basis of this attack is the lack of "reproducibility" of an initial study that identified atrazine as an endocrine-disruptor. n300 Pro-atrazine groups argued the study was unsuitable for use by EPA in its risk assessment determination. n301 According to a spokesperson for the group, using the study before replication is against EPA's DQA rules. n302 Thus, "before the results of an experiment are accepted as valid, they have to be replicated [by other researchers]," n303 and until such replication occurs, groups challenging EPA's atrazine regulation object to the agency's tentative labeling of atrazine as harmful. n304

While many have hailed the DQA as an effective mechanism for identifying the weaknesses underlying scientific studies, n305 others have expressed concern that "science [may be] attacked as a way of [making] sure that policy isn't made." n306 Insisting that "influential" data is reproducible has the benefit of ensuring higher quality data, but the rule's drawbacks include delay, increased costs, and the possibility of judicial attack.

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E. How the DQA Treats Information Generated by Third Parties

A significant question raised by the mandates of the DQA concerns the treatment of third party information under the Act. OMB guidelines state, "If an agency ... disseminates information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines." n307 As such, it becomes critical to ascertain which types of agency actions "reasonably suggest" that an agency endorses a particular piece of information. Once an agency is perceived to have approved the information, it will be required to subject this third-party data to the rigors of the DQA.

1. Third-Party Information "Maintained" or "Disseminated" by an Agency

Many, if not most, federal agencies maintain databases that "merely serve as a "conduit' for information generated by third parties." n308 For example, EPA maintains files relating to pollution emissions submitted by regulated companies in order to comply with certain legal requirements. n309 EPA's Toxic Release Inventory (TRI) is an example of such a program. n310 This publicly available database contains information on toxic chemical releases reported by various industries. n311 The inventory's primary purpose is to inform the public of chemical hazards located in their communities. n312 However, under the DQA, it is not yet clear whether data of this sort would be subjected to the provisions of the Act.

Aside from "maintaining" (as opposed to "disseminating") data, agencies often incorporate research or studies generated by third parties into their own research. Agencies sometimes go further still and base a portion of their rulemaking or regulatory decisions on data supplied by third parties. n313 As [*348] previously mentioned, EPA based its decision to reclassify atrazine as an endocrine-disruptor, in part, on a study by an independent researcher at the University of California-Berkeley. n314 This example represents just one of the almost innumerable instances of agency decisionmaking based, at least in part, on information garnered from independent, nonagency sources.

The pervasive use of outside sources has obvious benefits; agencies that are ill-funded and understaffed are often not equipped to conduct expensive and time-intensive research using their own resources. As such, relying on secondary sources is often a necessity, rather than a choice. In light of agencies' pervasive reliance on independent research, the impact of subjecting third party data to the strictures of the DQA takes on special significance.

2. How Much Information Is Third-Party Information?

It is not altogether clear, however, just how far the Act's coverage extends to third party information. Since OMB promulgated its guidelines, there has been considerable dispute regarding the scope of the Act. OIRA Administrator John Graham weighed in on the debate during a data quality workshop sponsored by the National Academies of Science, stating that in those instances when an agency chooses to rely on information from a source external to the agency, that information "must meet the same quality standard that information generated by the agency must meet." n315

OMB provisions, however, are not all-inclusive in their definition of the types of data that should be included under the Act. To be subject to data quality standards, information must be "disseminated" as defined by the Act. n316 OMB defined "dissemination" to pertain to "agency initiated or sponsored distribution of information to the public." n317 The definition was further limited to information that was adopted or otherwise endorsed by the agency. n318

[*349] Agencies, however, have attempted to further define and limit the reach of the DQA to third party information. A primary mechanism for doing so has been to focus on the term "disseminate." n319 Jim Scanlon, head of the Division of Data Policy within the Department of Health and Human Services, noted that "dissemination, as defined in [OMB] guidelines ... must be initiated or sponsored by the agency" and that "there must be some sort of an agency imprimatur, some action or indication that the dissemination of that information represents agency views" in order for the information to be covered by OMB guidelines. n320

Thus, many agencies have opined that only information that clearly represents an agency's viewpoint on a given matter should be subjected to the heightened standards of data quality. n321 Such information would not include data merely maintained on a government website, such as industries' toxic releases inventoried on EPA's TRI n322 database. n323 NDRC, for example, strongly recommended that EPA exclude agency publications that merely serve as a "conduit" for third-party information, such as TRI, from coverage of the DQA, "lest [EPA] sink without a trace in a morass of complaints about the quality of data provided directly by industry." n324

Critics have complained that the exemptions to the Act have the potential of swallowing the rule. These same critics object to the carve-outs proposed by agencies, arguing that agencies' data quality guidelines should apply to all information that an agency makes public. n325 Groups such as CRE have asserted that neither OMB nor any other federal agency has the requisite authority to create an exemption from the DQA for information. n326 Instead, [*350] such groups argue that the "clear congressional intent ... is [there be] only one restriction on the terms "disseminated' or "dissemination': they only apply to information that an agency in fact makes public." n327 Aside from information that is withheld from the public, opponents maintain that any and all information, whether third party or interagency, should be subjected to the quality standards imposed by the DQA.

While it seems clear that some amount of agency action or endorsement is necessary to signify that the disseminated data represents agency views, the boundaries of this requirement have not yet been defined. Further complicating matters is the fact that agencies often use third-party data as a basis for agency rulemaking decisions. An OIRA review of draft agency data quality guidelines noted that OMB data quality standards should be applied to third-party research used by an agency for a proposed rulemaking. According to the example provided in the OMB preamble, data quality standards were applicable to all third-party information relied on by an agency for rulemaking decisions, even if the studies had been published before the agency used them. n328

3. Agencies' Definitions of Third-Party Information and the Likely Effects

Various agencies charged with implementing the DQA have addressed these concerns in their own, agency-specific guidelines. DOT, for example, noted that "the standards of these [data quality] guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely upon ... this information." n329 EPA has likewise incorporated OMB's provisions concerning third-party data into its own guidelines. According to the agency guidelines published in the Federal Register, "[EPA's data quality] guidelines may ... apply to ... distribution of ... [third-party] information in which EPA adopts, endorses or uses the information to formulate or support a regulation, guidance, or other Agency decision or position." n330

Thus, it appears that in those instances where agency rulemaking was based on third-party information, a number of agencies have, at least initially, been [*351] willing to subject that information to the requirements of the DQA. However, the repercussions of this new policy are uncertain. Several commentators have hazarded the opinion that the likely result will be a decrease in participation in rulemaking by less powerful, less well-funded entities who lack the resources to comply with the strictures of the DQA, such as peer review and reproducibility. n331

Post-enactment, several groups have raised concerns that subjecting data to the quality mandates of the DQA could have significant adverse effects. According to PCCW, although "such an approach may improve the quality and amount of some kinds of information made available to the public, it may also set an unnecessarily high standard to apply across the board." n332 Thus, the benefits of better quality information may be obtained at the price of less public participation in agency rulemaking, as the DQA "disproportionately silences" scientists who are ignorant of the new standards or who have insufficient resources to subject their information to the exacting new data quality tests. n333

IV. Normative Analysis

A. Undoing the Data Quality Act - A Normative Critique

The DQA, because it provides little direction to the agencies charged with implementing its mandates, will likely result in costly legal battles and needless regulatory delays. And while the Act's goal of improving the quality of disseminated information is laudable, the DQA creates the opportunity for abuse and the likelihood that scarce agency funds will be misdirected and ill-used.

The DQA presents an especially insidious danger to agencies because its objectives seem to be above reproach. It seems unlikely that courts will be receptive to an agency's plea that it wants to be free to disseminate bad information. Courts interpreting the DQA, however, should recognize the possible ulterior motives behind this industry-backed legislation. As one commentator noted, the DQA's "clear purpose is to slow agencies down." n334

[*352] Furthermore, it is questionable whether legislation of this type was necessary. Proponents of the Act, including pro-industry groups and conservative factions, have never demonstrated that agency dissemination of data prior to the DQA suffered from endemic problems. n335 Agencies, such as EPA, have for decades utilized quality control devices to ensure the dissemination of high quality data. n336 Given the tremendous benefits of information disclosure, n337 and the lack of any real need for these additional, burdensome provisions, the DQA should be construed as narrowly as possible.

Likewise, because the DQA was not the subject of any congressional debate, its effects on agency regulation should be curtailed. An appropriations rider, inserted in a massive budget bill, without proper consideration by the Congress as a whole, should not be allowed to alter the fundamental missions of a multitude of federal agencies. n338 Courts interpreting the DQA should construe its provisions so that they have minimal effects on federal agencies.

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B. Limiting the Effects of the DQA

1. Data Quality Challenges for Correction

Due to the lack of congressional consideration, the DQA should be narrowly construed by courts. One possible means of doing so would be to force petitioners who request data corrections to prove that their requests were submitted in a timely manner. Likewise, the impetus should be on the challenger to show both that the request is nonfrivolous and that the information, in fact, needs correcting. Furthermore, once an agency addresses a request, additional challenges regarding the same or substantially similar data should be foreclosed. In this vein, courts should presume good faith and fair dealing by agencies and view denials of data correction requests in the light most favorable to the agency. In sum, those challenging agency information should face a formidable hurdle before information can be depublished or otherwise removed from the public forum.

Likewise, frivolous claims should be dealt with harshly by the courts. Individuals who bring wasteful or disingenuous data correction claims in an effort to whittle away an agency's time and resources should face fines or other civil penalties. Furthermore, agencies should be given broad discretion in deciding whether to decline a data correction request.

In order to facilitate this end, agencies should clearly define and limit those parties with sufficient interests to satisfy the "affected person" standard of the DQA. Although OMB guidelines necessitate "administrative mechanisms" to provide "affected persons" with a venue to petition for the correction of information, n339 the scope of the "affected person" standard can and should be limited by agency guidelines. In order to do so, agencies should promulgate rules that address the level of sincerity or scientific quality a particular challenger must demonstrate to trigger a corrective administrative response or, indeed, any response at all. Likewise, only parties with an actual stake in the matter should have the requisite standing to challenge an agency's disseminated data. Thus, protective mechanisms that avoid wasteful or frivolous claims are crucial if agencies are to ensure that the DQA is not used for impermissible purposes.

[*354] Furthermore, although the final OMB guidelines emphasize that agencies "may reject claims made in bad

faith or without justification," n340 no definitive criteria were established by OMB to identify "bad faith" claims. As such, implementing agencies should take care to delineate "bad faith" claims from legitimate ones. In an effort to do so, agencies should establish a minimum threshold for challenges to the quality of data. Petitioner's requests that fall below this standard should be viewed as prima facie bad faith, allowing agencies to ignore them with impunity.

2. Limiting the DQA Through Statutory Construction and Legislative History

An additional means for limiting the effect of the DQA involves statutory construction. In those instances where the DQA conflicts with fundamental goals clearly defined by an agency's enabling statute, the DQA should be construed narrowly. This approach is based on the canon of statutory construction that states, "a later, more specific statute trumps an earlier, more general one." n341 Thus, in those instances where an agency is directed by its enabling act to make a regulatory decision based on the "best available" data, provisions of the DQA requiring stricter standards should be set aside. By doing so, courts should give greater weight to an agency's fulfillment of its fundamental mission as clearly defined by Congress.

Another important means for limiting the effect of the DQA is to restrict the number of legal challenges the Act is allowed to produce. In doing so, courts should consider "whether the alleged rule establishes clear, enforceable mandates, or whether instead it is essentially aspirational in character." n342 When viewed in this light, it seems clear that OMB's DQA guidelines were primarily aspirational goals, rather than inflexible directives mandating certain behavior. n343 For example, OMB guidelines speak of "performance goals" n344 and levels of data quality "appropriate to the nature and timeliness of the [*355] information to be disseminated." n345 Thus, because the DQA provisions are, for the most part, discretionary, the guidelines should not be viewed as providing substantially new judicial rights. As such, courts should allow agencies wide latitude in their case-by-case consideration of data quality correction requests.

Likewise, Congress's legislative intent should be taken into account when determining whether the Act grants challengers the right to judicial review. Although the DQA was enacted as an appropriations rider and thus provides little legislative history, it may be argued that Congress manifested a clear intention to preclude judicial review. n346 For example, the DQA uses the term "guidelines" to describe its scope, despite the fact that a previously defeated and markedly similar Act used the more mandatory term "rules." n347 This difference in language tends to support the conclusion that the DQA is more limited in reach and does not provide courts with the power to review actions committed to an agency's discretion. Thus, because of the restricted scope of the DQA, as demonstrated both by Congress's choice of language and OMB's qualified terms, courts should be wary of interfering in agency affairs.

3. Limiting the DQA by Limiting the SDWA

The DQA can also be limited by restricting the reach of the SDWA. As previously noted, the provisions of the SDWA are among the most stringent standards for risk assessment contained within any federal statute. n348 They place a strong emphasis on peer-reviewed science and burden agencies with exacting data collection and reporting requirements. n349 Because the DQA mandates that agencies apply these heightened standards to information regarding risks to human health, safety, or the environment, there is a very real potential that the new requirements will have a far-reaching effect.

Risk assessment is a subjective process that often forces an agency to make difficult decisions based on uncertain or incomplete data. Thus, the effects of [*356] the SWDA should be limited. n350 Furthermore, agencies often employ default assumptions in an effort to promulgate protective standards. n351 These tendencies should be recognized and steps should be taken that allow agencies to regulate in the manner that is most productive and practicable. Thus, the peer-review presumption and stringent reporting requirements of the SDWA should be set aside in those instances where adhering to them would be impractical or cause undue delay. Agencies should not be expected to sit idly on the sidelines collecting "perfect" data while their inaction causes real harm.

4. Restricting the Reach of the Term "Influential"

A final mechanism for limiting the reach of the DQA involves the scope and timing of an agency determination that disseminated information is "influential." According to OMB guidelines, influential information is "[information] the agency can reasonably determine ... will have or does have a clear and substantial impact on important public policies or important private sector decisions." n352 As previously mentioned, information labeled as "influential" is required to meet a heightened degree of transparency in order to facilitate its reproduction by qualified third parties. n353 These heightened standards, while beneficial in some respects, have the potential of substantially limiting involvement in public policy. Because only moneyed interests will have the resources to satisfy the peer review presumption and the "reproducibility" standard, agencies should withhold any determination regarding the "influential" nature of data for as long as practicable.

C. Reconciling Science and Policy

Furthermore, the differing goals of scientific study and regulatory policy should be recognized and reconciled. The inability of peer review to guarantee "perfect" scientific data is widely acknowledged by scientists. Legislators, too, must come to terms with the inherent uncertainty and evolutionary nature of scientific research. A misplaced confidence in "sound science" and an over-reliance on peer review may prove to be a dangerous mix. These remedies are [*357] alluring precisely because they seem to offer a quick and straightforward solution to complex regulatory problems. As such, lawmakers and agencies alike seem to be entranced by the apparently limitless promise these reforms may hold.

Instead of reflexively reaching for scientific "answers" to questions founded on policy decisions, a more forthcoming and ultimately more productive approach would be to acknowledge the underlying value choices and engage in a debate based on them. Until lawmakers realize that "the credibility of a policy decision simply does not hinge upon the "objectivity' of discrete units of information," n354 science will be overused as a convenient proxy for thoughtful conversation on value-laden policy choices.

D. Learning to Live with the Data Quality Act

The DQA may be subject to abuse by parties seeking to impede agency regulation. Thus, its parameters should be clearly defined and reined in, both by the agencies charged with implementing the Act and the courts charged with interpreting it. Furthermore, because the correction provisions of the DQA are vague, they may engender frivolous and unwarranted law suits. These suits may, in turn, result in the misdirection of limited agency resources and have a chilling effect on the dissemination of useful information. Unfortunately, in promulgating its guidelines, OMB has failed to calculate the relative value of having access to information, albeit less than perfect, versus the costs of hiding data from public view. n355 Because these harms include additional lives lost and increased harm to human health and the environment, they should weigh heavily in any cost-benefit analysis. Thus, although OMB failed to consider the possible negative consequences of unavailable information, agencies and courts should take steps to avoid this same pitfall when promulgating their guidelines and interpreting the Act.

Furthermore, because timely access to information is critical for making informed judgments, this right should not only be protected, but should receive priority in relation to other, competing claims on agency resources, such as lofty standards of data quality. Public access to information has played a crucial role in protecting everything from human health to highway safety. [*358] Therefore, an agency should presumptively be allowed to disseminate information that is reasonably reliable. As James Madison remarked over two centuries ago, a society that expects to be truly free must arm itself with the power knowledge gives. n356 Anything that curtails this right is "but a prologue to a farce or a tragedy or perhaps both." n357

**Legal Topics:**

**FOOTNOTES:**

n1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison 1819-1836, at 103 (G.P. Hunt ed., 1910).

n2. According to OMB Watch, a nonprofit organization established to monitor the Office of Management and Budget, the Data Quality Act builds on report language added to the 1999 Fiscal Year Omnibus Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681. The Omnibus Appropriations Act's language was extremely similar to the language of the DQA. However, OMB failed to issue any guidelines based on the report language. Likewise, some commentators have expressed the opinion that the DQA builds on another appropriations rider, known colloquially as the Shelby Amendment. This amendment directed OMB to authorize unrestricted public access to federally sponsored research data through Freedom of Information Act requests. OMB Watch, Background on Data Quality Guidelines (May 28, 2002), at http://www.ombwatch.org/article/articleprint/773/-1/1/.

n3. The DQA amendment was attached to the Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 515, 114 Stat. 2763 (2000), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106<_>cong<_>public<_>law&docid=f:publ554.106.pdf.

n4. Id.

n5. Id.

n6. Id.

n7. Id. 515(b)(2)(A) (requiring that "each Federal agency to which the guidelines apply ... issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information ... disseminated by the agency, by not later than 1 year after the date of issuance of the [OMB's] guidelines").

n8. Id. 515(b)(2)(B).

n9. Id. 515(b)(2)(C).

n10. Id. 515(b)(2)(C)(i)-(ii).

n11. Id. 515(b)(2).

n12. PCCW was founded by Ralph Nader in 1971. It is a national, nonprofit consumer advocacy organization. Public Citizen, About Public Citizen, at http://www.citizen.org/about/ (last visited Feb. 27, 2003).

n13. Draft Memorandum from Frank Clemente, Director, & Wendy Keegan, Regulatory Affairs Fellow, Public Citizen's Congress Watch, to Interested Parties 1 (May 9, 2002) (on file with author) [hereinafter PCCW Memo].

n14. Id. at 2 ("Jim Tozzi, a former OMB figure who runs the corporate sponsored Center for Regulatory Effectiveness ... persuaded Representative Jo Ann Emerson to quietly insert the Act into [Pub. L. No. 106-554] in order to pursue his deregulatory agenda."); see Dan Davidson, Nixon's "Nerd' Turns Regulations Watchdog, Fed. Times, Nov. 11, 2002, at 1 ("Tozzi's latest - if not his crowning - achievement is the [DQA], which he largely wrote and helped become law in 2001 ... ."), available at http://federaltimes.com/ index.php?S= 1285338.

n15. Davidson, supra note 14. Later in the article, Tozzi reminisces about his experiences getting the DQA implemented, stating, "Looking back, I would say it was a hell of a ride. You got a high, man. Every time you went to work. You could feel it. You were going to regulate the regulators." Id. at 3.

n16. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 515, 114 Stat. 2763 (2000).

n17. Id.

n18. Id. 515(b)(2)(A).

n19. Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34,489 (June 28, 2001).

n20. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369 (Jan. 3, 2002).

n21. Id. at 376 (emphasis added).

n22. Id. at 369.

n23. OMB noted that numerous comments attempted to clarify or limit the term "affected persons." As explained by OMB, some commentators argued that the authority to correct scientific information should be limited specifically to other scientists. OMB went on to note that several comments "suggested that OMB identify the types of information that could be challenged rather than ... the characteristics of a "legitimate' challenger." Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. at 49,721.

n24. See Letter from Sean Moulton, Senior Policy Analyst, OMB Watch, to Evangeline Tsibris Cummings, Environmental Protection Agency 11-12 (June 21, 2002) (on file with author) (criticizing EPA for its weak definition of "affected person" and predicting that without a clearer definition the clause would rarely be useful in excluding requests).

n25. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. at 49,721.

n26. See, e.g., PCCW Memo, supra note 13, at 11 (noting that although agencies are presumably allowed to reject frivolous challenges, even this "common sense understanding might be challenged" by parties seeking to attack agency regulation).

n27. OMB noted that during the notice and comment period, several commentators called attention to the fact that there was a "great potential for abuse" in the data correction appeals process. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. at 49,721. OMB quoted one interested party as stating that the administrative appeals process "could be seen to provide grounds for interested parties to demand access to underlying data, to compel the government to replicate research findings (at great expense and with unnecessary delay), or in other ways impede, discredit, harass or stymie research." Id.

n28. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 375 (Jan. 3, 2002). The guidelines likewise state that "the correction process should serve to address the genuine and valid needs of the agency and its constituents without disrupting agency processes." Id.

n29. According to OMB, "comments from all fields suggested ... that challenging individuals should be required to openly state his/her relationship with the data/information (familiarity/expertise) and provide information [as] to his/her interest in it." Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. at 49,721 (second bracketed material in original).

n30. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 375.

n31. Id.

n32. See Memorandum from Rena I. Steinzor, Natural Resources Defense Council, to Office of the Docket at Environmental Protection Agency 16 (May 31, 2002) (suggesting that EPA establish deadlines for requests to correct data, because "without such deadlines, the [EPA] runs the risk that it will waste considerable resources back-tracking over decisions that must be made at all stages of the decision-making process as information is "newly discovered' by interested parties") [hereinafter Steinzor Memo], available at http://www.epa.gov/oei/

qualityguidelines/dockets/ivc1109-053102-steinzor.pdf.

n33. Citizens for Sensible Safeguards (CSS) noted this potential for abuse in its response to the Department of Transportation's (DOT) Data Quality Guidelines. To avoid these pitfalls, CSS suggested that DOT's administrative data correction process be limited to "protect the agency from becoming mired down in minor data disputes, bad faith requests, and frivolous, repetitive, or non-timely claims." Memorandum from Citizens for Sensible Safeguards, to Office of the Dockets and Media Management, Docket Clerk, Department of Transportation 3-4 (June 14, 2002) (on file with author) [hereinafter CSS Memo].

n34. "Comments noted that the breadth of the definition of "influential' in interim final [OMB guidelines] required much speculation on the part of agencies." Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 372.

n35. Id.

n36. Id. at 377.

n37. Id. at 372.

n38. Id. (emphasis added).

n39. Id.

n40. The Food and Drug Administration (FDA), for example, defined "influential" in terms of a set dollar amount. Likewise, the agency limited the scope of the definition to data disseminated in the context of regulatory actions. See U.S. Department of Health and Human Services, Guidelines for Ensuring the Quality of Information Disseminated to the Public, at http://www.hhs.gov/infoquality/fda.html (last visited Feb. 27, 2003). Jim Tozzi criticized FDA's approach as being "overly restrictive," because "clearly agency actions can have broad and important impacts, even if they are below $ 100 million in effect." Memorandum from Jim J. Tozzi, Member of Board of Advisors, Center for Regulatory Effectiveness, to James V. Scanlon, Director, Division of Data Policy at U.S. Department of Health and Human Services 4 (May 31, 2002) (on file with author). Tozzi

suggested, instead, that FDA adopt a more comprehensive list of information encompassed by the "influential" category. Id.

n41. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 377.

n42. 42 U.S.C. 300g-1(b)(3)(A) (2000).

n43. See Steinzor Memo, supra note 32, at 21.

n44. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 375.

n45. See id. (stating that "comments [to OMB's proposed guidelines] also argued that the continued flow of vital information from agencies responsible for disseminating health and medical information to medical providers, patients, and the public may be disrupted due to these peer review and reproducibility standards").

n46. Compare Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34,489, 34,492 (June 28, 2001) (lacking any language regarding the dissemination of "vital health or medical information"), with Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 375 (requiring agencies responsible for disseminating "vital health or medical information" to assure the "timely flow of vital information from agencies to ... the public").

n47. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 375.

n48. Id.

n49. See, e.g., Memorandum Regarding Draft 2002 Data Quality Guidelines: Environmental Protection Agency, from Member Scholars, Center for Progressive Regulation, to Docket Clerk, Environmental Protection Agency 17 (May 31, 2002) (on file with author) (instructing agencies to take care that complying with the principles of the SDWA does not "steer [the agency] away from the protective policies of the statutes that the agency is administering") [hereinafter CPR Memo].

n50. See, e.g., Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 Colum. J. Envtl. L. 171 (1988) (criticizing the efficiency of command and control regulation).

n51. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

n52. Id. at 594 ("The fact of publication (or lack thereof) in a peer reviewed journal ... will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an [expert] opinion is premised.").

n53. For example, President Bush has stated that he is committed to clean air and clean water but will "make decisions based upon sound science, not some environmental fad or what may sound good." Bush Makes Rounds to Defend Environmental Plan, Envtl. News Network (Apr. 25, 2001) (citing Bush as quoted in an Associated Press news release) (emphasis added), at http://www.enn.com/news/wire-stories/2001/04/ 04252001/ap<_>bush<_>43221.asp. Likewise, former Vice President Al Gore explained his views on international opposition to genetically modified commodities by stating, "We can't let Europe and Japan determine our farm policy, [instead] sound science should govern." Bradley, Gore, Spar Over Health Care, Farming in Iowa Debate, CNN.com (Jan. 8, 2000), at http://216.239.53.100/search?q=cache:P7LlVVullscC:www.cnn.com/ 2000/ALLPOLITICS/stories/01/08/ gore.bradley.debate/ (emphasis added).

n54. In Washington circles, "sound science" has become the remedy of choice for most of what ails the regulatory system. Proponents of this seemingly simple solution argue that if the Environmental Protection Agency would only get more scientists on board and listen carefully to their sage advice, we could eliminate or at least reduce ... excessive health and safety regulations that squander public funds ... .

Linda Greer & Rena Steinzor, Bad Science, Envtl. F., Jan./Feb. 2002, at 28.

n55. See Howard Latin, Good Science, Bad Regulation, and Toxic Risk Assessment, 5 Yale J. on Reg. 89,

90 (1988) (suggesting that the current emphasis on "good science" is likely to result in "expanded opportunities for obstructive behavior by ... private parties hostile to [a certain type of] regulation").

n56. See, e.g., Greer & Steinzor, supra note 54, at 31 (noting that regulated entities often use scientific uncertainty opportunistically, by insisting that an agency such as EPA postpone acting until it is equipped with "better science").

n57. Daniel Sarewitz, of the Center for Science, Policy, and Outcomes at Columbia University, has noted that:

Good science is always pushing into the realm of the unknown ... . The process of scientific investigation intrinsically militates against, is designed to inhibit, premature consensus. Thus, if scientists are doing their job, then "more research" in the short-term is invariably a prescription for raising new questions - for preventing, not achieving, consensus.

Daniel Sarewitz, Science and Environmental Policy: An Excess of Objectivity, at http://www.cspo.org/products/articles/excess.objectivity.html (last visited Feb. 23, 2003).

n58. See Greer & Steinzor, supra note 54, at 28.

n59. See, e.g., Lars Noah, Sanctifying Scientific Peer Review: Publication as a Proxy for Regulatory Decisionmaking, 59 U. Pitt. L. Rev. 677, 679 (1998) (noting that "both Congress and federal administrative agencies recently have decided to use publication as a proxy for judgments about the reliability of scientific information").

n60. Lars Noah, Scientific "Republicanism": Expert Peer Review and the Quest for Regulatory Deliberation, 49 Emory L.J. 1033, 1034 (2000).

n61. Id.

n62. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information

Disseminated by Federal Agencies, 67 Fed. Reg. 369, 371 (Jan. 3, 2002).

n63. Id. at 377.

n64. Id.

n65. According to OMB guidelines, the presumption in favor of independent peer review is only rebuttable "based on a persuasive showing by the petitioner in a particular instance." Id. at 372 (emphasis added).

n66. Id. at 377.

n67. Id.

n68. Id.

n69. Id.

n70. See, e.g., Latin, supra note 55, at 93-94 (examining the differences between the goals of science and regulation).

n71. See, e.g., Greer & Steinzor, supra note 54, at 31; Sheryl Gay Stolberg, Gifts to Science Researchers Have Strings, Study Finds, N.Y. Times, Apr. 1, 1998, at A17.

n72. The Supreme Court, in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993), noted that "arguably, there are no certainties in science." Likewise, one commentator remarked that the most pervasive myth underlying an over-reliance on science is the idea that "harmony among scientists and certainty in their

views constitute the rule, not the exception." Ned Miltenberg, Myths About "Neutral' Scientific Experts, Trial, Jan. 2000, at 62, 62-63; see Ellen E. Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference, 77 Or. L. Rev. 59, 99 (1998) ("From today's perspective, ... enough accepted scientific conclusions have been abandoned, modified, or transcended in the last century to make the notion of scientific certainty seem a bit quaint.").

n73. Greer & Steinzor, supra note 54, at 31.

n74. Id. at 32. "The call for "more science' heard in the halls of Congress and from regulated industries often serves as nothing more than a ruse for indefinite delay ... sometimes for decades." Id.

n75. See supra note 72 and accompanying text.

n76. Greer & Steinzor, supra note 54, at 32.

n77. See, e.g., Holly Doremus, Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy, 75 Wash. U. L.Q. 1029, 1045 (1997) (suggesting that "legislators embraced science as an objective, apolitical decisionmaking device").

n78. See Wendy E. Wagner, The Science Charade in Toxic Risk Regulation, 95 Colum. L. Rev. 1613 (1995).

n79. Id. at 1617; see also Latin, supra note 55, at 93-94 ("The illusion that risk assessment is a purely scientific activity reduces the visibility and political accountability of policy judgments that often guide regulatory decisions ... .") (emphasis omitted).

n80. See Adam M. Finkel, A Second Opinion on an Environmental Misdiagnosis: The Risky Prescriptions of Breaking the Vicious Circle, 3 N.Y.U. Envtl. L.J. 295, 330 (1995) (characterizing risk assessment and policy choices as empirical and noting that "the gulf is not between facts and values, but between value-laden facts and fact-laden values").

n81. Wagner discusses the concept of the "science charade" in terms of toxic risk regulation. According to Wagner, a "science charade" describes those instances "where agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions." Wagner, supra note 78, at 1617.

n82. Id. at 1628.

n83. Id. at 1654-57 (citing 5 U.S.C. 553(c) (1994) (requiring that the public have the opportunity to comment on agency rulemaking)).

n84. Id. at 1656 (quoting Ted Greenwood, Knowledge and Discretion in Government Regulation 251 (1984)).

n85. Id. at 1628.

n86. See Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (noting that "federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-Daubert world than before" and characterizing this new environment as a "Brave New World").

n87. See, e.g., Bert Black et al., Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge, 72 Tex. L. Rev. 715, 721 (1994) ("Properly applied, the Daubert test should mean a deeper and more detailed preliminary review of scientific claims ... .").

n88. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993).

n89. Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L.J. 729, 750 (1979) (finding that "to the extent that a reviewing court is willing to defer to agency "expertise' in choosing between the theories of equally

respectable scientists, the court will simply force the agency to disguise policy decisions as factual determinations," ultimately resulting in less stringent judicial review of agency policy choices).

n90. Daubert, 509 U.S. at 589 (emphasis added).

n91. Wagner, supra note 78, at 1663 (footnotes omitted).

n92. See infra note 108 and accompanying text.

n93. Noah, supra note 60, at 1037.

n94. Id.

n95. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 377 (Jan. 3, 2002).

n96. OMB's initial version of the DQA contained no such rebuttable presumption. OMB added the presumption to the final guidelines only after comments by interested parties revealed concerns that peer review was incapable of establishing the reproducibility of scientific results. Id. at 372 ("However, this presumption is rebuttable based on a persuasive showing by the petitioner."). Compare Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,724 (Sept. 28, 2001) (containing no rebuttable presumption against peer-reviewed information), with Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 376-77 (stating that the peer review presumption of objectivity can be overcome "based on a persuasive showing by the petitioner").

n97. See PCCW Memo, supra note 13, at 7 ("OMB's data quality guidelines appear to require agencies to subject scientific, financial and statistical information to peer review in order to meet basic quality standards because the guidelines are silent as to how else agencies might satisfy the objectivity requirement.").

n98. Noah, supra note 60, at 1044.

n99. "Peer review, in its broadest sense, represents the scientific community's effort to police itself and to assure a certain minimum level of quality so that scientists and others can rely on the results of reported scientific research." Id. at 1045.

n100. Id.; see also Greer & Steinzor, supra note 54, at 32 ("By exposing all of the underlying elements of one's work to inspection by dispassionate peers, and revealing details sufficient to replicate results, researchers build on others' successes and avoid others' failures.").

n101. See Greer & Steinzor, supra note 54, at 32 (stating that "peer review and replication are the only reliable methods to ensure that experiments are conducted in a scientifically appropriate manner").

n102. See, e.g., Noah, supra note 59, at 695-706 (noting that peer review suffers from many shortcomings, including inconsistencies in reviewers and inherent biases); CPR Memo, supra note 49, at 13 ("Peer review is not always a useful exercise.").

n103. Noah, supra note 60, at 1046.

n104. "A new theory or explanation must generally survive a period of testing, review, and refinement before achieving scientific acceptance." Noah, supra note 59, at 693; see also Chuck Herrick, Ogmius Exchange: Editorial Response (May 2002) (stating that "science is inherently evolutionary"), at http://sciencepolicy.colorado.edu/ogmius/archives/issue<_>2/response.html (last visited Jan. 27, 2004).

n105. See Wendy E. Wagner, Congress, Science, and Environmental Policy, 1999 U. Ill. L. Rev. 181, 193.

n106. Noah, supra note 60, at 1046.

n107. See, e.g., Greer & Steinzor, supra note 54, at 40-41 (suggesting that it is counterintuitive to argue that money does not buy influence and pointing out that a main staple of scientific research is industry funding); Miltenberg, supra note 72, at 63 (stating that neutral scientists are virtually nonexistent).

n108. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 377 (Jan. 3, 2002) (stating that peer review should meet the general criteria recommended by OMB-OIRA to the President's Management Council).

n109. See, e.g., CSS Memo, supra note 33, at 6 (stating that OMB's recommendations regarding peer review are "inadequate"); PCCW Memo, supra note 13, at 8 (identifying several problems associated with peer review as required by OMB guidelines, including the fact that peer review requirements limit participation and divert agency resources); Steinzor Memo, supra note 32, at 26 (expressing concern that OMB's instruction to agencies to select peer reviewers on the basis of "expertise" won't ensure panels that are balanced or free from conflicts of interest) (citing Draft 2002 Cost Benefit Report, 67 Fed. Reg. 15,014, 15,019 (Mar. 28, 2002)).

n110. See supra note 109 and accompanying text.

n111. One study showed that research financed by the chemical industry was more likely than government-funded research to find that the effects of occupational exposure to chemicals were not harmful. See Miltenberg, supra note 72, at 64; Richard A. Knox, Biomedical Results Often Are Withheld - Study Examines Researchers' Financial Links to Corporations, Boston Globe, Apr. 16, 1997, at A1 (reporting that corporate funding of research can impede the unrestricted exchange of scientific information).

n112. Stolberg, supra note 71, at A17. This study was anonymous and involved university researchers who received donations from drug or biotechnology companies. The scientists surveyed admitted that the companies from which they received gifts sometimes expected to review the scientists' papers prior to publication and to patent commercially valuable discoveries. Id.

n113. Rebecca S. Eisenberg, Academic Freedom and Academic Values in Sponsored Research, 66 Tex. L. Rev. 1363, 1363 (1988) (noting that certain types of research conducted at universities are now dominated by grants from corporations that "increasingly seek to control the agenda of sponsored research and the dissemination of its results"); Miltenberg, supra note 72, at 64 ("Indeed, several studies on the effects of industry sponsorship indicate that ... concerns about conflict of interest are justified."). But see Noah, supra note 60, at 1067 ("Critics have overdrawn the claim [of industry-biased peer review] insofar as they suggest that essentially no scientists have the independence necessary to serve as referees.").

n114. Miltenberg, supra note 72, at 64.

n115. See PCCW Memo, supra note 13, at 8 ("It is well known that the stakeholders that can usually afford to sponsor peer review panel members are from regulated industry. Thus, the peer review requirement of [Congressional legislation S. 746] greatly limited participation by public interest groups, labor unions, environmental groups, and civil rights organizations.").

n116. Id. (noting that "peer review is ... expensive").

n117. Alan Morrison, Ensuring the Quality of Information Disseminated by the Federal Government Workshop #3: Agency-Specific Guidelines, Remarks at the National Academies of Science Technology and Law Program 16 (May 30, 2002) ("I think there is one thing we can all agree about the [DQA] and that is it is the biggest unfunded mandate ever passed by Congress."), available at http://www7.nationalacademies.org/stl/DQ<_>Workshop<_>transcript<_>5-30-02.doc.

n118. PCCW Memo, supra note 13, at 8 (noting that the DQA does not provide for increased budgetary allocations to assist agencies in carrying out its quality-assurance provisions and that "instead agencies must stretch limited resources or redirect them away from other priorities").

n119. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369 (Jan. 3, 2002). These guidelines were republished on February 22, 2002, to correct various errors. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452 (Feb. 22, 2002).

n120. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369. Federal agencies were required to publish draft guidelines for public notice and comment by April 1, 2002. Id. at 376. Following this period, agencies were directed to submit their guidelines to OMB for review no later than July 1, 2002. Id.

n121. See Center for Regulatory Effectiveness, Data Quality Guidelines by Agency, at http://www.thecre.com/quality/agency-database.html (last visited Jan. 30, 2004).

n122. OMB Watch, Agencies "Adapt' Data Quality Guidelines, at http://www.ombwatch.org/article/articleprint/740/-1/39/ (last visited Jan. 30, 2004) (quoting Kovacs while speaking to the Bureau of National Affairs Correspondents, a Washington trade publication). Likewise, Jim Tozzi, architect of the Act, has stated that the Act's ramifications are broader than he had first supposed and that "[the DQA is] turning out to be a lot more significant that we thought it would be." Stephanie M. Horvath, New Law Will Let Business Attack Data Underlying Rules, Wall St. J., July 5, 2002, available at http://www.safe2use.com/ca-ipm/02-07-09b.htm.

n123. According to OMB Watch, there is significant debate regarding whether the DQA establishes any new rights to adjudicatory review of agency actions. Pro-industry forces maintain that the DQA's administrative error correction mechanisms, including the appeals process, create new, judicially reviewable responsibilities. However, many agencies, in their individual DQA guidelines, argue the opposite. OMB Watch, Background on Data Quality Guidelines (May 28, 2002), at http://www.ombwatch.org/article/articleprint/773/-1/1/. For example, the Department of the Interior attempted to limit the availability of judicial review under the DQA by explicitly stating in its guidelines that "these [DQA] guidelines are intended only to improve the internal management of the Department [of the Interior] ... . Nothing in these guidelines is intended to create any right or benefit, substantive or procedural, enforceable at law or equity ... ." U.S. Dep't of the Interior, Information Quality Guidelines Pursuant to Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, at 5, available at http://www.doi.gov/ ocio/guidelines/515Guides.pdf (last visited Jan. 30, 2004).

n124. CSS is comprised of nearly three hundred public interest organizations. The coalition was created to "preserve public protections that, over the last twenty years, have made our workplaces safer, our environment cleaner, our communities healthier, and our society more accessible." OMB Watch, About Citizens for Sensible Safeguards, at http://www.ombwatch.org/article/articleview/208/1/69/?PHPSESSID=5272a659ac754678f53f70c12bac96ce (last visited Jan. 30, 2004).

n125. CSS Memo, supra note 33, at 3.

n126. See, e.g., id. ("It seems clear that industry will attempt to use these guidelines as a vehicle to challenge federal regulation, by challenging the information that supports it.").

n127. Id. (stating that the "data quality guidelines are just that - guidelines," and thus, DOT should not

consider the guidelines judicially reviewable).

n128. "Affected" individuals are defined in OMB's response to public comments as "people who may benefit or be harmed by the disseminated information." Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,721 (Sept. 28, 2001). OMB went on to clarify that its definition was not limited to individuals addressing information about themselves, but included persons who used the information. Id.

n129. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002).

n130. See source cited supra note 3.

n131. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. at 8459.

n132. Id.

n133. Id. (emphasis added).

n134. Id.

n135. Id.

n136. James T. O'Reilly, The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions, 54 Admin. L. Rev. 835, 841 (2002).

n137. See supra notes 14-15 and accompanying text (providing background information on Jim Tozzi and his role in implementing the DQA).

n138. Jim O'Reilly, Biting the Data Quality Bullet: Burdens on Federal Data Managers Under New Section 515, Admin. & Reg. L. News, Summer 2002, at 2.

n139. O'Reilly, supra note 136, at 849.

n140. Administrative Procedure Act, 5 U.S.C. 551 (2000).

n141. See Abbott Laboratories v. Gardner, 387 U.S. 136, 139-42 & n.2 (1967) (finding that failure to provide by statute for judicial review is not necessarily evidence of intent to withhold review); see also infra notes 144-52 and accompanying text.

n142. OMB Watch, supra note 123.

n143. Jerry L. Mashaw & Richard A. Merrill, Administrative Law: The American Public Law System: Cases and Materials 49 (2d ed. 1985).

n144. Id. at 49-50.

n145. Administrative Procedure Act, 5 U.S.C. 702 (2000).

n146. John D. Echeverria & Julie B. Kaplan, Poisonous Procedural "Reform": In Defense of Environmental Right to Know 46 (2002); see also Bowen v. Massachusetts, 487 U.S. 879, 908 n.46 (1988) ("The theoretical justification for judicial review of agency action is grounded in concerns about constraining the exercise of discretionary power by administrative agencies.") (quoting Judge Wright of the Deleware District Court).

n147. 5 U.S.C. 701(a).

n148. 387 U.S. 136, 139-42 (1967).

n149. Id. at 140 n.2 (quoting H.R. Rep. No. 79-1980, at 41 (1946)).

n150. Id. at 141 (citing Rusk v. Cort, 369 U.S. 367 (1962)); see also id. at 139-42. For example, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), the Court found a right to judicial review despite the fact that the agency's enabling statute was wholly silent on the issue.

n151. See supra note 150 and accompanying text (discussing the Supreme Court's holding in Overton Park that established the right to judicial review of agency action despite a lack of statutory language granting the plaintiff such a right).

n152. See supra note 147 and accompanying text (discussing the APA's basic presumption of judicial review for an aggrieved party).

n153. 449 U.S. 232, 242 (1980).

n154. 2 Richard J. Pierce, Jr., Administrative Law Treatise 17.2 (4th ed. 2002).

n155. See Echeverria & Kaplan, supra note 146, at 47.

n156. W. Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659, 660 (7th Cir. 1998).

n157. See Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA, 313 F.3d 852, 860 (4th Cir. 2002) (holding that EPA risk assessments on second-hand smoke were not "final agency actions" under the APA and therefore not judicially reviewable); Hearst Radio, Inc. v. FCC, 167 F.2d 225, 227 (D.C. Cir. 1948) (holding that agency publication of an allegedly defamatory report was not "agency action" under the APA); see also Echeverria & Kaplan, supra note 146, at 48.

n158. See, e.g., Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

n159. See, e.g., Am. Trucking Assoc., Inc. v. United States, 755 F.2d 1292, 1296-97 (7th Cir. 1985) (deciding not to review an agency decision to issue a report despite the fact that the report might result in significant revenue loss).

n160. Echeverria & Kaplan, supra note 146, at 50. Echeverria and Kaplan note that courts have identified two major exceptions to the general rule that agency disclosures of information are unreviewable under the APA. First, release of information that could be considered an agency sanction against a party may be reviewable. Id. at 48-49. Secondly, "the courts have recognized an exception to the general rule of non-reviewability of information disclosure when the disclosure is intertwined with an agency action which itself is subject to judicial review under the APA, or where the disclosure triggers other regulatory effects." Id. at 49.

n161. Id. at 50.

n162. See Center for Regulatory Effectiveness, Courts Face Key Test on Jurisdiction of EPA Data Quality Decisions, at http://216.239.39.100/search?q=cache:zRE21LUOuIsC:www.thecre.com/news.html+%22AP A %22+DQA&hl= en&ie=UTF-8 (last visited Feb. 17, 2003).

n163. 271 F.3d 301, 310-11 (D.C. Cir. 2001).

n164. Center for Regulatory Effectiveness, supra note 162.

n165. CSS Memo, supra note 33, at 3 ("The data quality guidelines are just that - guidelines... . They do not

provide any new adjudicatory authority. [The Department of Transportation's data quality guidelines] should ... establish that DOT is not legally bound by the guidelines ... ."); see supra notes 131-35 and accompanying text (examining the administrative mechanisms established in OMB's final guidelines).

n166. OMB Watch was established in 1981 to monitor OMB and "lift the veil of secrecy shrouding" OMB. The organization's stated goal is to ensure that OMB is held accountable for the impact it has on agency operations. OMB Watch, What We Do, at http://www. ombwatch.org/article/articlestatic/31/1/7/ (last visited Jan. 24, 2004).

n167. O'Reilly, supra note 138, at 20.

n168. Id.

n169. Memorandum from John D. Graham, Administrator, Office of Information & Regulatory Affairs, to the President's Management Council (Sept. 20, 2001), available at http://www.whitehouse.gov/omb/inforeg/oira<_>review-process.html.

n170. O'Reilly, supra note 136, at 841.

n171. See Administrative Procedure Act, 5 U.S.C. 553(c) (2000) (requiring agencies to consider public comments during the rulemaking process).

n172. See O'Reilly, supra note 136, at 841-42.

n173. PCCW Memo, supra note 13, at 14 ("The possibility of judicial review, coupled with the enormous costs of enacting and carrying out the [DQA's] guidelines, creates a very real disincentive for agencies to create and disseminate information.").

n174. Id.

n175. Id. ("As a result [of legal challenges resulting from the DQA], less and less information will be available to the public."). Clemente and Keegan also note that the DQA may have a chilling effect on access to information and that, therefore, the public may be deprived of information that would allow individuals to make decisions based on the best information currently available. Id.

n176. In a petition filed just days after the DQA took effect, CRE challenged information disseminated by the National Highway Traffic Safety Administration regarding customer complaints of vehicle defects. Memorandum from Jim Tozzi, Member, Board of Advisors, Center for Regulatory Effectiveness, to Office of Information and Regulatory Affairs, Office of Management and Budget (Nov. 6, 2002), available at http://www.thecre.com/pdf/20021126<_>cre-nhtsa.pdf. These customer complaints have the potential of resulting in automobile recalls. See Joseph A. Davis, Industry Test-Fires New Secrecy Weapon (Dec. 17, 2002), at http://www.environmentwriter.org/resources/articles/1202<_>dataquality.htm.

n177. Davis, supra note 176.

n178. In addition to CRE's challenge to atrazine, Tozzi has called for withdrawal of the U.S. National Assessment on Climate Change. See Letter from Jim Tozzi, Member, Board of Advisors, Center for Regulatory Effectiveness, to John H. Marburger, Director, Office of Science and Technology Policy (Feb. 11, 2002), available at http://thecre.com/quality/20020211<_>climate-letter.html#start. This climate study places the blame for global warming squarely on human activities and actions by businesses. Therefore, there is the potential that agencies may use the study to promulgate regulations that would negatively affect industry. See Stephanie M. Horvath, Law to Let Businesses Attack Data Underlying Rules, Studies, Wall St. J., July 5, 2002, at A4. As such, businesses have a strong incentive to challenge the report, despite the fact that "many climate scientists, even some whose criticisms of early drafts [of the EPA report] were quoted in the center's petition, say the challenge is unfounded." Andrew C. Revkin, Law Revises Standards for Scientific Study, N.Y. Times, Mar. 21, 2002, at A30.

n179. Memorandum from Kansas Corn Growers Association et al., to Environmental Protection Agency 1-2 (Nov. 25, 2002) (on file with author) [hereinafter KCGA Memo].

n180. Kansas Corn Growers Association represents Kansas corn producers on a variety of issues, including the environment, market development of corn-based products, educational programming, and legislative issues. Kansas Corn Growers Association, About the Kansas Corn Growers Association, at http://www.

ksgrains.com/corn/kcga.html (last visited Jan. 24, 2004).

n181. Triazine Network is a coalition of agricultural organizations. According to its website, the group was organized in 1995 in response to EPA's Special Review of the triazine herbicides. The organization's stated goal is to "keep the beneficial triazine herbicides available in the United States" by ensuring a "science-based" outcome to EPA's Special Review of triazine herbicides. Triazine Network, Who We Are, at http://www.ksgrains.com/triazine/triazinewho.html (last visited Jan. 24, 2004).

n182. EPA initially classified atrazine as a likely human carcinogen. Later, an EPA Scientific Advisory Panel recommended that the classification be rescinded because there was ""not enough information' to classify it as a likely carcinogen." See Davis, supra note 176. Atrazine is currently being considered by EPA for re-registration. Its eventual classification depends on EPA's formal assessments of health risks associated with the substance. Id.

n183. KCGA Memo, supra note 179, at 1.

n184. The study, conducted by a University of California-Berkeley researcher, indicated that frogs exposed to atrazine experienced deformities. EPA cited the study as evidence that atrazine is an endocrine disruptor. Triazine Network, Growers Take Action to Keep Atrazine, at http://www.ksgrains.com/triazine/ (last visited Jan. 24, 2004).

n185. KCGA Memo, supra note 179, at 9.

n186. Id. at 2. According to OMB's DQA guidelines, agencies must ensure that the information they disseminate is "accurate, reliable, and unbiased" in order to satisfy the objectivity standard of the Act. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8459 (Feb. 22, 2002). CRE, in its petition for correction, argued that EPA guidelines require that a test be validated in order to determine its reliability. Because there are currently no validated test methods for determining the effects of atrazine, CRE claimed that there were no "reliable" tests for these effects. See KCGA Memo, supra note 179, at 2.

n187. KCGA Memo, supra note 179, at 2. According to CRE's petition, EPA's guidelines required that the agency "ensure reproducibility for disseminated original and supporting data" for influential scientific

information. Id. (quoting EPA's Data Quality Guidelines).

n188. Id.

n189. John Graham, Transcript of NAS-Sponsored Workshop: Ensuring the Quality of Data Disseminated by the Federal Government 20 (Mar. 21, 2002) (on file with author). John Graham, head of OIRA, went on to express the hope that courts would remain neutral in all but the most egregious of agency mismanagement, but he conceded that there would probably need to be a few court decisions before the issue was definitively decided. Id.

n190. Davis, supra note 176.

n191. Marilyn Geewax, New Law Means More Federal Rules Can Be Challenged, Cox Newspapers, Sept. 30, 2002, at http://coxnews.com/cox/news//static/cwb/previous/geewax/093002REGULATIONS30.html.

n192. Id. (quoting Wendy Keegan of Public Citizen's Congress Watch).

n193. See, e.g., Latin, supra note 55, at 92 (suggesting that scientific assessments involving risk are, at times, little more than "choices among competing estimates").

n194. Id. at 91-92.

n195. C. Richard Cothern et al., Estimating Risk to Human Health, 20 Envtl. Sci. & Tech. 111, 115 (1986).

n196. Davis, supra note 176.

n197. See supra note 12 (offering background information on PCCW).

n198. Geewax, supra note 191 (""There is never uncontested science.' But even if certain portions of a study are imperfect, the conclusions may well be valid... .") (quoting Wendy Keegan of Public Citizen's Congress Watch).

n199. Id. (quoting Wendy Keegan of Public Citizen's Congress Watch).

n200. PCCW Memo, supra note 13, at 14 ("At times agencies take protective action based on the "weight of evidence,' i.e., a collective series of individually "limited' studies that together paint a complete picture.").

n201. Id. (arguing that "unless agencies are permitted to evaluate all of the information on a given issue they cannot carry out their duties to the public").

n202. See supra note 72 and accompanying text (regarding the evolutionary nature of scientific progress).

n203. Geewax, supra note 191. Jim Tozzi, head of CRE, on the other hand, believes that the DQA will prevent so-called "junk science" from resulting in needless and costly agency regulations. Id. (quoting Jim Tozzi).

n204. Davis, supra note 176 (stating that the DQA "attempts to shift the burden of proof from those producing potentially harmful products to those trying to protect public health").

n205. O'Reilly, supra note 136, at 845-46.

n206. Geewax, supra note 191 (quoting Wendy Keegan of PCCW as stating, "corporations "can afford to hire the experts' to constantly question data").

n207. Id.

n208. OIRA Administrator John Graham has acknowledged that the DQA is, for all intents and purposes, an unfunded mandate on agencies. See Graham, supra note 189, at 20. Likewise, PCCW noted that the Act is especially problematic because it "does not provide for an increase in agency budgets to enable them to enact the quality assurance procedures required by the [OMB] guidelines." PCCW Memo, supra note 13, at 8.

n209. PCCW Memo, supra note 13, at 14.

n210. Id.

n211. Id.

n212. Safe Drinking Water Act, 42 U.S.C. 300g-1(b)(3)(A) & (B) (1976) (amended 1996).

n213. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002) ("With regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act ... .").

n214. OMB Watch, supra note 2 (stating that the SDWA's principles of risk assessment are "perhaps the most rigorous standards for risk assessment written into statute").

n215. 42 U.S.C. 300g-1(b)(3)(A)(i) (2000); see also OMB Watch, supra note 2 (stating that the SDWA places "particular emphasis" on peer-reviewed science).

n216. 42 U.S.C. 300g-1(b)(3)(B); see also OMB Watch, supra note 2 (stating that the SDWA "asks for very detailed information about the risks being examined").

n217. 42 U.S.C. 300g-1(b)(3)(B)(i).

n218. Id. 300g-1(b)(3)(B)(ii).

n219. Id. 300g-1(b)(3)(B)(iii).

n220. Id. 300g-1(b)(3)(B)(iv).

n221. See Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 515, 114 Stat. 2763 (2000) (instructing OMB to issue guidelines to ensure "quality, objectivity, utility, and integrity of [agency] information" without mentioning the SWDA).

n222. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002).

n223. See, e.g., OMB Watch, supra note 123. The Natural Resources Defense Council (NRDC), a national nonprofit organization, was candid in its criticism of OMB. According to NRDC, "OMB's demand that agencies and departments "adopt or adapt' the SDWA standards goes beyond any colorable interpretation of its authority under the [DQA]." Steinzor Memo, supra note 32, at 21. In a similar vein, PCCW stated that "for the OMB to push the SDWA as a model to be followed[] is an aspect wherein the OMB is seriously overstepping the provisions of the [DQA]." Letter from David M. Ritter, Policy Analyst, Public Citizen's Critical Mass Energy and Environment Program, to Office of the Chief Information Officer, U.S. Department of Energy (Aug. 21, 2001), available at http://www.citizen.org/congress/regulations/bush<_>admin/articles.cfm?ID=8269.

n224. Many commentators expressed alarm at OMB's importation of the SDWA. For example, a leading member of the Natural Resources Defense Council stated, "To put it mildly, NRDC and other public interest representatives were quite surprised at this effort to import the standards [of the SDWA] into the large number of statutes that govern agencies ... with such widely disparate missions as protecting public health, ... collecting

taxes, and conducting the nation's defense." Steinzor Memo, supra note 32, at 21.

n225. PCCW Memo, supra note 13, at 10.

n226. Id.

n227. Id. at 10 n.55 (emphasis added).

n228. See, e.g., Letter from William L. Kovacs, U.S. Chamber of Commerce, to James V. Scanlon, Director, Division of Data Policy, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services 3 (May 31, 2002) (on file with author) (stating that "the U.S. Chamber [of Commerce] strongly supports the use by federal agencies of the [SDWA's] risk assessment principles"). The U.S. Chamber of Commerce was established to represent the unified interests of businesses. It currently has a membership that includes more than three million businesses worldwide. United States Chamber of Commerce, The U.S. Chamber's History, at http://www.uschamber.com/about/history/default (last visited Jan. 23, 2003).

n229. See, e.g., Letter from William L. Kovacs, supra note 228, at 3 (criticizing FDA adaptation of the SDWA and noting that where appropriate, "FDA must closely adhere to the SDWA risk assessment principles").

n230. OMB Watch, supra note 123.

n231. Id. (quoting William Perry, Director of OSHA, as stating that "there is no way agencies are going to just agree on some kind of common or even very similar language for adapting the [SDWA] principles to their own agency-specific guidelines" because individual agency enabling statutes are too disparate); see CSS Memo, supra note 33, at 5 (noting that "EPA - the agency that operates under the SDWA and its risk assessment principles" made an important adaptation to the SDWA by specifying that "best available" referred to "best available study at the time the study was done") (emphasis added).

n232. Letter from Sean Moulton, supra note 24, at 8. See generally Celia Campbell-Mohn & John S. Applegate, Learning from NEPA: Guidelines for Responsible Risk Legislation, 23 Harv. Envtl. L. Rev. 93, 95

(1999) ("Risk assessment has become ubiquitous in the federal government's regulation of a wide variety of threats to safety, health, and the quality of our environment.").

n233. Joseph V. Rodricks et al., Significant Risk Decisions in Federal Regulatory Agencies, 7 Reg. Toxicology & Pharmacology 307, 307 (1987).

n234. Campbell-Mohn & Applegate, supra note 232, at 97; OMB Watch, supra note 123 ("In virtually any risk assessment, there is a great deal of scientific uncertainty.").

n235. OMB Watch, supra note 123 (noting that agencies are forced to deal with science's inevitable uncertainty by making certain default assumptions "which frequently point the agency in the direction of caution - that is, a more protective standard").

n236. Id.

n237. Campbell-Mohn & Applegate, supra note 232, at 97 ("Political and judgmental factors pervade the entire assessment function."); Steinzor Memo, supra note 32, at 6 ("Risk assessment is a judgmental tool that informs decisions based on science, fact, policy, economics, and ... the application of the precautionary principle ... .").

n238. OMB Watch, supra note 123.

n239. 42 U.S.C. 300g-1(b)(3)(A)(i) (2000) (stating that the Administrator shall use "the best available, peer reviewed science and supporting studies conducted ... with sound and objective scientific practices" when EPA action is based on science) (emphasis added).

n240. See Latin, supra note 55, at 93-94.

n241. See, e.g., Endangered Species Act, 16 U.S.C. 1533(b)(1)(A) (directing EPA to act based on the best data available).

n242. OMB Watch, supra note 123.

n243. Id. (quoting William Perry).

n244. See 29 U.S.C. 655(b)(5) (stating that the agency, in promulgating standards concerning toxic materials or harmful physical agents, shall implement a standard on the basis of the best available evidence).

n245. See supra notes 215-20 and accompanying text.

n246. 16 U.S.C. 1533(b)(1)(A) (emphasis added); see also Am. Trucking Ass'n v. EPA, 283 F.3d 355, 378 (D.C. Cir. 2002) (finding that EPA should err on the side of caution when setting National Ambient Air Quality Standards "to protect the public health with an adequate margin of safety, taking into account both the available evidence and the inevitable scientific uncertainties").

n247. See, e.g., Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1052 (1st Cir. 1982).

n248. Steinzor Memo, supra note 32, at 22.

n249. See supra notes 246-48 and accompanying text.

n250. See 21 C.F.R. 2.5 (2003) (stating "occurrence of the final anticipated injury is not essential to establish that an imminent hazard of such occurrence exists").

n251. See supra notes 242-44 and accompanying text.

n252. See supra notes 215-20 and accompanying text (discussing the exacting standards of the SDWA).

n253. The Center for Progressive Regulation noted that the goals of science and regulation are quite different. On the one hand, scientists can demand greater guarantees of precision in their work because their overall goal is perfect knowledge. Regulators, on the other hand, have been instructed by Congress to protect human health and the environment. CPR Memo, supra note 49, at 5-6.

n254. Environmental Protection Agency, Emission Characterization and Prevention, Fine Particle (PM-2.5) Emissions Characterization, at http://www.epa.gov/appcdwww/ecpb/fine.htm (last visited Jan. 26, 2004) (stating that "fine particle emissions ... are responsible for increased mortality in urban areas").

n255. National Primary and Secondary Ambient Air Quality Standards for Particulate Matter, 40 C.F.R. 50.7 (2003).

n256. Jeff Thomas, Air Standards Under Fire, Boulder County Bus. Rep., at http://www.bcbr.com/jan97/cleanai2.htm (last visited Feb. 1, 2004).

n257. Id.

n258. Andrew C. Revkin, Law Revises Standards for Scientific Study (Mar. 21, 2002), at http://www.ntec.org/air/dataquality.html.

n259. Id. (emphasis added).

n260. 42 U.S.C. 300g-1(b)(3)(B)(i) (2000).

n261. Id. 300g-1(b)(3)(B)(ii).

n262. Id. 300g-1(b)(3)(B)(iii).

n263. Id. 300g-1(b)(3)(B)(iv).

n264. Envtl. Prot. Agency, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency 5 (2001) (stating that the mission of EPA is to "protect human health and safeguard the natural environment upon which life depends").

n265. See id.

n266. Steinzor Memo, supra note 32, at 2.

n267. See, e.g., Letter from Sean Moulton, supra note 24, at 9; Steinzor Memo, supra note 32, at 1 ("Vague and open-ended calls for "better quality' data must not be allowed to trump the purposes of detailed and carefully crafted statutes.").

n268. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 378 (Jan. 3, 2002).

n269. Id. at 377.

n270. Id. at 372 ("OMB guidelines apply stricter quality standards to the dissemination of information that is considered "influential.'").

n271. See, e.g., Letter from Sean Moulton, supra note 24, at 7.

n272. See Center for Regulatory Effectiveness, Checklist of Key Concerns Regarding Agency Implementation of Data Quality Law, at http://www.thecre.com/quality/20020513<_>chamber.html (last visited Jan. 26, 2004).

n273. See supra note 215 and accompanying text.

n274. Letter from Sean Moulton, supra note 24, at 8.

n275. CPR Memo, supra note 49, at 10.

n276. Id.

n277. Steinzor Memo, supra note 32, at 16-17.

n278. Id. at 17; CPR Memo, supra note 49, at 10 (stating that "procedures to promote the quality of information have significant costs, and that the most significant ... of such procedures should be reserved for information that is the most important in terms of the agency's mission").

n279. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 372 (Jan. 3, 2002).

n280. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

n281. U.S. Dep't of Health and Human Servs., Guidelines for Ensuring the Quality of Information Disseminated to the Public 8 (2001).

n282. See id.

n283. See id.

n284. CSS Memo, supra note 33, at 6 (stating that the "influential" label should be avoided because "it would be time-consuming, burdensome, and likely interfere with dissemination efforts").

n285. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 377-78 (Jan. 3, 2002).

n286. CPR Memo, supra note 49, at 5.

n287. CPR is an organization of academics, specializing in legal, economic, and scientific issues as they relate to agency regulation. The group's mission is to "advance the public's understanding of the issues addressed by the country's health, safety, and environmental laws and to make the nation's response [to these types of issues] as effective as possible." Id. at 1.

n288. Id. at 5.

n289. Id.

n290. Id.

n291. See id.

n292. Id.

n293. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 378 (Jan. 3, 2002).

n294. OMB Watch, supra note 123.

n295. Id.

n296. Id.

n297. Id. ("Indeed, it might be possible to look at the studies and data used by the agency, and draw completely different conclusions.").

n298. See id.

n299. See supra notes 178-88 and accompanying text.

n300. See supra note 184 regarding the University of California-Berkeley study that indicated that frogs exposed to atrazine experienced deformities.

n301. Triazine Network, Kansas Corn Growers Petition EPA to Follow the Rules, at http://www.ksgrains.com/triazine/ (last visited Jan. 27, 2004).

n302. Id.

n303. Id.

n304. Id.

n305. Revkin, supra note 258.

n306. Id. (quoting Joanne Padron-Carney of the Center for Science, Technology and Congress of the American Association for the Advancement of Science). In much the same vein, Alan B. Morrison of PCCW was quoted as stating that "[the DQA's] clear purpose is to slow agencies down." Id.

n307. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8454 (Feb. 22, 2002).

n308. Steinzor Memo, supra note 32, at 5.

n309. CPR Memo, supra note 49, at 10-11.

n310. Steinzor Memo, supra note 32, at 5.

n311. Environmental Protection Agency, What Is the Toxics Release Inventory (TRI) Program?, at http://www.epa.gov/tri/whatis.htm (last visited Jan. 27, 2004).

n312. See id.

n313. Letter from Warren E. Stickle, President, Chemical Producers & Distributors Association, to Evangeline Tsibris Cummings, Office of Environmental Information, Environmental Protection Agency (June 21, 2002) ("Increasingly, the [EPA's] actions are based on externally-supplied information ... ."), available at http://www.cpda.com/content/regulatory<_>affairs/currentUploads/data<_>quality&us core;2.doc.

n314. Triazine Network, supra note 301.

n315. See Graham, supra note 189, at 9.

n316. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002) (instructing agencies to issue their own data quality guidelines ensuring the quality of information disseminated by the agency).

n317. Id. at 8454. OMB instructed agencies to exclude certain types of information from DQA coverage when promulgating their own, independent DQA guidelines. Data that was exempted included information distributed to government employees or agency contractors. Likewise, government data shared intra-or interagency was removed from consideration. Agency responses to Freedom of Information Act or Privacy Act requests were likewise exempted. Finally, information limited to correspondence with individuals, press releases, archival records, public filings, or adjudicative processes were excluded from the DQA's provisions. Id. at 8460.

n318. Id. at 8454.

n319. See, e.g., Graham, supra note 189, at 21.

n320. Id.

n321. See Steinzor Memo, supra note 32, at 19.

n322. See supra note 311 and accompanying text (discussing EPA's toxic release database).

n323. Graham, supra note 189, at 22 (stating that OMB guidelines should not include intra-or interagency sharing of government information).

n324. Steinzor Memo, supra note 32, at 20 ("To open the door ... to possible self-serving claims by one company that information provided by another company is inaccurate or incomplete, and therefore that such information should be pulled down from the worldwide web, would pervert the clear intent ... of the Data Quality Act ... .").

n325. Memorandum from Scott Slaughter, Esq., Multinational Legal Services, to the Center for Regulatory Effectiveness 4-5 (May 29, 2002) (on file with author).

n326. Id. at 4.

n327. Id. at 5.

n328. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002).

n329. Department of Transportation, The Department of Transportation's Information Dissemination Quality Guidelines, at http://www.thecre.com/pdf/20021026<_>dot-final.pdf (last visited Jan. 27, 2004).

n330. Envtl. Prot. Agency, supra note 264, at 18.

n331. PCCW Memo, supra note 13, at 6.

n332. Id.

n333. Id.

n334. Revkin, supra note 258 (quoting Alan B. Morrison, a lawyer on leave from the nonprofit consumer watchdog group, Public Citizen).

n335. See Echeverria & Kaplan, supra note 146, at 36 ("Industry has not substantiated that there are serious and pervasive problems with data accuracy and, in fact, there is significant evidence refuting the premise."). But see Graham, supra note 189, at 3 (stating that "there is plenty of evidence that the quality of the information advanced for use by government decision makers needs to be improved" and that "there are entire books of case studies demonstrating technical problems with the information collected, used and published by federal regulatory agencies"). See generally 2001 Environmental Protection Agency Annual Report 21 (on file at the Georgetown Environmental Law and Policy Institute) (reporting that actual data errors detected by EPA online error tracking process were "very few").

n336. See Steinzor Memo, supra note 32, at 6-7 ("EPA is a pioneer among federal agencies ... both in making information ... available to the public and in allowing the public to submit requests for correction of such data."). NRDC goes on to note that a previously initiated EPA program, allowing the public to submit correction requests online, resulted in only 120 data corrections out of the 1000 notifications that EPA received over an 18-month period. Furthermore, only 300 of the 1000 requests received were deemed valid in the sense that they actually reported an error and provided EPA with sufficient information to evaluate the request. Id.

n337. Echeverria & Kaplan, supra note 146, at 21 ("The systematic gathering of information, combined with the technological capacity to organize and transmit vast amounts of data, offers citizens an opportunity to gain a new, far more extensive understanding of public issues.").

n338. According to OMB Watch,

The [DQA] was added [to the budget bill] at the last second as an appropriations rider with no congressional debate, hearings, or even report language clarifying its intent. This total lack of legislative history and congressional involvement would indicate that the size of the mandate is very small, and tradeoffs with major congressional priorities should be minimized.

Letter from Sean Moulton, supra note 24, at 8.

n339. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 369 (Jan. 3, 2002).

n340. Id. at 375.

n341. United States v. Estate of Romani, 523 U.S. 517, 522 (1998).

n342. Echeverria & Kaplan, supra note 146, at 77; see also Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987) (finding that "pronouncements that impose no significant restraints on [an] agency's discretion are not regarded as binding norms").

n343. Echeverria & Kaplan, supra note 146, at 77 ("In the main, the OMB guidelines appear more aspirational than mandatory.").

n344. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002) (emphasis added).

n345. Id. at 8453 (emphasis added).

n346. Echeverria & Kaplan, supra note 146, at 77 (stating that a number of factors would tend to favor the conclusion that judicial review should be unavailable to enforce agency DQA guidelines, especially since those guidelines were developed pursuant to an appropriations rider).

n347. Compare H.R. 592, 105th Cong. (1999) (using language analogous to the language used in the DQA but directing OMB to develop rules), with Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 1(a)(3), 114 Stat. 2763 (2000) (urging OMB to promulgate guidelines). See supra note 2 for additional information on earlier legislation that was strikingly similar to the DQA.

n348. See supra note 214 and accompanying text.

n349. See supra notes 215-20 and accompanying text.

n350. See supra note 253 and accompanying text.

n351. OMB Watch, supra note 123 (noting that agencies are forced to deal with science's inevitable uncertainty by making certain default assumptions "which frequently point the agency in the direction of caution - that is, a more protective standard").

n352. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

n353. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 377 (Jan. 3, 2002).

n354. Herrick, supra note 104.

n355. PCCW Memo, supra note 13, at 5-6 ("OMB has failed to compare the benefits to the public of having

access to information that is 80 or 90 percent accurate versus the costs to the public of having no information.").

n356. Letter from James Madison to W.T. Barry, supra note 1, at 103.

n357. Id.