The Data Quality Act is Judicially Reviewable in the D.C. Circuit

In two separate cases, the United States Court of Appeals for the D.C. Circuit has reviewed a federal agency's compliance with the Data [Information] Quality Act ("DQA"). There may be a conflict among the D.C. Circuit decisions as to whether an agency's compliance with its own DQA Guidelines is mandatory or discretionary. Even if compliance is only discretionary, then an agency's departure from its own DQA Guidelines is judicially reviewable in the D.C. Circuit under an abuse of discretion/arbitrary and capricious standard.

In American Petroleum Institute v .EPA, 2012 WL 2894566, (DC Circuit July 17 2012), the D.C. Circuit rejected industry challenges to EPA's adoption of a new, one-hour primary national ambient air quality standard for nitrogen dioxide. [1] The court summarized its *API* holding in the following conclusion:

> "Because the API has not shown the EPA's adoption of the one-hour NAAQS for NO2 was either arbitrary and capricious or in violation of the Clean Air Act, we shall deny the petitions in that respect. The portions of the petitions challenging the EPA's non-final statement regarding permitting in the preamble to the Final Rule we shall dismiss for lack of jurisdiction."

In reaching this conclusion, the D.C. Circuit reviewed and rejected industry's argument that, when EPA developed the NAAQS, the Agency violated mandatory peer review provisions of EPA's DQA guidelines. The court rejected these DQA arguments because it held that the DQA's peer review provisions are discretionary, not mandatory. In the court's own words:

> "The API also points to guidelines the EPA promulgated pursuant to the Information Quality Act (IQA), Pub. L. 106-554, § 515(b)(2)(A) (requiring each federal agency to issue guidelines 'for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency'), which it contends also require peer review. *See* EPA, GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE ENVIRONMENTAL PROTECTION AGENCY (Oct. 2002). By their terms, however, the Guidelines provide only 'non-binding policy and procedural guidance.' *Id.* at 4. Such a statement would not override a specific commitment made elsewhere in the document, *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000), but the petitioners point to none. In keeping with the Review Plan and the ISA, the Guidelines also state that 'major scientifically and technically based work products … related to Agency decisions should be peer-reviewed.' Guidelines at 11. The use of the phrase 'should be' rather than 'shall' suggests but does not necessarily mean the Guidelines are not binding. *Compare Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977) ('that the provision in question

> employs the directory 'should be' rather than the mandatory 'shall' or 'must' … should not be automatically determinative of the issue'), *with Jolly v. Listerman*, 672 F.2d 935, 945 (D.C. Cir. 1982) ('use of the word 'should' … detracts significantly from any claim that this guideline is more than merely precatory'), *and Military Toxics Project v. EPA*, 146 F.3d 948, 958 (D.C. Cir. 1998) (accepting as permissible EPA's interpretation of 'word 'should' … as calling for an exercise of judgment and hence conferring discretion upon the Administrator'). More important, the Guidelines themselves expressly commit 'the decision whether to employ peer review' to the discretion of agency management. Guidelines at 11. Finally, the Guidelines note the EPA's Peer Review Handbook 'provides detailed guidance for implementing' the agency's peer review policy, *id.*, and the Handbook in turn states specifically the relevant decision-makers 'need[] to make a judgment' whether peer review is appropriate in a specific case because '[t]here is no easy single yes/no test,' EPA, PEER REVIEW HANDBOOK § 2.2.3 (2000). No doubt the EPA believes peer review is important and it intended to impress that value upon its staff, but the agency did not bind itself to a judicially enforceable norm."

The court next concluded that it did not need to decide whether EPA had "acted reasonably" in not following its "non-binding" DQA peer review guidelines "because the EPA, contrary to the API's claim, did not depart from its non-binding peer review policy":

> "We need not decide the extent, if any, to which an agency must account for any departure from a non-binding guideline, *compare Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) (because manual was non-binding, question was whether, apart from requirements of manual, agency acted reasonably), *with Edison Elec. Inst. v. EPA*, 391 F.3d 1267, 1269 & n.3 (D.C. Cir. 2004) (agency must account for departure from non-binding plan), because the EPA, contrary to the API's claim, did not depart from its non-binding peer review policy. The EPA merely updated the Folinsbee meta-analysis, which was originally peer-reviewed and published; the only data it added to the meta-analysis were the results of a study that was itself peer-reviewed and published; and the CASAC peer-reviewed the results of the updated meta-analysis. *See* Peer Review Handbook § 2.4.3(d(listing the CASAC among acceptable sources of external peer review); c*f. City of Portland, Or. v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007) (holding "advice from [EPA's] Science Advisory Board [a group of outside scientists, similar to the CASAC, organized by the EPA to review its scientific analyses] … [was an] acceptable form of peer review"). The EPA also relied upon epidemiological studies, as well as individual clinical studies underlying the meta-analysis that had been published and peer-reviewed. The EPA's staff conducting the review of the proposed NAAQS judged the CASAC's review of the meta-analysis was sufficient, and the API has presented no reason for us to disturb that judgment."

In reviewing EPA's compliance with its DQA Guidelines, the *API* court is consistent with Prime Time Intern. Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010), pet. for rehearing denied per curiam (2010). [2]

In *Prime Time*, Prime Time Int'l sought disclosure and correction under the DQA of the data that the USDA used to calculate monetary assessments it levied on Prime Time under the Fair and Equitable Tobacco Reform Act ("FETRA"). FETRA repealed a system of quotas and price supports for tobacco producers and provided for assessments on tobacco product manufacturers and importers to ease the transition. USDA did not respond to Prime Time's DQA request for correction or a subsequent appeal.[3]

The D.C. Circuit held that USDA's calculation of Prime Time's annual assessment was an "adjudication," and therefore exempt from DQA coverage because the OMB DQA guidelines specifically exempted adjudications. The court did not rule expressly on whether the DQA authorized judicial review of agency action on a DQA request for correction. The court instead held that "because Congress delegated to OMB authority to develop binding guidelines implementing the [DQA], we defer to OMB's reasonable construction of the statute [exempting adjudications]." For this holding, the court cited *United States v. Mead*, 533 U.S. 218, 226-27(2001). 599 F.3d at 685. The court also stated: "The [DQA] is silent on the meaning of 'dissemination,' and in defining the term OMB exercised its discretion to exclude documents prepared and distributed in the context of adjudicative proceedings. This is a permissible interpretation of the statute, see *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778, and Prime Time does not contend otherwise." *Id*. at 685-86."

Thus, the *Prime Time* court, like the *API* court, reviewed a federal agency's compliance with DQA Guidelines. Like the *API* Court, the *Prime Time* court could not have conducted this review if judicial review of the DQA were barred.

In reaching its holding, the *Prime Time* court deferred to OMB's interpretation of the DQA guidelines because OMB's interpretation is a permissible interpretation of the DQA under *Chevron*. In doing so, the court apparently held that the OMB interpretation was entitled to *Chevron*-level deference (as opposed to a lower level of deference under *Skidmore*), because the OMB guidelines have the force of law, having been promulgated under a specific statute. If so, then the *Prime Time* court may have implicitly concluded that OMB's DQA Guidelines are binding on all federal agencies.

This conclusion may be inconsistent with *API's* apparent conclusion that EPA's compliance with its own DQA guidelines is discretionary and not mandatory. The *API* court does not mention *Prime Time* in its opinion.

Regardless of whether there is a real conflict between the two opinions, the most important point of the *API* and *Prime Time* decisions is that, in two separate cases, the D.C. Circuit has assumed

jurisdiction to review agency compliance with the DQA. Consequently, at least in the D.C. Circuit, agency compliance with the DQA is judicially reviewable.

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[1] This API decision is available online at http://www.cadc.uscourts.gov/internet/opinions.nsf/D610504626F2AB7C85257A3E004EC0C4/$file/10-1079-1383974.pdf . On September 24, 2012, the D.C. Circuit denied industry's petition for rehearing and rehearing en banc.

[2] The *Prime Time* decision is available online at http://www.leagle.com/xmlResult.aspx?xmldoc=in%20fco%2020100326168.xml&docbase=cslwar3-2007-curr .

[3] Apparently, and in contrast to *Prime Time*, there was no DQA request for correction filed in *API*.