Ossifying Ossification: Why the Information Quality Act Should Not Provide for Judicial Review

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Introduction

The Information Quality Act (IQA) aims to ensure the "quality objectivity, utility and integrity" of information disseminated by federal agencies.[1] The Act required first the Office of Management and Budget (OMB) and then the federal agencies to establish information quality guidelines. The Act further provides that members of the public may request that agencies correct information falling short of these guidelines through an administrative process. In it guidelines on implementing the Act, OMB broadened the requirement to include an administrative appeal process, also to be conducted by the agencies that "disseminate" covered information. The IQA, however, does not provide for judicial review. Instead, the IQA, alternately known as the Data Quality Act (DQA), rests oversight of agency implementation with OMB. Despite the congressional decision to leave the courts out of the IQA process, some intrepid industry petitioners have challenged agency decisions to reject IQA requests for correction in court.

So far, two United States District Courts have rejected attempts to seek judicial review of agency IQA decisions.[2] One of those decisions, *Salt Institute v. Leavitt*, is on appeal before the United States Court of Appeals for the Fourth Circuit.[3] The court's decision in that case may well be the first ruling by a federal appeals court on the question of whether agency decisions under the IQA are judicially reviewable. Both the IQA's critics and supporters will watch carefully the outcome of the *Salt* case.

The Fourth Circuit's word, however, will not be the last. Jim Tozzi, former OMB official, original proponent of the IQA and co-founder of the Center for Regulatory Effectiveness, has indicated that his group is "exploring other litigation in other circuits" to further test the IQA's judicial reviewability.[4] Moreover, should the Fourth Circuit follow the lower courts' reasoning and find no provision for judicial review in the plain meaning of the statute, supporters of a broad reading of the Act have already suggested they will ask Congress to provide legislative relief.[5] All the attention being paid to the question is warranted, for as the nonpartisan Congressional Research Service has observed, "[t]he determination of whether agencies' actions are subject to judicial review under the IQA will clearly have a major effect on its implementation."[6]

Both of the federal district courts that have considered claims under the IQA have concluded that agency decisions made under the Act are not judicially reviewable because the Act does not subject the action underlying such a challenge — the dissemination of data by an agency – to court supervision. As the United States Department of Justice has argued before

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the Fourth Circuit, decisions made pursuant to this law are not judicially reviewable under the Administrative Procedure Act (APA), because: 1.) an agency decision on a petition for correction is not "final" in the sense required for APA judicial review; and 2.) decisions on such petitions are committed to agency discretion.

After examining more fully the reasons the IQA does not provide judicial review, this report will highlight some of the major arguments against amending the Act to provide for judicial review. Chief among the concerns that Congress must carefully consider before making the IQA judicially reviewable is that asking the courts to consider challenges filed under the Act as currently written would amount to an improper delegation of policy determinations. Additionally, adding judicial review would exacerbate existing problems with the Act, including its tendency to slow (or "ossify") the regulatory process, and to tilt the procedural balance in favor of the wealthy and well-organized. Finally, the demands of deciding data correction challenges will add significantly to the burden of the already over-taxed federal court system.

Origin of the IQA

The IQA came into the world in late 2000 as a rider buried between two unrelated provisions in the 2001 appropriations bill.[7] There were no hearings on the two paragraphs that would comprise the IQA, and no one referred to the provisions during the debate on the larger 2001 appropriations bill in which they were embedded.[8] Only two paragraphs long, the IQA directed the Office of Management and Budget (OMB) to promulgate "policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies."[9] The IQA further mandated that agencies promulgate their own guidelines and establish procedures under which affected persons may "seek and obtain correction of information . . . that does not comply with the guidelines."[10] According to those who support the IQA, it is a "simple law,"[11] which "on its face, merely requires agencies to adhere to principles that few would dispute."[12]

Precisely because of the universal desirability of ensuring that federal agencies use, rely on and disseminate high-quality information, mechanisms toward that end existed prior to the IQA's enactment.[13] There is no credible evidence that such mechanisms are inadequate, nor is there anything other than anecdotal evidence that agency information was flawed and in need of correction.[14] Thus, as the Center for Progressive Reform (CPR) has previously argued, when enacted, the IQA was a "solution in search of a problem."[15] Since then, as interpreted by OMB and used by petitioners, the purportedly modest "good government" law has created more problems than it has solved.

Adverse Effects of Implementation

CPR's analysis of a sampling of data correction petitions, more fully set forth in its report, *Truth and Science Betrayed: The Case Against the Information Quality Act*,[16] found that industry petitioners routinely file complaints that seek relief well beyond mere "correction" of information. The complaints can be organized into the following categories, all of which share the common characteristic of seeking to frustrate regulatory action:

- *Delay*. Petitioners file IQA complaints in an attempt to challenge long overdue regulatory actions that have already been the subject of numerous public participation opportunities.
- *Censorship*. Though the remedy offered by the IQA is correction of information, numerous petitioners have chosen to ignore that fact and instead have sought complete withdrawal or exclusion of inconvenient information.
- *'Correcting' Policy, Not Information*. Under the guise of seeking correction of information, numerous petitioners have instead challenged policy decisions that agencies are authorized to make – particularly those which take a precautionary approach to uncertainty.
- *End Run around Health and Safety Laws*. In the course of challenging management and policy decisions rather than seeking the correction of information errors, petitioners have sought to bypass existing statutory procedures with respect to health, safety, and the environment.

- *Frustrating Agency Efforts to Cope with Uncertainty*. Incomplete information is not the same is poor quality information, but industry petitioners frequently challenge the policy decisions made by agencies when they lack definitive or complete information. In effect, these petitioners claim that the IQA provides industry with an opportunity to impose substantive standards that they would be unable to argue for directly.
- *Fishing Expeditions*. Arguing their need for underlying data to assess the "reproducibility" of agency analyses, petitioners have inappropriately sought records under the IQA rather than the Freedom of Information Act (FOIA).
- *Sidestepping the Courts*. Attempting to employ the IQA as an administrative opportunity to file motions *in limine*, industry petitioners have sought agency withdrawal of information that they either have been unable to exclude from evidence in court, or would prefer not to encounter in later litigation.

Although agencies have so far resisted such inappropriate attempts to expansively invoke the IQA, they must devote untold time and resources responding to IQA petitions for correction, the majority of which are ultimately dismissed as lacking merit.[17] OMB imposed its IQA guidelines without any analysis concerning costs and benefits of implementing them. Accordingly, it is impossible to know what programs, initiatives and actions are being delayed or altogether pushed aside by agencies already strapped for resources sufficient to implement their statutory mandates.

Judicial Review

No Judicial Review under the IQA

As explained by the United States District Court for the Eastern District of Virginia in the *Salt Institute* case, "[f]or a plaintiff to enforce the provisions of a federal law in court, Congress must first have afforded the party a private right of action."[18] The IQA does not provide for such a right. Rather, the IQA directs OMB to provide guidance to federal agencies, and federal agencies to establish their own information quality guidelines.[19] It addresses the interests of "affected persons" by requiring that agencies provide them the opportunity to "seek and obtain correction of information" through "administrative mechanisms" established by the agencies.[20] Thus, "[t]he language of the IQA reflects Congress's intent that any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not in the courts."[21] Furthermore, the IQA's "very limited legislative history" fails to provide "a mechanism for judicial review of information quality or any avenue for judicial relief."[22]

No Judicial Review under the APA

The alternate avenue for judicial relief that would-be IQA plaintiffs have attempted to invoke is the Administrative Procedure Act (APA). The APA allows persons to obtain judicial review of agency actions that are both "final," and "not committed to agency discretion by law."[23] Agency actions under the IQA, however, fail both prerequisites for APA review: they are not final, and they are committed to agency discretion by law.

Data Dissemination Is Not 'Final' Agency Action

The agency action that the IQA addresses is dissemination of information.[24] Courts have long held that information dissemination does not constitute final agency action. This conclusion derives from the Supreme Court's requirements that to be final, agency action must: 1.) mark the "consummation" of the agency's decisionmaking process; and 2.) be one from which legal consequences flow, or by which rights or obligations are determined.[25] Thus, even where a report or other agency information marks the consummation of the agency's decisionmaking process, in order to be considered final action subject to APA review, it must give rise to legal consequences, rights or obligations.[26]

The *Salt Institute* case provides an example of the reasons that reports and information of the kind likely to be challenged under the IQA fail the "legal consequences, rights or obligations" test. Appellants/Plaintiffs in that case, the Salt Institute and the U.S. Chamber of Commerce (collectively, the "Salt Plaintiffs") are, respectively, a trade association made

up of companies that produce and market salt, and a business federation that includes companies that market foods containing salt.[27] They objected to the National Heart, Lung and Blood Institute's (NHLBI) reporting, on its website, the results of the Dietary Approaches to Stop Hypertension-Sodium Trial (DASH-Sodium Trial), which recommended limits on dietary sodium intake.[28]

Unhappy with the NHLBI's publication of the DASH-Sodium Trial results, the Salt Plaintiffs filed an IQA complaint, which did not request "correction" of any specific information, but instead sought the disclosure of the data underlying the study.[29] NHLBI, part of the National Institutes of Health (NIH), denied the petition, correctly noting that the appropriate avenue through which to seek access to data is the FOIA, not the IQA.[30] NHLBI also noted, among other things, that the challenged information satisfied NIH's information quality standards.[31] The Salt Institute and Chamber of Commerce next submitted an administrative "Request for Reconsideration" with NHLBI,[32] which NHLBI denied.[33] The Salt Plaintiffs then filed suit, and claimed generally that they had "suffered actual or threatened injury" due to NHLBI's conduct.[34]

Though plaintiffs did not specify their alleged injuries, the court surmised that

> Plaintiffs might contend that they are injured by NHLBI's dissemination of the results of the DASH-Sodium Trial because this information might cause consumers to reduce their consumption of salt, thus decreasing the Plaintiffs' constituent members' sales.[35]

The original IQA petition recited impacts similar to those articulated by the court. According to the petition, the companies that make up the Salt Institute "are, on a bottom line basis, directly affected by changes in the public's use of salt and salted products," which "in turn, is heavily influenced by scientific findings of the federal government."[36]

The potential consequences of the DASH-Sodium Trial complained of by the Salt Institute typify the broad category of consequences that proponents of the IQA hope it will minimize. According to Mark Greenwood of the Coalition for Effective Environmental Information, "[i]n the modern world, EPA uses a wide array of non-regulatory tools to influence behavior."[37] According to Greenwood, guidance documents, scientific assessments and environmental data, now increasingly available via the internet, "can have impacts profound as any legal mandate."[38] Companies that stand to suffer from such information disclosure claim the "public can easily misinterpret complex data,"[39] and the Center for Regulatory Effectiveness has dubbed the phenomenon "Regulation by Information."[40]

Information disseminated by federal agencies, particularly consumer-oriented agencies, may well, as Congress intended, influence the public and other decisionmakers.[41] Even if information has this impact, however, the impact, as the courts recognize, is "indirect and arises from the reactions and choices of . . . customers."[42] Since the consequences of information disclosure are associated with the "independent responses and choices of third parties," they do not legally flow from the agency's dissemination of the information and do not constitute final agency action.[43]

Indeed, as the United States Court of Appeals for the Fourth Circuit warned in the context of EPA's issuance of a 1993 report that classified second-hand smoke as a known human carcinogen:

> as a practical matter and of considerable importance, if we were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review. We do not think that Congress intended to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published. Such policy statements are properly challenged through the political process and not the courts.[44]

Agency Action on an IQA Petition is Not 'Final' Agency Action

With the IQA, entities concerned about the impacts of information disclosure gained a formal tool with

which administratively to challenge faulty information. The newfound ability formally to seek "information correction" throughout the federal agencies, however, failed to satisfy entities seeking to muffle information disclosure. Without judicial review, the argument goes, "agency personnel will not take the IQA seriously," if only because of competing demands on their time.[45]

Seeking to evade the established principle that agency information dissemination is not "final agency action" within the meaning of the APA, the Salt Institute and Chamber of Commerce argue that passage of the IQA "radically altered the prerequisites for APA review."[46] They point out that when NHLBI denied their administrative appeal, they were left with no place to go.[47] Thus, they argue, it is "difficult to understand how this could be described as anything other than the 'consummation' of the administrative decision making process".[48] According to the industry petitioners in the *Salt* case, the district court "misse[d] the point"[49] when it held that the NHLBI's dissemination of the DASH-Sodium Trial results did not constitute final agency action.[50] Rather, they argue, the point is that "the agency's denial of an IQA application is itself a legally germane 'consequence,'"[51] which deprives them of "their rights to seek and obtain correction of information."[52]

As the two federal district courts to have considered the issue so far have concluded, the IQA fails to provide standards sufficient to evaluate whether an agency properly exercised its discretion in acting on an IQA petition.

It is the *Salt* plaintiffs, not the district court, that "miss the point." Their analysis collapses into one the two necessary and distinct elements of finality. The gravamen of plaintiffs' argument is that: 1.) when an agency denies an IQA request, its consideration of the request is complete; and 2.) the "legal consequence" of the denial claimed by the Salt Plaintiffs is that the agency will not further consider the complaint (leaving them "nowhere to go"). The "consequence" alleged by the Salt Plaintiffs is but a different way of saying that the denial marks the "'consummation' of the agency's decisionmaking process."

Concededly, the IQA aids plaintiffs in establishing the first required element of "finality" by clearly demarcating the "consummation" of agency decisionmaking processes on requests for information correction. It does not, however, change the legal consequences of information dissemination. As put by the Department of Justice, "[t]he IQA does not transform an Agency's otherwise unreviewable statements into final agency action reviewable under the APA."[53]

Decisions on IQA Petitions Are Committed to Agency Discretion

As noted above, the APA authorizes judicial review of agency actions only where the action in question is both "final," and "not committed to agency discretion by law."[54] Not only are decisions on IQA petitions not "final" in the sense required for APA judicial review, but they are also firmly committed to the discretion of the reviewing agencies and thus precluded from review. Agency action is committed to the discretion of the agency by law when the authorizing statute is "'drawn in such broad terms' that 'there is no law to apply.'"[55] Stated differently, without a "'meaningful standard against which to judge the agency's exercise of discretion,' . . . meaningful judicial review is impossible."[56]

As the two federal district courts to have considered the issue so far have concluded, the IQA fails to provide standards sufficient to evaluate whether an agency properly exercised its discretion in acting on an IQA petition.[57] The IQA's goal statement, "ensuring and maximizing the quality, objectivity, utility and integrity of information disseminated by the agency," is a collection of terms not defined elsewhere in the statute. "Moreover, the history of the legislation fails to provide any indication as to the scope of these terms."[58] As noted earlier, there were no hearings on the Act and no debate in the House or Senate. Nor were there committee reports since the IQA came to life as an appropriations rider.

Proponents of the IQA argue that OMB's IQA guidelines "explain at great length and implement what is meant by each statutory quality test mandated."[59] Importing OMB's interpretation of the

statutory terms to guide judicial review of the IQA, however, "would ignore that Congress failed entirely to define these terms, which is a strong signal that it did not contemplate that IQA would create a private right of action."[60]

The language that Congress did elect to include indicates an affirmative intent that oversight of agency IQA implementation rest with OMB, not the courts. The Act requires agencies to "report periodically to the Director" of OMB: 1.) the nature and number of information quality complaints received; and 2.) how those complaints were handled by the agency.[61] "In light of Congress's failure to define key terms, this delegation indicates that Congress expected that OMB would define the terms and enforce compliance with its definitions."[62]

Congress Should Not Make the IQA Judicially Reviewable

Testifying before Congress in July 2005, an official representing the U.S. Chamber of Commerce responded to the possibility that the appeal of the Salt litigation would result in affirmation that there can be no judicial review of the IQA. Congress, he suggested, "will then either have to provide for judicial review, or accept the contention that federal agencies have sole discretion over the quality of information disseminated to the public and to Congress."[63] The Chamber suggests that Congress's chief concern under such circumstances should be whether to accept unfettered agency discretion over information quality. As an initial matter, this rhetoric ignores existing checks on agency information quality, not the least of which is the scheme set up by the IQA, for which oversight authority rests explicitly with OMB. More importantly, the provocatively phrased statement confirms that should the United States Court of Appeals for the Fourth Circuit agree with the lower courts that have considered the issue and hold judicial review of IQA decisions unavailable, IQA proponents will call upon Congress for legislative relief.[64]

Congress should not authorize judicial review of the IQA, because, as discussed above, standing alone, the Act's vague terms do not provide adequate standards for a reviewing court to apply in evaluating the propriety of agency action on an IQA petition. If Congress authorizes judicial review of the IQA under the theory that the OMB Guidelines offer sufficient supplementary guidance, it will delegate to the courts questions of policy properly left to the legislative and executive branches. Additionally, authorizing judicial review of the IQA will exacerbate many of the previously identified problems with the Act itself, including contributing to the ossification of rulemaking. Finally, creating a private right of action under the IQA would further burden the already overloaded federal courts with challenges so technical as to be administratively impracticable.

Improper Delegation of Policy Questions to the Courts

Industry groups, including the U.S. Chamber of Commerce, one of the Salt Plaintiffs, view the IQA as much more than a mere "sunshine" or "good government" measure. Rather, to regulated entities such as those represented by the Chamber, the IQA holds the potential to fundamentally alter the regulatory process, enabling them to cut off potential regulation at the pass. The IQA

> empower[s] businesses to challenge not just government regulations – something they could do anyway – but scientific information that could potentially lead to regulation somewhere down the road. The Data Quality Act, Chamber of Commerce vice president William Kovacs explained in an interview, allows industry to influence the regulatory process from "the very beginning."[65]

This is precisely the kind of agenda the Fourth Circuit has previously explained has no place in the courts. Judicial review of the "various results of controversial government research as soon as published but before they are given regulatory effect"[66] would be inappropriate, the court reasoned, because "such policy statements are properly challenged through the political process, not the courts."[67] This reasoning holds true notwithstanding passage of the IQA. Although most IQA requests identify specific pieces of allegedly erroneous information, the vast majority are aimed at the underlying policy that the agency has adopted, and that the information supports. Legislatively authorizing judicial review under the

IQA would have impacts well beyond simply ensuring that agencies take their "information quality" responsibilities seriously. Rather, such a provision would go a long way toward delegating to the courts piecemeal a task that, if it is to be performed, must be performed by Congress, wholesale.

IQA petitioners frequently target agency actions taken pursuant to environmental statutes by arguing that the underlying information suffers from some flaw, while in reality attacking the agency's precautionary use of information.[68] Such petitions challenge policy, not information. Entities that file such challenges are not mere outliers, however – OMB has explicitly encouraged this use of the IQA.

For analyses of risks to human health, safety and the environment, OMB's IQA Guidelines require that agencies "adopt or adapt" the stringent requirements of the Safe Drinking Water Act Amendments of 1996 (SDWAA).[69] The SDWAA standards, in turn, establish a minimum quality of scientific data on which EPA can rely in the narrow context of setting contaminant limits in national drinking water regulations for public water systems. Specifically, EPA must "use the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices" and "use data collected by accepted methods or best available methods . . . ."[70] In addition, the SDWA standards indicate how EPA is to describe public health data to the public, including the stipulation that the agency provide, "the expected risk or central estimate of risk" for affected populations.[71]

By including the SDWAA standard for risk information in its IQA guidelines, OMB attempts to force onto regulatory agencies a narrow view of regulation that Congress has written into one, arguably unique, statute.[72] Without support, OMB asserts that in the SDWAA, Congress "adopted a basic standard of quality for the use of science in agency decisionmaking."[73] As the Natural Resources Defense Council has explained, OMB's implication is that, across the board, "decision-makers can make judgments on how to apply the precautionary principle and other statutory mandates on the basis of precise, 'factual,' numerically-based data."[74] In reality, however, such widespread quantitative certainty is impossible. Based on large gaps in data on the quantity, chemical characteristics, and toxicology of even the most common pollutants, Congress passed statutes ensuring that both qualitative and quantitative information be used to inform the regulatory process.[75]

In addition to its attempt to import the SDWAA risk standards to all federal agencies through its Guidelines, OMB has directly urged petitioners to use the IQA to challenge "the inadequate treatment of uncertainty," and not merely errors in information. In its reports to Congress on the first years of IQA implementation, OMB stated:

> Thus far, the majority of non-frivolous correction requests have been denied, usually on the basis that a reasonable scientist could interpret the available information in the way the agency had. *Such correction requests might have been better focused if they had addressed the inadequate treatment of uncertainty rather than the accuracy of the information*.[76]

The ability of agencies to act in the face of incomplete information, however, was intentionally provided for by Congress, which had become "exasperated at the inability of the common law to adequately protect the public health and environment from toxic hazards."[77] In recognition of those limitations, Congress passed a suite of statutes authorizing regulation of potential environmental hazards "without requiring definitive evidence of harm . . . ."[78]

The distinction between incomplete information and poor quality information is critical. Often, waiting to take regulatory action until definitive data is available concerning, for example, the nature of a particular chemical, its environmental fate, transport, and ultimate health effects on exposed populations will mean "many people can be harmed or the environment can be despoiled before the government acts."[79] Therefore, the appropriate balance between information quality and adequate protection of public health and the environment is for agencies to take into account the quality of the available information, but, when appropriate, act upon (or disseminate) the best available evidence – not wait for more conclusive evidence to be discovered.[80] This balance is explicitly permitted by a variety of substantive statutes.[81]

The IQA threatens to undermine the precautionary approach mandated by Congress in such statutes by subjecting individual regulatory decisions to strict evidentiary standards once a petitioner (usually a regulated entity) files an information correction request. The proponents of IQA judicial review argue that the OMB Guidelines – complete with their attempted imposition of SDWAA standards onto risk information – should inform reviewing courts' analyses of the propriety of agency action on IQA petitions.[82] Thus, judicial review of the IQA would provide an avenue for petitioners to chip away, through the courts, at a broad principle laid down by Congress in a host of authorizing statutes to better provide for protection of the environment and public health. The proper vehicle for such a broad policy shift is not an authorization for judicial review of the IQA but amendments to the health, safety and environmental statutes themselves.

Moreover, authorizing judicial review of IQA requests would often mean asking the courts to resolve policy questions involved in agency judgments concerning the proper treatment of scientific information. Did the agency properly weigh its "information quality" obligations against the substantive, precautionary mandate set forth in the organic statute that the regulatory action implements? The IQA conceives the public interest as inhering in rigorous scientific proof. The organic statutes, on the other hand, recognize the importance of utilizing the best available information, but also the principle that "it is often wise to act before all the answers are in." As the Supreme Court explained in responding to policy arguments advanced by the parties in the seminal case of *Chevron v. NRDC*, the "responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our constitution vests such responsibilities in the political branches.'"[83]

From Bad to Worse:[84] Furthering Ossification and Tilting the Balance

Making the IQA judicially reviewable will amplify many of the Act's negative impacts. Of particular concern is the potential for judicial review to further contribute to the "ossification" of information dissemination and, in some cases, regulatory action. Even without adding potential court challenges into the analysis, the IQA "opens the door for entities opposing the release of government information to use the appeals process to attempt to frustrate the dissemination of information that may alert the public about risks to them or to the environment."[85] As Professor Shapiro has explained, the prospect of judicial review of agency decisions on IQA petitions threatens to exacerbate the "ossification" of information dissemination:

> If agencies find themselves defending dozens of information quality lawsuits, the dissemination of information to the public is likely to shrink. Agency resources will be diverted to defense of lawsuits, which will reduce resources that can be devoted to the dissemination of information. Moreover, the agency will likely involve its lawyers in the vetting of information in order to reduce such litigation, which will slow the dissemination of information to the public. Finally, in order to avoid these costs, agencies may simply reduce the amount of information that they disseminate.[86]

Further, although often defended as a mechanism to correct, for example, postings on agency websites, the IQA has been interpreted by OMB to apply equally to agency dissemination of information during full-fledged rulemaking.[87] Petitioners have actively enlisted the IQA as another tool in the proverbial anti-regulatory arsenal.[88] Authorizing judicial review of agency decisions on IQA petitions could further stall rulemaking processes, as IQA petitioners sue agencies over the disposition of challenges to discrete bits of information within overall rulemaking records.

On a related note, even without the added layer of judicial review, the IQA creates an imbalance that favors regulated industries over public interest groups. As Professor Wagner explains, "regulatory delay generally works at cross purposes with public interest groups' goals of ensuring the expeditious promulgation of protective regulation."[89] Thus, the IQA by its very design creates an imbalance by providing an additional opportunity for delay. Even those public interest groups who might wish to

challenge agency information through the IQA, however, may be unable to fully compete on a playing field that is inherently tilted in favor of the technically sophisticated and resource endowed.[90] Extending the IQA petition process into the courts will exacerbate these imbalances by adding the resource demands of litigation onto the already resource-intensive IQA petition process.

Overloading the Federal Courts

Would-be litigants are not the only parties whose resources an IQA judicial review provision would affect. Adding IQA cases to the federal judiciary's workload will further burden a system already strained beyond its capacity. Congress has only authorized 179 court of appeals judgeships, 662 district judgeships, and 532 magistrate positions across the country.[91] The dockets of such courts are already filled to capacity. Inadequate funding for the federal court system has forced many courts to impose hiring freezes, furloughs and reductions in force.[92] As former Chief Justice William Rehnquist warned in his Year-End Report on the Federal Judiciary for 2004, "[a]s the Judiciary's workload continues to grow, the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice."

Before accepting at face value the simplistic assertion that the IQA is a mere 'good government' statute that agencies will only take seriously if enforced by the courts, Congress need consider carefully the arguments against making the IQA judicially reviewable.

The nature of IQA petitions filed thus far strongly suggests that courts frequently would be called upon to resolve complex questions involving scientific theory, a task that may evolve to more closely approximate presiding over "mini-trials" than reviewing an administrative record.[93] As of December 2004, the U.S. Census Bureau reported that the total number of federal government civilian employees is 2.7 million.[94] As the federal workforce goes about performing its collective job duties, untold amounts of information are "disseminated," within the meaning of OMB's IQA guidelines, on a daily basis.[95] The potential for swamping the courts with information correction requests is therefore enormous.

IQA proponents, including the staff of OMB's Office of Information and Regulatory Affairs, which administers the Act, argue that because only approximately 85 "substantive" IQA requests have been filed thus far, there is no reason to be concerned that IQA use will increase dramatically in the future.[96] This wishful thinking is not convincing, especially if the question on the table is whether to open the federal courts to those disaffected by federal information dissemination. The IQA has been in effect for a period of no more than three years, if one dates its implementation to the final issuance of OMB and agency guidance regarding the implementation of the Act. The Administration of George W. Bush has not been activist in the regulatory arena. Further, the absence of complaints could just as easily be read to demonstrate that there are no major problems with the quality of information used by the federal government.

At the very least, Congress should be very wary about expanding the Act's scope to enmesh the federal judiciary in resolving such disputes without doing a more extensive analysis of the potential impact on litigation – criminal and civil – that is far more important.

Conclusion

If the United States Court of Appeals for the Fourth Circuit reaches the question of judicial review of the IQA and follows the reasoning of the United States District Court for the Eastern District of Virginia, it will find that the IQA is not judicially reviewable. Whether it concludes the IQA is not judicially reviewable or it does not reach the issue, however, proponents of the Act are sure to seek congressional relief. Before accepting at face value the simplistic position that the IQA is a mere "good government" statute that agencies will only take seriously if enforced by the courts, however, Congress need consider the arguments against making the IQA judicially reviewable. In order to ensure that such concerns are carefully weighed, it is imperative that any such proposal – unlike the IQA as originally passed – be the subject of hearing and debate.

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Notes

[1] Section 515 of the FY 2001 Appropriations Act, P.L. 106-554, 114 Stat. 2763A-153-154 (December 21, 2000) [hereinafter, "Information Quality Act"].

[2] *Salt Institute v. Thompson*, 345 F. Supp.2d 589 (E.D.Va. 2004); *In re: Operation of the Mo. River Sys. Litig.*, 2004 WL 1402563 (D.Minn. June 21, 2004) (order granting summary judgment).

[3] *Salt Institute et al. v. Leavitt*, No. 05-1097 (4th Cir. filed Jan. 25, 2005).

[4] *OMB Downplays Impact of Data Quality Act on Federal Agencies,* Risk Policy Report (Dec. 20, 2005).

[5] *Improving Information Quality in the Federal Government: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Gov't Reform*, 109th Cong. 4 (statement of William L. Kovacs, Vice President, U.S. Chamber of Commerce) *available at* http://reform.house.gov/UploadedFiles/7-20-2005%20Kovacs%20Testimony.pdf (last visited Nov. 21, 2005) [hereinafter, "Information Quality Act Hearing (statement of William L. Kovacs)"]; *See also OMB Downplays Impact of Data Quality Act on Federal Agencies,* Risk Policy Report (Dec. 20, 2005) (reporting that the U.S. Chamber of Commerce has indicated it will seek legislation amending the IQA to allow judicial review should it lose its appeal of the *Salt* case).

[6] Curtis W. Copeland & Michael Simpson, Congressional Research Service, *The Information Quality Act: OMB's Guidance and Initial Implementation,* 17 (updated Sept. 17, 2004), *available at* http://www.ombwatch.org/info/dataquality/RL32532_CRS_DQA.pdf (last visited Dec. 28, 2005).

[7] Information Quality Act, *supra* note 1. The IQA paragraphs appear between provisions relating to a transfer of land to support the Gerald R. Ford Museum and Library and the non-foreign area cost of living allowance.

[8] Thomas O. McGarity, *et al.*, *Truth and Science Betrayed: The Case Against the Information Quality Act*, CPR Publication No. 502, 2 (Mar. 2005), *available at* http://www.progressivereform.org/articles/iqa.pdf (last visited Nov. 7, 2005).

[9] Information Quality Act, *supra* note 1, § (a).

[10] *Id.*, §§(b)(2)(A) & (B).

[11] Mark A. Greenwood, *The Information Quality Act: How a Sunshine Statute Brought a Perfect Storm*, 57 DEN B-1, 2005.

[12] *Id.* at B-2.

[13] OMB's IQA guidelines acknowledge that "in accordance with OMB Circular A-130, agencies already have in place well-established information quality standards and administrative mechanisms that allow persons to seek and obtain correction of information that is maintained and disseminated by the agency." Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*; Republication, 67 Fed. Reg. 8452, 8453 (Feb. 22, 2002) [hereinafter, "*OMB Guidelines*"] (referencing OMB Circular A-130). Additionally, for example, EPA's eight-step Agency-wide Quality System "helps ensure that EPA organizations maximize the quality of environmental information, including information disseminated by the Agency." United States Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, October 2002, EPA/260R-02-008, 10-11, *available at* http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf (last visited Nov. 7, 2005).

[14] According to Professor Wendy Wagner of the University of Texas School of Law, "despite the thousands of public health and safety regulations promulgated annually, there are surprisingly few examples of EPA using unreliable science or using science inappropriately to support a final regulation." Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation*, 66 Law and Contemp. Probs. 63, 72 (2003). Wagner's analysis reveals that any "'bad science' problem" that does exist involves information produced by regulated industry and not by the agencies themselves. *Id*. at 73.

[15] For more detail regarding the arguments set forth in this section, *see* McGarity, *et al*., *supra* note 8.

[16] *Id*.

[17] *Id*. at 11-12.

[18] *Salt Institute v. Thompson*, 345 F. Supp.2d 589, 601 (E.D.Va. 2004).

[19] Information Quality Act, *supra* note 1, §§ (a) & (b)(2)(A).

[20] *Id*., § (b)(2)(B).

[21] *Salt Institute v. Thompson*, 345 F. Supp.2d at 601; *accord In re: Operation of the Mo. River Sys. Litig*., 2004 WL 1402563, *24 (D.Minn. June 21, 2004) (order granting summary judgment).

[22] *Salt Institute v. Thompson*, 345 F. Supp.2d at 593; *see also* note 8 & accompanying text.

[23] 5 U.S.C. §704 (providing that ". . . *final agency action* for which there is no adequate remedy in a court are subject to judicial review") (emphasis added); 5 U.S.C. §701(a)(2)(excluding "agency action committed to agency discretion by law" from judicial review provisions of APA). *See also Salt Institute v. Thompson*, 345 F. Supp.2d at 601-02 (citing, *inter alia*, *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C.Cir. 1996) (indicating presumption of APA judicial review does not apply if agency action is committed to agency discretion by law or if action is not final)).

[24] Information Quality Act, *supra* note 1, § (a) (directing OMB to provide guidance to federal agencies "for ensuring and maximizing the quality, objectivity, utility and integrity of information . . . disseminated by Federal agencies . . .) (emphasis added).

[25] *Bennett v. Spear*, 570 U.S. 154, 177-78 (1997) (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

[26] *See Flue-Cured Tobacco Coop. Stabilization Corp. v. Envtl. Prot. Agency*, 313 F.3d 852 (4th Cir. 2002) (reasoning that where parties agreed report in question marked consummation of agency's decisionmaking process, critical issue was whether report gave rise to legal consequences, rights, or obligations).

[27] *Salt Institute v. Thompson*, 345 F. Supp.2d 589, 593 (E.D.Va. 2004) (citing First Am. Compl. ¶¶7,8).

[28] *Id*.

[29] Letter from William L. Kovacs, Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce & Richard L. Hanneman, President, Salt Institute to Office of Communications, National Heart, Lung, and Blood Institute, National Institutes of Health (May 14, 2003), *available at* http://aspe.hhs.gov/infoquality/request&response/8a.pdf (last visited Nov. 8, 2005) [hereinafter, "Salt IQA Petition"]; *See also Salt Institute v. Thompson*, 345 F. Supp.2d 589, 596 (E.D.Va. 2004).

[30] *Salt Institute v. Thompson*, 345 F. Supp.2d at 596; *see also* Letter from Carl A. Roth, Ph.D., LL.M., Associate Director for Scientific Program Operation, National

Heart, Lung and Blood Institute, National Institutes of Health, to William L. Kovacs, Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce & Richard L. Hanneman, President, Salt Institute (Aug. 19, 2003), *available at* http://aspe.hhs.gov/infoquality/request&response/reply_8b.shtml (last visited Nov. 8, 2005) [hereinafter, "NHLBI Response to Salt IQA Petition"].

[31] *Salt Institute v. Thompson*, 345 F. Supp.2d at 596; *see also* NHLBI Response to Salt IQA Petition, *supra* note 30.

[32] Letter from William L. Kovacs, Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce & Richard L. Hanneman, President, Salt Institute to Associate Director for Communications, Office of the Director, National Institutes of Health (Sept. 22, 2003), *available at* http://aspe.hhs.gov/infoquality/request&response/8c.pdf (last visited Nov. 8, 2005).

[33] Letter from Barbara Alving, M.D., Acting Director, National Heart, Lung, and Blood Institute, National Institutes of Health to William L. Kovacs, Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce & Richard L. Hanneman, President, Salt Institute (Feb. 11, 2004), *available at* http://aspe.hhs.gov/infoquality/request&response/8d.shtml.

[34] Plaintiffs' failure to make specific assertions of injury caused by NHLBI's conduct led the court to conclude that plaintiffs had not suffered harm of the type sufficiently concrete and particularized to confer standing to sue. *Salt Institute v. Thompson*, 345 F. Supp.2d at 599. Article III standing, a constitutional prerequisite for parties to pursue their claims in federal court, may, in specific cases, provide an additional argument against judicial review of agency decisions under the IQA. This analysis leaves aside arguments concerning standing, which are properly considered on the facts of each particular case. Instead this report focuses on generally applicable principles concerning the reasons that agency information dissemination fails the APA's prerequisites for judicial review.

[35] *Salt Institute v. Thompson*, 345 F. Supp.2d at 599.

[36] Salt IQA Petition, *supra* note 29, at 14. In their opening brief before the United States Court of Appeals for the Fourth Circuit, appellants, the Salt Institute and the Chamber of Commerce rebuke the district court for "wander[ing] in a thicket of non-germane inquiries, investigating presumed economic affects [*sic*], speculating on the hypothetical behavior of the public and perusing the general literature on sodium consumption and blood pressure . . . ." Brief of Appellants at 23, Salt Institute and the Chamber of Commerce of the United States v. Leavitt, No. 05-1097 (4th Cir. Apr. 15, 2005), *available at* http://www.uschamber.com/nclc/caselist/briefsrtoz.htm (follow "Salt Institute and the Chamber of Commerce of the United States v. Leavitt" link) (last visited Nov. 9, 2005) [hereinafter, "Salt Brief"]. According to appellants, their standing to pursue their case in court (apparently, as distinct from their rationale for being "affected persons" under the IQA) derives from their "informational rights conferred . . . by Congress in the IQA." *Id*.

[37] Greenwood, *supra* note 11, at B-4.

[38] *Id*.

[39] *Id*.

[40] *See* Center for Regulatory Effectiveness, *Regulation by Information*, http://www.thecre.com/information/index.html (last visited Nov. 9, 2005). For a detailed discussion of the role of Jim Tozzi, the founder of the Center for Regulatory Effectiveness, in developing the Information Quality Act, *see* McGarity, *et al*., *supra* note 8, at 2-6.

[41] *Indus. Safety Equip. Ass'n, Inc. v. Envtl. Prot. Agency*, 837 F.2d 1115, 1118 (D.C. Cir. 1988) (citing, *inter alia*, Occupational Safety and Health Act, 29 U.S.C. §§ 669(a),(d), 671; Public Health Service Act, 42 U.S.C. §§ 241(a), 4321, 4364, 4366; Food Drug and Cosmetic Act, 21 U.S.C. § 375).

[42] *Id*. at 1121.

[43] *Flue-Cured Tobacco Coop. Stablization Corp. v. Envtl. Prot. Agency*, 313 F.3d 852, 861 (4th Cir. 2002); *see also Indus. Safety Equip. Ass'n, Inc. v. Envtl. Prot. Agency*, 837 F.2d at 1121.

[44] *Flue-Cured Tobacco Coop. Stablization Corp. v. Envtl. Prot. Agency*, 313 F.3d at 861.

[45] Greenwood, *supra* note 11, at B-4.

[46] Brief of Appellee at 34, Salt Institute and the Chamber of Commerce of the United States v. Leavitt, No. 05-1097 (4th Cir. June 20, 2005) [hereinafter, "DOJ Brief"].

[47] Salt Brief, *supra* note 36, at 33.

[48] *Id*.

[49] *Id*.

[50] *Salt Institute v. Thompson*, 345 F. Supp.2d 589, 602 (E.D.Va. 2004).

[51] Salt Brief, *supra* note 36, at 33. The *Salt* plaintiffs' full statement reads, "[t]he agency's denial of an IQA application is itself a legally germane consequence, just as is an agency's denial of a request for disclosure of information under FOIA." *Id*. Plaintiffs' attempted analogy to denials of FOIA requests fails. FOIA specifically provides for judicial review of agency denials of requests for information, empowering district courts to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . ." 5 U.S.C. § 552(a)(4)(B). Thus, suits against agencies for denial of FOIA requests proceed under the APA's provision that "agency action made reviewable by statute" is subject to judicial review, rather than its alternate authorization of judicial review of "final agency action for which there is no adequate remedy in a court." *See* 5 U.S.C. § 704. Courts analyze what constitutes "final agency action," including the legal consequences (or lack thereof) of agency information dissemination, pursuant to the provision authorizing judicial review of "final agency action for which there is no other adequate remedy in a court." *See, e.g.*, *Indus. Safety Equip. Ass'n, Inc. v. Envtl. Prot. Agency*, 837 F.2d 1115, 1117 (D.C. Cir. 1988). As the Salt Plaintiffs plainly concede, since the IQA does not provide for judicial review, would-be IQA plaintiffs must attempt to convince courts that a denial of an IQA petition is "*final agency action* for which there is no adequate remedy in a court." Salt Brief, *supra* note 36, at 31.

[52] *Id*. at 33.

[53] DOJ Brief, *supra* note 46, at 34. The Department of Justice makes the related, but more technical, argument that the Salt Plaintiffs confuse the two requirements of exhaustion and finality, and that the exhaustion of administrative remedies does not make otherwise non-final agency action final. *Id*. at 37-38.

[54] 5 U.S.C. §704 (providing that ". . . *final agency action* for which there is no adequate remedy in a court are subject to judicial review") (emphasis added); 5 U.S.C. §701(a)(2)(excluding "agency action committed to agency discretion by law" from judicial review provisions of APA). *See also Salt Institute v. Thompson*, 345 F. Supp.2d 589, 601-02 (E.D.Va. 2004) (citing, *inter alia*, *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C.Cir. 1996) (indicating presumption of APA judicial review does not apply if agency action is committed to agency discretion by law or if action is not final)).

[55] *In re: Operation of the Mo. River Sys. Litig*., 2004 WL 1402563, *24 (D.Minn. June 21, 2004) (order granting summary judgment) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)) (finding agency actions under IQA committed to agency discretion).

[56] *Salt Institute v. Thompson*, 345 F. Supp.2d 589, 602 (E.D.Va. 2004) (quoting *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

[57] *Salt Institute v. Thompson*, 345 F. Supp.2d at 602; *See also In re: Operation of the Mo. River Sys. Litig*., 2004 WL 1402563, *24 (D.Minn. June 21, 2004) (order granting summary judgment).

[58] *In re: Operation of the Mo. River Sys. Litig*., 2004 WL 1402563 at *24; *See also* Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 Wm. & Mary Envtl. L. & Pol'y Rev. 339, 370-71 (2004).

[59] Salt Brief, *supra* note 36, at 35; *see also* Greenwood, *supra* note 11, at B-9 (arguing that "the standards of the IQA, particularly when the specific provisions of the OMB Guidelines are considered," have substance sufficient to provide for meaningful judicial review).

[60] Shapiro, *supra* note 58, at 371.

[61] Information Quality Act, *supra* note 1, § 515(b)(2)(C).

[62] Shapiro, *supra* note 58, at 371.

[63] Information Quality Act Hearing (statement of William L. Kovacs), *supra* note 5.

[64] *See also OMB Downplays Impact of Data Quality Act on Federal Agencies,* Risk Policy Report (Dec. 20, 2005) (reporting that the U.S. Chamber of Commerce has indicated it will seek legislation amending the IQA to allow judicial review should it lose its appeal of the *Salt* case, and that Rep. Candice Miller (R-MI), Chair of the Subcommittee on Regulatory Affairs of the House Committee on Government Reform, has "suggested she would offer legislation on the issue"); Manu Raju, *Industry, Key Republican Suspend Shift for Expanded Data Quality Act*, Inside EPA (Jul. 20, 2005) (quoting Representative Miller as stating that if the U. S. Court of Appeals for the Fourth Circuit agrees with lower courts' decisions that the IQA is not judicially reviewable, she would consider offering legislation amending the IQA to provide explicitly for judicial review).

[65] Chris Mooney, *Interrogations: Thanks to a Little-Known Piece of Legislation, Scientists at the EPA and Other Agencies*

Find Their Work Questioned Not Only by Industry, But By Their Own Government, Boston Globe, Aug. 28, 2005.

[66] *Flue-Cured Tobacco Coop. Stablization Corp. v. Envtl. Prot. Agency*, 313 F.3d 852, 862 (4th Cir. 2002).

[67] *Id*. at 861.

[68] Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J.L. & Pol'y 589, 601-02 (2004). Professor Wagner gives several examples of such instances: 1.) an IQA challenge that sought to exclude studies of the hormonal effects of the pesticide Atrazine on frogs, which was not based on any technical issue but instead on a policy argument that new scientific discoveries cannot be considered in regulating pesticides until after the underlying methods have been formally promulgated by EPA; 2.) a challenge to EPA's barium risk assessment based in large part on the petitioner's disagreement with the EPA's conservative assumptions used in preventative regulation; and 3.) a challenge to the National Oceanic and Atmospheric Administration's use of models to predict the effects of global warming, which in reality targeted the basic policy decisions involved in deciding whether to suspend use of available models pending availability of a more robust dataset or model. *Id*.

[69] *OMB Guidelines*, *supra* note 13, at 8460, § V.3.b.ii.C.

[70] The SDWA provides:

> (A) Use of science in decisionmaking
>
> *In carrying out this section*, and, to the degree that an Agency action is based on science, the Administrator shall use— (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data).

42 U.S.C. § 300g-1(b)(3)(A) (emphasis added).

[71] The SDWA provides:

> (B) Public information
>
> *In carrying out this section*, the Administrator shall ensure that the presentation of information on public health effects is comprehensive, informative, and understandable. The Administrator shall, in a document made available to the public in support of a regulation promulgated under this section, specify, to the extent practicable— (i) each population addressed by any estimate of public health effects; (ii) the expected risk or central estimate of risk for the specific populations; (iii) each appropriate upper-bound or lower-bound estimate of risk; (iv) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and (v) peer-reviewed studies known to the Administrator that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.

42 U.S.C. § 300g-1(b)(3)(B) (emphasis added).

[72] McGarity, *et al*., *supra* note 8, at 9.

[73] *OMB Guidelines*, *supra* note 13, at 8457.

[74] Comments of the Natural Resources Defense Council regarding EPA Draft Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, May 31, 2002, at 22.

[75] *Id*. at 25. For more information on the chemical "data gap," *see* Rena I. Steinzor, *et al*., *Overcoming 'Environmental Data Gaps': Why What EPA Doesn't Know About Toxic Chemicals Can Hurt*, CPR White Paper No. 510 (July 2005), *available at* http://www.progressivereform.org/articles/Data_Gaps_510.pdf (last visited Dec. 20, 2005).

[76] Office of Management and Budget, Office of Information and Regulatory Affairs, Information Quality: A Report to Congress, Fiscal Year 2003, 8 (Apr. 2004), *available at* http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf (last visited Dec. 19, 2005). The statement is repeated, virtually verbatim, in the "Implementation of the Information Quality Act" section of OMB's 2005 Report to Congress on the Costs and Benefits of Federal Regulation. *See* Office of Management and Budget, Office of Information and Regulatory Affairs, Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities, 63 (Dec. 2005), *available at* http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf (last visited Dec. 19, 2005) [hereinafter, "2005 Cost Benefit Report"].

[77] *See, e.g.*, Wagner, *Importing Daubert to Administrative Agencies*, *supra* note 68, at 590 (citing, *inter alia*, Robert V. Percival *et al*., Environmental Regulation: Law,

SCIENCE AND POLICY 72 (3d ed. 2000)). As Professor Wagner points out in her article, the IQA threatens to impose upon the regulatory agencies an evidentiary screening test that looks very much like the vigorous *Daubert* test developed by the courts in 1993 and since implemented to scrutinize scientific evidence to determine whether it is "reliable" before proceeding to trial. *Id*. (citing, *inter alia*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)). Professor Wagner explains that "there are important institutional differences between the agencies and the courts that could lead the IQA to be more damaging and potentially counterproductive as compared with the courts' use of Daubert." *Id*. For a discussion of the problems associated with *Daubert* as implemented by the courts, *see* Lisa Heinzerling, *Doubting Daubert*, Georgetown Public Law Research Paper No. 784689, BROOK. J. L. & POL'Y (forthcoming), *available at* http://www.progressivereform.org/articles/Doubting_Daubert_511.pdf (last visited Dec. 7, 2005).

[78] Wagner, *Importing Daubert to Administrative Agencies*, *supra* note 68, at 590 (citing Sidney A. Shapiro & Robert L. Glicksman, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH ch. 3 (2003); Wagner, *The Bad Science Fiction*, *supra* note 14, at 85-87).

[79] Shapiro, *supra* note 58, at 351.

[80] *Id*.

[81] *See* McGarity, *et al*., *supra* note 8, at 9 (detailing different, less prescriptive mandates set forth in statutes other than the SDWAA concerning the nature of the evidence upon which an agency can rely, including the Occupational Safety and Health Act and the Clean Air Act).

[82] Salt Brief, *supra* note 36, at 23 (supporting its argument that the district court was incorrect in its conclusion that the IQA does not provide standards for a reviewing court to apply by: 1.) noting that the "IQA provides that there shall be a process for 'ensuring and maximizing the quality, objectivity, utility and integrity of information . . . disseminated by an agency;'" 2.) asserting that the OMB Guidelines "explain at great length and implement what is meant by each statutory quality test mandated;" and 3.) concluding that "[t]his is hardly a standard-less environment.") *See also* Greenwood, *supra* note 11, at B-8-B-9 (arguing that the IQA, "particularly when the specific provisions of the OMB Guidelines are considered" provides adequate standards for judicial review).

[83] *Chevron v. NRDC*, 467 U.S. 837, 865-66 (1984) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

[84] Manu Raju, *Industry, Key Republican Suspend Push for Expanded Data Quality Act*, Inside EPA (Jul. 20, 2005) (quoting Sidney A. Shapiro's statement before the Subcommittee on Regulatory Affairs of the House Committee on Government Reform that if Congress changed the IQA to provide for judicial review, it would make a "bad situation worse").

[85] Shapiro, *supra* note 58, at 358.

[86] *Id*. at 368.

[87] *Id*. at 347 (citing *OMB Guidelines*, *supra* note 13, at 8457); *See also* Curtis W. Copeland & Michael Simpson, Congressional Research Service, *The Information Quality Act: OMB's Guidance and Initial Implementation*, 7 (updated Sept. 17, 2004), *available at* http://www.ombwatch.org/info/dataquality/RL32532_CRS_DQA.pdf (last visited Dec. 28, 2005) (explaining that although OMB has stated that agencies should handle correction requests submitted during the public comment period for a rule through the APA commenting process, if they are dissatisfied with the agency's handling of the correction request during the APA process, they could appeal the agency's decision through the agency's IQA administrative appeal process).

[88] *See*, *e.g.*, Letter from E. Donald Elliott, Wilkie, Farr & Gallagher LLP to Information Quality Guidelines Office, EPA (June 2, 2004) *available at* http://www.epa.gov/quality/informationguidelines/documents/04020.pdf (last visited Dec. 20, 2005) (challenging information underlying State Implementation Plans required under the Clean Air Act); Letter from Reed D. Rubinstein, Greenberg Traurig to Information Quality Guidelines Staff, EPA (Aug. 30, 2004), *available at* http://www.epa.gov/quality/informationguidelines/documents/04023.pdf (last visited Dec. 20, 2005) (challenging information underlying the proposed listing of a contaminated site on the Superfund National Priorities List).

[89] Wagner, *Importing Daubert to Administrative Agencies*, *supra* note 68, at 608.

[90] *Id*.

[91] *See* FEDERAL JUDICIAL CENTER, *How the Federal Courts Are Organized*, *available at* http://www.fjc.gov/federal/courts.nsf/0/a783011af949b6bf85256b35004ad214?opendocument (last visited Jan. 24, 2006).

[92] Chief Justice William Rehnquist, *2004 Year-End Report on the Federal Judiciary*, 2 (Jan. 1, 2005), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf (last visited 12/27/2005).

[93] Wagner, *Importing Daubert to Administrative Agencies*, *supra* note 68, at 607 (noting that the *Daubert* test, discussed *supra* note 77, has been criticized for causing greater imbalances in adversarial processes because of the high costs associated with mounting and defending *Daubert* challenges and citing, *inter alia* Ellen Relkin, *To Hear or not to Hear: When Are Daubert Hearings Appropriate*, SF78 A.L.I.-A.B.A. 371, 375 (2001) (reporting that *Daubert* hearings can range from a few hours to numerous days and have evolved into virtual mini-trials involving a myriad of experts from both sides that can cost parties "tens to hundreds of thousands of dollars")).

[94] United States Census Bureau, *Federal Government Civilian Employment by Function: December 2004*, *available at* http://ftp2.census.gov/govs/apes/04fedfun.txt (last visited Jan. 24, 2006).

[95] The IQA does not define the term "disseminated." *See* Information Quality Act, *supra* note 1. However, OMB's IQA guidelines broadly define "dissemination" as "agency initiated or sponsored distribution of information to the public." *OMB Guidelines*, *supra* note 13, at 8460, § V.8.

[96] *See, e.g.*, 2005 Cost Benefit Report, *supra* note 76, at 64.

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Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information. Direct media inquiries to Matthew Freeman at mfreeman@progressivereform.org. For general information, email info@progressivereform.org. Visit CPR's website at www.progressivereform.org.

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