Testimony of

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Scholar
Center for Progressive Reform

Before the
Subcommittee on Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives

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CPR CENTER FOR PROGRESSIVE REFORM

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Madame Chairman, Ranking Member Lynch, and Members of the Subcommittee, thank you for the opportunity to testify before you today. My name is Sidney A. Shapiro. I am the University Distinguished Chair in Law at Wake Forest University, Winston-Salem, North Carolina. I have also been the John M. Rounds Professor of Law at the University of Kansas, Lawrence, Kansas. I hold a B.S. in Economics from the Wharton School of Finance and Commerce, University of Pennsylvania, and a J.D. from the University of Pennsylvania Law School. My expertise is in administrative law and regulatory policy. My most recent book is *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation*, published by the Environmental Law Institute Press. I am also the co-author of *Risk Regulation at Risk: Restoring a Pragmatic Approach*, published by Stanford University Press, two law school textbooks on regulatory law and practice and administrative law, as well as a one-volume administrative law treatise. I have published over 40 articles.

I am the author of articles about the Information Quality Act (IQA): One, entitled "The Information Quality Act and Environmental Protection: The Perils of Reform By Appropriations Rider," appeared in 28 WILLIAM. & MARY ENVIRONMENTAL LAW & POLICY REVIEW 339 (2004). The other, "The Case Against the IQA," is forthcoming in the next issue of the ENVIRONMENTAL FORUM.

I am also a Scholar at the Center for Progressive Reform (CPR). Founded in 2002 as the Center for Progressive Regulation, CPR is a 501(c)(3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR is comprised of university-affiliated academics with expertise in the legal, economic and scientific issues related to regulation of health, safety and the environment. 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.

I. IQA Does More Harm Than Good

There was no solid evidence that data quality was a series problem in the federal government at the time Congress quietly enacted the IQA as a two-paragraph rider buried in an appropriations bill. This is not surprising. Administrative agencies had in place elaborate and time-tested procedures for data verification and correction prior to the IQA.

Despite the lack of need for the IQA, its defenders claim that it is a modest and useful effort to vet information on which the government relies. A March 2005 report by CPR, entitled *Truth and Science Betrayed: The Case Against the Information Quality Act*,[1] (which is available at http://www.progressiveregulation.org/articles/iqa.pdf), finds otherwise.

The case against the IQA is twofold. First, it causes delay and imposes unknown, but likely substantial, opportunity costs. Second, the use of the IQA has very little to do with correcting government information and very much to do with creating new opportunities to oppose and weaken existing and new regulatory controls. Petitions are routinely filed in attempts at:

- *Censorship.* Industry petitioners have tried to exclude or withdraw inconvenient information entirely rather than correct incorrect information;
- *"Correcting" policy.* Many IQA petitions challenge agency policy decisions and precautionary policies rather than technical or scientific information;
- *End running regulations* by challenging decisions, not information, bypassing traditional remedies in those laws;
- *Delaying* already overdue regulatory actions that have already complied with extensive opportunities for public participation;
- *Preventing agency action in the face of incomplete information* — as is frequently the case in environmental law — not poor quality information, as the law is designed to address;
- *Conducting fishing expeditions* by seeking underlying data without complying with Freedom of Information Act procedures, even though the act gives no access to those data;
- *Creating substantive conditions or standards* for rulemaking, implementation, or dissemination not contemplated by Congress; and

[1] Thomas O. McGarity, Sidney A. Shapiro, Rena I. Steinzor, Joanna Goger & Margaret Clune, *Truth and Science Betrayed: The Case Against the Information Quality Act*, Center for Progressive Regulation (March 2005), *available at*: http://www.progressivereform.org/articles/iqa.pdf (last visited 07/11/2005).

- *Sidestepping the courts* by attempting to discredit information that corporate defendants have either been unable to successfully exclude at trial, or would prefer not to encounter in future litigation.

The IQA's defenders point to the fact that there have also been IQA petitions filed by public interest groups. However, most requests (72 percent), are filed by regulated entities or their trade associations. There is little question that over time these entities will dominate the complaint process and heavily tilt it in the direction of disrupting regulatory programs.

The time has come for Congress to reevaluate the desirability of a separate statute aimed exclusively at such a vague and ultimately undefinable goal as "information quality." I believe that experience to date with the IQA establishes that it should be repealed.

II. A Solution in Search of a Problem

In late 2000, Congress quietly enacted the IQA as a two-paragraph rider buried in an appropriations bill,[2] although there is really no evidence that there was a serious problem with data quality in the federal government prior to the legislation. OMB's justification for its broad IQA guidelines, for example, has no examples of the government relying on poor quality data.[3] When Mark Greenwood wrote an essay in the *Daily Environment Report* prior to the passage of the IQA, which advocated for a data correction process, he was hard pressed to come up with examples of poor quality information used by agencies.[4]

This failure to find examples of poor quality data is not surprising. Administrative agencies had in place elaborate and time-tested procedures for data verification and correction prior to the IQA. Thus, it is not surprising that CPR Scholar and Professor Wendy Wagner of the University of Texas School of Law has found that "[a]fter more than [30] years of vigorous public health and safety regulation . . . there are surprisingly few examples of EPA using unreliable science or using science inappropriately to support a final regulation."[5] She continues, noting that if one subtracts the instances of "private science," where industry or independent contractors fabricated data in order to support an application for a permit or license, "the examples of regulatory bad science are winnowed down to a few, virtually all of which are contested."[6]

My testimony today, which is based on the CPR report, describes the problems created by the IQA and indicates why these problems justify the conclusion that the Act

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

[3] *See* OMB, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*; Republication, 67 Fed. Reg. 8452 (February 22, 2002) (hereinafter, "OMB Guidelines").

[4] *See* Mark Greenwood, *White Paper from Industry Coalition to EPA on Concerns Over Information Programs*, BNA DAILY ENVIRONMENT REPORT (May 4, 1999), *available in* Westlaw, 85 DEN E-1, 1999.

[5] Wendy Wagner, *The "Bad Science" Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation*, 66 LAW AND CONTEMPORARY PROBLEMS 63, 72 (2003).

[6] *Id*.

does more harm than good. I will describe how the IQA causes delay and imposes unknown, but likely substantial, opportunity costs. I will also demonstrate how use of the IQA has very little to do with correcting government information and very much to do with creating new opportunities to oppose and weaken existing and new regulatory controls.

III. Causing Delay and Imposing Opportunity Costs

A. Delay: The Act's ability to stall decision-making and consume resources is clear from a look at the first two years of implementation. While OMB stated in its first Report to Congress on the IQA that the number of "substantive correction requests that were responded to was relatively small," a look at the numbers as calculated by OMBWatch reveals a different picture. OMB reported that the agencies had only received 35 correction requests "that appear to be stimulated by the Information Quality Act,"[7] but there were actually 98 substantive IQA petitions filed in fiscal year 2003.[8]

This number of requests might appear manageable if it were divided evenly among the agencies and if the requests merely involved the correction of information on an agency website. However, the bulk of these petitions have been aimed at a few agencies with regulatory powers, particularly EPA. Since the period covered by OMB's report, an additional seventeen petitions have been filed with EPA alone (between October 2003 and June 2005).[9] In addition, there have been at least 23 Requests for Reconsideration (RFR) filed with HHS and EPA alone.[10]

Furthermore, a majority of these requests are lengthy, substantive complaints about scientific judgments and policy that have taken the agency months to answer. For example, it took EPA nearly 9 months to reject a complaint that it was inaccurate to characterize bromate as a likely human carcinogen.[11] It took EPA an additional eight months to uphold its original decision and deny that petitioner's RFR.[12] Similarly, an eleven-page request from the Perchlorate Study Group filed on December 22, 2003 was

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[7] OMB, *Information Quality: A Report to Congress, Fiscal Year 2003* at 8, available at: http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf (last visited 07/11/2005) (hereinafter, "OMB Report").

[8] OMBWatch, *The Reality of the Information Quality Act's First Year: A Correction of OMB's Report to Congress*, DQ-6 (July 24, 2004), http://www.ombwatch.org/info/dataqualityreport.pdf (last visited 07/11/2005) (hereinafter, "OMBWatch Report").

[9] *See Information Quality Guidelines - Requests for Correction (RFC) and Requests for Reconsideration (RFR) Submitted to EPA*, http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited 07/12/2005).

[10] *See HHS Information Quality Website: Information Requests for Corrections and HHS' Responses*, http://aspe.hhs.gov/infoquality/requests.shtml (last visited 07/11/2005); and *Information Quality Guidelines - Requests for Correction (RFC) and Requests for Reconsideration (RFR) Submitted to EPA*, http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited 07/12/2005).

[11] Request for Correction from David A. Smith, Ozone Industry (August 18, 2003), http://www.epa.gov/quality/informationguidelines/documents/12385.pdf; EPA Response to Petition (April 28, 2004), http://www.epa.gov/quality/informationguidelines/documents/12385-response.pdf.

[12] Request for Reconsideration from David A. Smith, Ozone Industry (September 23, 2004), http://www.epa.gov/quality/informationguidelines/documents/12385A.pdf; EPA Response to Request for Reconsideration, http://www.epa.gov/quality/informationguidelines/documents/12385A-response.pdf (June 9, 2005).

not answered until September 15, 2004,[13] nearly nine months after the petition was filed, and EPA is still working to respond to the industry group's RFR more than six months after it was filed.[14]

The additional layer of an appeals process, which OMB requires, provides an added mechanism for delay. There have been at least ten RFRs submitted to EPA.[15] While seven months was the shortest period of time to elapse between the filing of a request for correction and resolution of the associated RFR,[16] three petitions took well over a year to finally resolve,[17] and four remain to be answered more than a year after the original petitions were filed.[18]

B. Opportunity Costs: While OMB suggests in its first report to Congress that the IQA has not affected the pace or length of rulemakings (without referencing any data to support this conclusion),[19] it also acknowledges that it is taking agencies longer than expected to respond to requests and appeals, taking longer to find the correct personnel to handle the request, and that it is difficult to ensure that personnel have sufficient time to give "priority" to the request,[20] all of which suggest that agencies are hard-pressed to

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[13] Request for Correction, Perchlorate Study Group (December 22, 2003), http://www.epa.gov/quality/informationguidelines/documents/13679.pdf; EPA Response to Request for Correction, http://www.epa.gov/quality/informationguidelines/documents/13679-response.pdf (September 15, 2004).

[14] Request for Reconsideration, Perchlorate Study Group (December 21, 2004), http://www.epa.gov/quality/informationguidelines/documents/13679A.pdf.

[15] *See Information Quality Guidelines - Requests for Correction (RFC) and Requests for Reconsideration (RFR) Submitted to EPA*, http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited 07/12/05).

[16] Competitive Enterprise Institute, Request for Correction (February 10, 2003), http://www.epa.gov/quality/informationguidelines/documents/7428.pdf; EPA Response to Request for Reconsideration (September 23, 2003), http://www.epa.gov/quality/informationguidelines/documents/7428AresponsetoCEI.pdf.

[17] BMW Manufacturing Corporation, Request for Correction (February 7, 2003), http://www.epa.gov/quality/informationguidelines/documents/7421.pdf; EPA Response to Request for Reconsideration (May 13, 2004), http://www.epa.gov/quality/informationguidelines/documents/7421A-response.pdf; *See also* Chemical Products Corporation, Request for Correction (October 29, 2002), http://www.epa.gov/quality/informationguidelines/documents/2293.pdf; EPA Response to Request for Reconsideration (December 11, 2003), http://www.epa.gov/quality/informationguidelines/documents/2293AResponse.pdf; *and* David A. Smith, Ozone Industry, Request for Correction (August 18, 2003), http://www.epa.gov/quality/informationguidelines/documents/12385.pdf; EPA Response to Request for Reconsideration (June 9, 2005), http://www.epa.gov/quality/informationguidelines/documents/12385A-response.pdf.

[18] *See Information Quality Guidelines - Requests for Correction (RFC) and Requests for Reconsideration (RFR) Submitted to EPA*, http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited 07/11/05). Requests for Reconsideration filed by the National Paint and Coatings Association, U.S. Chamber of Commerce, National Multi-Housing Council, and Perchlorate Study Group remain unanswered as of July 11, 2005. Dates of the original Requests for Correction submitted by these petitioners are as follows: National Paint and Coatings Association, RFC #04020 filed June 2, 2004; U.S. Chamber of Commerce, RFC #04019 filed May 27, 2004; National Multi Council Housing RFC #04017 filed March 11, 2004; and Perchlorate Study Group RFC #13679 filed December 22, 2003. *Id*.

[19] OMB Report, *supra*, n. 7 at 9.

[20] *Id.* at 10.

simultaneously address IQA complaints and do the other business of the agency. In light of the trade-off, it is difficult to see how the IQA will not delay rulemaking.

OMB further recommends in its Report and directly to agencies that agency scientific and technical staff be increasingly engaged in the IQA process, which will undoubtedly come at the expense of agency scientific and technical involvement in other necessary projects. For example, OMB told the National Institute of Health (NIH) in November, 2004, that it should add three time-consuming steps to its process of responding to IQA complaints about the National Toxicology Program (NTP) after NIH had received six IQA complaints.[21] OMB requested these steps even though it conceded that in its letter to NIH that "NTP already has a rigorous process of scientific deliberation."[22]

OMB did not subject its IQA guidelines to any explicit cost-benefit analysis, and there is very little information available to help the public determine how many agency resources are consumed responding to IQA requests. As OMBWatch pointed out in its report, the agencies' annual reports to OMB, which follow a template developed by OMB, fail to include information on staff or other agency resources.[23] Direct requests by CPR to obtain such information from EPA failed to illicit any further information. In July, 2004, a member of EPA's Office of Environmental Information's Quality Staff responded to a request for resource information by explaining that "[a]t this time, I am not able to provide you with a report on the financial resources or personnel-hours dedicated to responding to the public's request and overall management of the EPA's Information Quality Guidelines (IQG) program."[24] The fact that the costs associated with implementing the IQA are unknown means that the IQA's opportunity cost is also unknown – that is the extent to which other agency programs and initiatives are languishing while resources are diverted to respond to IQA petitions.

III. New Opportunities to Oppose and Weaken Regulation.

Besides diverting agencies from their core responsibilities, a review of the petitions filed in the first two years of the IQA indicates that the IQA has very little to with correcting government information and very much to do with creating new opportunities to oppose and weaken existing and new regulatory controls. CPR's review of IQA petitions indicates a number of ways in which the IQA has become a deregulatory tool in the hands of industry petitioners.

A. Fishing Expeditions: Petitioners have imposed burdens not contemplated by the Act on federal agencies by seeking to obtain underlying data rather than requesting the correction of information.[25] The IQA explicitly provides that agencies issue guidelines

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[21] Letter from Dr. John Graham, Administrator, OIRA to Dr. Elias Zerhouni, Director, NIH (November 16, 2004), available at: http://www.whitehouse.gov/omb/inforeg/prompt/nih_ntp111604.pdf (last visited 07/11/2005).

[22] *Id*.

[23] OMBWatch Report, *supra*, n.8 at DQ-4.

[24] E-mail from Vincia C. Francis-Holloman, EPA, Office of Environmental Information Quality Staff to Matthew Shudtz, Research Assistant to Professor Rena Steinzor, University of Maryland School of Law (July 1, 2004) (on file with CPR).

[25] *See, e.g*., Perchlorate Study Group, Request for Correction, 5-11(December 22, 2003), http://www.epa.gov/quality/informationguidelines/documents/13679.pdf; NPC Services, Inc., Petition for

that establish administrative mechanisms allowing affected persons to seek and obtain *correction of information*, but the Act says nothing about providing access to the underlying data. Nevertheless, relying on the "reproducibility" standard set forth in the OMB guidelines for "influential information," petitioners have attempted to use the IQA as a shortcut around established Freedom of Information Act (FOIA) procedures, thus consuming additional agency resources.

B. Correcting Policy: Some petitioners have filed complaints for strategic purposes. The Competitive Enterprise Institute (CEI), for example, filed petitions with EPA, the National Oceanic and Atmospheric Administration, and the Office of Science and Technology Policy challenging climate change models used in the National Assessment on Climate Change and seeking withdrawal or exclusion of the models.[26] CEI filed its challenge notwithstanding the fact that the final report had been the subject of hundreds of public comments and exhaustive peer review.[27] Specifically, 300 scientific and technical experts provided detailed comments on drafts of the report.[28] After CEI sought judicial review of agency denials of its petitions, the government agreed to put a disclosure on the NACC that it had not been reviewed according to the standards of IQA.[29] CEI then asserted in a press release that the disclaimer established that the "the National Assessment is propaganda, not science,"[30] a statement which is consistent with the sound science campaign used by industry to attack scientific information used by the government. As the members of the Committee may know, this campaign seeks to convince the public that incomplete information is the same thing as poor quality information, thereby undermining public support for regulation of hazards about which there is reasonable, but incomplete information. By filing and publicizing their IQA

Disclosure and Correction, 5-6 (August 3, 2004), http://www.epa.gov/quality/informationguidelines/documents/04023.pdf.

[26] See, e.g., CEI Petition to EPA, Request for Response to/Renewal of Federal Data Quality Act Petition Against Further Dissemination of 'Climate Action Report 2002' (February 10, 2003), http://www.epa.gov/quality/informationguidelines/documents/7428.pdf. Similar petitions were filed with the National Oceanic and Atmospheric Administration and the Office of Science and Technology Policy.

[27] 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, 359, n. 114 (2004) (citing Nat'l Assessments Synthesis Team, US Global Change Research Program, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change* (2000)). *See also*, Thomas O. McGarity, *Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 925 (2004) (noting that the National Assessment on Climate Change had "received extensive peer review and public vetting").

[28] Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, *supra*, n. 27 at 359, n. 114 (citing Nat'l Assessments Synthesis Team, US Global Change Research Program, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change* (2000)).

[29] *See* U.S. National Assessment of the Potential Consequences of Climate Variability and Change, http://www.usgcrp.gov/usgcrp/nacc/ (last visited 07/11/02005); *see also* OMBWatch, The OMB Watcher, *First Data Quality Act Lawsuit Filed*, August 11, 2003, http://www.ombwatch.org/article/articleview/1733/1/185 (last visited 07/11/2005).

[30] CEI Press Release: *White House Acknowledges Climate Report Was not Subjected to Sound Science Law* (November 6, 2003), http://cei.org/gencon/003,03740.cfm (last visited 07/11/2005).

complaints, even ones that have no merit, opponents of government regulation support their sound science campaign.

A petition by BMW Manufacturing Corporation challenged EPA's legal determination that the company was in significant non-compliance with the Resource Conservation and Recovery Act (RCRA) after EPA had conducted inspections at a BMW facility and had found violations involving disposal of hazardous wastes.[31] Because the company later came into compliance with RCRA, it sought to have its historical record erased using the IQA. After its petition was denied, BMW sought reconsideration of its petition, and specifically set forth 17 "legal questions" for the appeals panel to review regarding the company's compliance status.[32] One year and three months later, the EPA appeals panel reached the appropriate result and upheld the denial of the original petition, concluding that EPA's decision on the compliance status of a facility was outside the scope of the IQA.[33]

C. Imposing Substantive Legal Standards: There is, as noted earlier, no indication that Congress intended that the IQA establish substantive criteria that augments or amends existing regulatory statutes, but industry petitioners have nonetheless asserted such claims. For example, a petition filed by the Center for Regulatory Effectiveness (CRE) and the makers of the most widely used herbicide in the United States, Atrazine, sought to exclude studies on the hormonal effects of the herbicide in frogs from EPA's decision regarding its reregistration because those studies were not subject to EPA-approved testing protocols.[34] There is, however, no such requirement in the Federal Insecticide Fungicide and Rodenticide Act (the statute providing for the registration of pesticides and herbicides) that EPA is barred from considering studies that precede an approved protocol.[35] In this case, the tactic appears to have succeeded since EPA apparently intends to seek additional data concerning whether Atrazine causes the hormonal effects.

The IQA has also been used in an effort to undermine the long-used and universally-employed "weight of the evidence" approach to evaluating environmental problems. This approach necessarily acknowledges that some studies may be more reliable than others, but considers the totality of the information in making judgments rather than eliminating certain studies or pieces of information entirely to the point that there is nothing left upon which to make a decision. By using the IQA to break apart this information into small parts rather than allowing it to be analyzed collectively, petitioners seek to undermine this fundamental approach to determining risks to the environment.

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[31] BMW Manufacturing Corp., Request for Correction (February 7, 2003), http://www.epa.gov/quality/informationguidelines/documents/7421.pdf.

[32] BMW Manufacturing Corp., Request for Reconsideration (November 25, 2003), http://www.epa.gov/quality/informationguidelines/documents/7421A.pdf.

[33] EPA Response to BMW Manufacturing Corp. Request for Reconsideration (May 13, 2004), http://www.epa.gov/quality/informationguidelines/documents/7421A-response.pdf.

[34] Center for Regulatory Effectiveness, Request for Correction (November 25, 2002), http://www.epa.gov/quality/informationguidelines/documents/2807.pdf.

[35] *See* Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J. OF LAW & POL'Y 589, 601 (2003).

Other petitioners have filed complaints seeking interpretations of the IQA which are clearly not authorized by Congress but which would inhibit agencies in protecting people and the public if adopted. For example, petitioners have asserted the failure of EPA (and other agencies) to comply with the risk principles set forth in the Safe Water Drinking Act (SDWA)[36] despite the fact that OMB's guidelines direct agencies to "adopt or adapt" the SDWA principles[37] and that EPA (and other agencies) have adapted, rather than adopted, the principles except for when the SDWA directly applies.[38]

Despite the fact that challenges to agency policy positions, judgments and legal determinations are entirely outside the scope of the IQA, OMB and industry petitioners have expanded the reach of the Act to challenge such decisions in a way that consumes untold agency resources, delays crucial action and circumvents existing statutory processes for regulatory decisionmaking.

D. Subverting Regulatory Processes: Still other petitioners have used the IQA to raise claims that were previously made in prior proceedings or that the petitioner can make in the normal course of agency proceedings. Such invocations of the IQA flout the intent of Congress as evidenced by the Act's language. The IQA requires each agency to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under the [IQA] . . . ."[39] Rulemaking, however, would be included in the common meaning of the words "administrative mechanism."[40] Notice and comment rulemaking provides extensive opportunities for interested parties to object to information relied on by the agency in the course of developing its proposed regulation, and such procedures are governed by well-established standards of review under the Administrative Procedure Act. Thus the language of the IQA suggests that Congress's intent was for agencies to "establish" "administrative mechanism[s]" where no such mechanisms previously existed. Stated differently, Congress could not have meant the IQA to apply to rulemaking because the requirement that an agency establish an "administrative mechanism" to hear complaints on the quality of information used during the course of a rulemaking is entirely superfluous or redundant.[41]

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[36] *See e.g.,* U.S. Chamber of Commerce, Request for Correction, 7 (May 26, 2004), http://www.epa.gov/quality/informationguidelines/documents/04019.pdf; NPC Services, Inc., Petition for Disclosure and Correction, 5-6 (August 3, 2004), http://www.epa.gov/quality/informationguidelines/documents/04023.pdf.

[37] OMB Guidelines, *supra*, n. 3, § V.3.b.ii.C. *See also* Safe Drinking Water Act Amendments (SDWA) of 1996, 42 U.S.C. § 300g-1(b)(3)(A)& (B).

[38] *See, e.g.*, EPA, *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, at § 6.4, p.22 http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf (last visited 07/11/2005) (specifying that EPA's adaptation of SDWA principles must be "consistent with Agency statutes and existing legislative regulations).

[39] Section 515(B)(2)(b) of the FY 2001 Appropriations Act, P.L. 106-554, 114 Stat. 2763A-153-154 (December 21, 2000).

[40] Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, *supra*, n. 27, 365.

[41] *Id*.

Nonetheless, petitioners have filed IQA petitions concerning information they had ample opportunity to challenge during previous regulatory processes.[42] Such petitions may simply be an effort to make the same argument in multiple venues, which slows down the effort to regulate or disseminate information while contributing no useful new information or arguments. Alternatively, as discussed previously, petitioners file IQA complaints, rather than make arguments in the normal course of agency business, because they want to assert that the IQA establishes independent, substantive conditions that an agency must meet before it can regulate or disseminate information.

IV. Case Studies: The Paint Rule and Devil's Swamp Lake[43]

A. The Paint Rule: A petition filed by the National Paint and Coatings Association (NPCA) and the Sherwin-Williams Company illustrates several of the previously explained problems with the IQA. NPCA's request involved a model rule drafted by the Ozone Transport Commission concerning the emission of volatile organic compounds (VOCs) released into the air during the application of thousands of architectural and industrial maintenance paints and coatings.[44] VOC emissions contribute to the creation of ground-level ozone, a pollutant regulated under the Clean Air Act (CAA) because it is associated with such respiratory ailments as shortness of breath, impaired lung function, severe lung swelling and even death.[45] As part of their ongoing efforts to meet CAA standards, several Mid-Atlantic states adopted versions of model rule, tailored to their specific circumstances ("Paint Rule"), after a full rulemaking process. The states then submitted their Paint Rules to EPA, asking that the agency approve the revisions to their CAA plans, and EPA proposed to approve the rules.[46]

The paint industry petition complained about a single spreadsheet among the rather voluminous materials relied on by the states to justify their Paint Rules. The NPCA and Sherwin-Williams argued that some cells of the spreadsheet, which projected the reductions in VOC emissions under the states' rules, were erroneous.[47] In some of the

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[42] *See*, *e.g.*, National Paint & Coatings Association and Sherwin-Williams, Request for Correction (June 2, 2004), http://www.epa.gov/quality/informationguidelines/documents/04020.pdf; NPC Services, Inc., Petition for Disclosure and Correction, 5-6 (August 3, 2004), http://www.epa.gov/quality/informationguidelines/documents/04023.pdf. Both petitions are discussed at length, *infra*, Section IV.

[43] The legal and factual shortcomings of the IQA petitions filed with respect to the Paint Rule and Devil's Swamp Lake by the National Paint & Coatings Association and NPC Services, Inc., respectively, are explored more fully in CPR's letters to Dr. John D. Graham, Administrator, OMB Office of Information and Regulatory Affairs and the Honorable Michael O. Leavitt, Former Administrator, EPA. The letters are available online at: http://www.progressivereform.org/articles/Paint_DQA_0804.pdf (CPR Response to IQA petition filed with EPA by the National Paint & Coatings Association and The Sherwin-Williams Co.); *and* http://www.progressivereform.org/devil_swamp/Devil_Swamp_Leavitt_Graham.pdf (CPR Response to IQA petition filed with EPA by NPC Services, Inc.).

[44] National Paint & Coatings Association and Sherwin-Williams, Request for Correction (June 2, 2004), http://www.epa.gov/quality/informationguidelines/documents/04020.pdf.

[45] *See* H.R. Rep. No. 101 - 490, at 199 (1990).

[46] See, e.g., EPA, *Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control of VOC Emissions From AIM Coatings*, 69 Fed. Reg. 29674 (May 25, 2004).

[47] National Paint & Coatings Association and Sherwin-Williams, Request for Correction, 3-4 (June 2, 2004), http://www.epa.gov/quality/informationguidelines/documents/04020.pdf.

states under review by EPA, the paint industry had raised the identical claim in the rulemaking process and had received thorough responses from the states – albeit not the responses they would have liked – explaining the alleged errors in the spreadsheet, and further explaining that the spreadsheet was by no means the sole basis for adopting the Paint Rule.[48] During the state rulemaking in Delaware, the first of the Mid-Atlantic states to adopt the Paint Rule, the paint industry raised several related arguments, but failed to raise the specific objections to the spreadsheet that would later become a hallmark of their objections to similar rules adopted by other Mid-Atlantic States. NPCA and Sherwin-Williams sued the Delaware Department of Natural Resources & Environmental Control over its adoption of the Paint Rule, but the court rejected the industry's arguments, finding that the state's decision was "supported by substantial evidence."[49]

Unable to convince state agencies and courts of their arguments concerning the state Paint Rules, the industry filed its IQA petition with EPA, arguing that the spreadsheet violated the IQA and that EPA must therefore reject any revision to a state Clean Air Act plan that included such a rule.[50] Thus, in addition to attempting to apply the IQA to *state* rulemakings, the paint industry was also using the IQA as an attack on the weight of the evidence approach used by the states. In the same manner, the industry was arguing that the Act provides substantive standards that limit EPA's authority to act under the CAA. Whether these efforts will succeed is still uncertain. Although EPA ultimately denied NPCA's petition,[51] the industry has filed a Request for Reconsideration[52] and is challenging EPA's approval of the Paint Rule in federal court on IQA grounds.[53]

B. Devil's Swamp Lake: A petition filed by NPC Services, Inc.[54] likewise illustrates multiple problems posed by the IQA. NPC was formed by eleven petrochemical companies identified by EPA in the mid-1980s as the parties responsible for contaminating a Superfund site in Devil's Swamp, just north of Baton Rouge, Louisiana.[55] Inside Devil's Swamp sits the man-made Devil's Swamp Lake, a veritable

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[48] *See*, *e.g.*, New Jersey Department of Environmental Protection, *Rule Adoption, Envtl. Protection, Office of Air Quality Management, Air Quality Regulation Program, Air Pollution Control, Prevention of Air Pollution from Architectural Coatings*, Response to Comment 116, 36 N.J. Reg. 3078(a) (June 21, 2004).

[49] *Nat'l Paint & Coatings Ass'n. v. Delaware Dep't of Natural Resources & Envtl. Control*, 2004 WL 440410, *7 (Del Super. 2004).

[50] National Paint & Coatings Association and Sherwin-Williams Company, Request for Correction, 8 (June 2, 2004), http://www.epa.gov/quality/informationguidelines/documents/04020.pdf.

[51] EPA, Response to NPCA Request for Correction (February 25, 2005), http://www.epa.gov/quality/informationguidelines/documents/04020-response.pdf.

[52] Sherwin-Williams Company, Request for Reconsideration (May 26, 2005), http://www.epa.gov/quality/informationguidelines/documents/04020A.pdf.

[53] *See Sherwin Williams Fighting EPA Approval of State Rules for VOCs in Paints, Coatings*, BNA ENVIRONMENT REPORTER (February 25, 2005).

[54] NPC Services, Inc., Petition for Disclosure and Correction, (August 3, 2004), http://www.epa.gov/quality/informationguidelines/documents/04023.pdf.

[55] *MSOF Corp. v. Exxon Corp., et al.*, 295 F.3d 485, 488 (5th Cir. 2002). NPC was formed by: Exxon Corporation, Exxon Chemical Corporation, USS Chemical Company, Copolymer Rubber & Chemical Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical Company, American Hoechst Corporation, Allied Chemical Corporation, Rubicon Chemical Company, and Petro Processors of Louisiana Inc. *Id*.

toxic soup, contaminated by PCBs, lead, mercury, hexachlorobenzene and hexachlorobutadiene,[56] and still used by the surrounding low-income population for subsistence fishing. NPC's petition demanded that EPA in effect withdraw its proposed addition of Devil's Swamp Lake to the Superfund National Priorities List (NPL).[57]

NPC filed its complaint for strategic purposes, despite the fact that EPA had repeatedly stated NPC's members would not be liable for the cleanup of Devil's Swamp Lake.[58] NPC sought to challenge a regulation that it previously had ample opportunity to contest in EPA rulemaking – the EPA's Hazard Ranking System (HRS). EPA decides which sites are placed on the NPL based on the site's score according to the HRS, a complex multi-factor formula set forth in the Code of Federal Regulations.[59] NPC's petition suggests that the HRS itself does not, in NPC's estimation, satisfy IQA standards.[60] Indeed, an attorney for NPC characterized the company's IQA petition as an "attempt to look at the science that underlies the HRS site scoring process."[61] Any challenge to the HRS regulations, however, would be thirteen years too late if brought in court.[62] Thus, NPC used the IQA both in an attempt to further delay a long-overdue and urgently necessary regulatory action, and as a means of attacking an established regulatory process that can no longer be challenged in court.

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[56] Louisiana Department of Environmental Quality (LDEQ) and Department of Health and Hospitals, Office of Public Health (LOPH), *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, http://www.oph.dhh.state.la.us/environmentalepidemiology/healthfish/docs/other%20chemical%20Advisories%20Complete%20List.pdf (last visited 07/12/2005).

[57] NPC Services, Inc., Petition for Disclosure and Correction, (August 3, 2004), 6, http://www.epa.gov/quality/informationguidelines/documents/04023.pdf. NPC's demand that EPA retract the HRS Documentation Record supporting its proposal to add Devil's Swamp Lake to the NPL pending various reviews that NPC asserted the agency should perform amounted to a request to withdraw the proposed listing.

[58] EPA, *HRS Documentation Record for Devil's Swamp Lake* (LAD981155872), 5, 25 (February 2004), http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d48023eb15&docIndex=0 (last visited 07/12/2005), document no. SFUND-2004-0004-019.

[59] *Board of Regents of the Univ. of Washington v. EPA*, 86 F.3d 1214, 1217 (D.C. Cir. 1996). The HRS methodology is set forth as Appendix A to the National Contingency Plan, 40 C.F.R. Pt. 300, App. A, and was revised in 1990. *See Hazard Ranking System, Final Rule,* 55 Fed. Reg. 51532 (Dec. 14, 1990).

[60] Although NPC's Petition never explicitly challenges the HRS, in each of its six "requested disclosures," the company seeks information about not only the data, but also the methods used to determine various conclusions set forth on EPA's *Worksheet for Computing HRS Site Score* and *Surface Water Overland/Flood Migration Component Scoresheet*. The "methods" EPA used to compute the information set forth on those worksheets are taken from the HRS itself. Accordingly, NPC's requests to evaluate those methods in order to "test the objectivity and reproducibility" of the site score suggests that the HRS itself may not, in NPC's estimation, satisfy IQA standards.

[61] *Data Quality Petition Challenges EPA's Superfund Risk Ranking Process*, INSIDE EPA (September 3, 2004).

[62] The HRS was last revised on December 14, 1990. *Hazard Ranking System, Final Rule,* 55 Fed. Reg. 51532 (Dec. 14, 1990). Pursuant to the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA, or "Superfund"), any challenge to the HRS must have been made within ninety days from the date the revised HRS regulation was promulgated, *i.e.* by March 14, 1991. *See* 42 U.S.C. § 9613(a). Accordingly, any implicit challenge to the HRS raised in NPC's Petition is time-barred. *See*, *e.g.*, *RSR Corp. v. EPA*, 102 F.3d 1266, 1269 (D.C. Cir. 1997) (finding challenge to HRS time-barred).

Moreover, NPC's petition sought interpretations of the IQA that are clearly beyond its scope. The petition argued that EPA's analyses supporting its assignment of an HRS score failed the IQA because they did not comport with the SDWA standards, although, as explained *supra* in Section III.B., EPA has not adopted those principles, nor was it required to do so. In addition, NPC's petition demanded that EPA provide information underlying the calculation of the HRS score, but as noted earlier, the Act does not provide a mechanism for the public to obtain information – FOIA performs that role.

Ultimately, EPA opted to include NPC's IQA petition as an additional comment on the proposed listing. More than a year later, the listing of Devil's Swamp Lake has yet to be finalized.

V. A Critical Look at Arguments in Defense of the IQA

The supporters of the IQA see nothing wrong with OMB's expansive interpretation of the IQA because additional protections are warranted and appropriate in their view. Since regulations, or even the dissemination of information about risks to people and the environment, can cost corporations millions of dollars, they argue that additional procedures to vet information is a good idea. This claim, however, ignores the lack of evidence that the government previously relied on poor quality information. It also ignores the trade-off between additional procedures and the impact of delay on the government's statutory responsibilities to protect people and the environment. In light of this trade-off, the government should not employ more procedures than are necessary to ensure the reliability of the information on which it relies.

Another popular argument among the Act's defenders is that the IQA is not anti-regulatory, since environmental and other public interest groups can and have filed IQA petitions. While it is technically accurate that environmental groups have filed IQA petitions, industry, trade organizations, and conservative groups have filed the large majority of the petitions. A July 2004 report by OMB Watch concluded that 72 percent of all requests for correction were filed by industry, and a majority of those requests challenged information relating to safety and the environment.[63] The industry petitions, moreover, were far more substantive and required much longer response times than petitions filed by individuals.[64] Finally, as noted earlier, the IQA provides industry the opportunity to make collateral attacks on regulatory and informational efforts by EPA and other agencies. These tactics force public interest groups to use scarce resources monitoring agencies and ensuring that they do not succumb to extravagant industry claims concerning the scope of the IQA. Thus, on balance, the IQA is likely to do more harm than good concerning the positions supported by environmental and similar public interest groups.

The lack of justification for the IQA might have been apparent to Congress had the Act been subject to the normal legislative process, rather than being passed as a rider hidden in a massive appropriations bill. These suspicious origins, however, did not stop OMB from making the IQA into an open-ended opportunity for industry petitioners to

[63] OMBWatch Report, *supra*, n. 8 at DQ-7-8.

[64] *Id*. at DQ-8.

challenge an agency's policy judgments about whether information is sufficient to justify agency action under a statutory mandate.

VI. Conclusion

We have now had enough experience with the IQA to know that it results in significant time and resource burdens for agencies, which are difficult to justify in light of the fact the Act is layered on top of existing procedures that adequately vet such information. A review of the petitions filed to date also indicates that industry petitioners are aggressively using the Act to further their own strategic goals, raise claims that have already been made or that could have been made in another forum, seek expansive interpretations of the Act that if ever adopted by the courts would seriously hamper EPA and other regulatory agencies, and attack the weight of the evidence approach used by EPA and other agencies to assess scientific information about risks to people and the environment.

Unfortunately, the disruptive and antiregulatory impacts of the IQA are about to get worse. After providing in its IQA Guidelines that information that has been subjected to formal, independent, external peer review will "generally be presumed to be of acceptable objectivity,"[65] OMB issued in September 2003 a set of prescriptive procedures for the conduct of peer review by federal agencies that would require an additional layer of review for a broad range of scientific information and assessments. In April 2004, OMB revised the proposal in response to criticism by environmental and public health advocates, as well as scientific organizations. Nonetheless, the *Final Information Quality Bulletin for Peer Review*, issued in December 2004, remains a concern because of its breadth and potential to delay the regulatory process.[66] The IQA says nothing about peer review, and efforts to impose such broad requirements across federal agencies have repeatedly failed in Congress throughout the last decade. While peer review may enhance agency evaluations in some cases, it is neither necessary nor appropriate in every case and should be restricted to those instances where it is already mandated as part of the regulatory process.

It is important that the government adequately vet the information that it uses. Agencies, however, did this before the IQA, and there is no proof that the procedures that were used were inadequate for this purpose. The IQA therefore appeared from the time of its passage as an industry effort to slow regulation and bypass or amend existing statutory standards. The experience to date with the Act offers substantial proof for this conclusion.

The time has therefore come for Congress to reevaluate the desirability of a separate statute aimed exclusively at such a vague and ultimately undefinable goal as "information quality." I believe that experience to date with the IQA establishes that it should be repealed.

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[65] OMB Guidelines, *supra*, n. 3, § V.3.b.i.

[66] *See* OMB, *Final Information Quality Bulletin for Peer Review* (December 16, 2004), http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf (last visited 07/12/2005).