

William & Mary Environmental Law and Policy Review

Volume 28 (2003-2004)
Issue 2

Article 5

February 2004

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Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 Wm. & Mary Env'tl. L. & Pol'y Rev. 339 (2004), <https://scholarship.law.wm.edu/wmelpr/vol28/iss2/5>

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THE INFORMATION QUALITY ACT AND ENVIRONMENTAL PROTECTION: THE PERILS OF REFORM BY APPROPRIATIONS RIDER

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Congress gave the White House new oversight powers in 2001 over environment protection and other forms of regulation, but the significance of this new authority went largely unnoticed at the time because the new legislation was hidden in a few paragraphs of a very large appropriations bill.¹ The legislation, now known as Information Quality Act ("IQA"), required the Office of Management and Budget ("OMB"), to establish guidelines that required each federal agency to establish procedures to ensure the "objectivity, utility, and integrity of information . . . disseminated" by the federal government.² The significance of this new authority has become more apparent as OMB and the regulatory agencies have begun to implement the legislation. In January 2002, OMB promulgated its guidelines instructing agencies how to comply with the legislation.³ The Environmental Protection Agency ("EPA"), after receiving public comment, promulgating procedures

* Rounds Professor of Law and Associate Dean, University of Kansas; Scholar, The Center for Progressive Regulation. The author appreciates the comments and suggestions he received from the other panelists and members of the audience at the symposium. The Center for Progressive Regulation filed comments on OMB's proposed Information Quality Guidelines and on proposed agency guidelines, and it has issued a "Perspective" on the subject of this article. Although I either was the author of these documents or participated in their drafting, this Article represents only the viewpoint of the author.

¹ Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763A-125, 2763A-153 to 2763A-154 (2001).

² *Id.* § 515(a), (b)(1); 114 Stat. at 2763A-153 to 2763A-154. The Act is known as both the Data Quality Act and the Information Quality Act, though it has most recently been referred to as the Information Quality Act by the Office of Management and Budget. *See, e.g.*, Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54023, 54,026 (Sept. 15, 2003); Solicitation of Public Comments on Agency Information Quality Guidelines for Ensuring Information Quality, 67 Fed. Reg. 38,690, 38,690 (June 5, 2002).

³ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452 (Feb. 22, 2002).

to implement the legislation in October 2002,⁴ as did other regulatory agencies.⁵

This Article contends that IQA may turn out to be a useful good government reform or a serious impediment to the protection of individuals and the environment, depending on how the courts ultimately interpret its terms. My argument proceeds in six steps. Part I describes the types of information that the government disseminates, and indicates how these disclosures have a number of positive effects in terms of protecting individuals and the environment. Part II describes IQA and OMB's interpretation of it. Part III acknowledges that a process to vet information disseminated in government reports and on the internet is appropriate, but it also explains how the vague language used by Congress invites political and private actors to interpret the rider in ways that may ossify the information disclosure process. More specifically, Part III identifies several ways that IQA can be interpreted to hinder the government's effort to protect people and the environment through information disclosure. Parts IV and V offer a more extended discussion of two additional potential adverse impacts. Part IV discusses the assumption by OMB and agencies that IQA applies to the rulemaking process, and contemplates how this application is likely to add to the ossification of rulemaking. This Part argues that a better reading of the legislation is that it does not apply to rulemaking. Part V discusses the extent to which Congress intended that there be judicial review of agency decisions regarding information quality complaints. It identifies arguments that both preclude judicial review and limit the extent of such review. The potential adverse impact of IQA on information disclosure that protects the public and the environment will depend on the extent to which judicial review is available.

Finally, Part VI concludes that IQA demonstrates the perils of reform by the appropriations rider. Because Congress failed to define the scope of the rider, it has invited special interests to seek interpretations that inhibit the

⁴ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, 67 Fed. Reg. 63,657 (Oct. 15, 2002), *available at* <http://www.epa.gov/oei/qualityguidelines/EPA-OEI-IQG-FINAL-10.2.pdf>.

⁵ *See, e.g.*, Department of Commerce, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Disseminated Information, 67 Fed. Reg. 62,685 (Oct. 8, 2002); Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Labor, 67 Fed. Reg. 61,669 (Oct. 1, 2002).

government's ability to protect individuals and the environment. The courts have good reasons to reject these interpretations, and if they do so, IQA will turn out to be a good government reform. If, however, Congress had resisted the temptation to undertake reform by appropriations rider, it could have avoided the time and effort that will be necessary to clarify the scope of the Act.

I. INFORMATION AND REGULATION

The dissemination of information is now part and parcel of the regulatory process. While agencies have always provided information to the public as part of the implementation of their statutory missions, the nature and extent of such disclosures have changed over the last decade or so. This Part describes the types of information disclosed by the government and the benefits to the government of information disclosure.

A. *Types of Disclosure*

Some information disclosed by government is objective, factual information generated by private parties or by the government itself.⁶ The Toxic Release Inventory ("TRI"), established by the 1986 Emergency Planning and Community Right-to-Know Act,⁷ is perhaps the best example of the disclosure of factual information generated by private parties.⁸ TRI is an annual, national compilation of chemical releases issued by EPA.⁹ The dissemination by the Occupational Safety and Health Administration ("OSHA") of company-specific inspection and enforcement data is a good illustration of the second category of factual information.¹⁰

⁶ See James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 529 (2003) (suggesting examples in the text used as illustrations).

⁷ 42 U.S.C. §§ 11001-11050 (2000). TRI is specifically established by 42 U.S.C. § 11023 (2000).

⁸ Conrad, *supra* note 6, at 528.

⁹ 42 U.S.C. § 11023 (2000); see Env'tl. Prot. Agency, *Toxic Release Inventory (TRI) Program*, at <http://www.epa.gov/tri/> (last updated Nov. 5, 2003) (providing access to chemical releases information by zip code).

¹⁰ Occupational Safety & Health Admin., Dep't of Labor, *Establishment Search*, at <http://www.osha.gov/cgi-bin/est/est1> (last visited Dec. 10, 2003) (allowing for searching of OSHA enforcement inspections).

Other information disseminated by the government results from testing and evaluation done by agencies or for agencies.¹¹ EPA, for example, publishes test results indicating the gas mileage of new automobiles,¹² and the Department of Transportation ("DOT") informs the public about the results of test rating the crash-worthiness of vehicles.¹³ EPA assesses the risks posed by certain substances in its Integrated Risk Information System ("IRIS").¹⁴ The Department of Health and Human Services' National Toxicology Program's Report on Carcinogens, as its name indicates, identifies substances that are potential carcinogens.¹⁵ EPA's Index of Watershed Indicators informs the public about state water quality information,¹⁶ and its Risk Screening Environmental Indicators Model ranks the health risks of toxic chemical releases according to the seriousness of the health risk and the number of persons exposed to the risk.¹⁷ In addition, EPA recently created "Science Inventory," a searchable Agency-wide database of the Agency's scientific and technical work products (for example, risk assessments, technical studies and guidance, and research).¹⁸

B. *Benefits of Information Disclosure*

The disclosure of information by agencies can have a number of positive effects. First, if individuals are more knowledgeable about some types of potential risks to themselves, they may be able to take protective actions. Consumers, for example, can use the crash data disseminated by DOT to purchase automobiles that have a higher crash rating.¹⁹ Similarly, OSHA may

¹¹ Conrad, *supra* note 6, at 528.

¹² See DEP'T OF ENERGY & ENVTL. PROT. AGENCY, PUB. NO. DOE/EE-0271, MODEL YEAR 2003 FUEL ECONOMY GUIDE, <http://www.fueleconomy.gov/feg/FEG2003.pdf> (last visited Dec. 10, 2003) (providing a searchable database of results of crash tests by automobile type and brand).

¹³ See Nat'l Highway Traffic Safety Admin., *New Car Assessment Program*, at <http://www.nhtsa.dot.gov/NCAP/Index.html> (last visited Dec. 10, 2003).

¹⁴ See Envtl. Prot. Agency, *Integrated Risk Information System*, at <http://www.epa.gov/iris> (last updated Aug. 13, 2003) (providing access to IRIS).

¹⁵ See NAT'L TOXICOLOGY PROGRAM, DEP'T OF HEALTH & HUMAN SERVS., REPORT ON CARCINOGENS (10th ed. 2002), available at <http://ehp.niehs.nih.gov/roc/toc10.html>.

¹⁶ See Envtl. Prot. Agency, *Index of Watershed Indicators: National Maps*, available at <http://www.epa.gov/wateratlas/geo/maplist.html> (last updated July 31, 2002).

¹⁷ See Envtl. Prot. Agency, *Risk-Screening Environmental Indicators Version 2.1* (July 2003), at http://www.epa.gov/opptintr/rsei/docs/factsheet_v2-1.pdf.

¹⁸ See Envtl. Prot. Agency, *Science Inventory*, at <http://cfpub.epa.gov/si/> (last visited Dec. 19, 2003).

¹⁹ See *supra* note 13 and accompanying text.

“prompt greater worker protection by publishing [workplace] risk and abatement information,” because, armed with such information, some workers may be able to bargain for more protection.²⁰

Consumers can also use information disseminated by federal agencies to take actions that may lead to greater protection of the environment or other regulatory goals. First, consumers may use information to favor companies with good environmental records or to refuse to buy the products of companies with poor records, either individually or as part of consumer boycotts.²¹ In addition, political activists can use information about environmental performance to engage in actions that reduce environmental risks, such as negotiating directly with polluters.²² In order to head off adverse consumer or political action, companies may take additional actions to protect individuals and the environment.²³ There is evidence, for example, that the Toxic Release Inventory has caused firms to improve their environmental performance by reducing toxic exposures beyond the amounts required by existing regulations.²⁴ Some regulatory reformers believe that information disclosure has a powerful enough impact on corporations that it can serve as an alternative to regulation,²⁵ while other commentators, including this author, see it as a useful supplement to rulemaking, but not a replacement for it.²⁶

The internet greatly increased the potential for the positive effects. Although the government previously disseminated information to the public in the form of reports, bulletins, and other documents, the information was often difficult to locate and obtain prior to the internet. All regulatory agencies now have websites and the government has established one location—<http://www.firstgov.gov>—that provides central access to all agency databases.²⁷

²⁰ Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 140 (2000) (proposing such disclosure).

²¹ *Id.* at 113.

²² E. Donald Elliot, *Environmental TQM: Anatomy of a Pollution Control Program That Works!*, 92 MICH. L. REV. 1840, 1852 (1994).

²³ *See id.* at 1851.

²⁴ *Id.*

²⁵ *See, e.g., id.* at 1849-51 (finding that corporations will voluntarily reduce pollution in response to incentives such as information disclosure).

²⁶ *See, e.g.,* Shapiro & Rabinowitz, *supra* note 20, at 100-01 (expressing skepticism that disclosure can replace traditional regulation).

²⁷ *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 (2000)) (requiring federal agencies to establish electronic reading rooms—i.e., websites—containing policy and guidance

If regulation compels corporations to take preventative actions to protect individuals and the environment without further regulatory action on the part of EPA or other agencies, agencies can avoid rulemaking, which is now such a burdensome process that it often takes years and years.²⁸ Further, the information also can be easily updated or supplemented, while changes in regulations, by comparison, require a second round of notice and comment rulemaking.²⁹

In addition, regulated entities may prefer information-based strategies because these approaches do not mandate any specific method of achieving that protection. For example, according to the reformers, TRI, unlike "conventional regulatory rules, . . . is not a costly, flexibility-impeding, externally imposed constraint."³⁰

In light of the government's increased reliance on information to inform consumers and influence regulated entities, there has been increased emphasis on ensuring that the information disseminated by the government is accurate and useful to the public.³¹ Poor quality information can lead consumers to take actions that are unnecessary and inappropriate, and it can lead citizens to take political and consumer actions that are unwarranted. When agencies disseminate unreliable information, they also can unfairly damage a corporation's reputation and adversely affect their own credibility. Ernie Gellhorn pointed out the last disadvantage of erroneous information thirty years ago,³² but the potential of the internet to spread information heightens the harm that can occur.

II. THE INFORMATION QUALITY ACT

The Information Quality Act is intended to promote the dissemination by the government of reliable and accurate information.³³ Unfortunately,

documents, and, most importantly, all documents that "the agency determines have become or are likely to become the subject of subsequent requests," 5 U.S.C. § 552(a)(2)(D)).

²⁸ See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-91 (1992) (documenting delays in rulemaking).

²⁹ 5 U.S.C. § 553 (2000).

³⁰ Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L. J. 257, 300 (2001).

³¹ See, e.g., Mark Greenwood, White Paper From Industry Coalition to EPA Over Concerns Over Information Programs Submitted May 4, 1999, [1999] 85 Daily Env't (BNA), at E-1 (May 4, 1999) (raising concerns about the government dissemination of incorrect information).

³² Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1426-27 (1973).

³³ See Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L.

because it was passed as a brief appropriations rider, without the benefit of hearings or debate, Congress gave limited guidance as to how this goal was to be accomplished, and how it was to be balanced with the regulatory goals of agencies. OMB plugged this gap by offering its own interpretation of what Congress required. This section describes and analyzes the IQA and OMB's interpretation of it.

A. *The Rider*

In light of its brevity, the easiest way to describe the IQA is to reprint it. The IQA, amending the Paperwork Reduction Act, states in its entirety:

- (a) In General.—The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.
- (b) Content of Guidelines.—The guidelines under subsection (a) shall—
 - (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
 - (2) require that each Federal agency to which the guidelines apply—
 - (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
 - (B) establish administrative mechanisms allowing affected

persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

- (C) report periodically to the Director—
 - (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency and;
 - (ii) how such complaints were handled by the agency.³⁴

B. OMB Guidelines

The legislation requires OMB to establish “policy and procedural” guidelines to ensure and “maximiz[e] the quality, objectivity, utility, and integrity of information” that is “disseminated by Federal agencies”³⁵ Congress did not define any of the previous terms nor is there any legislative history that indicates what the scope of these terms might be. Because the legislative rider is an empty vessel, OMB’s definition of these terms is very influential. Agencies are bound by OMB’s definitions unless and until a court determines that OMB’s definitions misstate Congress’ intent.³⁶ Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,³⁷ however, courts will defer to an agency when Congress has failed to precisely define statutory language, which means that OMB’s definitions³⁸ may prevail.

As noted, the legislation applies to all information that is “disseminated” by an agency. OMB has defined “dissemination” of information to include any “agency initiated or sponsored distribution of information to the public.”³⁹ An agency initiates or sponsors information any time that it endorses the information in some manner.⁴⁰ Thus, even if the source of information is a non-government entity, the information falls within the scope of the legislation so long as the government uses it in a manner that indicates the

³⁴ *Id.* § 515, 114 Stat. at 2763A-153 to 2763A-154.

³⁵ *Id.* § 515(a), 114 Stat. at 2763A-154.

³⁶ *Id.* § 515(b)(2), 114 Stat. at 2763A-154.

³⁷ 467 U.S. 837 (1984).

³⁸ *Id.* at 844-45.

³⁹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. 8,452, 8,460 (Feb. 22, 2002).

⁴⁰ *Id.* at 8,453-54.

agency's endorsement of the information. Under OMB's definition, an agency would therefore "disseminate" information when it places information on its website or issues a memorandum or report addressing some policy issue.

OMB's position is that an agency also "disseminates" information when it issues information during rulemaking,⁴¹ and the agency guidelines reflect this interpretation.⁴² This interpretation, however, is open to dispute, and Part IV of this Article will argue that the legislation does not encompass rule-making.

OMB subjected agencies to a three-tiered set of requirements⁴³ intended to "maximize the quality, utility, objectivity and integrity" of disseminated information.⁴⁴ These requirements are summarized in Table 1 *infra*. The requirements address both the manner in which an agency presents information and the reliability of the information that the agency presents. All information must, at a minimum, meet the criteria OMB has established for routine information.⁴⁵ In addition, agencies must meet additional requirements if information is "influential," which is information that "will have or does have a clear and substantial impact on important public policies or important private sector decisions."⁴⁶ Finally, there is an additional requirement concerning information about environmental, health, or safety risks.⁴⁷

⁴¹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. at 8,457.

⁴² See, e.g., ENVTL. PROT. AGENCY, GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE ENVIRONMENTAL PROTECTION AGENCY 32 (2002), available at <http://www.epa.gov/oei/qualityguidelines/EPA-OEI-IQG-FINAL-10.2.pdf>.

⁴³ See generally Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. at 8,458-59.

⁴⁴ *Id.* at 8,452.

⁴⁵ *Id.* at 8,452-53, 8,458 § III(1).

⁴⁶ *Id.* at 8,460 § V(9) ("Each agency is authorized to define 'influential' in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.").

⁴⁷ *Id.* at 8,460 § V(3)(b)(ii)(C).

Table 1: OMB Information Quality Requirements

Type	Presentation	Reliability
Routine	Clear and unbiased manner with contextual information if necessary	Presumed to be of sufficient quality if subject to independent peer review
Influential	High degree of transparency	"Sound" statistic and research methods required
Risk	Adapt or adopt Safe Drinking Water Act Amendments of 1996	Adapt or adopt Safe Drinking Water Act Amendments of 1996

Agencies are required to present all information in a clear and "unbiased manner," including the presentation of other contextual information if it is necessary to ensure a lack of bias.⁴⁸ In addition, an agency must present influential information with sufficient transparency to ensure that others can reproduce the results.⁴⁹ This requirement is only overridden by other compelling interests, such as the necessity of protecting trade secrets, in which case the agency is to apply "especially rigorous robustness checks" before disseminating the information.⁵⁰ Finally, as to risk information, the agency must adopt or adapt the risk disclosure provisions contained in the Safe Drinking Water Act Amendments of 1996 ("SDWAA").⁵¹

Agencies are required to assure that all of the information that they disseminate is of reliable quality.⁵² If the information has been the subject of "independent, external peer review," there is a rebuttable presumption that it meets this requirement.⁵³ In addition, an agency cannot disseminate influential "scientific, financial, or statistical" information until it determines that "analytical results" were "developed, using sound statistical and research methods."⁵⁴ If the agency is disseminating risk information, the information must meet the requirements for risk information in SDWAA or some adaptation of these principles.⁵⁵

⁴⁸ *Id.* at 8,459 § V(3)(a).

⁴⁹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. at 8,459 § V(3)(a).

⁵⁰ *Id.* at 8,460 § V(3)(b)(ii)(B)(i)-(ii).

⁵¹ *Id.* at 8,460 § V(3)(b)(ii)(C).

⁵² *Id.* at 8,459 § V(3)(b)(i).

⁵³ *Id.* at 8,460 § V(3)(b).

⁵⁴ *Id.* at 8,459 § V(3)(b)(ii)(C).

⁵⁵ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of

IQA further requires agencies to establish guidelines for the same purpose as OMB and to establish “administrative mechanisms” that allow “affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the [OMB] guidelines”⁵⁶ OMB provides that such “mechanisms shall be flexible, appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices.”⁵⁷

III. THE COSTS AND BENEFITS OF THE OMB GUIDELINES

This Part begins the analysis of the impact of OMB’s interpretation of IQA. The guidelines raise three issues. First, to what extent is it likely that the proposed procedures will improve the quality of information disseminated by the federal government? Second, to what extent will the proposed procedures delay the dissemination of information to the public and impose additional time and cost burdens on agencies? Third, in light of the previous potential problems, do the benefits of the proposed procedures outweigh the costs that they impose? This Part discusses a number of issues that relate to these questions.

A. *The “Sound Science” Campaign*

In order to ensure that information is “objective,” OMB requires agencies to verify that information that is “scientific, financial, or statistical” has been derived “using sound statistical and research methods.”⁵⁸ Affected persons are entitled to file a complaint that agency-disseminated information fails to meet this test.⁵⁹ Thus, the legislation opens the door for corporations or trade associations to challenge any scientific information that an agency makes public on the internet or in a report. The legislation there-

Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. at 8,460 § V(3)(b)(ii)(C).

⁵⁶ Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(b)(2)(B), 114 Stat. 2763A-125, 2763A-154.

⁵⁷ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. at 8,459 § III(3).

⁵⁸ *Id.* at 8,459 § V(3)(b).

⁵⁹ § 515(b)(2)(B), 114 Stat. at 2763A-153.

fore opens the door for industry to pursue its "sound science" campaign in the context of information disclosure.⁶⁰

The "sound science" initiative argues that agency regulations, particularly health and environmental regulations, are based on weak science that does not support the stringency of the regulatory actions that agencies take to protect people and the environment.⁶¹ Often, however, this argument blurs the distinction between incomplete information and poor quality information. A study on the potential risk of a hazard may be extremely competent, but it may not yield definitive information about the extent of the risk posed. In this circumstance, there is a policy question about what protective actions the government ought to take. Environmental laws and other health and safety laws require EPA and other agencies to act to reduce such risks before definitive information is available. As John Applegate noted, "[r]egulation based on risk permits regulatory action based on *ex ante* collective danger rather than *ex post* individual injury, and also operates preventatively to avert injury to the public as a whole."⁶² In order to discredit this protective tilt, industry attempts to convince the public that such preventative actions are not based on "sound science."⁶³ What industry is attacking, however, is the policy choice made by Congress that the country should not wait for definitive information about a hazard before something is done about it.⁶⁴

Consider, for example, an excellent study that establishes that heightened levels of lead in a person's blood have adverse health effects. The study, however, may fail to establish the extent to which airborne lead is absorbed in the bloodstream. The "sound science" campaign would describe the absence of knowledge about air-to-blood transfer rates to mean that the scientific evidence about the risks to humans of lead in their blood is of poor scientific quality. If the government fails to act to protect individuals from airborne lead for this reason, it would "mark a huge shift in American environmental policy, which since the 1970s has relied upon the principle

⁶⁰ See Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 17 (1998).

⁶¹ *Id.* at 17-18 (describing the "sound science" campaign).

⁶² John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261, 273 (1991).

⁶³ Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L. REV. 587, 612-13 (1996) (explaining that the "sound science" campaign objects not to the quality of data collected, but to regulations based on incomplete scientific information and worst-case scenarios).

⁶⁴ *Id.*

that we should base policy on the best available evidence.”⁶⁵ For example, one of EPA’s most successful efforts to protect the public was its decision in 1973 to phase out the use of leaded gasoline at a time when scientists did not fully understand the air-to-blood transfer rate.⁶⁶

The tilt in government regulation in favor of acting before we have complete information about environmental risks does not mean that regulators should ignore how much we actually know about a hazard, but “it is often wise to act before all the answers are in.”⁶⁷ Otherwise, many people can be harmed or the environment can be despoiled before the government acts. Likewise, if information disclosure is to serve as a useful supplement to regulation, administrators should take the quality of the evidence into account, but it will often be good policy to disseminate the best available evidence and not wait for more conclusive evidence to be discovered.

The risk for environmental and health and safety protection is that OMB and agencies will administer IQA in a manner that makes information quality “a goal in and of itself, rather than a means to ensure the most effective protection of individuals and the environment under existing circumstances.”⁶⁸ If this happens, IQA will turn out to hinder the government’s legitimate efforts to protect people and the environment. If, by comparison, OMB recognizes the “sound science” campaign for what it is—an attempt to discredit the policies adopted by Congress to protect people and the environment—then IQA is more likely to be a “good government” statute.

B. *Peer Review*

In its IQA guidelines, OMB discussed a potential role for peer review of information. The guidelines require the use of “sound statistical and research methods” regarding “scientific, financial, or statistical” information.⁶⁹ OMB indicated, however, that it would presume that information met this test if it had been subjected to “formal, independent, external peer

⁶⁵ Ctr. for Progressive Regulation, *The Data Quality Appropriations Rider: New Procedures and Information Disclosure*, para. 4, at <http://www.progressiveregulation.org/perspectives/dataQuality.htm> (last visited Dec. 10, 2003).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at para. 5.

⁶⁹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. 8,452, 8,459, § V(3)(b) (Feb. 22, 2002).

review”⁷⁰ In fall 2003, OMB proposed a bulletin that would supplement the procedures announced in the IQA guidelines by requiring peer review of most types of regulatory information not previously subjected to peer review and by specifying the procedures under which that review would take place.⁷¹ Since I have explored this proposal in some detail in another article,⁷² I will focus here on the general relationship between peer review and the likelihood that IQA will end up ossifying the dissemination of government information.

The proposed bulletin requires that agencies conduct “appropriate and scientifically-rigorous peer review . . . on all significant regulatory information that [is] . . . disseminate[d],” and it defines “significant information” as information that meets the “‘influential test’ in OMB’s Information-Quality Guidelines.”⁷³ Those guidelines define “influential” information as “information [that] will have or does have a clear and substantial impact on important public policies or important private sector decisions.”⁷⁴ For “significant” information, agencies can vary the type and extent of peer review depending on the nature of the information being reviewed.⁷⁵ OMB, however, mandates specific peer review procedures for “[e]specially [s]ignificant [r]egulatory [i]nformation.”⁷⁶ The proposed bulletin defines especially “significant regulatory information” as information that supports a “major regulatory action,” “has a possible impact of \$100 million” or more a year, or it determined by OMB “to be of significant interagency interest or relevant to an Administration policy priority.”⁷⁷ For this category of information, an agency must, among other procedures, choose independent and unbiased scientists to provide the peer review, “provide . . . an explicit, written charge . . . describing the purpose and scope of review,” provide an opportunity for the public to comment, require peer reviewers issue a final written report, and respond to the final report indicating where the agency agrees and disagrees with the peer review.⁷⁸

⁷⁰ *Id.* at 8,459, § V(3)(b)(i).

⁷¹ See Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023 (Sept. 15, 2003).

⁷² Sidney A. Shapiro, *OMB’s Dubious Peer Review Procedures*, [2004] 34 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,064 (Jan. 2004).

⁷³ Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. at 54,027.

⁷⁴ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. at 8,460.

⁷⁵ Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. at 54,027, § 2.

⁷⁶ *Id.* at 54,027-28, § 3.

⁷⁷ *Id.* at 54,026.

⁷⁸ *Id.* at 54,027-28.

OMB's proposal would subject a significant amount of government information to peer review. Much of the information that the government disseminates is likely to have a "substantial" impact on "important public policies or private sector initiatives."⁷⁹ The category of "especially significant" information is narrower, but OMB has left itself a couple of loopholes that would permit it to greatly expand this category of information. OMB will determine whether information be of "significant interagency interest" or "relevant to an Administration policy priority," both ambiguous concepts.⁸⁰

The problem with this approach is that OMB ignores whether peer review is necessary or is likely to identify problems with the information being reviewed. Information may have a significant impact on public policy or private sector initiatives, but "it does not follow that the information is likely to be unreliable or that peer review is necessary to ensure its objectivity."⁸¹ OMB does permit an agency to vary the extent and nature of peer review of "significant" information, which will reduce an agency's time and expense of undertaking peer review. Nevertheless, there is likely to be a considerable cost to the government. Although OMB's flexibility may reduce the time and burden of individual reviews of significant information, the collective cost of reviewing this information is likely to be great because the government disseminates so much of this type of information. The burden on an agency will be substantially greater for "especially significant regulatory information" since OMB mandates expensive and time consuming procedures that agencies must use.

By ignoring the need for peer review, OMB is likely to ossify the information dissemination process without producing offsetting benefits. OMB would strike a more appropriate balance between the benefits and costs of peer review if it "limit[ed] peer review to [instances] where the information [being reviewed] . . . sets a new precedent or is reasonably controvertible."⁸²

Peer review has a role to play in the implementation of IQA, but OMB's failure to limit peer review to situations where it is most likely to be useful suggests that IQA is more likely to hinder government than to help it. This criticism is based on OMB's proposed peer review guidelines, and the final

⁷⁹ See *supra* note 74 and accompanying text (proposing peer review for information that has a "substantial" impact).

⁸⁰ See *supra* note 77 and accompanying text (defining "especially significant" information).

⁸¹ Shapiro, *supra* note 72, at 10,066.

⁸² *Id.*

guidelines may restrict peer review in the manner recommended here. If so, IQA is more likely to turn out to be a good government statute.

C. *Risk Information*

An agency's dissemination of risk information to the public may also be hampered depending on how IQA is interpreted. The problem concerns OMB's requirement that agencies "adopt or adapt" the risk principles in the SWDAA of 1966.⁸³

IQA requires agencies to maximize the "objectivity" of information.⁸⁴ The OMB guidelines defines the "objectivity" of information as information that is "accurate, reliable, and unbiased."⁸⁵ Scientific, financial or statistical information is "accurate, reliable, and unbiased" when it is produced by "sound statistical and research methods."⁸⁶ If scientific information relates to the analysis of risks to human health, safety and the environment, an agency must meet the previous test by "adopt[ing]" or "adapt[ing]" the quality principles applied by Congress to risk information used and disseminated pursuant to SDWAA.⁸⁷ Although EPA adopted SDWAA principles,⁸⁸ this still may result in the inappropriate use of these principles. The danger is that EPA's efforts to blend SDWAA principles with the approach mandated by another statute may skew the end-result towards SDWAA principles and away from Congress' mandate.

SDWAA sets out standards for the scientific evidence on which EPA can rely in its regulation of water pollutants. The Act provides that "to the degree that an Agency action is based on science" EPA "shall use . . . the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices . . ."⁸⁹ Further, the Act requires EPA to use "data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision jus-

⁸³ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. 8,452, 8,460 § V(3)(b)(ii)(C) (Feb. 22, 2002).

⁸⁴ Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763A-125, 2763A-154 (2001).

⁸⁵ *Id.* at 8,459, § V(3)(a).

⁸⁶ *Id.*

⁸⁷ *Id.* at 8,460 § V(3)(b)(ii)(C).

⁸⁸ ENVTL. PROT. AGENCY, *supra* note 42, at 50.

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

tifies use of the data).⁹⁰ Since SDWAA only applies to EPA's implementation of the Safe Drinking Water Act, these standards do not apply to other actions by EPA or other agencies. Nevertheless, OMB claims that Congress in SDWAA "adopted a basic standard of quality for the use of science in agency decision-making,"⁹¹ but there is nothing in the text of SDWAA or the legislative history to support this claim.

OMB's claim that the evidentiary standards in SDWAA apply outside that context is also contradicted by the fact that Congress established different, and less prescriptive evidentiary standards, in other environmental and health and safety standards. Congress, for example, required OSHA to use the "best available" scientific evidence in promulgating workplace standards for toxic materials or harmful physical agents.⁹² In the Clean Air Act, Congress required EPA to use the "latest scientific knowledge," as reflected in air quality criteria documents, in setting the National Ambient Air Quality Standards.⁹³ Likewise, the Clean Water Act requires EPA recommendations on science-based water quality criteria to be based on "latest scientific knowledge,"⁹⁴ and the Toxic Substances Control Act provides general authority to develop testing protocols for evaluating risks from toxic substances, but it does not embody the highly prescriptive risk assessment principles announced in the Safe Drinking Water Act Amendments.⁹⁵ In other statutes, the evidentiary standards for science-based decision-making are the same as the substantive statutory standards. If, for example, a statute mandates that EPA establish "margin of safety" in order to protect the public health, it would not be unreasonable for the agency to focus its attention on upper-bound estimates of risk as a policy judgment.⁹⁶

⁹⁰ *Id.*

⁹¹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. 8,452, 8,457 (Feb. 22, 2002).

⁹² 29 U.S.C. § 655(b)(5) (2000).

⁹³ 42 U.S.C. § 7408(a)(2) (2000). In fact, *Whitman v. American Trucking Ass'n's*, rejected an argument by industry litigants that the Clean Air Act requires a quantitative risk assessment from EPA when EPA sets National Ambient Air Quality Standards under the Act. See 531 U.S. 457 (2001).

⁹⁴ 33 U.S.C. § 1314(a)(1) (2000).

⁹⁵ 15 U.S.C. § 2626(a) (2000).

⁹⁶ Cf. Cass R. Sunstein, *The Arithmetic of Arsenic* 38 (AEI-Brookings Joint Ctr. for Regulatory Studies, Working Paper 01-10, 2001), available at <http://www.aei-brookings.org> (suggesting congruence of risk assessment protocols and substantive standards).

Given that other statutes set out different evidentiary standards, it would be illegal for EPA or another agency to adopt the SDWAA principles in another context. Moreover, in light of this discrepancy, it is not clear how EPA or another agency can "adapt" the principles. In any case, EPA or another agency would be violating its statutory obligations if its efforts to "adapt" the SDWA principles led it away from the protective policies of the statutes being administered.

Another provision of SDWAA concerns how risk information is presented to the public. It requires EPA to "ensure that the presentation of information on public health effects is comprehensive, informative, and understandable."⁹⁷ Accordingly, EPA and other agencies are required, "to the extent practicable," to make available to the public the following information:

- (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.⁹⁸

Since this provision does not dictate an evidentiary standard, agency compliance with it is not necessarily inconsistent with the implementation of statutes other than the SDWAA. Moreover, agencies should make the scientific information about risks as transparent as possible for the public.

There is one aspect of the previous requirements, however, that is problematic. Section (ii) requires EPA to disclose "the expected risk or central estimate of risk for the specific populations"⁹⁹ The problem is that the uncertainties that confound most risk assessments make it impossible

⁹⁷ 42 U.S.C. §300g-1(b)(3)(B).

⁹⁸ *Id.*

⁹⁹ *Id.* § 300g-1(b)(3)(B)(ii).

to come up with a “central estimate”¹⁰⁰ Moreover, this problem cannot be solved by simply averaging the predictions of competing risk models in order to derive such an estimate. As one risk assessor notes, calculating a central estimate of risk is like “average[ing] the winning percentage of all Los Angeles sports teams—basketball, football, hockey, and baseball—to derive a central estimate of the likely success for an athlete playing in that city.”¹⁰¹ In order to be transparent, agencies should instead reveal the different predictions provided by different risk models, and explain the differences in a comprehensive way.¹⁰²

OMB’s requirement that agencies adapt or adopt the risk principles contained in SDWAA could lead to substantial harm to the protection of people and the environment if it causes agencies to weaken their commitment to the protective tilt that Congress built into the environmental and safety and health laws. There is no evidence that Congress intended IQA to change the substantive mandate of any agency in this manner. None of the language of the Act supports this conclusion. Moreover, since there is no legislative history or debates concerning the Act, there is also no legislative history that suggests this was Congress’ intention. By comparison, the public would benefit from a more transparent disclosure of risk information, such as that suggested by SWDAA,¹⁰³ as long as agencies not attempt a central estimate of risk when it would be inappropriate.

D. *Administrative Appeals*

The ultimate impact of IQA will also depend on how agencies and OMB implement the requirement that agencies “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 [pursuant to the Act]”¹⁰⁴ OMB’s guidelines interpret this

¹⁰⁰ McGarity, *supra* note 60, at 28.

¹⁰¹ *Id.* at 28 (quoting Elle Silbergeld’s testimony before the House Subcomm. on Health and Environment and the Subcomm. on Commerce, Trade and Hazardous Materials of the House Comm. on Commerce in 1995).

¹⁰² See Comment from Thomas O. McGarity, President, Ctr. For Progressive Regulation, to Envtl. Prot. Agency, Docket ID No. OEI-10014, at 16-17 (May 31, 2002), at <http://www.epa.gov/oei/qualityguidelines/dockets/ivb1105-053102-mcgarrity.pdf> (taking the same position).

¹⁰³ See *supra* note 98 and accompanying text.

¹⁰⁴ Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(b)(2)(B), 114 Stat. 2763A-125, 2763A-154 (2001).

provision to require each agency to establish procedures that permit "affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines."¹⁰⁵ The guidelines provide further that these "mechanisms shall be flexible, appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices."¹⁰⁶

Sensibly implemented, the previous requirements give the public the opportunity to bring questionable information to the attention of an agency and permit the agency to make appropriate corrections. Nevertheless, this aspect of IQA may turn out to hinder protection of the public and the environment in two ways. First, there is the potential that administrative appeals will become part of the litigation strategy of regulated entities to slow, or even stop, the government from disseminating information that is legally or politically inconvenient for them. If agencies cannot respond expeditiously to these efforts, they may have their intended effect. Second, the resolution of information quality complaints should be transparent. If OMB and agencies are not accountable to the public for these actions, there is the potential for regulated entities to use IQA in ways that limit the protection of people and the environment.

1. Ossification of Information Disclosure

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. The extent to which the administrative mechanism will become a burden on agencies depends on the number of complaints that they will receive, how easily meritless complaints can be dismissed, and whether the agencies have adequate resources to process the complaints without diverting time and attention away from other regulatory and information activities.

There is insufficient evidence to date to determine the number of complaints that agencies will have to resolve. Although some agencies publish Information Quality Act complaints on their websites, most agencies have

¹⁰⁵ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by Federal Agencies; Republication, 67 Fed. Reg. 8,452, 8,459, § III(3) (Feb. 22, 2002).

¹⁰⁶ *Id.*

apparently not yet done so. EPA is one of the agencies that does publish its complaints. In the first year after EPA's guidelines became effective, for example, EPA received fifteen information quality complaints.¹⁰⁷ By comparison, the Department of Transportation received forty-four complaints in just the first three months after its guidelines were published.¹⁰⁸

Some of the complaints that have been filed certainly suggest that agencies will have to cope with complaints filed for strategic purposes. The Competitive Enterprise Institute ("CEI"), for example, filed complaints with EPA,¹⁰⁹ the National Oceanic and Atmospheric Administration,¹¹⁰ and the Office of Science and Technology Policy¹¹¹ requesting the agencies to withdraw the National Assessment on Climate Change ("NACC"), an interagency government report on global warming.¹¹² CEI is an industry think tank "that has received more than \$1 million in donations since 1998 from . . . Exxon."¹¹³ CEI filed the challenge even though the report it challenged was subjected to numerous rounds of public comment and peer review prior to being disseminated by the government.¹¹⁴ In other words, although the report

¹⁰⁷ Env'tl. Prot. Agency, *Requests Submitted To EPA*, at http://www.epa.gov/oei/qualityguidelines/af_req_correction_sub.htm (last updated Nov. 24, 2003).

¹⁰⁸ Dep't of Transp., *Docket Management System*, at http://dms.dot.gov/cfreports/dataQuality_run.cfm (last updated Dec. 10, 2003).

¹⁰⁹ Letter from Christopher C. Horner, Competitive Enterprise Inst., to Office of Env'tl. Info, Env'tl. Prot. Agency, Request for Response to/Renewal of Federal Data Quality Act Petition Against Further Dissemination of 'Climate Action Report 2002' ("RFC") (Feb. 10, 2003), at <http://www.epa.gov/oei/qualityguidelines/afreqcorrectionsub/7428.pdf>.

¹¹⁰ Letter from Christopher C. Horner, Competitive Enterprise Inst., to Nat'l Oceanic & Atmospheric Admin. Section 515 Officer, Nat'l Oceanic & Atmospheric Admin., Request for Correction of Information: Petition to Cease Dissemination of the National Assessment on Climate Change, Pursuant to the Federal Data Quality Act (Feb. 19, 2003), at <http://www.cei.org/pdf/3374.pdf>.

¹¹¹ Letter from Christopher C. Horner, Competitive Enterprise Inst. to Dir. of the Office of Sci. & Tech. Policy, Initial Request for Correction of Information: Petition to Cease Dissemination of the National Assessment on Climate Change, Pursuant to the Federal Data Quality Act (Feb. 20, 2003), at <http://www.cei.org/pdf/3360.pdf>.

¹¹² NAT'L ASSESSMENT SYNTHESIS TEAM, US GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS ON THE UNITED STATES: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE (2000), at <http://earth.usgcrp.gov/usgcrp/Library/nationalassessment/overview.htm>.

¹¹³ Paul Harris, *Bush Covers Up Climate Research: White House Officials Play Down Its Own Scientists' Evidence of Global Warming*, GUARDIAN UNLIMITED, Sept. 21, 2003, at <http://www.guardian.co.uk/usa/story/0,12271,1046388,00.html>.

¹¹⁴ NAT'L ASSESSMENT SYNTHESIS TEAM, *supra* note 112, at 3 (noting that "300 scientific and technical experts . . . provided detailed comments" on drafts of the report, that hundreds of public comments were received during a sixty-day comment period, and that "[a] panel of distinguished experts convened by the President's Committee of Advisors on Science and Technology . . . provided broad oversight, and monitored the authors response to all

constituted the latest and best information about global warming according to leading experts, CEI's complaint insisted that the report was not good enough even to be disseminated to the public. After the agencies denied CEI's request, it sued the government.¹¹⁵ The suit was settled by CEI after the government agreed to put a disclosure on the NACC that it had not been reviewed according to the standards of IQA.¹¹⁶ CEI asserted in a press release that the disclaimer established that the "the *National Assessment* is propaganda, not science,"¹¹⁷ an assertion that is consistent with the sound science campaign used by industry to attack scientific information used by the government. As noted earlier, this campaign seeks to convince the public that incomplete information is the same thing as poor quality information.¹¹⁸

A complaint filed by Morgan, Lewis and Bockius with EPA is another example of efforts to use IQA in a strategic manner.¹¹⁹ The complaint attacks information in a 1986 publication, *Guidance for Preventing Asbestos Disease Among Auto Mechanics*, which warns mechanics to take preventative efforts to prevent their exposure to asbestos contained in replacement brakes that they install.¹²⁰ The firm said it was filing the complaint to challenge the document because it was used by thousands of mechanics who had brought lawsuits after being exposed to asbestos in brakes.¹²¹ According to a news report, "public health surveys indicate that thousands of auto workers are diagnosed each year with asbestos-related diseases, such as mesothelioma, lung cancer and asbestosis," and "[f]ew mechanics take protective measures when working with brakes—mainly, they say, because they believe asbestos is no longer present."¹²² As several members of Congress have pointed out, there is new scientific information about the risks to mechanics, but none of this information makes warnings in the book erroneous or justifies its withdrawal:

reviews").

¹¹⁵ Press Release Competitive Enterprise Inst., White House Acknowledges Climate Report Was not Subjected to Sound Science Law: CEI Drops Lawsuit Against Bush Administration (Nov. 6, 2003), at <http://www.cei.org/gencon/003,03740.cfm>.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (quoting Myron Ebell, CEI Director of Global Warming Policy).

¹¹⁸ See *supra* note 54 and accompanying text.

¹¹⁹ Letter from Dino Privitera, Morgan, Lewis & Bockius, LLP, to Info. Quality Guidelines Staff, Envtl. Prot. Agency, Request for Correction of Information (Aug. 19, 2003), at <http://www.epa.gov/oei/qualityguidelines/afreqcorrections/12467.pdf>.

¹²⁰ Andrew Schneider, *EPA Warning on Asbestos is Under Attack*, ST. LOUIS POST-DISPATCH, Oct. 25, 2003, available at <http://www.stltoday.com/stltoday/news/stories.nsf/News/8D5A91107334195086256DCA0054D4CA?OpenDocument&Headline=EPA+warning+on+asbestos+is+under+attack>.

¹²¹ *Id.*; Privitera, *supra* note 119, at 8-9.

¹²² Schneider, *supra* note 120.

In short, there is substantial evidence, which is ignored by Morgan Lewis, indicating that considerable risks remain for individuals that work with brake maintenance or manufacture. While EPA could update the Guidance with this information, it should by no means simply withdraw the Guidance. Withdrawing the Guidance without issuing new guidance would create the misleading and dangerous impression that little or no risk exists.¹²³

The filing of information complaints, such as the previous ones, indicate that the IQA can be used by regulated entities, or their lawyers, to attack even reliable information for strategic reasons. If this trend accelerates, the Act could lead to the ossification of information disclosure. How burdensome these complaints may become may turn on how easily corporations can sue EPA and other agencies after they dismiss a complaint; an issue that is discussed below.¹²⁴ It will also depend on whether the White House and Congress agree to give the agencies additional resources to process such complaints. If not, agencies will either have to divert resources away from other regulatory and information duties, or slow down the dissemination of information in order to process the information complaints. In today's budget climate, however, the likelihood of additional resources seems remote.

2. Accountability

In order to assure the accountability of the administrative appeals process, agencies should notify the public about pending requests, permit interested persons to file comments, and resolve the complaints in a transparent manner. Although these procedures are important to assuring that IQA is a good government statute, it is not yet certain that the public will achieve this degree of participation and accountability.

First, as mentioned previously, agencies have been slow to put information quality complaints on their websites. Without such notification, public participation is likely to be stymied. The American Bar Association recommended that "agencies should explore means to maximize the availability and

¹²³ Letter from Representatives Henry Waxman, George Miller, John Tierney, Major Owens and Dennis Kurcinich, to Marianne Horinko, Acting Adm'r, Env'tl. Prot. Agency (Oct. 20, 2003), at http://www.house.gov/apps/list/press/oh10_kucinich/031020EPAasbestos.html.

¹²⁴ See *infra* Part V.

searchability of existing law and policy on their websites,"¹²⁵ including making available "all agency rules and regulations, and all important policies, interpretations, and other like matters on which members of the public are likely to wish to rely"¹²⁶

Second, OMB recently proposed that it must be notified of all information quality complaints received by EPA and other agencies, and this proposal would require an agency to consult with OMB prior to responding to the complaint.¹²⁷ OMB, however, has not proposed any procedures that would make this process transparent or that would make it accountable to the public concerning how it influences an agency's decision regarding an information quality complaint. Thus, OMB can order agencies to resolve a complaint in a specific manner without acknowledging its participation in the process. OMB can also intervene based on information and lobbying by regulated entities or others that is unknown to the public or to the agency that received the complaint.

Professor Glen O. Robinson explained the importance of accountability in presidential oversight when he noted that executive oversight is an

important form[] of policy influence and direction, . . . but one should not suppose that, individually or collectively, these interveners are simply representatives of the president. In fact, these executive interveners are themselves part of the administrative bureaucracy and, as such, present the same type of monitoring and control problems . . . as the agencies that they seek to influence.¹²⁸

These same concerns would apply to OMB's efforts to influence or decide how agencies resolve information quality complaints.

OMB's lack of accountability is particularly troubling in light of the concerns raised in the previous section. Once regulated entities file strategic information quality complaints, they will seek meetings with OMB to obtain its support for their challenges. If the persons seeking OMB intervention are

¹²⁵ Am. Bar Ass'n, Recommendation on Agency Web Pages 1 (Aug. 2001), at <http://www.abanet.org/adminlaw/federal02.pdf>.

¹²⁶ *Id.* at Report, 4.

¹²⁷ Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023, 54,029, § 7 (Sept. 15, 2003).

¹²⁸ GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 102 (1991).

politically valuable to the White House, it is possible that OMB will support dubious information quality challenges. The likelihood of such a politically motivated process is greater to the extent that OMB's invention occurs behind a veil of secrecy.

OMB can make its participation more accountable and create a transparent process by "issu[ing] a concise [public] explanation" when it recommends how an agency should resolve a complaint.¹²⁹ It "should also reveal for public disclosure any written communications, and a summary of any oral communications" that it receives from members of Congress or persons outside of the government concerning such complaints.¹³⁰

IV. RULEMAKING

IQA may lead to the dissemination of more accurate information by the government, or it may needlessly bog down the dissemination of information by agencies. The resolution of the issues identified in the last section will determine which of these two possibilities will come to fruition. The fate of IQA will also be determined by two additional issues that are taken up in the next two Parts. This Part considers whether IQA applies to rulemaking, and the next section considers whether there is judicial review of agency resolution of information quality complaints.

IQA applies to all information that is "disseminated" by an agency, and OMB has defined "dissemination" of information to include any "agency initiated or sponsored distribution of information to the public."¹³¹ OMB takes the position that IQA applies to information that an agency cites in a Notice of Proposed Rulemaking because an agency is endorsing the reliability of that information.¹³² The difficulty is that Congress failed to define the term "dissemination." While the courts might defer to OMB's interpretation because the statute is ambiguous,¹³³ there is a strong textual argument that OMB's interpretation is clearly inconsistent with Congress' intent. Moreover, this argument is supported by the legislative history of the Act, sparse as it is.

¹²⁹ Shapiro, *supra* note 72, at 10,072.

¹³⁰ *Id.*

¹³¹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452, 8,460, § V(8) (Feb. 22, 2002).

¹³² See *id.* at 8,457 (creating an exemption for adjudication but not for rulemaking).

¹³³ See *supra* note 37 and accompanying text (noting that courts defer to agency interpretations of ambiguous statutes under *Chevron*).

The outcome of this issue will have an important impact on EPA's ability to protect people and the environment. As discussed earlier, the rulemaking process has become substantially ossified.¹³⁴ If IQA applies to rulemaking, the process will become even slower. For one thing, agencies would have an obligation to have information peer reviewed prior to its use in rulemaking under OMB's proposed requirements for peer review.¹³⁵ Further, interested persons could file information act complaints regarding the information in a Notice of Proposed Rulemaking, and OMB requires agencies to respond to such complaints in certain circumstances before the rulemaking is over.¹³⁶ Further, agencies will have to grapple with the issues presented earlier as part of the rulemaking process, such as adopting SDWAA principles to any risk information.¹³⁷ Finally, the courts will have to sort out how IQA and agency rulemaking are going to be reconciled, which will embroil final rules in additional litigation.

The Supreme Court commonly interprets statutory terms according to their common meaning.¹³⁸ According to the dictionary, disseminate means "to spread or give out something, especially news, information, ideas, etc., to a lot of people."¹³⁹ This definition arguably includes the dissemination of information in rulemaking, but it arguably does not as well. The definition emphasizes that dissemination involves giving out information to "lots of people."¹⁴⁰ This suggests that IQA applies only to agency efforts to bring information to the attention of the public, which is not what takes place in rulemaking. In rulemaking, people seek out the information, rather than the agency trying to contact them and acquaint them with the information. By comparison, according to this interpretation, dissemination involves agency reports and putting information on the internet.

If the only evidence of Congress' intent was the common meaning of the word "disseminate," the courts may well uphold OMB's interpretation of IQA. But the structure of the statute strongly indicates that Congress did not

¹³⁴ See *supra* note 28 and accompanying text.

¹³⁵ See *supra* notes 73-78 and accompanying text (discussing new obligations).

¹³⁶ See *infra* note 145 and accompanying text.

¹³⁷ See *supra* Part III.C.

¹³⁸ See generally WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 253 (2000) (discussing ordinary meaning canons of statutory construction).

¹³⁹ See, e.g., CAMBRIDGE ADVANCED LEARNER'S DICTIONARY, at <http://dictionary.cambridge.org/>.

¹⁴⁰ *Id.*

mean for the Act to apply to rulemaking. The Act 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 Act]”¹⁴¹ Rulemaking, however, would be included in the common meaning of the words “administrative mechanism.” Why would Congress require each agency to “establish” an “administrative mechanism” to hear information quality complaints when the rulemaking process already accomplishes this goal? Why would Congress require each agency to “establish” an “administrative mechanism” to hear information quality complaints when they already have a perfectly good “administrative mechanism” to vet the quality of information in the Notice of Proposed Rulemaking (“NPR”)? In other words, Congress could not have meant IQA to apply to rulemaking because the requirement that an agency establish an “administrative mechanism” to hear information quality complaints is entirely superfluous or redundant.

Congress could not have meant that IQA apply to rulemaking for a related reason. Not only is there already an “administrative process” to vet the information used in rulemaking, information receives far more scrutiny in rulemaking than it receives under IQA. Not only does the public have an opportunity to comment on the information, but an agency’s failure to justify its rule in light of significant allegations that its data is not objective is grounds for a judicial remand.¹⁴² As a result, agencies routinely respond to comments regarding information quality, even if the agency does not think that the comments are significant because a reviewing court might not agree.

There is additional support for the conclusion that IQA does not apply to rulemaking when you consider that there was no “administrative mechanism” by which interested persons could challenge information contained in reports or on the internet prior to IQA. Congress’ requirement that agencies establish an administrative mechanism obviously is responding to the lack of such a process outside the context of rulemaking. Moreover, prior the enactment of IQA, industry groups were complaining about the lack of a process to challenge information in reports and on the internet, not in

¹⁴¹ Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(B)(2)(b), 114 Stat. 2763A-125, 2763A-154.

¹⁴² See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 527 (1997) (explaining the encompassing nature of hard look review).

rulemaking.¹⁴³ Congress clearly was responding to these complaints. This makes sense because there is little or no evidence that agencies rely on poor quality information in promulgating rules.

OMB has partially conceded that a new administrative mechanism is unnecessary to vet the information used in rulemaking. In a document issued after its guidelines were finalized, OMB stated, "[w]here existing public comment procedures—for rulemakings, adjudications, other agency actions or information products—provide well-established procedural safeguards that allow affected persons to contest information quality on a timely basis, agencies may use those procedures to respond to information quality complaints."¹⁴⁴ Perhaps because OMB recognizes that this concession raises questions about whether IQA even applies to rulemaking, it interprets IQA to require a separate administrative mechanism for information correct in a limited context. OMB requires that agencies decide information quality complaints about rulemaking information before the completion of the rule-making process "where needed to avoid the potential for actual harm or undue delay."¹⁴⁵

It is highly unlikely that Congress meant to apply IQA to rulemaking in order to protect complainants in the manner that OMB has established. First, such a procedure is unnecessary because companies already have an opportunity to lobby the agency and object to information. Agencies are subject to lobbying by interested parties long before there is a NPR. This is the purpose of the Semiannual Regulatory Agenda, which informs interested persons about rules under development in an agency.¹⁴⁶ Moreover, it seems highly unlikely that a corporation will be unaware of the information used by an agency to issue a NPR. Agencies normally rely on scientific evidence that has

¹⁴³ See, e.g., Greenwood, *supra* note 31 (complaining about the quality of information contained in reports and on the Web, but not rulemaking); see also Am. Bar Ass'n, Recommendation and Report (Aug. 2001), available at <http://www.abanet.org/leadership/2001/107c.pdf> (ABA resolution endorsing a correction process for information disseminated in reports and on the internet).

¹⁴⁴ *Information Quality Guidelines—Principles and Model Language* (Sept. 5, 2002), in Memorandum from John D. Graham, Adm'r Office of Info. & Regulatory Affairs, for the President's Management Council, Agency Final Information Guidelines (Sept. 5, 2002), available at <http://www.whitehouse.gov/omb/inforeg/pmcmemo.pdf>.

¹⁴⁵ *Id.* at 1.

¹⁴⁶ See Executive Order 12,866, Regulatory Planning and Review, § 4(b), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (requiring that agencies publish semiannual regulatory agendas describing regulatory actions they are developing); Regulatory Flexibility Act, 5 U.S.C. § 602 (2000) (requiring that agencies publish semiannual regulatory agendas describing regulatory actions they are developing).

been published in the scientific literature, and interested corporations and trade associations closely track these scientific developments. Second, OMB reviews proposed significant agency rules before the agency issues a NPR and therefore reviews the quality of information on which the agency is relying. Interested parties have the opportunity to call OMB's attention to alleged inaccuracies in the information on which an agency is relying. Third, interested parties frequently have an additional opportunity to challenge alleged inaccuracies in information during the public hearings held by scientific advisory boards that agencies appoint to help them evaluate scientific information and arguments. Indeed, since agencies routinely rely on such committees regarding scientific information utilized in significant rules, persons with an interest in the accuracy of such information receive the protection of this form of peer review before it is used in a NPR. Finally, permitting judicial review in the middle of an agency action is such a dramatic departure from normal administrative procedure that courts should be wary of assuming that this was Congress' intention. As the Supreme Court has said, the "expense and annoyance" of participating in the agency process is "part of the social burden of living under government."¹⁴⁷

The structure and the scant legislative history of IQA both suggest that Congress intended the Act to give interested parties the opportunity to challenge information disseminated by the government in reports and on the internet. It remains to be seen whether the courts will regard this evidence of legislative intention as sufficiently definitive to overcome OMB's argument that the common meaning of the word "disseminate" includes the distribution of information in rulemaking. The outcome of this issue will have a significant impact on the fate of IQA. If it does apply to rulemaking, it is likely to further ossify the rulemaking process without producing offsetting benefits. As argued, the rulemaking process is sufficient to vet information and further such procedures are unnecessary.

V. JUDICIAL REVIEW

The final aspect of IQA that will impact agency dissemination of information is the extent to which corporations and other entities can obtain judicial review when EPA or another agency denies an information quality

¹⁴⁷ Fed. Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 244 (1980) (quoting Petroleum Exploration, Inc. v. Pub. Serv. Comm'n, 304 U.S. 209, 222 (1938)).

complaint. 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.

The extent to which an agency's rejection of information quality complaints will be subject to judicial review is difficult to predict for the reasons explored in this section. Courts have previously refused to engage in judicial review of agency dissemination of information on the ground that it was not final agency action, which is a prerequisite for judicial review under section 702 of the Administrative Procedure Act ("APA").¹⁴⁸ By comparison, the rejection of a complaint under IQA is probably final agency action, which would make it possible for litigants to seek judicial review under section 702. Nevertheless, the government has a good argument that judicial review is precluded under APA section 701 because resolution of an information quality complaint is committed to agency discretion by law.¹⁴⁹ If courts reject this argument, the availability of judicial review will turn on whether plaintiffs have standing to seek judicial review of information quality complaints. It appears that some plaintiffs may have standing to appeal such complaints and others may not.

A. *Cause of Action*

In order to sue an agency, a litigant must have a cause of action, which indicates that Congress has authorized the type of lawsuit that the litigant seeks to file.¹⁵⁰ IQA, however, does not authorize a lawsuit if an agency rejected an information quality complaint. A person may be able to file an action under APA section 702, which is a backstop provision that can provide

¹⁴⁸ See 5 U.S.C. § 704 (2000) (authorizing the courts to review "final agency action").

¹⁴⁹ See 5 U.S.C. § 701(a)(2) (2000) (precluding judicial review of "agency action [that] is committed to agency discretion by law").

¹⁵⁰ See WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 404 (2d ed. 2001) (noting a cause of action gives a plaintiff a judicially enforceable right).

a cause of action when there is none in the agency's mandate.¹⁵¹ Thus, whether or not there is judicial review of agency compliance with the appropriations rider depends on whether there is a cause of action under APA.

According to section 702, any person "aggrieved by agency action within the meaning of a relevant statute" may seek judicial review of that action.¹⁵² A plaintiff satisfies this provision if the injury suffered by the plaintiff as a result of agency action is "arguably within the zone of interests to be protected . . . by the statute . . ."¹⁵³ To make this determination, a court "discerns the interests 'arguably . . . to be protected' by the statutory provision" and then determines whether the plaintiff's interests "affected by the agency action in question are among them . . ."¹⁵⁴

Despite section 702, the courts have routinely refused to subject agency information activities to judicial review under APA prior to the passage of IQA. The reason was that section 704 limits judicial review under APA to "final agency action,"¹⁵⁵ and the courts concluded the issuance of reports or the dissemination of information was not "agency action" as defined by APA. APA defines "agency action" as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . ."¹⁵⁶ Since the release of information is not a "rule, order, license, sanction, relief, . . . or the failure to act," or anything equivalent to these functions, the courts have long taken the view that information disclosure is not agency action.¹⁵⁷

All of the functions listed in APA as "final agency action" have some direct and immediate legal effect. Since reports and information disclosure do not have such an impact, they are not the type of action to which APA refers. In *Industrial Safety Equipment Ass'n v. EPA*, for example, the court held that the publication of a guide on respirators by the National Institute of Occupational Safety and Health was not final agency action despite the fact the report allegedly had the impact of decertifying most of the respirators

¹⁵¹ *Id.* at 404 (describing section 702 of the APA as a "fall-back" provision).

¹⁵² *See* 5 U.S.C. § 702 (2000).

¹⁵³ *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 487 (1998) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970)).

¹⁵⁴ *Id.* at 492.

¹⁵⁵ 5 U.S.C. § 704 (2000).

¹⁵⁶ 5 U.S.C. § 551(13) (2000).

¹⁵⁷ *See Hearst Radio v. Fed. Communications Comm'n*, 167 F.2d 225, 227 (D.C. Cir. 1948) (denying review of information disclosure).

currently for sale.¹⁵⁸ The court justified its decision in part on the ground that a report did not impose mandatory requirements.¹⁵⁹ Similarly, the Fourth Circuit refused to review an EPA report on second-hand smoke that Congress ordered the agency to produce.¹⁶⁰ It noted that because the statute barred the agency from imposing "any" regulation, the report carried no legally binding effect.¹⁶¹

IQA could change the previous result because a litigant would not be seeking review of an agency's dissemination of information, but rather the agency's rejection of the litigant's information quality complaint. Unlike the dissemination of information, the rejection of a complaint is arguably an "order,"¹⁶² which places the agency's action in rejecting the complaint within the terms that APA defines as "final agency action."¹⁶³ That is, the agency resolves a legal claim and this makes the decision subject to review as final agency action.

B. *Preclusion of Review*

The resolution of information quality complaints appears to be final agency action as the APA defines that term. Nevertheless, the availability of judicial review under section 702 is subject to the condition in section 701 that prohibits judicial review when agency action is "committed to agency discretion by law."¹⁶⁴ According to judicial interpretation of section 701, a matter is "committed to agency discretion by law" when a statute is "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."¹⁶⁵ In other words, there is no judicial review according to section 701 when there is no law to apply.

IQA requires OMB and other agencies to "ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information . . . [that is] disseminated by Federal agencies,"¹⁶⁶ but the legislation does not define any of

¹⁵⁸ See 837 F.2d 1115, 1117 (D.C. Cir. 1988).

¹⁵⁹ *Id.* at 1121.

¹⁶⁰ *Flue-Cured Tobacco Coop. Stabilization Corp. v. Env'tl. Prot. Agency*, 313 F.3d 852, 854 (4th Cir. 2002).

¹⁶¹ *Id.* at 858.

¹⁶² 5 U.S.C. § 551(6) (2002).

¹⁶³ *Id.* § 704.

¹⁶⁴ *Id.* § 701(a)(2).

¹⁶⁵ *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

¹⁶⁶ Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763A-125, 2763A-154 (2001).

these terms, and there is no legislative history that indicates what the scope of these terms might be. Congress' failure to define such terms strongly suggests that it intended to leave the policing of IQA to OMB.

The statutory language of the Act can be read to support this interpretation. It requires OMB to establish guidelines that establish a framework for agency guidelines.¹⁶⁷ Second, it requires agencies to "report periodically to the Director" concerning "the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency" and concerning "how such complaints were handled by the agency."¹⁶⁸ In other words, Congress envisioned that OMB would establish standards for agency guidelines and intended OMB to police agency adherence to those guidelines through the report back provision.

Litigants seeking judicial review will argue that a court can use the definitions established by OMB to effectuate judicial review. But to do so 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. Moreover, the fact that Congress assigned OMB the responsibility for monitoring agency compliance with the legislation supports the conclusion that no judicial review was intended. In light of Congress' failure to define key terms, this delegation indicates that Congress expected that OMB would define the terms and enforce compliance with its definitions.

C. *Standing*

Even if a court determines that a litigant has a cause of action, the person or entity must also have standing to appeal the denial of an information quality complaint. The requirement that a litigant have standing is constitutional and arises because federal courts are restricted to deciding cases and controversies.¹⁶⁹ In order to have standing, a litigant must demonstrate that it has "suffered an 'injury in fact,'" there is a "causal connection between the injury and the conduct complained of," and it is "'likely' . . . that the injury will be 'redressed by a favorable decision.'"¹⁷⁰ It is unclear the extent to which persons seeking judicial review of information quality complaints will be able to meet these requirements.

¹⁶⁷ *Id.* § 515(a)(1)-(b)(2)(A), 114 Stat. at 2763A-154.

¹⁶⁸ *Id.* § 515 (b)(2)(C), 114 Stat. at 2763A-154.

¹⁶⁹ U.S. CONST. art. III, § 2.

¹⁷⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

The harm to a corporation of the release of information about risks to humans or the environment is that other people may act on the basis of the information in ways that are politically or financially disadvantageous to the corporation.¹⁷¹ If, for example, EPA releases information about the extent of the risk posed by a chemical, access to this information may encourage activists to engage in political action that seeks to pressure the corporation to reduce its use of that chemical or find a less dangerous substitute. Alternatively, someone who believes he or she has been injured by exposure to the chemical may seek legal redress.

While the Supreme Court has long recognized "economic harm" as an injury that satisfied the "injury-in-fact" requirement,¹⁷² the plaintiff must establish that its injury is "actual or imminent, not 'conjectural' or 'hypothetical . . .'"¹⁷³ The problem for plaintiffs claiming economic injury from the agency's rejection of an information quality complaint is that the degree of economic harm depends on the reaction of third parties to the agency's refusal to adjust the information in the manner the plaintiff sought. For example, a plaintiff would have to have sufficient proof that the agency's decision would in fact lead to a loss of sales or a tort suit, using the previous examples of harm. The degree of evidence that courts will require is uncertain. As Professor Pierce demonstrates, the Supreme Court has granted standing in some cases "based on causal relationships that are remote, tenuous, and highly speculative,"¹⁷⁴ and "[t]he Court also has denied standing in many cases where the challenged action seemed highly likely to cause the alleged injury."¹⁷⁵

Assuming that courts employed "a realistic assessment of the likely consequences of agency action,"¹⁷⁶ some plaintiffs may gain standing to pursue judicial review of information quality complaints and some will not, depending on the nature of the information at issue. For example, assume EPA issues a report that a pesticide, manufactured by one company, is far more harmful to individuals or the environment than was previously understood. If EPA rejects an information quality complaint concerning that

¹⁷¹ See notes 21-22 and accompanying text (describing the potential for this reaction).

¹⁷² See 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1122-25 (4th ed. 2002) (discussing cases that recognize economic injury as grounds for standing).

¹⁷³ *Lujan*, 504 U.S. at 560.

¹⁷⁴ 3 PIERCE, *supra* note 172, at 1159.

¹⁷⁵ 3 *Id.* at 1161.

¹⁷⁶ See 3 *id.* at 1156 (noting in some cases the Court employs this standard).

finding, the manufacturer of the pesticide may be able to establish that consumers may switch to less dangerous alternatives or that the information makes it more likely that the manufacturer will be subject to tort actions. In other situations where EPA's dissemination of information is less newsworthy, a corporation would have more difficulty proving that a sufficient number of consumers or members of the public are likely to find out about the information and that the company will suffer some type of injury. This suggests that corporations may not gain standing concerning information quality complaints that address routine agency information that is little noticed except by regulated entities and perhaps environmental advocacy groups. Companies should have difficulty gaining standing in another situation. Assume that EPA releases a report indicating that the dangers of global warming are greater than previously understood. It is difficult to see how companies that emit carbon dioxide can plausibly claim that the report will lead to an adverse consumer reaction or that they are now more likely to be sued.

In the last two examples, a corporation may seek standing on the ground that the release of routine information or a report on global warming is likely to lead to greater regulation. Based on such a claim it is difficult to see how a corporation can prove an injury is "actual or imminent" as opposed to "'conjectural' or 'hypothetical . . .'"¹⁷⁷ As any observer of the regulatory process knows, predicting whether Congress or an agency will act is a difficult feat. Predicting that Congress or an agency will act in a manner that leads to economic injury to a particular company would seem even more daunting.

In summary, judicial review of information quality complaints may result in the ossification of information disclosure if agencies are subject to a constant barrage of such lawsuits. The number of lawsuits that agencies will have to defend depends on how the courts resolve two key issues. Congress gave no positive indication in IQA that there was to be judicial review of an agency's rejection of an information quality complaint, and Congressional failure to define any of the significant terms of the rider is good evidence that Congress left the resolution of information quality complaints to the discretion of agencies subject to OMB's supervision. If, however, a court finds that the undefined terms of IQA offer law to apply¹⁷⁸ in the resolution of

¹⁷⁷ *Lujan*, 504 U.S. at 560.

¹⁷⁸ 5 U.S.C. § 701 (2000).

lawsuits, the impact of IQA will be determined by the extent to which plaintiffs can gain standing. It is difficult to make a prediction because the Supreme Court is not always consistent concerning the degree of proof it requires to demonstrate that an agency action will lead to an actual injury to the plaintiff. Assuming that the Court requires evidence that such an injury is "likely,"¹⁷⁹ the resolution of standing disputes will be fact-based, with some plaintiffs obtaining standing and others failing to do so.

VI. CONCLUSION

The ultimate impact of IQA is unknown at this point. Because Congress failed to define any of the key terms of IQA, hold any hearings, or develop any other legislative history, it left it for OMB, the agencies, and ultimately the courts to determine how to balance the agency's substantive mission with the requirements of IQA. Congress' failure is particularly unfortunate because a number of interpretations of IQA will likely ossify the government's efforts to disclose information and protect the public and the environment. This result can be avoided, but only if the courts reject interpretations of IQA that will significantly impede the regulatory mission of EPA and other agencies. The courts should reject interpretations that ossify information disclosure because there is no indication in the legislation that Congress meant for it to have this drastic result.

IQA can serve a useful purpose if the courts ultimately limit it to avoid the various pitfalls identified in this Article. This satisfactory result, however, does not mean that Congress acted appropriately in passing IQA. Even if IQA turns out ultimately to be a good government reform, Congress' failure to hold hearings and write a clearly-defined statute will lead to costly litigation, which will have diverted agencies from their regulatory missions. While it may be true that all is well that ends well, reform by appropriation rider is hardly the best way to address administrative reform.

¹⁷⁹ See *Lujan*, 504 U.S. at 561.