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May 19, 2003

Honorable Christine Todd Whitman
Administrator
U.S. EPA
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Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
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Dr. John Graham
Administrator,
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1725 17th Street, NW
Washington, D.C. 20503

Re: Regulatory Censorship: An Industry Campaign to Quell Scientific Debate by Misreading the Data Quality Rider

Dear Administrators Whitman and Graham:

We write to you today on behalf of the Center for Progressive Regulation (CPR) to focus your attention on a troubling development that could chill the open scientific debate that is fundamental to sound policymaking. The Environmental Protection Agency (EPA) has received a complaint from the Center for Regulatory Effectiveness (CRE), an industry-funded advocacy group. The complaint challenges comments filed by the Natural Resources Defense Council (NRDC) concerning EPA's Proposed Rule Revising the Standards for the Use and Disposal of Biosolids (Proposed Biosolids Rule). CRE contends that NRDC's comments do not comply with the Data Quality Act (DQA)[1] and demands that EPA not "use" them in any way. CPR believes that EPA must reject CRE's request because the DQA does not apply to rulemaking.

Efforts like these, which have as their goal persuading EPA to censor comments from environmental organizations and academic scientists submitted in the context of ongoing rulemakings, give credence to the worst fears regarding misuse of the DQA. We urge you to take immediate action to discourage such tactics and to reassure the public that you support open, transparent consideration of diverse scientific views.

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1 Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106, § 515 (2001) [hereinafter DQA].

CPR is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR member scholars reject the idea that government's only function is to increase the economic efficiency of private markets. CPR's mission is to advance the public's understanding of the issues addressed by the country's regulatory laws. CPR is committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment. It seeks to inform the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values.

Proposed Biosolids Rulemaking

NRDC's comments concerning the Proposed Biosolids Rule were submitted on September 10, 2002, and were signed by Jennifer Sass, a Ph.D. toxicologist who works for NRDC; Ellen Harrison, Director of the Cornell Waste Management Institute's Center for the Environment; and Nancy Stoner, an attorney who directs NRDC's Clean Water Project. CRE's petition, dated February 27, 2003, warns EPA that it will be subject to a formal "Request for Correction" by CRE under the DQA if the agency "uses" NRDC's comments. Since the DQA was passed, CRE has contended that an agency's rejection of a Request for Correction is a final agency action subject to appeal in an appropriate federal court. Thus, while the threat of litigation is not made explicitly, it seems clear that CRE is threatening to sue EPA before EPA's rulemaking proceeding has run its course.

Before explaining why this position is a serious distortion of the law, we want to make it crystal clear that we recognize the absolute right of CRE and its corporate sponsors to challenge the final Biosolids Rule, invoking, among a myriad of other possible grounds, the possibility that EPA relied upon faulty scientific data in determining the rule's substance. Rather than encouraging EPA and its stakeholders to produce the most comprehensive record for EPA's consideration, however, CRE seeks, prematurely, to pick off comments contrary to views espoused by its corporate sponsors and subject them to a time-consuming challenge outside of the normal confines of the rulemaking process. Despite the clear inapplicability of the DQA to rulemaking, there is a danger that EPA staff will yield to CRE's tactics in order to avoid the litigation that CRE threatens.

We therefore urge both OMB and EPA formally to clarify that the DQA does not apply to rulemaking. If OMB does not do so, we urge EPA to stand firm and to refuse to apply the Act to rulemaking.

The DQA Does Not Apply to Rulemaking

The DQA requires OMB and federal agencies and departments to issue "guidelines" concerning the "quality, utility and integrity of information *disseminated* by federal agencies…."[2] OMB guidelines define "dissemination" as any "agency initiated or

2 *Id.*

sponsored distribution of information to the public."[3] Using this definition, OMB maintains rulemaking is subject to the DQA, but this interpretation is inconsistent with the language and structure of the Act.

When Congress passed the data quality rulemaking rider, it failed to define "dissemination" or, for that matter, any other key term of the Act. A common canon of construction in this circumstance is to assume that Congress used a term according to its common meaning.[4] Dictionary definitions emphasize that dissemination involves efforts to engage in the "widespread" distribution of information,[5] which suggests that the Act only applies when agencies are actively engaged in trying to bring information to the attention of the public, as in a report or web site. This activity is different than making information available to people who would like to seek it out, which is what occurs during rulemaking. OMB's simple equation of "dissemination" with "agency initiated or sponsored dissemination," while it may be consistent with a usage of the term, is hardly a self-evident interpretation. In fact, all other aids to statutory interpretation undermine OMB's rendering.

The conclusion that rulemaking does not involve the "dissemination" of information is confirmed by considering the relationship of the word "dissemination" to the requirement that agencies "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency."[6] The ordinary meaning of "administrative mechanism" would clearly include rulemaking. Since agencies already have an "administrative mechanism" – i.e., rulemaking – to consider complaints about data quality, the requirement in the rider that they establish such a mechanism is superfluous or redundant if Congress intended the rider to apply to rulemaking. In other words, Congress could not have meant to include the information released during rulemaking as information being "disseminated" for purposes of the rider because that interpretation leads to a requirement that agencies establish a new mechanism to hear data complaints when they already have a perfectly good mechanism for that purpose.

Why then did Congress put in a provision that requires agencies to set up a new administrative mechanism? The background of the Act provides a clear answer. Prior to its enactment, there was a discussion and debate over how to provide for public input before agencies produce written reports or put information on their web sites. The scope of this debate indicates that Congress' goal in adopting the rider was to address this more limited purpose.

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3 Office of Management and Budget, Guidelines for Ensuring and Maxmizing the Quality, Objectivity, Utility and Integrity of Information Disseminated By Federal Agencies, 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002) [hereinafter OMB DQA Guidelines].

4 *See* William N. Eskridge, Jr., Phillip P. Frickey, & Elizabeth Garrett, Legislation and Statutory Interpretation 253 (2000) (discussing ordinary meaning cannons of statutory construction).

5 *See, e.g.*, Cambridge International Dictionary of English (the act of "dissemination" means "to spread or give out (esp. news, information, ideas, etc.) to a lot of people."); available at: http://dictionary.cambridge.org/define.asp?key=22599&dict=CALD)

6 DQA §515(b)(2).

The debate over agency accountability for information disclosed in written reports and on the Internet can be traced back to publication of a "White Paper" submitted by an industry coalition to EPA in May, 1999.[7] The report, prepared by Mark Greenwood of Ropes and Gray, observed that the disclosure of information in written reports and on the Web had important consequences for affected persons and that agencies generally lacked any process for inviting public comment on such "information products" before they were disseminated. The White Paper addressed this problem and not the release of information during rulemaking. The Section of Administrative Law and Regulatory Practice held a program on the industry "White Paper" at its Spring Meeting in Williamsburg in April 2000 at which Mark Greenwood spoke, among others. According to the published description of the program, it "explore[d] the impact of the Internet on government information disclosure …"[8] Subsequently, at the instigation of the Section, the House of Delegates of the American Bar Association (ABA) adopted a recommendation on information disclosure at the ABA's annual meeting in 2001. The ABA's recommendation recognized the lack of a process for public input concerning agency written reports and information on the Web, and it recommended that agencies seek public input concerning such "significant" information activities.[9] The recommendation does not consider the use of information in rulemaking.

This background clarifies that when Congress referred to the "dissemination" of information, it meant the distribution of information in written reports and information on the web because there was no generally established process for interested parties to seek the correction of erroneous information in this situation. In light of the absence of such procedures, it makes sense that Congress would require agencies to provide an "administrative mechanism" to resolve data quality complaints.

The conclusion that Congress did not intend for the data quality rider to apply to rulemaking is further confirmed when one considers the level of protection for data that is already offered in rulemaking. The courts construe a statute to further its purposes – in this case, to ensure and promote the quality of data.[10] Since there are already adequate rulemaking procedures for this purpose, it follows that the DQA ought to be limited to situations where there is an absence of such procedures.

Agencies are required under prevailing interpretations of the Administrative Procedure Act (APA) to reveal the scientific basis for any proposed rule, to solicit comments, and to respond to the comments that are received when a final rule is adopted. In addition, any "significant" rule is subject to OMB review before it is proposed and before it is adopted. A brief review of these protections indicates that they adequately promote the quality of data in rulemaking.

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7 White Paper From Industry Coalition to EPA Over Concerns Over Information Programs Submitted May 4, 1999, Daily Env. Rep. (May 4, 1999), at E-1.

8 25 Administrative & Regulatory Law News #3 (Spring 2000), at 10.

9 *See* Resolution and Report (August, 2001), available at http://www.abanet.org/leadership/2001/107c.pdf.

10 *See, e.g.*, Kerstetter v. U.S., 17 F.3d 362, 367 (3rd Cir. 1995) (ancient "mischief rule"" of statutory construction requires a statute be read "so as 'to remedy the mischief at which it is directed'").

One of the purposes of the OMB guidelines is to make agency disclosures of information more transparent.[11] Since the 1970s, however, the courts have required agencies to disclose the data and assumptions on which an agency's proposed rule is based.[12] When a proposed rule is based on scientific data, the agency is required to identify the data and methodology used to obtain it.[13] Thus, the law not only establishes an obligation to engage in transparent disclosure, this obligation is enforced by the courts.

If someone objects to the quality of the information that an agency is using to propose a rule, that person can file comments objecting to the information. Similarly, if someone objects to the quality of information submitted in comments by some other person, that person can bring the quality of the submitted information to the agency's attention in the rulemaking proceeding, as CRE has done here. It would be wholly inappropriate, however, for the agency to censor the submitted information or otherwise decline to consider it merely because it does not meet the scientific criteria set out in the agency's data quality guidelines.

Once an agency starts down the road that CRE advocates, there will be no end to the havoc that outsiders can wreak on the rulemaking process. If, as CRE suggests, agencies are obliged to "throw out" submissions in rulemaking every time a commenter suggests that they do not meet its view of proper data quality, EPA can expect commentators to challenge each other's comments on data quality grounds. In particular, corporations and corporate-funded advocacy groups, like CRE, can be expected to file numerous complaints to challenge the information that they do not like in an attempt to expunge the information from the rulemaking record. This unfortunate turn of events would be grossly inconsistent with the whole purpose of informal rulemaking, which is to afford affected individuals an opportunity to comment on proposed rules. It would also further ossify the rulemaking process since EPA would have to resolve every data quality complaint that is filed in order to determine what information could remain in the rulemaking record.

In light of the considerable level of protection for data that is already offered in rulemaking, it is inconceivable that Congress intended for the data quality rider to apply to rulemaking. One cannot assume that Congress would require redundant procedural protections that only have the effect of keeping EPA and other agencies from carrying out their substantive mandates. Moreover, there is also OMB review of proposed and final rules,[14] which engages that agency in review of the quality of agency data, often at the behest of the very corporations and trade associations allied with CRE's interests. If OMB believes that there is a problem with the quality of data on which agencies rely, it has an opportunity to address this problem before a Notice of Proposed Rulemaking is ever issued.

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11 OMB DQA Guidelines at 8459.

12 *See* Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921 (1974).

13 Lloyd Noland Hospital and Clinic v. Heckler, 762 F.2d 1561 (11th Cir. 1985); *see generally* Jeffrey S. Lubbers, A Guide To Federal Agency Rulemaking 195-99 (3rd ed. 1998).

14 *See* Exec. Order 12866, 58 Fed. Reg. 51735 (1993) (providing for OMB review of "significant" regulatory action").

Besides the availabilty of rulemaking procedures and OMB review, there is yet another reason to believe that Congress did not intend to require agencies to set up a separate administrative mechanism to review data quality complaints in the rulemaking context. If agencies are required to review and rule on data quality complaints as they arise, it will substantially slow what already is an ossified rulemaking process. Moreover, if the denial of a request to correct data constitutes final agency action subject to judicial review, agencies will be subject to countless interlocutory attacks on their rulemaking process, many of which may be frivolous, making it virtually impossible to ever promulgate a rule.

The courts are highly likely to avoid any construction of the rider that would wreak this level of havoc with the rulemaking process. Indeed, since rulemaking would quickly break down completely if collateral judicial review were available, it is very difficult to believe that Congress sanctioned this result on the basis of a one-paragraph rider inserted, without debate, into a voluminous appropriations bill. It is also unlikely Congress sanctioned such an outcome because collateral review is unnecessary to ensure that an agency does not rely on unreliable data. A court will eventually have the opportunity to rule on any and all objections to the quality of data used by an agency when there is judicial review of the rule. Until that event happens, however, we assume CRE will continue its destructive efforts to censor diverse views. Unfortunately, a poorly reasoned OMB memorandum has only served to encourage this censorship.

OMB's Misinterpretation of the DQA

OMB's interpretation of the DQA has been frustratingly ambivalent. On the one hand, OMB has recognized that rulemaking is adequate to vet issues of data quality. According to OMB, "Where existing public comment procedures – for rulemaking, 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 data quality complaints."[15] However, in the same document, OMB also insisted that agencies rule within 60 days on data quality complaints when "the complainant has shown a reasonable likelihood of actual harm from the agency's dissemination of the information if the agency does not resolve the complaint prior to the final agency action" and if "the agency has determined that an earlier response would not unduly delay issuance of the agency action."[16]

As the CRE Biosolids petition illustrates, OMB's interpretation is highly problematic. Under OMB's interpretation, agencies must take time away from the main task of rulemaking in order to consider the merits of DQA petititions at a time, not of the agencies' choosing, but at a time of private parties' choosing. OMB's tiny escape valve based on lack of harm and undue delay will not help agencies very much: they still must

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15 "Information Quality Guidelines – Principles and Model Language, Sept. 5, 2002," in Memorandum from John D. Graham for the President's Management Council on Agency Final Information Guidelines (Sept. 5, 2002) (available at http://www.whitehouse.gov/omb/inforeg/ pmcmemo.pdf).
16 *Id.*

go through the process of determining harm and delay. Most ominously, if the courts will hear appeals of an agency's conclusion that a company is not harmed by the dissemination of information or that resolution of its claim will unduly delay rulemaking, agencies will still be subject to numerous lawsuits that will disrupt and ossify further the rulemaking process.

Moreover, the OMB memorandum concedes a new administrative process is unnecessary to prevent agencies from adopting regulations on the basis of poor quality data. Consequently, the only apparent justification for the new 60-day procedure is to provide a remedy for a corporation that might suffer harm if an agency is delayed in addressing the corporation's complaint. It is worth noting in this regard that the Supreme Court has recognized that requiring a corporation to wait to the completion of a proceeding imposes costs and burdens on a company, but it has rejected early judicial intervention because the "expense and annoyance" of participating in the agency process is "part of the social burden of living under government."[17]

Recommendations

In conclusion, the better interpretation of congressional intent is that the rider is limited to information distributed on the Internet or in written reports. This interpretation is consistent with common usage, the structure of the statute, the nature of complaints about the lack of a process to vet data complaints that occurred before passage of the rider, the adequacy of rulemaking proceedings to address the quality of data used in rulemaking, OMB's oversight of rulemaking, and OMB's concession that such procedures are adequate. Finally, it is difficult to believe that Congress applied the rider to rulemaking in order to protect the reputation of companies.

The basic premise of the DQA is sound. The government should ensure that the information it releases is accurate and the public should have some way to call potential errors to an agency's attention. At the same time, this objective must take into account the impact of data quality activities on an agency's substantive mission and the role of disseminated data in the implementation of that mission. Any rational system of procedures requires methods to eliminate claims that are not meritorious. Agencies should not devote scarce resources to issues that do not deserve attention. Nothing in the language, structure, or history of the DQA evidences any considered congressional judgment to alter any agency's substantive mandates, yet the Act has the potential to hinder or even prevent agencies from carrying out these mandates.

Both OMB and the agencies have assumed that the Act applies to the information that an agency references when it proposes a new or amended regulation. This interpretation threatens to ossify the rulemaking process to an intolerable extent. If the DQA has this result, it will become a major impediment to the capacity of EPA and other agencies to issue new regulations or amend existing ones. Industry groups can be expected to use data correction procedures in a strategic manner to slow, or even stop, the release of information that is embarrassing or politically inconvenient to them.

17 Federal Trade Commission v. Standard Oil Company of California, 449 U.S. 232 (1980).

To protect the integrity of the rulemaking process, we urge:

1. OMB and EPA to clarify that the DQA does not apply to rulemaking;

2. EPA to refuse to apply the Data Quality Act to rulemaking, including rejecting any comments that make such a claim; and

3. EPA to establish a mechanism to notify the public about pending challenges to data quality filed during rulemaking so that other stakeholders have the opportunity to respond to such comments.

Thank you for considering these views. Please contact us if you have any questions or comments.

Sincerely,

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cc: Senators Collins and Lieberman, Congressmen Davis and Waxman