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CPR Letter to EPA/OIRA Challenges Misreading of Data Quality Act

CPR's Shapiro: 'Industry's challenge to NRDC comments on sludge initiatives invites the Administration to extend the Data Quality rider beyond the plain meaning of the statute. It is a plain effort to censor comments that industry finds disagreeable, backed up by thinly veiled threats of delaying litigation.'

Washington, DC – The Center for Progressive Regulation on Tuesday submitted a letter to EPA Administrator Christine Whitman and OIRA Director John Graham urging the two agencies to reject a call from the industry-funded Center for Regulatory Effectiveness (CRE) to ignore recent comments filed by the Natural Resources Defense Council. CRE asserts, wrongly in CPR's view, that NRDC's comments on a proposed rule on sludge do not meet standards established by the Data Quality Act, and suggests that by considering them, EPA might expose itself to litigation over the rulemaking process even before a rule is promulgated.

CPR's letter, authored by law professors Sidney Shapiro of the University of Kansas School of Law and Rena Steinzor of the University of Maryland School of Law, calls on the agencies "to take immediate action to discourage such tactics [as CRE's] and to reassure the public that you support open, transparent consideration of diverse scientific views.... We therefore urge EPA and OMB to clarify that the DQA does not apply to rulemaking, and if OMB does not make such a clarification, we urge EPA to refuse to apply the Act to rulemaking."

"Industry's challenge to NRDC comments on EPA's proposed Biosolids Rule invites the Administration to extend the Data Quality rider beyond the plain meaning of the statute," said Professor Shapiro in releasing the letter. "It is a plain effort to censor comments that industry finds disagreeable, backed up by thinly veiled threats of delaying litigation."

CPR's letter argues that the Data Quality Act does not apply to rulemaking. The law is intended, the letter notes, to apply to information *disseminated* by federal agencies in written reports and on the Internet, not to comments submitted in response to proposed rules. The letter charges that CRE's purpose is to "persuad[e] EPA to censor comments from environmental organizations and academic scientists submitted in the context of ongoing rulemakings." It continues:

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“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.....

“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....

“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.”

Founded in 2002, the Center for Progressive Regulation is a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny. The full text of the eight-page letter is available at www.progressiveregulation.org. For more information, or to arrange an interview, contact Matthew Freeman at 301-762-8980, or at CPRMedia@earthlink.net.