No. 05-1097

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Salt Institute and The Chamber of Commerce of the United States of America,

Plaintiffs-Appellants,

v.

Michael O. Leavitt, Secretary, United States Department of Health and Human Services,

Defendant-Appellee

On Appeal from a Final Decision of the United States District Court for the Eastern District of Virginia, Alexandria Division

Brief of *Amicus Curiae* National Association of Home Builders Supporting Plaintiffs-Appellants Salt Institute, et al., for Reversal

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2. Does party/amicus have any parent corporations?
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(signature) April 25, 2005 (date)

*The National Association of Home Builders has filed a Motion for Relief from the requirement to identify its 225,000 members, their parent corporations, and publicly held companies owning 10% or more of a member's stock.

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INTRODUCTION

1. Statement of Interest in the Case and Authority to File

Pursuant to Federal Rule of Appellate Procedure 29, and with the consent of all the parties, the National Association of Home Builders ("NAHB") respectfully submits this brief *amicus curiae* in support of Appellants Salt Institute and The Chamber of Commerce of the United States of America ("Appellants").

NAHB is a non-profit corporation that advocates on behalf of the national home building industry. NAHB's membership consists of over 225,000 individuals and firms that develop land and construct and supply homes, apartments, and commercial and industrial projects. NAHB's members are subject to a myriad of federal regulatory requirements, and it is germane to NAHB's organizational purpose that it work to ensure that such requirements are based on sound and accurate scientific information and independent peer review of that information.

To this end, NAHB has devoted considerable resources to ensure that federal agencies satisfy the uniform federal information quality standards established by the Information Quality Act ("IQA" or "the Act")[1] whenever they disseminate information pertinent to the interests and regulatory obligations of NAHB

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[1] Public L. No. 106-554 § 1(a)(3) [Title V, § 515], 114 Stat. 2763 (2000), codified at 44 U.S.C. § 3516, note (hereinafter cited as "IQA, § 515").

members. Among other things, NAHB filed comments on the draft IQA guidelines of six federal departments or agencies to ensure that their guidelines are consistent with the threshold standards established in the guidelines promulgated by the Office of Management and Budget ("OMB") pursuant to the Act. NAHB has also filed IQA information correction petitions with two federal agencies. Consequently, the rights of affected parties under the IQA are of critical interest to NAHB and its members.

2. Significance of Issues Before the Court

In 2000, Congress passed the IQA, directing OMB, in fulfillment of the purposes of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3520, to issue guidelines to federal agencies for "ensuring and maximizing the quality, objectivity, utility, and integrity [hereinafter collectively referred to as "quality"] of information" those agencies disseminate to the public. IQA, § 515(a). In enacting the IQA, Congress responded to growing awareness that the volume of information informally disseminated by federal agencies has grown exponentially, and that that information increasingly affects private and public behavior in significant ways. As is evident from the legislative history of the IQA,[2] Congress was concerned that non-regulatory methods of communicating information were allowing federal agencies to have enormous impact on government policy and

[2] See Brief of Appellants, at 15-20.

private interests without the safeguards of (i) public comment and judicial review afforded by the APA, and (ii) the uniform quality standards called for, but not then promulgated under, the PRA.

Similarly, the courts have criticized federal agencies for "regulating by informal guidance" in an attempt to avoid rulemaking procedures and judicial review. As the D.C. Circuit has noted,

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statements on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." [citation omitted]. The agency may also think there is another advantage -- immunizing its lawmaking from judicial review.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

As courts have rejected improper agency efforts to regulate by guidance, agencies have realized that they can regulate simply by disseminating information. As a former U.S. Environmental Protection Agency ("EPA") General Counsel observed, "[i]nformation . . . can be a supplement, sometimes even an alternative, to regulation. When broadly available, information can change behavior."[3]

The far-reaching consequences of dissemination of "free-standing" information is amply demonstrated by the information correction requests that have been filed to date pursuant to the IQA. Among other things, these petitions have challenged the quality of information related to climate change impacts; human health and environmental risks posed by certain chemicals, construction activities, and consumer products; the effectiveness of technologies to protect children from harmful Internet content; dietary guidelines; and the human health risks and benefits of fluoridation. These requests have been filed by a wide variety of affected interests, including private citizens, farm groups, trade organizations, liberal and conservative non-governmental organizations, corporations, other government agencies, and even U.S. Senators.[4] The types of information at issue

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[3] Profile: Jonathan Z. Cannon, Environmental Forum, July/August 1998, at 34, 36.

[4] See OMB, Office of Information and Regulatory Affairs, Information Quality: A Report to Congress, Fiscal Year 2003 ("2003 OMB Report"), at 9, Appendix, available at http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf.

in these challenges influence what people eat and drink, where they live, and how they spend and invest their money.

The ever increasing use of the Internet vastly increases the ability of agencies to disseminate, and therefore "regulate" by, information. For example, recognizing that it is now able to reach nationwide audiences almost instantaneously with a broad spectrum of information people rely on and invoke, EPA has an entire office -- the Office of Environmental Information -- devoted to "ensur[ing] that EPA collects high quality environmental information and makes it available to the public."[5] That Office has engaged in, or assisted, numerous projects involving dissemination of influential information via the Internet. The impact of this revolutionary information dissemination technology can not be gainsaid. As OMB, the federal agency charged by Congress with overseeing implementation of the Act, has observed, "the fact that the Internet enables agencies to communicate information quickly and easily to a wide audience not only offers great benefits to society, but also increases the potential for harm that can result from the dissemination of information that does not meet basic information quality standards." 66 Fed. Reg. 49718, 49719 (Sept. 28, 2001).

[5] EPA Office of Environmental Information, http://www.epa.gov/oei/.

Recognizing the far-reaching societal impacts of such information, Congress in 1995 enacted the PRA to ensure the "quality" of information disseminated to the public. See 66 Fed. Reg. 49718.[6] When OMB and federal agencies failed to fulfill their responsibilities under the PRA, Congress enacted the more far-reaching IQA.[7] In doing so, Congress determined that federal agencies, which enjoy a presumption in the public mind that information they disseminate is accurate, should no longer be allowed to "self-police" the quality of that information, including "free-standing" information that is not disseminated in the context of a rulemaking or other "binding" agency action.[8] Instead, that information now must be judged by uniform quality standards applicable to all federal agencies. Moreover, by requiring agencies to establish an administrative mechanism for affected parties "to seek and *obtain* correction" of information that does not meet these quality

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[6] Under the PRA, each federal agency is required to act to "improve the integrity, quality, and utility of information to all users within and outside the agency . . . ." 44 U.S.C. § 3506(b)(1)(C). To effectuate that objective, Congress provided OMB rulemaking authority to "develop and oversee the implementation of policies, principles, standards, and guidelines to apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated." Id. at §§ 3504(d)(1), 3516.

[7] See Appellant's Brief, at 16-20.

[8] Subject to certain limited exemptions not relevant here, "information" is broadly defined for IQA purposes as "any communication or representation of knowledge such as facts or data in any medium or form . . . ." 67 Fed. Reg. 8452, 8453-54 (Feb. 22, 2002) ("OMB Guidelines"), §§ V.(5), (8).

standards, Congress bestowed a new *legal right* upon parties affected by the dissemination of such information. IQA, § 515(b)(2)(B) (emphasis supplied).

With the backdrop of this clear Congressional intent that agencies disseminating information no longer be the sole arbiter of its quality, this case presents the question of whether the District Court erred in concluding that Appellants have no right to judicial review of whether the National Heart, Lung, and Blood Institute ("NHLBI") unlawfully denied their right under the IQA to "obtain correction" of flawed information. In so concluding, the District Court improperly focused on the lack of regulatory impact of the information in question. The District Court never acknowledged, much less addressed, Appellants' meritorious argument that NHLBI's denial of their administrative appeal was determinative of their *statutory right* to "seek *and obtain* correction of information . . . that does not comply with" IQA quality standards, id. (emphasis supplied), and as such judicially reviewable. The District Court's decision therefore must be reversed or vacated.[9]

[9] As discussed in Section II of the Argument below, this Court must first address whether Appellants have standing. If the Court agrees with the District Court that Appellants lack standing, it can do no more, and should vacate the District Court's judgment and opinion on judicial review under the IQA and APA and order that court to simply dismiss the Complaint for lack of subject matter jurisdiction.

ARGUMENT

I. NHLBI's Final Denial of Appellants' Petition for Correction is Judicially Reviewable Under Either the APA or the IQA

A. NHLBI's Denial of Appellants' Administrative Appeal Under the IQA is Final Agency Action That is Reviewable Under the APA

Under the APA, "judicial review of agency actions is the rule, nonreviewability the exception, and 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.' " Shell Oil Co. v. Dep't of Energy, 477 F. Supp. 413, 424 (D. Del. 1979), aff'd, 631 F.2d 231 (3d Cir. 1980) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). See also Inova Alexandria Hosp. v. Shalala, 244 F.3d 342, 346 (4th Cir. 2001). Thus, even where a statute pursuant to which an agency acts is silent on the issue of judicial review (as is the IQA), there is a presumption of reviewability under the APA. Center for Auto. Safety v. Dole, 828 F.2d 799, 804 (D.C. Cir. 1987) (requiring "compelling circumstances to infer from the structure or history of a silent statute a congressional intent to preclude review"). The limited and narrow exceptions to this rule apply only if the agency's action is (i) not "final," or (ii) "committed to agency discretion by law." Neither exception applies here.

1. NHLBI's Denial of Appellants' IQA Appeal is "Final Agency Action"

An agency action is considered "final" for purposes of the APA if the action is the consummation of the agency's decisionmaking process, and is one by which "rights or obligations have been determined." Bennett v. Spear, 520 U.S. 154, 178 (1977). The District Court did not question that NHLBI's decision on appeal consummated that agency's decisionmaking process. Instead, the court determined that NHLBI's actions were not final agency action because "[a]gency dissemination of advisory information that has no legal impact has consistently been found inadequate to constitute final agency action." See Salt Institute v. Thompson, 345 F. Supp. 2d 589, 602 (E.D. Va. 2004). In so ruling, the District Court wrongly focused on the "legal impact" of the information disseminated by NHLBI, rather than the fact that NHLBI's denial of Appellants' administrative appeal is a final determination regarding Appellants' *legal right* to correction of information found deficient under the Act and applicable IQA guidelines.

Under the new paradigm of the IQA, the proper inquiry in an IQA case is whether the agency's ruling upon an information correction petition finally determines the affected party's legal right to "seek *and obtain* correction of information . . . that does not comply with the guidelines." IQA, § 515(b)(2)(B) (emphasis supplied). The nature of the information itself is irrelevant as long as it

is within the broad range of "information" covered by the IQA.[10] The relevant question in this case is not, therefore, whether the information had any "legal impact," but whether NHLBI's final "refus[al] to correct or disclose the data," Salt Institute, 345 F. Supp. 2d at 597, finally determined Appellants' right under the IQA to correction of information that allegedly failed to meet IQA quality standards.

The District Court did not consider that question. Instead, the court focused on the effect of the information disseminated by NHBLI, and cited only cases in which the issue was the effect of the *content* of the information disseminated by an agency. Notably, none of those cases, including Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA, 313 F.3d 852 (4th Cir. 2002), involved an IQA claim. Those cases are inapposite where, as here, the claim is based on the IQA, and the final agency action complained of is one by which an affected party's statutory right to correction of information allegedly disseminated in derogation of statutorily mandated quality standards was determined.

In Flue-Cured Tobacco, the plaintiffs challenged an EPA report issued pursuant to § 404 of the Radon Gas and Indoor Air Quality Research Act ("Radon Act"). That statute established an EPA research program to collect data and

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[10] See note 8 supra.

coordinate research, but expressly precluded the exercise of any regulatory authority. The plaintiffs argued that the report "constituted regulatory action" in violation of § 404. This Court looked first to the statute at issue, and found that the Radon Act did not authorize EPA "to carry out *any* regulatory program or *any* activity" other than certain research, development, and related information dissemination. Flue-Cured Tobacco, 313 F.3d at 859 (emphasis in original). Applying the Bennett v. Spear doctrine, this Court held that because "Congress [had] spoken [in the negative] on the EPA's ability under the statute to create legal rights, obligations, or consequences," the report was not final agency action subject to review under the APA. Id.

The enactment of the IQA completely changed the framework for considering these issues. The IQA expressly directs that agencies must "allow[] affected persons to seek and *obtain* correction of information maintained and disseminated by the agency that does not comply with the guidelines . . . ." IQA § 515(b)(2)(A) (emphasis supplied). There could be no clearer statement of the creation of "legal rights, obligations, or consequences." Flue-Cured Tobacco, 313 F.3d at 859. The "legal consequences that flow" from NHLBI's refusal to disclose the data or correct the information alleged to be flawed by Appellants is the denial of their right to dissemination of information that meets uniform quality standards

mandated by Congress. Accordingly, NHLBI's action was "final" within the meaning of the APA.[11]

Apparently recognizing the merit of this argument, Defendant argued in the District Court that Appellants' information correction petition constituted an attempt to "manufacture final agency action simply by lodging an administrative challenge to otherwise non-final agency actions and wait[ing] for the agency's denial of their protest." Memorandum in Support of Defendant's Motion to Dismiss ("Defendant's Memorandum"), at 28-29. This assertion is meritless.

As Appellants explained below, they were not "manufacturing" agency action, or a right to it. Instead, they were simply pursuing the statutory right to correction accorded by the IQA. In addition, none of the cases cited by Defendant in support of its argument involved a situation where the plaintiff had a clear statutory right to agency action. See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, at 22.

Finally, Defendant's argument fails to recognize that the IQA imposes affirmative obligations upon federal agencies to ensure that the information they disseminate meets uniform quality standards, and to correct erroneous information that "affect[s] persons." This situation is directly analogous to the longstanding

[11] For the same reasons, this Court's finding of no "final" agency action in Invention Submission Corp. v. Rogan, 357 F.3d 452, 459-60 (4th Cir. 2004), which relied on Flue-Cured Tobacco and did not involve the IQA, is inapposite.

statutory obligations that agencies have to not disclose trade secrets of private parties. Neither the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, nor any other statute explicitly provides a cause of action to enjoin agency disclosure of trade secrets. Nevertheless, a long line of "reverse FOIA" cases holds that the APA authorizes such actions because agency disclosure of trade secrets despite statutory disclosure prohibitions would be "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). Chrysler Corp. v. Brown, 441 U.S. 281 (1979); General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981); Acumenics Research & Tech. v. Dep't of Justice, 843 F.2d 800 (4th Cir. 1988); General Electric Co. v. U.S. Nuclear Reg. Comm'n, 750 F.2d 1394 (7th Cir. 1984). See also CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987) (recognizing that these " '[r]everse-FOIA actions' are now a common species of FOIA litigation"). Under Chrysler and its progeny, an agency's failure to fulfill its statutory obligation not to disclose information is judicially reviewable, even though the information at issue does not itself determine "legal rights" of affected parties.[12]

[12] Notably, the "reverse FOIA" cases do not examine whether the *information* the agency seeks to disseminate is determinative of any "legal rights or obligations" of the affected party. Instead, they focus on whether the statute involved places a substantive limitation on *dissemination* of that information by government employees and provides those parties affected with a corresponding substantive right to prevent dissemination, as is the case with the IQA. See, e.g., General Motors, 654 F.2d at 296-97.

Here, the IQA prohibits federal agencies from disseminating information that fails to conform with IQA quality standards, and requires agencies to correct such information when it is disseminated. As in the "reverse FOIA" cases, if an agency disseminates flawed information, the APA provides a cause of action for an "affected person" to demonstrate that that dissemination is not in accordance with the IQA.

2. NHLBI's Actions Under the IQA Are Not Committed to the Agency's Discretion By Law

The District Court concluded that NHLBI's response to Appellants' information correction petition was committed to the agency's discretion by law and thus not reviewable under the APA. The basis for this conclusion was that "[n]either the IQA nor the OMB Guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication," in large part because agencies "are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved." Salt Institute, 345 F. Supp. 2d at 602.[13] This rationale is at odds with established case law of the Supreme Court and this Court.

[13] The District Court also noted that the guidelines allow agencies to "reject claims made in bad faith or without justification." Id. Of course, those situations are the exception, rather than the rule, and the District Court's declaration simply begs the question of whether standards exist to judge agency determinations where good faith claims are involved.

It also ignores the clearly sufficient standards set forth in the IQA and the OMB, National Institutes of Health ("NIH"), and U.S. Department of Health and Human Services ("HHS") guidelines that govern NHLBI's dissemination of information and enable "meaningful" review of that agency action.[14]

The "committed to agency discretion by law" exception to reviewability of agency action under the APA applies only where the statute at issue commits decisionmaking to the "agency's judgment *absolutely*." Heckler v. Chaney, 470 U.S. 821, 830 (1985) (emphasis supplied). See also Inova, 244 F.3d at 346 (exception is a "*very* narrow" one reserved for those "*rare* instances" where there is "*no* law to apply" (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (emphasis supplied)). As such, it does not matter for purposes of APA reviewability that an agency is granted considerable discretion by Congress; an agency's action is non-reviewable *only* if a statute provides *absolutely no* guidance as to how that discretion is to be exercised. As another federal appellate court has stated,

> Even where there are no clear statutory guidelines, courts often are still able to discern from the statutory scheme *a congressional intention to pursue a general goal.* If the agency action is found not to be reasonably consistent

[14] See National Institutes of Health Guidelines for Ensuring the Quality of Information Disseminated to the Public, Nov. 12, 2003 ("NIH Guidelines"); U.S. Department of Health and Human Services Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated to the Public, Nov. 13, 2003 ("HHS Guidelines").

> with this goal, then the courts must invalidate it. The mere fact that a statute grants broad discretion to an agency does not render the agency's decision completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, *taken together with other relevant materials,* provides *absolutely no* guidance as to how that discretion is to be exercised.

Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985) (emphasis supplied). See also Inova, 244 F.3d at 348 (citing Robbins with approval).

The broad search courts typically take to ascertain standards against which to judge an agency's action is exemplified in Beverly Health & Rehab. Serv. v. Thompson, 223 F. Supp. 2d 73 (D.D.C. 2002). There, the district court determined that the underlying statute's vague and terse "mandate" to "test and validate" the study protocol being challenged in and of itself evidenced Congress' intent that the agency action be subject to judicial review. Id. at 88-90. See also Armstrong v. Bush, 924 F.2d 282, 293 (D.C. Cir. 1991) (finding there was law to apply in a statute merely providing that agency heads "should establish and maintain" records management programs and "shall establish safeguards against the removal and loss of records"); Inova, 244 F.3d at 347 (noting that statutory "language allowing for discretion does not create unlimited discretion" and that "courts routinely conclude that judicial review is available notwithstanding statutory language that seemingly allows for unlimited discretion").

The language of the IQA clearly sets forth both a "congressional intention to pursue a general goal," Robbins, 780 F.2d at 45, and an express, concrete statutory command: federal agencies are to "ensure and *maximize* the *quality*, *objectivity*, *utility*, and *integrity* of information (including statistical information) they disseminate." IQA, § 515(a) (emphasis supplied). That goal and command are achieved by the Act's further command that OMB issue information quality guidelines for agencies to follow in issuing their own guidelines to fulfill the statutory mandate.[15] The statutory language of the IQA alone provides ample guidance as to how an agency's discretion is to be exercised, and certainly more in the way of standards than the sparse Congressional commands at issue in Inova, Armstrong, and Beverly Health.[16]

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[15] Although the IQA refers to OMB and agency "guidelines," OMB has made clear that "agency guidelines should not suggest that agencies are free to disregard their own guidelines;" instead, the OMB and agency information quality standards are "government-wide quality standards" which agencies are not "free to ignore. . . ." Memorandum from John D. Graham, OMB, to the President's Management Council, June 10, 2002, Attachment, "OIRA Review of Information Quality Guidelines Drafted by Agencies," at 14-15. The binding nature of the guidelines is also reflected in the IQA directive that agencies correct information that does not comply with the quality standards set forth in the guidelines and by the fact that the OMB "guidelines" were to be issued pursuant to OMB's rulemaking authority under the PRA. Under 44 U.S.C. § 3504(d)(1), OMB information dissemination "standards" and "guidelines" are to "*apply to* Federal agency dissemination of public information." (emphasis supplied). See also id. at § 3506(a)(1)(B) (directing federal agencies to comply with "policies" established by OMB).

[16] In citing the sole decision it did in support of its ruling, the District Court swung weakly and missed. Steenholdt v. FAA, 314 F.3d 633 (D.C. Cir. 2003), involved a statute and agency regulations that gave the FAA "unfettered discretion," in that they allowed the agency action at issue "at any time for any reason the [FAA] considers appropriate." Id. at 638. That is a far cry from the IQA, which *requires* agencies to "ensur[e] and *maximiz*[e] the quality,

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Moreover, the Act's statutory standards are supplemented extensively by other "relevant materials," namely the IQA guidelines of OMB, NIH, and HHS. See, e.g., Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1998) (judicially manageable standards "may be found in formal and informal policy statements and regulations as well as in statutes"); Inova, 244 F.3d at 346-47 (regulations promulgated by agency in carrying out statutory mandate provided standards for judicial review of agency decision to dismiss an administrative appeal, which "decision [as here] is not the kind of decision that is ordinarily committed exclusively to agency discretion by law," especially where "substantial interests" are at stake).

For example, those guidelines define the statutory terms "quality," "objectivity," "utility," and "integrity" in ways that provide more than sufficient standards by which a court can review an agency's decision not to correct information. See generally OMB Guidelines § V.(1)-(4); NIH Guidelines, at 2-3 (stating that NIH "will ensure that disseminated information meets the standards set forth in the OMB, HHS, and NIH guidelines").[17] By way of illustration, OMB's definition of "objectivity" comprises more than two full columns of

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(...Continued)
objectivity, utility and integrity" of information they disseminate and correct such information when it fails to meet the detailed quality standards set forth in the OMB guidelines.

[17] See also HHS Guidelines Part I § D.2.

Federal Register text and has both "presentation" and "substantive" components. The "presentation" component refers to whether information is presented in an "accurate, clear, complete and unbiased manner," and requires presentation of supporting data, models, and potential error sources affecting data quality so that the public can assess for itself whether there is a basis to question the objectivity of the information. The "substantive" component focuses on ensuring "accurate, reliable, and unbiased information" generated by use of "sound statistical and research methods." OMB Guidelines § V.(3); NIH Guidelines, at 2.[18] These concrete parameters provide much more in the way of judicially manageable standards for courts to employ in reviewing agency IQA determinations than has been required by the judiciary in other contexts.[19]

By focusing on the discretion that federal agencies admittedly have as to *how* to correct information found to fall short of IQA quality standards,[20] the

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[18] The guidelines also define "influential scientific information" (such as that allegedly at issue here) that is subject to heightened information quality standards. Those standards are highly precise and technical. See OMB Guidelines §§ V.(3)(b)(ii), (9); NIH Guidelines § VII; HHS Guidelines Part I, § D.2.c.2.

[19] In addition, the administrative information correction petition and appeal processes provide administrative materials sufficient to facilitate judicial review of an agency's action. Whether judicial review should be *de novo* or on the basis of the administrative record is not an issue before the Court.

[20] Notably, even the language cited by the District Court to the effect that agencies need only undertake the *degree* of correction that they conclude is appropriate for the nature and timeliness of the information involved (i) goes largely to the nature of the administrative *mechanisms* agencies have the discretion to adopt so as not to unduly "burden" them and (ii) is

(...Continued)

District Court erroneously failed to acknowledge or consider the robust standards that guide both an agency and the courts in determining *whether* information needs to be corrected in the first place. With these standards in place, agencies clearly do not have "absolute" discretion to decide whether federal information quality standards have been violated and whether, as a result, the information at issue must be corrected.[21] In short, final agency action in ruling upon an IQA information correction petition is not "committed to agency discretion by law" and is reviewable under the APA.[22]

(...Continued)
accompanied by the direction that Agencies "*shall* adopt *specific* standards of quality that are appropriate for the various categories of information they disseminate." 67 Fed. Reg. 8458-59; OMB Guidelines §§ III.(1), (3) (emphasis supplied).

[21] Even assuming *arguendo* that an agency's response to an information correction request is committed to agency discretion by law, the District Court would have authority to review the allegations in the Complaint that NHLBI failed to follow its own IQA guidelines. See, e.g., Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981) (concluding that even where particular agency action is committed to agency discretion by law, a court may review the action if there is a claim that the agency has "exceeded its legal authority" or "has violated . . . regulatory or other restrictions"). See also First Amended Complaint ¶¶ 1, 32, 48; J.A. 5, 14, 20.

[22] Defendant asserted below that the availability of judicial review of IQA determinations will "open the floodgates" of litigation and unduly burden the courts and federal agencies. Defendant's Memorandum, at 35. This claim is baseless (and, in any event, legally irrelevant). In the first year after the guidelines were published, only 35 substantive correction requests were submitted to all federal agencies combined. Of these, only two were the subject of judicial challenges, despite agency denials of a number of the petitions. 2003 OMB Report, at 8-9.

B. By Creating a Right to "Obtain Correction" of Information Not Meeting IQA Standards, Congress Evidenced Its Intent to Establish a Private Right of Action Under the IQA

The District Court also found that there is no private right of action under the IQA. That ruling is erroneous, and should be reversed (or vacated) by the Court.

Congressional intent is the principal focus in determining whether an implied right of judicial review exists under a statute. Alexander v. Sandoval, 532 U.S. 275, 286 (2001). That intent may be express or implicit, and may appear in the language or structure of the statute, the circumstances of its enactment, "or some other source." Thompson v. Thompson, 484 U.S. 174, 179 (1988). Congressional intent to establish a right of action under the IQA is evident from the history and fundamental purposes underlying its enactment, and the clear Congressional statement that parties affected by information that does not meet federal quality standards are entitled to correction of that information.

The IQA fundamentally changed the law governing the obligations to which federal agencies are subject when they disseminate information. For the first time, Congress gave "affected persons" a right "to seek *and obtain correction*" of information disseminated by an agency, even if the agency acted informally and the information itself did not amount to "final agency action" within the meaning of the APA. See IQA, § 515(b)(2)(B) (emphasis supplied). This statutory right,

and the Congressional intent that underlies it, can be secured only if "affected persons" have a right of redress in federal courts. See, e.g., Sandoval, 532 U.S. at 288 (noting that finding an implied right of action was warranted where statutory text stated that "no person . . . shall be subjected to discrimination" and the statute, as with the IQA, focused on the individuals or particular class of persons protected under it).

To allow federal agencies to be the final judge of the quality of information they informally disseminate and whether it needs to be corrected to conform to IQA standards would judicially nullify the Act. Agencies are not impartial custodians and arbiters of information they collect or develop and disseminate. Rather, agencies use their authority and resources to collect, develop and disseminate information as a means to accomplish their missions. The influence of an agency's mission upon the information that it disseminates cannot be overstated, particularly in our modern age when agencies routinely disseminate information electronically on a global basis. Indeed, one federal agency has described information as the "ultimate weapon" in achieving the agency function.[23]

This Court also has recognized the power and influence that an agency's informal dissemination of information can have. As the Court observed in Flue-

[23] Providing Information to Decision Makers to Protect Human Health and the Environment: Information Resources Management Strategic Plan, 30 EPA Pub. No. 220-B-95-002 (April 1995).

Cured Tobacco, "[t]he practical consequences of the [non-regulatory] EPA Report [at issue in that case] are great and affect the livelihood of thousands." 313 F.3d at 862.

On its face, the IQA represents a Congressional determination that agencies should no longer have unchecked power to disseminate information. If Congress had trusted agencies to correct erroneous information they disseminate, there would have been no need for the IQA, the uniform OMB quality standards under it, or the statutory right of "affected parties" to "*obtain* correction" of information that does not meet those standards. Instead, the right to bring the issue to the agency's attention, as in the past, would have sufficed.[24]

The statutory right Congress created is meaningless without judicial review, especially since information correction petitions must typically be addressed in the first instance to the office that disseminated the information. See, e.g., NIH Guidelines, § VI(1) (correction request to be submitted to the "disseminating office"). Although administrative appeals are supposedly heard by agency officials

[24] The legislative history of the IQA provides clear evidence that Congress did not believe that recourse to agencies, in and of itself, would suffice. When Congress directed OMB and federal agencies in 1998 to establish information quality rules, it was content to permit agencies to establish "administrative mechanisms allowing affected parties to [merely] *petition* for correction of information which does not comply with such rules." Appellants' Brief, at 17 (quoting House Report No. 105-592 (1998)) (emphasis supplied). Frustrated by the failure of OMB and federal agencies to comply with its directive, Congress determined in the IQA that agencies should not have the discretion to deny such "petitions" for whatever reason they deemed appropriate. Instead, affected parties were accorded the *right* to "seek and *obtain* correction" of flawed information.

who are separate from those offices, these officials are being asked to overturn the decisions of their colleagues; in that conflicted role, they hardly function as independent administrative law judges who can effectively "*ensure* and *maximize*" information quality, as the IQA requires. Consequently, judicial review is necessary to effectuate Congress's intent to provide "affected persons" a meaningful right to "obtain correction" of information that does not meet the applicable quality standards. The District Court's ruling that the IQA does not create a right to judicial review should be reversed.

II. Should the Court Sustain the District Court's Holding That Appellants Lack Standing, It Should Vacate That Court's Decision With Respect to Judicial Review Under the IQA and APA

In granting Defendant's motion to dismiss the Complaint, the District Court first held that Appellants do not have standing under Article III of the U.S. Constitution ("Article III"). Salt Institute, 345 F. Supp. 2d at 598. After so holding, the District Court improperly went on to rule that the IQA does not provide a private right of action and that NHLBI's actions in this case are not subject to APA review. Id. at 601-03. Having first determined that it did not have Article III jurisdiction, the only remaining authority the District Court had was to dismiss the case in its entirety. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

Similarly, if this Court agrees that the lower court had no jurisdiction under Article III, the Court must decline to reach the other issues on appeal and should vacate the remaining portion of the District Court's opinion as impermissibly advisory in nature. See Steel Co., 523 U.S. at 95 (when lower federal court lacks jurisdiction, appellate court only has jurisdiction to correct the error of the lower court in entertaining the suit); id. at 110 (vacating the judgment of the district court and remanding with instructions to direct that the complaint be dismissed). See also Comite de Apoyo A Los Trabajadores Agricolas v. U.S. Dep't of Labor, 995 F.2d 510, 511, 515 (4th Cir. 1993) (decision on merits should not issue where plaintiffs lack standing).

Both the IQA and APA rulings should be vacated. With respect to the IQA, a determination as to whether a right of action exists under a federal statute is a decision on the merits, and does not implicate subject matter jurisdiction. Bell v. Hood, 327 U.S. 678, 682 (1946); Steel Co., 523 U.S. at 89; Ridenour v. Andrews Federal Credit Union, 897 F.2d 715, 722 (4th Cir. 1990). If federal question "jurisdiction fails because no such federal claim exists, the proper disposition is to dismiss on the merits for failure to state a claim rather than for want of subject matter jurisdiction." Ridenour, 897 F.2d at 719. See also Steel Co., 523 U.S. at 89, 101-102 ("[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition,

for a court to act ultra vires.")[25] Because the District Court interpreted the "meaning" of the IQA (i.e., whether it establishes a private right to judicial review of agency action) when it had no jurisdiction to do so, its opinion must be vacated. Id. at 110.

The same result pertains with respect to the District Court's APA ruling. The Supreme Court has held that "the APA is not to be interpreted as an implied grant of subject matter jurisdiction to review agency actions." Califano v. Sanders, 430 U.S. 99, 105 (1977). 28 U.S.C. § 1331-- not the APA -- confers jurisdiction on federal courts to review agency action. Id. Section 10(a) of the APA, 5 U.S.C. § 702, merely supplies the cause of action. Chrysler Corp. v. Brown, 441 U.S. at 317 & n.47. See also CNA Financial Corp., 830 F.2d at 1133 & n. 1. As such, once the District Court concluded that it did not have Article III jurisdiction, it was without authority to address whether a cause of action existed under the APA. Steel Co., 523 U.S. at 89-102.

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[25] The only exception to this well-settled rule is if "the federal claim as pleaded is so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy." Ridenour, 897 F.2d at 719 (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974)) (internal quotations omitted). That is not the case here. Appellants brought issues of first impression to the District Court under a new federal statute, never before tested in the federal courts of appeal. Appellants' claims clearly raise substantial issues of first impression regarding the meaning of a new federal law, and rights and remedies under that law and the APA.

Even if the issue of APA reviewability were to implicate subject matter jurisdiction,[26] the result would be no different. Although this Court noted in Flue-Cured Tobacco, 313 F.3d at 857, that a court should not generally address Constitutional arguments unless absolutely necessary, courts clearly have discretion to address an issue of Constitutional standing first. See, e.g., Steel Co., 523 U.S. at 115 (J. Stevens, concurring). Having exercised that discretion and found that Appellants had no standing under Article III, the District Court could not permissibly go further to address anything else -- even another jurisdictional argument. Id. at 94.

The same justiciability principle applies to this Court. If the Court concludes that Appellants lack standing, it is without authority to rule further, even if it agrees with the remainder of the District Court's opinion. Id. at 95. Instead, the Court should vacate the District Court's judgment and remand the case with instructions that the complaint be dismissed for lack of subject matter jurisdiction. See id. at 88, 110 (vacating and remanding for dismissal of complaint where

[26] In Flue-Cured Tobacco, 313 F. 3d at 857, this Court treated the question of reviewability under the APA as a question of the Court's subject matter jurisdiction. See also Invention Submission Corp., 357 F.3d at 458. That treatment appears questionable in light of the Supreme Court decision in Califano.

district court granted motion to dismiss based on both lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted).[27]

CONCLUSION

For the foregoing reasons, if the Court finds that Appellants have standing, it should reverse the judgment of the District Court and hold that NHLBI's denial of Appellants' IQA petition is subject to judicial review. If, however, the Court finds that Appellants lack standing, it must vacate the District Court's judgment and supporting opinion and order the court to simply dismiss the case under Fed. R. Civ. P. 12(b)(1).

[27] Defendant moved to dismiss Appellants' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). While acknowledging the dual bases for Defendant's motion to dismiss, Salt Institute, 345 F. Supp. 2d at 592, the District Court clearly evaluated Defendant's motion under, and ruled on the basis of, Fed. R. Civ. P. 12(b)(6). Id. at 598 (addressing the standard of review applicable to the court's evaluation of Defendant's 12(b)(6) motion without reference to 12(b)(1)). That ruling was in error. Having determined that it lacked subject matter jurisdiction to entertain the Complaint, the District Court should have dismissed it under Rule 12(b)(1). Accordingly, the Court should "vacate [the District Court's] order . . . . as well as the supporting opinion, and remand with instructions to dismiss this case under Federal Rule of Civil Procedure 12(b)(1)." Invention Submission Corp., 357 F.3d at 460.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1097 **Caption:** Salt Institute, et al. v. Michael O. Leavitt

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I hereby certify that this 25th day of April, 2005, a copy of National Association of Home Builders' *Amicus Curiae* Brief was served on the following parties by overnight mail:

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