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LIBELS ON GOVERNMENT WEBSITES: EXPLORING REMEDIES FOR FEDERAL INTERNET DEFAMATION

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INTRODUCTION

“Government websites today told internet users that the John Doe Widget Company is the worst polluter in Utah. The Doe Company denied the charge and threatened to sue the government.”

Federal agencies take thousands of actions and make thousands of decisions each week, many of which can be found on agencies’ on-line websites. What happens when the federal agency website gives out incorrect and adverse information about a regulated person or firm? This paper studies the limited role of legal remedies such as libel and the availability of administrative correction tools in dealing with agencies’ Internet mistakes or misstatements.

Much of the federal regulatory information on agency websites has been submitted, processed, and then posted on the web by private companies and state officials. These private companies and state officials have the initial “quality assurance” roles in the accuracy of the records they submit to federal agencies. Ideally, accuracy of the information should have been carefully established before the data reaches the federal agency. That should be a basic assumption concerning the responsibility of the person who submits the data.

This paper addresses data that is posted on a federal agency Internet website, and then is perceived by someone outside the agency to be “inaccurate or misleading.” The accuracy of quantitative data is easier to establish than more subjective conclusions, such as ratings of quality or performance, where the “beauty is in the eye of the beholder.” Accuracy connotes a measurable, tangible level of alignment between a fact and the

report of that fact. This paper will focus on the remedies for dealing with the consequences of inaccuracy or erroneous judgment in federal website communications.

What is misleading depends on one's view of the context. A typical example is the listing of violators under a particular compliance program, where the specific products or facilities are fully compliant, but the violation consisted of noncompliance with particular paperwork entry requirements. Some regulated entities regard paperwork as a minor technical concern, but some regulators view paperwork completion as an important element of their overall compliance program. This paper does not try to reconcile the divergent views of what is considered "misleading," but rather addresses the mechanisms within which to resolve disputes when they arise.

I. DEFINE THE PROBLEMS

A. Correction of Errors

This article examines mechanisms for correction of electronic data where the affected person or entity wishes to change something that a federal agency has posted in an electronic database or website. The same principles are also applied to printed publications. Federal databases are valuable sources of factual information for millions of users. Many different databases exist, including the Environmental Protection Agency (EPA) system called "Envirofacts," a very large public database about environmental conditions.¹ Some of the electronic data that is on the agency website is obsolete, inaccurate or may be misleading. Prior to publication on the web, agencies like the EPA can use several means of assuring data quality, including stakeholder meetings, training, and software. But agencies get much of their data from sources for which federal employees were not the originating point, such as state or chemical manufacturer reports to an environmental compliance office. Screening the incoming data to aid in assuring the quality of the database is an ongoing task for agencies.

B. Typical Scenarios of Inaccuracy

Federal agency database disputes generally fall into several discrete categories. The angry response of the person affected by the agency

1. See The EPA Website, *Envirofacts* (establishing a single point of access to a massive environmental data warehouse), at <http://www.epa.gov/enviro/> (last visited July 5, 2003).

announcement is unaffected by the category, but the means by which dispute resolution may work is related to the content of the website statement. Consider three types of alleged website inaccuracies and misleading statements on a federal environmental database:

1. Chemical A causes illness B. A's maker disagrees.
2. Plant C harms the drinking water of town D. C's owner disagrees.
3. College E has exposed neighbors to air pollutant F. The campus environmental director of E disagrees.

The first scenario involves a conclusion about chemical hazards, drawn from data points examined by expert scientists. If the data points are reviewed and revision or expansion of the data set is undertaken to make them more accurate, the conclusion depends largely on the professional judgment of the scientists. In this scenario, the greater quantity of data would increase the accuracy of determinations made concerning the safety consequences of the public exposure to that chemical. The costs of the additional review are so fact-specific that no generalization about the cost of making use of the new or additional data can be offered. In academic institutions' responses to OMB Section 515 rulemaking, discussed later in this article,² great alarm was expressed that correction requests would frivolously attack the scientific conclusions of peer-reviewed experimentation.

The second scenario is likely to involve sampling methodology and the hydrogeology of groundwater. The sample analysis probably follows standard methods in a qualified laboratory so the accurate nature of the data points (deep well X, 34 micrograms per liter) is probably unaffected by the new mechanisms for data accuracy. The EPA program office's conclusion of, "harms the drinking water," from the data points is a qualitative result of professional judgment from several disciplines. The new correction mechanisms probably do not alter the data points regarding an individual sample. However, the new mechanisms could permit the factory C to post a statement of dispute, such as occurs with the individual credit reports in which charge account disputes are disclosed. The benefit of such a dispute statement to factory C in terms of reputation and local goodwill is

2. See CRE Repository of Data Quality Guidelines Comments, (discussing OMB rulemaking and responses to such rulemaking), *available at* <http://www.thecre.com/quality/comments/DQGuidanceComments.html> (last visited July 11, 2003).

significantly larger than the approximately \$6.00 cost to the agency³ of placing the flag on its system.⁴ Of course, the agency could choose to invest its resources in resolution of the disputed conclusion, "harms the drinking water," but such a revisit to the issue is a decision left to the agency's budgetary discretion.⁵ The difference between website and print publication is again evident in this scenario, because it costs more to retrieve, destroy and reprint hard copy documents that have been printed in error.

The third scenario is an environmental release scenario. The completeness of the data is in dispute because College E believes that the plume of gas F did not reach beyond the fence line of its technology building, and E has a measurement device at the fence line that disputes complaints that F was at a harmful concentration and/or that F was present at all beyond the fence line of E. In the release scenario, inaccurate means that the sample was not correctly taken, or a rebuttal sample was taken and shared with the agency, but not included in the agency data set that led to the conclusion that a release occurred. The term misleading has several meanings in a release scenario, but it usually involves a dispute over exposure levels, dispersion of gases, and inhalation doses at which risk occurs, all of which are areas of expert disagreement on technical questions. The agency may simply provide the flag with which the statement of disputed alternative views may be reached in a separate area of the database.

II. JUDICIAL REMEDIES FOR WEB LIBELS

Current statutes do not provide much recourse for the entity that disagrees with an EPA publication, web posting or other dissemination. In the absence of legislative adoption of such a remedy, there is virtually no prospect of a successful federal court challenge against an agency publication about a person or entity.

Federal case precedents do not recognize a litigation remedy for alleged data inaccuracy or misleading posting of information on federal websites. The few cases that have arisen may have been settled or resolved through a means outside of litigation. No statutory grant of review authority appears to exist. Of course, anyone with the filing fee can file a suit, but current

3. This is the cost estimate made by the EPA's Office of Environmental Information, error correction group, in June 2001 interviews.

4. If a citizen suit were filed against the facility as a result of the EPA posting inaccurate information, then the transaction costs attributable to the error would be very large.

5. The costs of such revisiting of a substantive matter are so fact specific that this report will not address them.

law makes the chances of success quite remote. The litigation options are very unlikely to be successful unless changes are made in the statutes, or appellate courts make re-interpretations of existing statutes.

A. Administrative Procedures

The Administrative Procedure Act (APA) provides remedies for only those administrative acts that are final agency action. This prerequisite may not be satisfied when an agency information product, such as a website, posts a statement concerning a private person or entity. A person suing the agency must show a final action has been made, any remedies within the agency have been exhausted (e.g., internal appeals for correction), and that the action is timely and ready ("ripe") for judicial review.⁶ The reviewable final action occurs when the agency announces a decision that is the consummation of agency decision-making, and where the agency decision determines rights or obligations, or creates legal consequences.⁷

Typically, this question about the existence of a final agency action arises when an agency has posted or published on its Internet site a statement of fact or opinion applicable to one entity or person, e.g., "Doe Industries discharged 50 gallons of X into the Y River on June 1." This might be in a press release or in an enforcement database. The statement is not a regulation or rule, and is not intended to be a final determination of adjudicative fact in a disputed proceeding, such as an administrative civil penalty or benefits proceeding. The website posted statement is not presented as a binding agency determination in a contested or adversarial proceeding. This APA analysis of the finality of agency action would be applied by a reviewing court to web-based or hard copy distributed statements.

So a person who is offended by the agency's website statement may be unable to obtain judicial review. Final agency action that is not otherwise reviewable under a specific statutory mechanism becomes reviewable in the courts only after the APA provisions for judicial review are satisfied. The prerequisites of an agency action and a person suffering legal wrong

6. See *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 738 (D.C. Cir. 1987) (explaining exhaustion is a prerequisite for obtaining judicial relief).

7. See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (allowing petitioner to challenge the FDA's 1962 amendment requiring manufacturers of prescription drugs to prominently print the established name of the drugs on the prescription bottle despite the fact the FDA had not yet enforced the amendment on the petitioners).

must exist to obtain review under APA Section 702.⁸ Section 704 of the APA requires final agency action “for which there is no other adequate remedy in a court.”⁹

Posting of data to a website is not a final action if other steps are readily available, e.g., to the extent that the agency staff provides a ready and cost-free remedy for the complaint that is internal to the agency. Management level officials are not involved in most stages of the decisions about correction. One can presume that higher-level executives could become involved in particularly visible conflicts, when and if the agency’s web content statement is disputed. Before it reaches that level, there might be a sustained level of disagreement between agency staff and the affected private persons about the website message.

An important appellate case in December 2002 established a dichotomy of harms and remedies, in which the court examines the benefits and the burdens. The court observed that a government report may have some persuasive value. This report may lead private groups to impose restrictions on the person who was the subject of the government statement. But these non-governmental adverse decisions are attributable to private persons’ independent responses and to the choices made by third parties. Furthermore, the report is not reviewable by virtue of those third-party consequences.¹⁰ The Fourth Circuit rejected the alternative option: “(I)f we were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review.”¹¹

The barrier of finality of action is a pivotal obstacle to judicial relief. In its 2001 decision in *Whitman v. American Trucking Association*,¹² the Supreme Court noted that the “bite” in the phrase “final action” is not in the word action, which is meant to cover “comprehensively every manner in which an agency may exercise its power.”¹³ The Court held that the word final requires that the action under review “mark the consummation of the agency’s decision making process.”¹⁴ Applying this measurement,

8. See 5 U.S.C. § 702 (2000) (establishing requirements for an individual’s right of review).

9. See 5 U.S.C. § 704 (2000).

10. See *generally* *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 862 (4th Cir. 2002) (rejecting the Tobacco companies and lobbying group’s argument that the EPA’s report regarding health hazards of second hand tobacco was a reviewable agency action).

11. See *id.* at 861.

12. 531 U.S. 457 (2001).

13. See *id.* at 478.

14. See *id.*

most website posted statements lack sufficient indicia of finality. Only if the “EPA has rendered its last word on the matter in question, is its action final and thus reviewable.”¹⁵ The EPA, for example, has an error corrections team that is accessible on the website to users who dispute an EPA data entry. The mechanism and flowchart for corrections is posted on the EPA’s website.¹⁶

The EPA internal correction mechanisms illustrate this non-finality. An error or objection that relates to substantive issues would be dealt with first by the staff and later by the management of the agency. When the statement being challenged has been made in hard copy by an office below the level of the policy-making management of the agency, it is not a final statement for the agency and its amendment or correction is procedurally accessible.

Therefore, the mere appearance of a piece or set of data on the federal website or in a federal publication is not a final agency action. It takes more to get into court to review such a web posted statement. In the absence of some special showing of more particularized effects of the agency publication, the listing is not a final agency action under *Whitman*.¹⁷ In the absence of a showing that no existing administrative remedy can provide relief, the argument for a remedy in court is unlikely to be successfully asserted. If the website posting is not a decisional pronouncement, it is not a final and reviewable agency action under *Hearst Radio v FCC*.¹⁸

The posting on the website of information that may be corrected via the agency’s error correction processes is not “final” in the sense that the posting has not achieved a binding or determinative consequence. For example, the mere listing of an entity on a list of polluters in an EPA data product is like a charge that has not resulted in a penalty. Appellate courts have long held that such charges cannot be reviewed in court until the agency process has run its course.¹⁹ The APA does not appear to allow

15. *See id.*

16. *See* The EPA Website, *Error Notification Work Flow Process Chart*, at http://www.epa.gov/enviro/html/error/flow_chart.htm (last visited May 21, 2003). This may be a useful model for other agencies that wish to deter litigation and instead consider rewording or deletion of web statements that may be having an adverse effect on regulated entities. *See id.*

17. 531 U.S. 457 (2001)

18. 167 F.2d 225, 227 (D.C. Cir. 1948), *quoted in* *Indus. Safety Equip. Ass’n v. EPA*, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

19. *See* *FTC v. Standard Oil*, 449 U.S. 232, 238 (1980) (stating a complaint by an agency is subject to judicial review before the completion of administrative adjudication only if it is a final agency action or directly reviewable).

judicial review of the simple website listing or published statement.

Attitudes of courts toward review of administrative agency routine actions can be described as a guarded reluctance to actively insert the judge into the role of the administrator.²⁰ This hesitation parallels the reluctance of appellate courts to become involved in piecemeal interlocutory review of the many rulings that occur during pretrial and trial stages of a lawsuit.

There is an extra layer of concern that cautions courts not to get involved in administrative choices, before these choices can crystallize into final action. That concern relates to the complexity of the tasks that specialized career professionals undertake within agencies. In the classic situation of *National Automatic Laundry and Cleaning Council v. Schultz*,²¹ an agency policy letter had received full internal consideration and had given no indication that it was tentative or had not yet developed into policy. Apart from a formal adjudication or an agency regulation, it can be difficult for entities outside the agency to know when the process inside the agency has come to a conclusion sufficient to be final.²² To determine an agency's decision is sufficiently final, a court must find (1) the agency's position is definitive and (2) the position has a direct and immediate effect on the challenger's daily business practices.²³ While making this determination, a court attempts to distinguish a tentative agency position from previous agency positions that are "sufficiently final to demand compliance with its announced position."²⁴ Finally, an agency's lack of formal statement on its position "is not dispositive of the status of the matter."²⁵

Against that background, the agency website is merely a digital file cabinet full of data, listings, measurements, policy positions and classifications, not an infallible pronouncement. There is usually an error correction team that is functioning and available. Furthermore, the databases are records, rather than high level decisions of the agency heads. Databases and websites are quintessentially non-final. The same can be said of agency publications, pamphlets, press releases, and other hard copy disclosures except for the small number that are issued by the specific direction of the agency head.

20. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 459 (2001) (demonstrating this reluctance).

21. 443 F.2d 689 (D.C. Cir. 1971).

22. See *id.* at 704-05 (holding the Wage and Hour Division's decision to apply the 1966 amendment to petitioners, rather than a previous administrative ruling was sufficiently final).

23. See *Her Majesty the Queen v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir.1990) (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-36 (D.C. Cir.1986)).

24. See *id.* at 1531 (quoting *Ciba-Geigy*, 801 F.2d at 436).

25. See *Natural Res. Def. Council v. EPA*, 22 F.3d 1125, 1132-3 (D.C. Cir. 1994) (quoting *Ciba-Geigy*, 801 F.2d at 438 n.9).

What status a report or web posting receives depends on how it is positioned within the administrative hierarchy. The Justice Department argued in district court in *Tozzi v HHS*²⁶ that a federal report listing certain chemicals was merely an informational document.²⁷ The district court did not reach this question but dismissed the claims and gave great deference to the agency's technical ability to evaluate the scientific data that underlay the report. The D.C. Circuit affirmed on the merits but was more generous with standing of the affected persons to sue over the disputed statements, allowing judicial review.²⁸ If one assumes that website files are informational, then the government's argument in *Tozzi* probably applies to the view that would be applied to hard copy publications as well as to web postings. But the appellate opinion allows judicial review where the adverse effects of the statements were negative for the specific business affected. This in turn suggests there may be future claims to be heard from private persons affected by either web-based or print-based agency statements about those persons. It is not an easy question for counsel to answer while an agitated client is angry at the government's callous detraction of the client's reputation.

In the Supreme Court's 1979 decision in *Chrysler Corp. v Brown*,²⁹ the Court held that the APA could be utilized as a basis for judicial review of decisions to make particular future disclosures, i.e., whether an agency has statutory power to make public disclosure of a private company's confidential data submissions to that agency. The Internet disclosure scenario, which we discuss in this paper, relates to a web posting that has already occurred, and about which posting the agency hears a complaint only after the release has taken place. In the same fashion, an information product in hard copy form has already been disseminated. So, the review of the adequacy of agency rules under *Chrysler*, deciding if they could justify a future release to specific requesters, is not a helpful guide.

Experts in the field have recommended that there be some remedy for the effects of erroneous publicity. The leading scholar who studied this field, Ernest Gellhorn, observed that "EPA announcements . . . are examples of agency publicity, which might be made more responsible by occasional judicial review."³⁰ Web posting of data is not the kind of

26. 271 F.3d 301 (2001).

27. See Appellee's Motion for Summary Affirmance and Opposition to Appellant's Motion for Injunction Pending Appeal, *Tozzi v. HHS*, 271 F.3d 301 (D.C. Cir. 2001) (No. 99-1170), available at <http://www.thecre.com/special-projects/TozziVHHS112700.htm>.

28. See *Tozzi*, 271 F.3d at 309-10 (upholding the district court's finding for standing).

29. 441 U.S. 281 (1979).

30. See Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1436 (1973) [hereinafter Gellhorn] (arguing that the lack of standards for issuing

affirmative publicity that Professor Gellhorn addressed in 1973, as printed reports at press conferences would be. However, web posting may be called passive publicity and arguably its potential for harm to reputations is as significant as a printed publication.

An illustration of the barriers to APA recovery was the 1986 publication of a report by the EPA and the National Institutes of Occupational Health (NIOSH) that decertified certain types of respirators. The private industry certification body sued under the APA seeking a court injunction against the report as an improperly adopted rule and as an unconstitutional deprivation of their property interest in issuing certifications.³¹ No charge was made that the report was false or misleading, which are the claims likely to be asserted in most website disputes. The dismissal of the complaint was upheld on appeal, because the report had no binding legal effect, and was not to be “implemented in the context of future agency proceedings.”³² The D.C. Circuit later described this case in *Associated Gas Distributors, v. FERC*³³ as a rejection of challenges to agency statements that did not “impose an obligation, determine a right or liability, or fix a legal relationship” because they were not yet ripe for review.³⁴ So at least in the D.C. Circuit, where the great majority of administrative litigation is argued, the website posting alone is not likely to be reviewable. Unless the website statement or an EPA report contains some more actionable contents, the same result of dismissal is very likely in future Washington-based litigation.

In November 2001, in the case of *Tozzi v. HSS*, the D.C. Circuit, including one active judge and two senior judges, carved out an exception that has significant potential for future Internet posting disputes.³⁵ If an agency were to list a chemical as a carcinogen or use another pejorative term that would likely cause damage to the sales of products made with that chemical, then the court held, the person with such a direct economic injury

administrative reports and press releases, and its potentially adverse impact have been ignored).

31. *See Ind. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1120 (D.C. Cir. 1988) (dismissing the ISEA's claim that the report constituted more than just a publication of factual matters).

32. *See id.* at 1122 (noting also that the ISEA raise any claims as to the report's veracity).

33. 899 F.2d 1250 (D.C. Cir. 1990).

34. *See id.* at 1260 (citing *Indus. Safety Equip. Ass'n, Inc. v. EPA*, 837 F.2d 1115, 1120 (D.C. Cir. 1988)).

35. 271 F.3d 301 (D.C. Cir. 2001) (recognizing a grievied party's standing to challenge the agency's carcinogen classification, but ultimately deferring to the agency's interpretation of its authority to make the challenged classification).

may be able to challenge the statement in district court.³⁶ But getting into court is not enough. It is quite difficult to win such a case because agencies are allowed considerable discretion in making listing decisions.³⁷ The court upheld the earlier decision in *Industrial Safety Equipment Ass'n v. EPA*, but three factors warranted closer scrutiny in the carcinogen listings case: specific statutory provisions applicable to the agency's study; publication of the listing in the Federal Register by the agency; and the triggering of other regulatory obligations, that follow directly once the listing had been published.³⁸

To summarize, most federal courts probably will not accept claims that an APA cause of action for judicial review can be asserted against the mere act of a website posting or publication of data, unless more direct harm occurs, or unless special circumstances can be established. The need for the plaintiff to show final agency action, to show exhaustion of remedies, and to show that the matter is ripe for adjudication, all combine to make web posting or publishing a non-reviewable act. The web posting of views or assertions by the staff of a federal agency will remain without remedy under current statutes and precedents. The problem will continue until the affected entity brings the issue to a substantive management level decision within the agency, and has received a particularized final action, which is directly adverse to the plaintiff's economic interests.

B. Other Federal Statutes

1. Privacy Act

The Privacy Act does not allow judicial review of an agency refusal to correct an Internet statement concerning a person or entity. The Act is limited to individuals and therefore does not apply to facts about entities such as corporations. Most agency Internet website listings will be data about a corporation, partnership or business proprietorship. These generally are not held by the agency within a system of records covered by the Privacy Act.³⁹ The entities regulated are usually not an individual.⁴⁰

36. See *id.* at 308-09 (determining the economic injury does not come directly from the agency's action, but rather from the "independent actions of third parties" influenced by the challenged action).

37. See *id.* at 311-12 (granting deference to the Secretary's reasonable construction even in the face of plausible alternatives).

38. See *id.* at 310-11 (having determined that these factors are present and that the agency's action is reviewable).

39. See 5 U.S.C. § 552a (2000) (defining "system of records" to mean a group of any records under the control of any agency form which information is retrieved by the name of

Though commercial privacy interests may exist, for purposes of the Freedom of Information Act (FOIA),⁴¹ a dispute concerning accuracy of website files is generally not a matter affecting an individual's privacy. For example, the major EPA web database, Envirofacts, is not treated by the EPA as a system of records subject to the agency's Part 16 privacy regulations.⁴² It is possible that an individual company employee named in an EPA file could argue for privacy protection of his or her name, but specific coverage of the system of records by the Privacy Act is a prerequisite to that Act's coverage.⁴³ The hard copy publications, such as press releases and brochures, likewise are not covered by the Privacy Act. These are publications for dissemination, not systems of records that can be amended or corrected by a concerned individual who wishes to fix an incorrect statement.⁴⁴ These government reports relate to companies, states, or other entities, not to individual named persons. So the Privacy Act would not apply to these manuals or press releases.

2. *Freedom of Information Act*

FOIA does not allow for suits asserting the theory that a preexistent public disclosure caused damage. Agencies have only a ceiling, not a floor, on what they can withhold. As a result, FOIA exemption status can be waived whenever an agency wishes. FOIA provides no remedies against web posting or hard copy publishing of a document that the agency could have elected to withhold as exempt.

FOIA remedies are against agency withholding. The 1979 Supreme Court decision in *Chrysler v. Brown*⁴⁵ allowed injunctive review under the APA prior to disclosure, where the agency had made but not yet executed its decision to disclose. But FOIA does not create any post-disclosure remedy that could apply, once the agency has published the record on the Internet or otherwise released the record. The reverse-Freedom of Information cases that try to prevent disclosure by an agency do not relate to the issues of inaccuracy, but to questions of secrecy or commercial

the individual or by some identifying number, symbol, or other identifying particular assigned to the individual).

40. See Implementation of Privacy Act of 1974, 40 C.F.R. § 16.2(a) (2002) (accepting the definition of "individual" as provided in 5 U.S.C. § 552(a)).

41. See 5 U.S.C. § 552(b)(4)(2000).

42. See Implementation of Privacy Act of 1974, 40 C.F.R. § 16 (revised as of July 1, 2002) (creating procedures by which an individual can request information from the EPA).

43. See 5 U.S.C. § 552a (2000) (establishing requirements on disclosure of records maintained on individuals).

44. See 5 U.S.C. § 552a(5) (2000).

45. 441 U.S. 281 (1979).

confidentiality of the records.

3. *Trade Secrets Act*

The Trade Secrets Act⁴⁶ does not authorize any private cause of action. The Trade Secrets Act is an older, vague criminal statute and does not create a private right to enforce the law. The agency website postings will unlikely contain trade secrets,⁴⁷ though the particular chemical or site specific information may be of value to a competitor who assembles a mosaic of pieces of information that are cumulatively of value to the competitor's engineers and analysts. Remedies for commercial confidential data protection exists under agency rules⁴⁸ that are apart from the present topic's more generic consideration of website postings. As discussed above, this paper is focused on generic website posting, not on the special considerations relating to commercial confidentiality.⁴⁹

4. *Special Statutes*

Specialized federal statutes that govern agency activities generally do not create a private cause of action for damages after publication of an allegedly inaccurate or misleading statement regarding a private entity. Congress has not adopted a generic statute allowing such damages as an exception to the 1947 Federal Torts Claims Act.⁵⁰ In rare cases, Congress has made agency employee disclosure of confidential data a criminal violation, but not a basis for civil suits by data submitters.⁵¹

The EPA publication of a report on second-hand tobacco smoke exposure risks led to lengthy litigation, resulting in a December 2002 reversal of a 1998 trial court decision which had initially found for the

46. See 18 U.S.C. § 1905 (2000) (providing for fines and employment termination for any government or agency employee who discloses a trade secret).

47. See RESTATEMENT (SECOND) OF TORTS § 757 cmt. b (1939) (defining the term "trade secret" as a formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it).

48. See Confidentiality of Business Information, 40 C.F.R. § 2.203 (revised as of July 10, 2002) (mandating the EPA provide written notice to businesses from which it is requesting information and documents that the business may be entitled to confidential treatment and that such information may be disclosed to the public if confidential treatment is not invoked).

49. Scope of this paper is set by the Notice in 65 Fed. Reg. 60, 662 (Oct. 12, 2000).

50. See 28 U.S.C. § 2680 (2000) (creating these exceptions through which injured parties may take action against the U.S. government).

51. See 15 U.S.C. § 2613(d) (establishing criminal penalties for wrongful disclosure).

tobacco plaintiffs.⁵² The EPA published its risk assessment on the smoke exposure but the statute did not empower the EPA to ban or regulate the exposure. The plaintiffs asserted the agency disclosure of the report exceeded agency authority. The court examined the Radon Research Act's prohibition of regulation and its idea of data dissemination. The court observed that the mere actions of collecting and researching information and disseminating the resulting information were the EPA's only function, so the directive by Congress which prohibited regulation under the Radon Research Act did not prevent the agency from disseminating its risk assessment.⁵³ The district court was reversed, as the Fourth Circuit held that the statute's unique provision that forbade EPA from regulating, made this agency report of no legal effect and thus, unreviewable: "While plaintiffs may fear that the Report will increase their vulnerability to liability, no statutory scheme triggers potential civil or criminal penalties for failing to adhere to the Report's recommendations."⁵⁴

Because the case dwelt upon one rather unusual congressional enactment and EPA compliance with its very exceptional procedures, the decision does not project onto other statutory authorities a limitation on what the EPA may post on the web. The Fourth Circuit's holding that the tort liability fallout of a federal report will not be grounds for judicial review of the EPA report is a decision friendly to toxic tort plaintiffs in future environmental cases premised upon EPA findings.⁵⁵ If these reports were reviewable, less similar reports would be published, or their language would be crafted to avoid risk-related statements.

On rare occasions, Congress may single out Internet websites and forbid disclosure of data that can be inspected in person at agency public file rooms. The Clean Air Act of 1990 included an obscure provision regarding factory chemical spills and their potential for neighborhood problems if factory safeguards failed. Disclosing this set of potential problems seemed to make sense as an objective of the environmental organizations that opposed chemical plant risks. But the mandate for dissemination arose before September 11, 2001. As a result, that tragedy gave broad public recognition of U.S. data disclosure practices and their special benefit to terrorists who could use the plans to design a disaster. A specialized statute

52. See *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 854 (4th Cir. 2002) (vacating the district court's decision because the EPA's report concerning the dangers of second-hand smoke in this instance was not reviewable).

53. See *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 465 (M.D.N.C. 1998), *rev'd*, 313 F.3d 852 (4th Cir. 2002).

54. See *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d at 861.

55. See *id.* (refusing to allow a civil or criminal claim for failing to adhere to an EPA report's recommendations). These indirect consequences are not weighed by the court's limited scope of analysis. See *id.*

limiting disclosure via the Internet of the worst-case scenario information in the Risk Management Plans (RMPs) was adopted in 1999, modifying Section 112(r) of the Clean Air Act.⁵⁶ The EPA adopted extensive regulations that limit dissemination of these particularized disclosures to individuals who come in person and disclose their identities before reading the plans.⁵⁷ The Homeland Security Act⁵⁸ later empowered the government to protect all such critical infrastructure submissions from public disclosure.⁵⁹ This statutory protection, effective in 2003, will preclude the website posting of detailed data on the vulnerability of sites where terrorists might attack American industrial facilities.⁶⁰

C. Tort & Constitutional Claims

The Federal Torts Claims Act (FTCA)⁶¹ does not provide damage awards for persons alleging that inaccurate or misleading agency statements caused them harm, even assuming proper compliance with the FTCA mechanisms and proper proof. The FTCA bars lawsuits that fall within these intentional tort⁶² categories, and Congress does not allow persons to sue the federal government for any injury that arises out of defamation. The FTCA case law shows a consistent refusal by courts to permit damage awards for libel, slander or intentional infliction of emotional distress.⁶³ Posting a news release on an agency website that erroneously reported that a person had been indicted arose out of the FTCA exclusion, and therefore the case was dismissed.⁶⁴ As a result, the consistent view of courts, commentators and career FTCA defenders is that any intentionally-caused federal agency disclosure, which causes reputational injury, is not actionable under the FTCA.

56. See 42 U.S.C. § 7412(r)(2000).

57. See 61 Fed. Reg. 31,718 (June 20, 1996), (as amended at 64 Fed. Reg. 28,700) (May 26, 1999) (codified at 28 C.F.R. § 68).

58. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 214(a)(1)(A), 116 Stat. 2135 (to be codified at §133(a)(1)(A)).

59. See *id.*

60. See *id.*

61. See 28 U.S.C. § 2680(h) (2000).

62. See *id.*

63. See, e.g., *McNeily v. United States*, 6 F.3d 343, 348 (5th Cir. 1993) (holding the claim fit within both the FTCA's discretionary function or the intentional torts exclusion); see also *Reisman v. Bullard*, 2001 WL 856960 (6th Cir. June 20, 2001); see also *Mumme v. U.S. Dep't. of Labor*, 150 F. Supp. 2d 162 (D. Me. 2001).

64. See *Doe v. United States*, 83 F. Supp. 2d 833, 842 (S.D. Tex., 2000) (dismissing the case with prejudice).

1. Non-Federal Standards Bodies

Apart from liability suits for website or published statements by the EPA, it is significant to note that organizations which provide classifications or ratings of chemical risk comparable to those on the EPA website have been challenged in court. The American Conference of Government Industrial Hygienists (ACGIH) imposed a special assessment on its members of \$200 apiece to avoid bankruptcy, which, in large part was brought on by lawsuits challenging statements made by the Conference in its evaluation of certain chemicals. The suits claimed ACGIH defamed the chemical trona by its Threshold Limit Value (TLV), and a separate suit claimed that TLVs for refractory ceramic fibers were being used as regulatory and punitive measurements.⁶⁵ Despite performing their duties, standard-writing entities like ACGIH lack the resources to fully accomplish their goals. Consequently, the lawsuits against the standard setting organization are important symptoms, because the content most likely to draw a defamation charge against an agency website would be a similar classification, rating, listing or finding, about a business.

2. Constitutional "Takings" Remedies

There is no Fifth Amendment or Tucker Act⁶⁶ compensable taking of a valued item in this situation.⁶⁷ Compensation must be paid when certain regulatory agency activities take the value of property, for purposes of compensation under the Fifth Amendment.⁶⁸ A takings analysis would follow the line of cases leading up to the 2001 Supreme Court decision in *Palazzolo v. Rhode Island*.⁶⁹ Courts would differentiate between public disclosure of commercial secrets made by an agency over objections of the owner of the secrets, from a routine web posting or classification statement about a company or product. Sometimes a reasonable investment backed expectation of governmental non-disclosure exists for the owner of confidential private commercial files submitted in confidence to an

65. See Press Release, American Conference of Governmental Industrial Hygienists, Legal Actions Challenge ACGIH and Threaten the Occupational Hygiene Profession (Jan. 19, 2001), available at <http://www.acgih.org/Resources/Press/LglActions.htm> (last visited July 7, 2003); see also Press Release, American Conference of Government Industrial Hygienists, ACGIH/RCFC Lawsuit Settled (July 2, 2001), available at <http://www.acgih.org/resources/press/rcfcrelease.htm> (last visited July 7, 2003).

66. 28 U.S.C. § 1491 (2000).

67. For example, interference with commercial relationships or damage to an entity's reputation and goodwill, when a disclosure occurs that is inaccurate or misleading.

68. See U.S. CONST. amend. V.

69. 533 U.S. 606 (2001).

agency.⁷⁰ But a prerequisite for one's expectation to be reasonable is that confidential handling of that private secret formula or design had been requested, however those confidential business information (CBI) cases⁷¹ are not addressed in this article. When examined, the government's statement about a product or company does not appear to take private property. And no case law decisions have been found that would support a takings claim from the agency posting of factual data on an agency website.

The Tucker Act is a limited waiver of federal sovereign immunity, allowing only qualified individuals to sue the federal government.⁷² The Tucker Act might allow the affected company to recover money for its loss against a federal agency, with which it had a quasi-contractual relationship warranting contract-like remedies. The affected firm could creatively argue that business relationships are interfered with by the disclosure, and that this causes injury remediable under quasi-contract theories of liability. But no Tucker Act precedents appear to support compensation for a reputational or goodwill injury from disclosures, where no special relationship existed. This is because the relations are regulator to regulated, instead of vendor and customer, and no specific contract bound the agency to not disclose the records submitted by the owner.

3. Constitutional Torts

A constitutional tort claim for money damages cannot be brought under the *Bivens*⁷³ line of civil rights cases, against individuals responsible for the agency website or for the contents that are to be posted. There does not appear to be a property right as to website accuracy for which a due process analysis could be asserted. The collection of data does not create a property right against its disclosure on the website, under those standards applied to EPA in the Supreme Court's *Ruckelshaus v. Monsanto* decision.⁷⁴ A *Bivens* claim goes beyond the statutory remedies, to confront persons who used federal powers to deprive citizens of their constitutional rights. The members of an agency web team would enjoy qualified

70. See *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1011-12 (1984).

71. See 5 U.S.C. § 552(b)(4) (2000) (stating "Confidential business information" is a class of private records, submitted to a federal agency, that are protected from mandatory disclosure under an exemption to the Freedom of Information Act). A plan for borrowing money, timing of sales, expansion of production of a certain product, etc. are customarily held as confidential by the private firms. See *id.*

72. See 28 U.S.C. § 1491 (2000).

73. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (discussing a non-statutory money damages remedy for violation of civil rights).

74. 467 U.S. 986 (1984).

immunity.⁷⁵ Suits which named an individual federal employee as the defendant would be automatically modified, with the agency's name supplanted for that of the individual employee, so long as the claim arose out of their assigned work.⁷⁶

III. PAST COURT REMEDIES FOR LIBEL OR DATA INACCURACY

Several pertinent case histories show the benefit and cost of certain remedies used against allegedly inaccurate or unclear data. This paper will not be examining the cases of erroneous decisions on the disclosure of confidential business data or trade secrets to other commercial competitors under FOIA.⁷⁷ These are distinct from the present discussion because (1) there is no question of the accuracy of that data in those FOIA cases, (2) the agency believed the disclosure was required by FOIA, rather than as an affirmative posting on the web by an agency, and (3) the remedial issues are distinct from those issues that occur in claims of inaccuracy or misleading contents. The most notable of these incidents was the court order against the EPA in *Polaroid Corp. v. Costle*.⁷⁸ The court order in *Costle* challenged the potential disclosure of a filmmaker's chemical formulations, and led to an extensive security program⁷⁹ for commercial secret formulas and other special data. This set of protections still remains in place today. Other cases, such as the EPA disclosure of the confidential statement of formula submitted by Monsanto for Roundup®, are of historic interest but not directly relevant to this article.⁸⁰ This article is directed to the study of remedies for the claimed inaccuracy and misleading nature of

75. See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (holding that in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business).

76. See 28 U.S.C. § 2679 (2000) (providing for this exclusive remedy). An example of this would be a posting of all widget makers in Delaware. See *id.*

77. See James O'Reilly, *FEDERAL INFORMATION DISCLOSURE* ch. 10 (3d ed. 2001) (discussing rights of the private submitter of information); see also *Predisclosure Notification Procedures for Confidential Commercial Information*, Ex. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987) (indicating that mechanisms already exist for the protection of these interests, in addition to the protections provided by case precedent).

78. See 11 Env't. Rep. Cas. (BNA) 2134 (D. Mass. 1978).

79. See TSCA, CONFIDENTIAL BUSINESS INFORMATION SECURITY MANUAL EPA PUB. 7700.

80. See WILLIAM L. CASEY, JOHN MARTHINSEN, AND LAURENCE MOSS, *ENTREPRENEURSHIP, PRODUCTIVITY AND THE FREEDOM OF INFORMATION ACT* 155 (Lexington, 1983) [hereinafter Casey] (citing Pete Earley, *EPA Lets Trade Secret Loose in Slip Up, to Firm's Dismay*, WASH. POST, Sept. 12, 1982 (discussing the Monsanto case as it relates to human error and the risk of trade secrets leakage from agency files)).

affirmative dissemination of non-confidential data on the agency's own initiative, without a FOIA request for the disclosure of that data. The several case studies on federal agency defamation include:

A. The Toy Listings Case

The closest analogy to inaccurate data listing on the web may be the error made by the Consumer Product Safety Commission in including a toy on the official pre-Christmas banned toy list in the mid-1970s.⁸¹ As a result of the Commission's mistake in including the toy on the list, sales were harmed.⁸² The toy maker lobbied Congress for a private bill that allowed the Claims Court to consider its equitable claims for relief based on the negligent misrepresentation made about the toy.⁸³ Without a congressional bill, the Federal Torts Claims Act (FTCA) would bar recovery. As a result, the Claims Court heard the arguments, and advised Congress that the claimant was entitled to \$40,000, an amount that could be awarded by the enactment of a private law.⁸⁴ The analogy shows how a website listing is difficult to overcome, even if erroneous, without the extra effort of a congressional reference permitting court review.

B. The Chilean Grapes Case

The Food & Drug Administration (FDA) barely escaped a huge tort liability for a 1989 public announcement that poison had been detected in imported grapes from Chile.⁸⁵ Devastated fruit exporters sued and asserted FDA had acted erroneously. However, the courts held that the process of gathering facts is a part of the FDA's discretionary functions, and the communication to the public about risk was a discretionary decision of the FDA Commissioner.⁸⁶

An anonymous caller to the U.S. embassy in Santiago, Chile in 1989 claimed that poison had been placed in grapes exported to the United States.⁸⁷ The FDA's Philadelphia lab found what it believed to be an indication of possible cyanide injection into a grape. However, upon

81. See *Marlin Toy Prods. Inc. v. United States*, 218 Ct. Cl. 630, 631 (1978)

82. See *id.*

83. See *id.*

84. See *id.* (granting relief which would be afforded by the enactment of legislation similar to S. 3666, 93rd Cong., or H.R. 17652, 93d Cong.).

85. See *Fisher Bros. Sales Inc. v. United States*, 46 F.3d 279, 288 (3d Cir. 1995) (affirming the district court's dismissal of the complaint).

86. See *id.* (attempting to justify the publicity that remained outside the compensable scope of the Federal Torts Claims Act under the discretion of FDA).

87. See *id.* at 282.

inspection, the FDA Cincinnati lab did not find cyanide.⁸⁸ Faced with uncertain facts, the FDA Commissioner chose to be cautious and banned the import and sale of Chilean grapes. As a result, the Chilean grape industry sued the FDA for \$210 million.⁸⁹ The case was decided on en banc appeal, in front of the full Third Circuit Court of Appeals by a 7-6 vote, which exonerated the FDA.⁹⁰

The grape industry plaintiffs knew the discretionary function defense of the Federal Torts Claims Act⁹¹ would prevent a tort recovery against the FDA for the Commissioner's decision. The industry sued instead for recovery of losses caused by the allegedly negligent lab testing. The lab testing asserted the presence of cyanide, and did so without close attention to certain FDA laboratory requirements. The trial court held for the FDA, and maintained that the recall was "grounded in the policy of protecting the public health."⁹² A panel of the appeals court split 2-1, and held the FDA liable for the lab errors. But the full appeals court then heard the case en banc, and ruled 7-6 in favor of the FDA.⁹³

The appeals court decision is instructive for agencies. Portions of some websites are classifications of status of entities based on collections of facts by widely scattered employees, contractors, states and regulated firms.⁹⁴ The Third Circuit in *Fisher Bros.* held that if the discretionary function exception to the Federal Torts Claims Act is to fulfill its clear and important purpose, a claim must meet two requirements. First, a claim must be "based upon"⁹⁵ the exercise of a discretionary function whenever the immediate cause of the plaintiff's injury is a decision which is susceptible of policy analysis. Second, the decision must be made by an official legally authorized to make it. The court further stated, "[T]here is no difference in the quality or quantity of the interference occasioned by judicial second guessing, whether the plaintiff purports to be attacking the database on which the policy is founded or acknowledges outright that he or she is challenging the policy itself."⁹⁶

The Third Circuit observed that recognizing negligent data gathering

88. *See id.* at 283-83

89. *See id.*

90. *See Fisher Bros. Sales Inc. v. United States*, 46 F.3d 279, 288 (3d Cir. 1995).

91. *See* 28 U.S.C. § 2680(h) (2000).

92. *See Fisher Bros. Sales Inc.*, 46 F.3d at 288.

93. *See Fisher Bros. Sales Inc. v. United States*, 17 F.3d 647 (3d Cir. 1994), *vacated by*, 46 F.3d 279 (3d Cir. 1995).

94. Example of this would include all air polluters in Dallas, and all hazardous waste dumpers in Chicago.

95. *See Fisher Bros.*, 46 F.3d at 281; *see also* 28 U.S.C. § 2680(h) (2000) (highlighting the operative phrase of the exception to the Act).

96. *See id.* at 286.

claims as tortious would require federal judges to examine in detail the decision-making process of the policymaker, to determine what role the challenged data had played in the policymaking. The social cost of permitting such judicial inquiry into policymaking would be prohibitive.⁹⁷ First, there could be huge liabilities for the agency as millions of people are affected by the decision. Next, creating such suits would take much of the time and attention of agency policymakers away from the agency's business. Furthermore, the fear of being sued for huge damages would deter decision-makers from acting on urgent public health matters. As a result of such fear, the en banc court denied liability by 7-6.⁹⁸

The *Fisher* decision suggests that a lawsuit alleging agency website classification of an entity as a major polluter, for example, would not succeed under the Federal Torts Claims Act. The complaint would fail even if the entity was fully in compliance, and even if the numerical data on which the suit was based had been miscalculated. Categorizing entities is a discretionary role of agency managers, and even if the data were inaccurate, the courts still do not impose civil liability when the entity sues the agency.

C. The Wine Risks Case

The makers of the wine Riunite recalled their product in 1985-86, based upon the order of the Bureau of Alcohol, Tobacco & Firearms (BATF), when the BATF relied on a report gathered within the FDA concerning the toxicity of diethylene glycol (DEG) found in the bottles of wine.⁹⁹ The winemaker later sued the FDA and lost.¹⁰⁰

In this case, the two agencies failed to adequately communicate, and the regulated company suffered. The FDA knew that the amount of the DEG contaminant, which was present in certain wines, was not harmful. However, the FDA communicated news of the presence of the contaminant to the BATF, and they ordered a recall of the wines.¹⁰¹ The company took the directive to recall, and later sued to recover its losses.¹⁰² It became known after the recall that the FDA did not adequately present and

97. *See id.*

98. *See id.* at 288.

99. *See Fisher Bros. Sales Inc. v. United States*, 17 F.3d 647 (3d Cir. 1994), *vacated by*, 46 F.3d 279 (3d Cir. 1995); *see also Banfi Prods. Corp. v. United States*, 41 Fed. Cl. 581, 584 (1998).

100. *See id.* (concluding Banfi Corporation did not have a viable legal or equitable claim against the United States).

101. *See id.*

102. *See id.*

communicate to the BATF its scientific conclusions. Specifically, the FDA did not adequately report that a person could safely consume 6 mg of DEG every day. In high doses, the chemical diethylene glycol is toxic, but it apparently is not a cause for safety concerns when detected at very low levels.¹⁰³

The case had a twist, which worked against the remedy sought. Only ingredients acceptable to the FDA and approved by the BATF as being consistent with good commercial practice may be used in wines.¹⁰⁴ Wine labels are required to disclose ingredients and additives, and diethylene glycol was not on the label of Riunite. Thus, the BATF had authority to detain the wine as mislabeled. The BATF asked Banfi to recall the wine and the recall cost the company a large amount of money.

Banfi asked Congress for relief. The House of Representatives referred a private bill seeking relief to the Court of Federal Claims, by means of a House resolution. The court upheld the FDA action since it was within the FTCA discretionary functions exemption.¹⁰⁵ The court's hearing officer ruled against Banfi and the court's three-judge review panel agreed.¹⁰⁶ The case was sent back to the House with a recommendation not to pay damages for the recall.

The Claims Court hearing officer denied recovery of Banfi's losses because, whether or not the FDA was negligent when it identified the Riunite wine as a health hazard, such negligence did not alter the fact that the BATF could request a recall because of the ingredient labeling requirement violations. So the court held the FDA inaccuracy or lack of clarity could not form the basis of an equitable claim for damages. As to the equity issues beyond negligence, the court found the BATF actions leading to the request for the recall were proper and authorized. Therefore, the court denied Banfi's equitable claim.

The most important principle of *Banfi* was finding the agency's duty to the public should be heavily weighed in balancing the ultimate decision to request a recall. By analogy, a public interest in health or safety may be a sufficient reason for including data in a federal website.

103. See *id.*

104. See Materials Authorized for Treatment of Wine, 27 C.F.R. §§ 240.1051, 1051a (revised as of April 1, 1983) (providing list of approved materials, consistent with good commercial practice, for use by proprietors of bonded wine cellars in the production, cellar treatment, or finishing of wine).

105. See 28 U.S.C. § 2680(h) (2000) (establishing these exceptions).

106. See *Banfi*, 41 Fed. Cl. at 583 (detailing the opinion of the court's three judge panel).

D. The Lance Rumor Case

The *Lance* litigation showed the negative effects of rumors stemming from a concern with today's rapid Internet transmission of news and opinions. The Lance product was a protective spray used in self-defense. Its sales were badly affected by a government agency report about dangers arising out of the use of a different product, coincidentally also trade-named Lance. The government agencies widely disseminated the rumor and this destroyed the marketability of Lance's product. After the product's sales collapsed, the plaintiff sued, alleging the federal government had a duty of care to verify the information that was reported by the various federal agencies whose personnel had re-transmitted the erroneous attribution of problems concerning Lance's safe product.

The court in *Lance* ruled against the plaintiff but nicely articulated the rationale under which recovery might be possible for future plaintiffs. The judge eloquently explored the holdings of other cases in which a federal agency misrepresentation of facts had been the basis for a suit.¹⁰⁷ To reach its conclusion, the opinion drew the correct definitional distinction between two intentional torts, libel of an entity and disparagement of a product.¹⁰⁸ Misrepresentation, which is also an intentional tort, required the claimant to show that the plaintiff relied to his detriment on the misrepresentation.¹⁰⁹ Disparagement requires a showing of intentional falsity or reckless disregard for the truth of the disparagement. The *Lance* court surveyed cases of agency false information, including *Jimenez-Nieves v. United States*.¹¹⁰ Ultimately the court ruled Lance had not shown a sufficient case against the agency's actions. The court concluded that the government had exercised due care under the circumstances in republishing the *Lance* warning.

Lance may very well be a plaintiff's guide to future tort claims. To make out a case of negligent misrepresentation, a claimant must also show damage caused by reliance on the misrepresentation. For example, in *Ware*

107. See *Lance Indus., Inc. v. United States*, 3 Cl. Ct. 762, 775-76 (1983) (discussing other instances of agency misrepresentation via *Jimenez-Nieves v. United States*, 682 F.2d 1 (1st Cir. 1982), *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980), *Rey v. United States*, 484 F.2d 45 (5th Cir. 1993) and *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959)).

108. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977) (discussing the relationship between injurious falsehood and defamation); see also W. Prosser, THE LAW OF TORTS §§ 111, 112, 128 (4th ed. 1971) [hereinafter Prosser] (discussing defamation, libel and slander, and injurious falsehood).

109. See Prosser, *supra* note 108, at § 108 (discussing reliance and misrepresentation).

110. 682 F.2d 1, 4-5 (1st Cir. 1982) (refusing to read misrepresentation broadly enough to include false statements that are happenstance causal elements of other torts).

v. United States,¹¹¹ the Government destroyed cattle after its employees negligently misdiagnosed a contagious disease. The court noted, "[T]he tort of misrepresentation demands some act, and that the act have been the result of justifiably relying on the misrepresentation."¹¹² Therefore, the *Lance* claim for damages was not a claim based on intentional or negligent misrepresentation because the company affected took no action in reliance on the defendant's republications of the *Lance* warning.

In *O'Donnell v. United States*,¹¹³ Congress made a specific reference of a private bill to the Claims Court. The purpose of the private bill was to examine the merits of a claim based on the negligent failure of an official of the Department of Agriculture to advise all interested parties that importation of potatoes affected by ring rot was barred by Swedish import regulations. The claimants exported potatoes and lost their value. The full Court of Claims rendered its opinion that the claimants had no legal claim against the United States because the FTCA specifically exempts misrepresentation claims.¹¹⁴ Further, no equitable right to recover existed because the claimants and Swedish officials were as negligent as the Department of Agriculture had been.¹¹⁵

The lesson from *Lance* is an agency inclusion of a statement on the website may not be subject to misrepresentation claims. This is based on the fact the entity that is the author or submitter of the data is not relying upon the Government's web inclusion as a basis for any actions. Hence, this distinction reduces the likelihood that Internet libels will be pursued as misrepresentation claims.

E. The Spinach Case

In *Mizokami v. United States*, Congress passed a special statute providing a jurisdictional waiver of sovereign immunity.¹¹⁶ The Claims Court granted relief to spinach growers, apparently on a theory of negligent misrepresentation due to the FDA's erroneous condemnation of two carloads of spinach shipped by claimants.

This award of damages occurred because the special statute waived

111. 626 F.2d 1278, 1282 (5th Cir. 1980).

112. *See id.*

113. *See* 166 Ct. Cl. 107, 107 (1964) (summarizing case describing exemption due to misrepresentation).

114. *See id.* at 109 (quoting the holding of Judge Laramore).

115. *See id.* at 118 (stating "[h]owever, we believe that in the instant case, no general principles of rights and justice . . . require that plaintiffs recompensate for the losses they suffered and which were in great part due to their own negligence").

116. 414 F.2d 1375, 188 Cl. Ct. 736 (1969) (per curiam) (explaining the basis of the Claims Court decision).

FTCA defenses. Recovery was allowed even though the court's discussion revealed no steps taken by claimants in reliance on the FDA's negligent misrepresentation. The more recent cases noted above may indicate that a stricter test would be applied today.

F. The Dirty Dishes Case

In *Sperling & Schwartz, Inc. v United States*, a private bill for relief was referred to the Claims Court.¹¹⁷ Sales of certain dishes were affected after an FDA press release warned against the use of claimant's dinnerware. As part of its food safety functions, the FDA monitors imported and domestic dishes for metals that might leach into hot food from the surface of the plates. An importer sued FDA for damages, but was not successful. Denial of the plaintiff's claim for damages was recommended to Congress by the court because the court found that FDA did not cause the alleged libel or damages.

This case illustrates that even with jurisdictional issues resolved a libel claim still may fail for inadequacies of the proof of causation of injury. Causation is an essential element of the plaintiff's proof. Both federal and state officials had been quoted in the media about the issue of ceramic dish safety with chemicals in the dish designs. In this case, the imported dishes did in fact contain high levels of lead. However, the dishes' importer disagreed with the accuracy of the claimed diagnosis that a child had suffered lead poisoning from the dishes.¹¹⁸ After an extensive review of the risk assessment and press release, the Claims Court trial commissioner concluded the recall and subsequent measures to avoid risk were not caused by the FDA. Rather, the recall was caused by peculiarities in the performance of the dishes and their colorful decals when tested for lead.¹¹⁹

The court found a sufficient basis for the FDA to issue its public warnings. It is notable that the FDA asserted, but the court disallowed, the defense of absolute privilege for government employee press statements on public health issues.¹²⁰ The analogy to other website files is that if a

117. 218 Ct. Cl. 625 (July 20, 1978) (summarizing the foundation of the Claims Court decision).

118. See *Sperling & Schwartz v. United States*, 1977 U.S. Cl. Ct. LEXIS 336, at *18 (Nov. 21, 1977), *aff'd*, 1978 U.S. Cl. Ct. LEXIS 577 (July 20, 1978) (illustrating the ultimate finding of causation).

119. See *id.* (explaining repeated dishwashing would remove the lead but the products as delivered to consumers had excessive lead levels). The dish importer argued economic adverse effects that the court did not accept in light of health concerns. See *id.*

120. See generally *Barr v. Matteo*, 360 U.S. 564, 574 (1969) (establishing the absolute privilege defense).

correction request relates to a substantive dispute over the public health consequence of chemical contamination, it is unlikely Court of Federal Claims precedent like *Sperling* would allow recovery of damages. This is true even if a congressional reference bill were to be undertaken to avoid the jurisdictional barriers of the FTCA.

G. The Cranberry Scare Case

Publication of news releases concerning public health is a venue of communication that is distinct from website posting. The cranberry scare was the classic case of misleading press conference announcements. A public statement, issued by the Secretary of Health, Education & Welfare just before Thanksgiving 1959, created the widespread perception that most cranberries were harmful because of levels of residue of a pesticide. The FDA later issued corrective information when, in fact, 33,600,000 pounds of cranberries were cleared and only 300,000 pounds were determined contaminated.

Congressional relief from the FDA mistake was accelerated by political pressure on behalf of farmers. In 1960, Congress indemnified the cranberry growers for substantial losses.¹²¹ A very broad constituency of farmers, plus a willing Congress, and a specific demonstrable factual error, resulted in recovery. Perhaps the manner of presentation of the news that is in error exacerbates the damage that flawed reporting by government can cause. Here the Cabinet officer himself made the announcement on radio and television. Mere routine posting of web page listing updates is not very likely to follow the cranberry example's visibility or its remedies.

IV. REMEDIES WITHOUT LITIGATION

A. Current EPA Mechanisms

If an agency's Internet website data is challenged, a remedy without litigation is possible. For example, the EPA has put in place a detailed step-by-step system for dealing with criticisms of the EPA website data. As explained on the EPA website with a flowchart, a system is now in place that is triggered by a complaint received over the web, by phone, or by other means.¹²²

121. See Gellhorn, *supra* note 30, at 1408-10 (examining the details of the indemnification). Gellhorn explains that the indemnification was for approximately \$9 million, a significant amount in 1960. See *id.*

122. See EPA Website (setting out the referenced charts and explanations), at <http://www.epa.gov> (last visited July 6, 2003).

Existing post-publication mechanisms for Internet corrections do not withdraw a challenged statement immediately. The EPA has created its Envirofacts database on its Internet site, which attempts to consolidate in one searchable site all the localized environmental problems that may relate to a particular community, or company, or site.¹²³ The likelihood of objections by companies or persons affected is very high. The EPA recognized this concern and established a mechanism for corrections. The staff will retain the records in place on the website but will use yellow flags to mark their status. These markings are the existing practice at the EPA when a complaint of inaccuracy is received after the EPA has made a web posting of data onto the Envirofacts system.

The EPA approach may be a useful model for other agencies. The correction staff is aware of the data quality issues and has sought to deal with them inexpensively and efficiently. As for the attitude of the EPA correction staff, if the Envirofacts website data is not factual, they want to have it corrected promptly in order to be factually accurate. No comparable structure exists for objections to hard copy publications at the EPA because these publications are managed by each of the various program offices within the agency.

The pre-publication steps for verifying data may be (1) mechanical, e.g., software that requires a certain selection, or forces the use of a checklist, (2) feedback loops that send a copy for examination or correction after the person enters the data but before it is added to the system, or (3) systems design issues.¹²⁴ Pre-publication data quality would be facilitated if all of the reporting entities had access to sophisticated data systems and software. However, many smaller entities still fill out paper forms and municipalities submit data in ways that reflect their local fiscal capability. Therefore, the data quality system must be capable of dealing with reporting that occurs in all of the contexts at varying levels of ability, from electronic submissions by multinational enterprises to penciled forms mailed by part-time village sewer supervisors.

For the more sophisticated constituencies, the Information Products Bulletin (IPB)¹²⁵ carries the potential to improve dialogue about accuracy as systems are designed. The IPB lists the newest EPA information products and allows any person to comment on the proposed system and its

123. *See id.*

124. *See* EPA Website Bulletin (identifying stakeholder meetings, etc.), at <http://www.epa.gov> (last visited July 3, 2003). An example of this would be stakeholder meetings prior to the collection of data, such as those announced in the Information Products Bulletin. *See id.*

125. *See id.* (displaying new EPA periodical issued quarterly), at <http://www.epa.gov>.

methods of assuring accuracy. The IPB is an agenda, referring the readers to particular program offices. IPB is not itself related to accuracy of contents of the databases or publications to which it directs the readers. Rather, it serves as a form of advance notice that the information product is being developed. An interested entity then uses the listing shown in the IPB to contact the particular EPA program office. This contact may include discussion about how data quality can be assured.

Overall, it is the responsibility of the office or regional managers to assure data quality at the pre-publication stage. The EPA regional offices, agency field inspectors, and states contribute the bulk of the data accessible through the federal agency website or included in paper records. These are the stewards of their submitted data. After the data is posted or published, these stewards must respond when the website or publishing entity receives complaints of inaccuracy or misleading contents.

In the EPA website's electronic databases, the existing mechanism for error correction operates only post-publication, upon a complaint or question received by the error correction group. This mechanism is centralized for processing purposes while diffused for action purposes. Web-related data quality complaints are centrally processed and sent out to the program office that owns that portion of the database.¹²⁶ Each program has a data steward who is contacted with the request for corrections. Within the EPA, a list of data stewards is maintained and complaints are channeled to that person by a central error correction team. This team then serves as central recipients of substantive comments about data quality. When a conclusion is reached by the program office data steward that an error exists on the website, the error correction staff then places a marker, appearing as a small yellow flag, on the spot where the error is found. This yellow flag has a hotlink to a pop-up page stating what the correction data will be. When the page is refreshed at the next scheduled reloading of the updated database, the erroneous data and the flag are removed. The length of time for this process may be days or weeks, depending on the program office data steward's opportunity to determine the correct information for that item.

Pre-publication stages of the assembly of environmental databases are not centrally managed within the EPA. This is because the data sources for the website are too diffuse and include states, EPA program offices, EPA regional offices, EPA labs, etc. The environmental data goes to the central website group from program offices that consider their output independently. No central body exists that is responsible for considerations of accuracy and clarity of the data messages. The EPA recently required

126. An example of this would be a state or regional office's water enforcement program.

that new website data be signed off by the Office Director, creating oversight of web posting content within the EPA. Data quality programs may exist in some of the states and in EPA regional and program offices. These programs generate the raw data for the website, but until adoption of the Section 515 rules discussed above, there is no regulation mandating that the data must be acquired and maintained with concern for its accuracy.

B. Possible Non-Litigation Remedies

Next, this article will consider alternatives to litigation that deal with post-publication or post-website posting disagreements. One's policy positions tend to frame one's process preferences.

1. The Suspension Option

From the viewpoint of the entity affected by allegedly inaccurate or misleading information, the optimal corrective measure would be immediate removal. The next best option would be for the agency to immediately take steps to verify, and then (if necessary) correct the record. While awaiting this review, the agency could temporarily suspend the display and distribution of this information on the site until the correction can be posted. This shifts the presumption from one of data is presumed accurate, to objections are presumed valid until verification of the data is completed.

Inexpensive technical software mechanisms currently exist for error markers or flags to be placed on the website, such as those that the EPA staff uses. But under this scenario, software programmers would need to go further, first withdrawing the bytes of data from the database, and then acting to refresh the database with a gap-filling message that this information is "temporarily unavailable pending verification or withdrawal." Here the internal schedules of the agencies' computer managers become significant. If the agency only tries to update or refresh its website once per quarter, the error could remain uncorrected for up to three months. More frequent refreshing of data carries an additional expense that varies from data system to data system.

Even if the agency immediately agreed that an error occurred and a corrected text should be issued, no comparable immediacy is possible for hard copy published documents. For these, the agency would have to retain a precise mailing list to enable the delivery of post-publication corrections or retractions. Even then, it is not possible to assure replacement on a library shelf. Though it is obvious that accelerated timing of the withdrawal of erroneous data reduces the number of persons affected by the error, the issue exists that such data-removal strategies have

feasibility problems and cost consequences.

Recalls of non-internet publications pose even greater logistical problems. In 2001, the aftermath of the September 11 attacks included a heightened awareness of how much data on U.S. cities' domestic vulnerabilities had been disseminated. The U.S. Geological Survey told depository libraries to withdraw from circulation a CD-ROM listing water supply areas around major cities. Reportedly, this was accompanied by FBI agents checking depository libraries to assure that the CD-ROM was destroyed.¹²⁷

Since agencies have discretion in handling their data accuracy processes, the discretion to choose this suspension option could be adopted. The cost of the technical change from the "install caution flag only" to "data suspended from access pending verification" would be determined by the agency staff responsible for the programming and database maintenance. Such a change could be controversial in light of the views expressed by nongovernmental organizations in their comments to the OMB's Section 515 rulemaking. Those comments warned of strong public opposition to any lessening of public access to agency records.

2. Accelerated Decisions

An alternative option would be to use a cautionary symbol or flag on the website, while data is being reviewed. However, this option would limit an agency program office to thirty days to verify or amend the data. A failure of the program staff to act within the time period would result in removal of the data from the database. Data that is admittedly incorrect would be removed as soon as the error is found, without awaiting the cycle of periodic refreshing of the database by the program office.

3. Establishing Error Thresholds

Setting a high threshold of proof for agency correction requests would establish an alternative presuming agency accuracy. The agency could adopt a regulation that describes how it will receive complaints, and how the system to mark data on the database with caution statements will be used. But the rules could very directly require the complaining person to clearly demonstrate (1) what the inaccuracy is, (2) why the inaccuracy in the current statement is adverse to that person, and (3) why the inaccuracy is significant to the accurate public utilization of the database. This suggestion is premised in concept on the duties that are placed on private

127. See OMB WATCH REPORT, May 10, 2003 (noting report of request and destruction), available at <http://www.ombwatch.org/article/articleview/213/1/104/>.

commercial submitters of data, who wish the agency to provide advance notification before a FOIA request for that data is made. The blueprint for placing the burden on the data submitter is provided by Executive Order 12,600.¹²⁸

Under this alternative, the agency's General Counsel could be designated as the decisional official by delegation from top managers. This rule could allow staff to take up to perhaps 100 days for processing of the complaint. The final agency decision by management, perhaps the General Counsel, would order the information retained in the database as it is, unless it is determined that the inaccurate statement would materially affect the accurate public utilization of the environmental database. If that finding occurred, the General Counsel could order changes be posted or deletions made within thirty days. A comparable set of rules could be adopted for printed items. This new administrative remedy would put a significant workload on some agencies' designated officials. However, it might correlate better with the new Section 515 requirements¹²⁹ addressed earlier in this article.

4. Ombudsman Resolution

Another alternative for post-publication disputes under current law would be a two-tier remedial structure to replace the current informal and internal correction structure. The current agency structure for corrections is likely to be staffed with career technology employees within an agency's information technology group on an ad hoc basis. The replacement would utilize a two tiered structure adopted by regulation. The technical corrections role would remain with the agency technology staff, for reports of minor flaws such as broken links¹³⁰ or obsolescent data (address changes, contact person changes, etc.). But the role of handling requests for substantive corrections¹³¹ and any printed matter corrections would be vested in the agency Ombudsman's office.

The Ombudsman office is a specific organizational element existing

128. See Predisclosure Notification Procedures for Confidential Commercial Information, Ex. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987) (providing methods by which companies that submit trade secrets and confidential business data could be required to separately mark those submissions to preserve their confidentiality).

129. See Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (describing the consolidated appropriations as set forth).

130. Broken links can generally be defined as hyperlinks that fail to connect to the data indicated on the link.

131. This might include disagreement about the conclusions drawn or adverse decisions made on the matter at hand.

within some federal agencies with a mission of reducing conflicts by a responsible form of mediation.¹³² Beyond the individual agencies' adoption of such remedial structures, the OMB may use its authority under Section 515 to adopt a standard requiring the Chief Information Officer to act as an ombudsman of complaints arising under Section 515's accuracy norms.

The reason for suggesting the use of the Ombudsman office is that these internal mediators have routinely guided affected entities, particularly small businesses, to resolving disputes with the agencies. The Ombudsmen have mediated disputes between program offices and external entities concerning decisions made by program offices. This suggested dispute resolution role regarding computerized database information is not typically within current agency Ombudsman roles. Therefore, the suggestion would require an additional funding allocation to staff up for that role. If this office were staffed and funded for this role, it might offer the appearance of a separation of functions that is needed to offer some greater credibility to the remedial function.¹³³ During public comments on the proposed OMB rules under Section 515, several comments were made that the Chief Information Officer role was not fully compatible with true ombudsman principles as those norms have been articulated by expert bodies such as the American Bar Association.

5. Chief Information Officer Resolution

The preceding two-tier structure could also be adopted but with a different second tier dispute resolution site called the office of the agency Chief Information Officer (CIO). This new assignment would reorient some of the work done by that office under its existing statutory authority.¹³⁴ This would integrate the OMB Section 515 accuracy provisions,¹³⁵ since these new provisions effective in October 2002 altered CIO roles to be more responsive to resolution of data quality complaints.

The CIO is still a new function in most agencies and may present some

132. See, e.g., 15 U.S.C. § 657 (2000) (calling for small business ombudsman to resolve disputes of smaller entities with federal agencies).

133. For example, the author of the disputed statement is not controlling the agency's final decision about whether to retain or amend that web or print statement.

134. See 44 U.S.C. § 3506(a)(2)(A) (2000) (requiring the head of each affected agency to designate a CIO).

135. See Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000) (directing the Office of Management and Budget to "ensure and maximize the quality, objectivity, utility and integrity of information").

diplomacy issues in the event a substantive dispute arose.¹³⁶ The priorities of each agency's CIO are still being developed. In terms of internal bargaining powers, a CIO might prefer not to take on data quality responsibility. The status or hierarchical powers of the CIO may be needed to argue for budget and policy outcomes within the agency. This could make the CIO reluctant to spend time resolving the program-related disagreements that this paper suggests for the CIO's role in this second step of the database correction process.

The adoption of that remedial role is a management choice to be made internally by agency CIOs. As to printed publications originating with an agency regional or program office, there may be internal difficulties with the use of the CIO office's powers to seek revision and correction of hard copy statements made by experts in a program office. The legislatively established jurisdiction for the CIO office¹³⁷ does not appear to include supervision of the data quality in the many routine reports and publications that flow from hundreds of federal entities and offices. Therefore the implementation in 2002 of the Section 515 norms will be a newly expanded role when its requirements are applied to agency dissemination.¹³⁸

6. Private Bills in Congress

For reasons of completeness, this review of current remedies must note that a person who alleges an injury from federal agency action could seek private bill relief from Congress. This most expensive option requires adoption by a house of Congress a piece of specific legislation directing the Court of Federal Claims to consider whether the federal government should pay an amount of cash compensation for the actions of an agency. This option then requires the adoption of a private law compensating the entity.

Private bills and their sequence of consideration by the special masters and judges of the Court of Federal Claims involve an intricate subspecialty of Washington based law practice. Successes with both the political and judicial stages of the remedy tend to be relatively rare. A particular Internet statement by an agency would need to be exceedingly severe in its negative impact to warrant the huge lobbying and litigation investment that a private bill would require. If the agency refuses to change the web

136. An example of this could be a dispute over a listing of a company on an adverse characterization list as a bad corporate citizen of some type.

137. See 44 U.S.C. § 3506(a)(2)(A) (requiring each agency to designate a CIO).

138. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369 (Jan. 3, 2002) (establishing OMB's guidelines for agencies' implementation of The Consolidated Appropriation's Act of 2001).

statement while the private bill compensation issue is pending, it may be five years or more before a remedy could be awarded. This remedy is such an unlikely outcome for Internet disclosure disputes that it is mentioned here for the sake of completeness, but is not recommended as a preferred outcome of disputes over agency web disclosures.

C. Benefits of New Alternatives

New mechanisms to ensure accountability for accurate and clear information offer benefits that are hard to quantitate. It is assumed persons using the website would become aware that correction methods have been adopted for the agency website that they search. This, in turn, requires a button or signal on the agency page that leads the web searcher to learn of an available remedy for perceived errors. Some other means would have to be found for alerting readers of published hard copy reports. Both forms of announcement might create greater expectations of data quality among the readers, while the delivery of data does not warrant that it is accurate. However, a standardized notice of how to ask for corrections may improve the perception that the agency really cares about the accuracy of its disclosures.

As a benefit to the submitter of information, if an error appeared, the means of correction would be readily accessible, and a change to a website data set is more likely to occur. As a benefit to the user, website information would be more reliable and could be used in making environmental decisions. There may be greater confidence that the data is an accurate reflection of contemporaneous performance of sites, facilities, or products regulated by the federal agency. If one cared to measure this attribute, the research vehicles needed to establish benefit as a quantified matter would include surveys among constituencies regarding the reliability and credibility of database information.

D. Costs of the Alternatives

The agency information technology group should have an error correction team. The team at the EPA's Office of Environmental Information developed an on-screen data flag system, comparable to case flags that appear in Lexis and Westlaw case reports for cases later overturned or questioned by an appellate court. The flags are an inexpensive means to convey the message that corrections were being considered. Since the cost of a flag is about \$6.00, and the flag system alerts the user of the file, the marginal additional cost of having a correction system would be the following:

1. Maintenance of file server space for a responsive statement, to which the viewer

would be directed;¹³⁹

2. Substantive cost of the staff time needed to determine whether and to what extent to provide the revision of data or deletion of data that the affected person seeks; and

3. Cost of more frequent purging and refreshing of databases.

For lawyers, these flag systems that give sidebar descriptions of the problem with a particular case decision are a familiar part of electronic case retrieval software. The attorney who conducts electronic research into court decisions sees a brightly colored flag on the page, that hyperlinks to a page that presents the details of how or when that case's decision had been questioned or reversed.

E. The Consumer Product Safety Act Paradigm

The private sector might prefer a form of advance notice and correction of negative information; a statutory remedy that is currently available for private companies under very limited circumstances at the Consumer Product Safety Commission (CPSC).¹⁴⁰ The CPSC, during its early years, made several highly publicized errors concerning safety of certain named consumer products, leading to severe market consequences and subsequent damages to the product's manufacturers. Manufacturers sued the CPSC, asserting all the way to the Supreme Court¹⁴¹ that disclosures of information would portray their products as unsafe, when in fact the information was inaccurate. In oral argument before the Court, lawyers for CPSC argued that disclosures by CPSC from its FOIA¹⁴² files carried no warranty of accuracy. The Chief Justice responded: "Once the cat is out of the bag, how many people are going to make that distinction?"¹⁴³

139. This may be a small or large expense, depending on how many challenges are made.

140. See Form of Notice and Opportunity to Comment, 16 C.F.R. § 1101.21-.26 (2002) (setting forth procedures for the Consumer Product Safety Commission to provide notice and opportunity to comment to manufacturers and private labelers).

141. See *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 107-08 (1980) (appealing the Third Circuit Court of Appeals' affirmation of the district court's decision enjoining the CPSC from disclosing accident reports).

142. See 5 U.S.C. § 552(a)(3) (2000) (discussing requirements in regards to requests for information and agencies' disclosure of information under FOIA).

143. See *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102 (1980), argument quoted in James T. O'Reilly, *Antidote to the Death Penalty: The Vital Role Intended by Congress for CPS Act Section 6*, in ABA NAT'L INST., CONSUMER SAFETY AND INDUSTRY COMPLIANCE WITH THE NEW REPORTING REQUIREMENTS OF THE CONSUMER

Congress, pressed by manufacturers soon after Ronald Reagan's victory in the presidential election of 1980, re-opened the statute¹⁴⁴ and accepted the manufacturers' proposed remedial solution.¹⁴⁵

The remedial approach that Congress adopted for the prevention of CPSC inaccuracy is most helpful to manufacturers and would be an ideal model for those impacted by agency websites. If a statement is to be made by the federal agency about a named product, the Commission must assure that the statement is accurate and "fair in the circumstances and reasonably related to effectuating the purposes of this Act."¹⁴⁶ Advance notice must be given to that product's manufacturer (except in emergencies or enforcement actions), and there must be time for response.¹⁴⁷ The Commission must then respond to the objections of the manufacturer. Otherwise, the manufacturer may sue the agency,¹⁴⁸ and the agency's disclosure may be enjoined.¹⁴⁹

The pre-disclosure nature of the inquiry shields the manufacturer from the serious problem of post-disclosure damage that cannot adequately be mitigated or compensated. Where disclosure happens and an error occurs, the CPSC must issue a retraction. Section 6(b)(8) requires that if the Commission (presumably upon the manufacturer's request) finds its disclosure had been inaccurate or misleading information which reflects adversely upon the safety of any consumer product or class of consumer products, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner equivalent to that in which such disclosure was made, take reasonable steps to publish a retraction of such inaccurate or misleading information.¹⁵⁰ This retraction process, in a manner equivalent, would equate to a public statement, press release, or Internet website banner similar to the original announcement.

PRODUCT SAFETY COMMISSION: A BLUEPRINT FOR COOPERATION IN THE '90s at H-8 (Am. Bar Ass'n 1992).

144. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 703 (1981) (amending consumer product safety and communications statute).

145. See JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 14:107 (3d ed. 2000) (explaining in detail the unusual maneuvering to weaken the notice provisions).

146. See 15 U.S.C. § 2055(b)(1) (2000).

147. See *id.* § 2055(b)(2) (providing the CPSC must give manufacturers and private labelers a minimum of ten days notice before disclosing, except in emergency situations).

148. See *Daisy Mfg. Co. Inc. v. Consumer Prod. Safety Comm'n*, 133 F.3d 1081, 1082 (8th Cir. 1988) (seeking restraining order and temporary injunction against the Commission after exhausting administrative remedies).

149. See *Reliance Elec. Co. v. Consumer Prod. Safety Comm'n*, 924 F.2d 274, 275, 280 (D.C. Cir. 1991) (precluding release of information by the Commission without determination of information's accuracy).

150. See 15 U.S.C. § 2055(b)(7) (2000).

V. EFFECT OF THE NEW SECTION 515 NORMS

In late 2002, under legislation adopted in 2000, a broader set of requirements for accuracy of data were implemented by each federal agency. Data gathering in recent years has been overseen by the Office of Information & Regulatory Affairs at the Office of Management & Budget (OMB) as part of the Paperwork Reduction Act.¹⁵¹ In fiscal 2000 appropriations legislation, the OMB was given new powers under Section 515¹⁵² to compel agencies to be attentive to data quality issues. Prior to 2002, statutes did not require systematic approaches to data verification or quality, and no law required agencies to reexamine existing databases and to clean up errors and obsolescent statements. Under Section 515, the new OMB guidelines for accuracy of data may be relevant to the ways in which an agency will handle complaints or concerns.¹⁵³ Each agency is compelled to issue guidelines "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated" by the agency.¹⁵⁴ Final rules are expected in October 2002, after public comments from April to May 2002. The new Section 515 accuracy provisions can be expected to increase attention to these issues in 2003 and beyond.

Because the dissemination of agency data across the Internet "increases the potential harm that can result from the dissemination of information that does not meet basic information quality guidelines,"¹⁵⁵ the new law focused on accuracy. The OMB, however, excused agencies from the requirements, except for the "essence of the guidelines," where states, contractors, private submitters, and so forth, had supplied the data to the agency.¹⁵⁶ This escape clause is a major loophole in the corrective action

151. See 44 U.S.C. §§ 3501, 3503 (2000) (establishing Office of Information and Regulatory Affairs within OMB, in the Paperwork Reduction Act).

152. See Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-154 (2000) (requiring the OMB to issue guidelines for federal agencies to follow regarding data "quality, objectivity, utility, and integrity").

153. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49718, 49720 (Sept. 28, 2001) (mandating agencies to create mechanisms allowing for "correction of information disseminated by the agency that does not comply with the OMB or agency guidelines").

154. See Consolidated Appropriations Act of 2001 § 515.

155. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 370 (Jan. 3, 2002).

156. See *id.* at 370 (acknowledging that "the guidelines . . . cannot be implemented in the same way by each agency").

that Section 515's sponsors had apparently intended, although the future challengers of agencies are likely to disdain an agency claim that website dissemination met the mere essence of 515. Further loopholes in Section 515 coverage announced in January 2002, included press releases, public filings, and charges made by agencies in their adjudicative processes. The situation of the agency press conference announcing that a property developer is being charged with polluting the local river is excluded from 515 by this OMB guidance.¹⁵⁷

In January 2002, OMB related how it planned to integrate the data quality provisions with special earlier legislation dealing with risk assessments for adverse health effects.¹⁵⁸ These elements of risk assessment and risk communication have been incorporated by OMB into the 515 process with the intriguing limitation that an agency could either adopt or adapt those norms allowing agencies to do less if they opt to adapt these risk norms.¹⁵⁹

A. Hard Copy Document Disputes

Until implementation of the new statutory Section 515 requirements, there does not appear to be any current method for the resolution of disagreements regarding inaccuracies in hard copy documents and published statements of the agencies. No regulation or published procedure exists that address this topic for all agencies. Presumably, however, an affected person could petition for retraction or correction under general administrative petition processes, using whatever format the agency would accept.¹⁶⁰ The entity to which the complaint is directed would be the authoring or publishing entity whose name is on the report or document. No central entity exists for corrections of hard copy published data within agencies, as is the case with the error correction team. The distributed organization structure of many agencies does not provide a central point of complaint for print and hard copy records, reports, or documents.

After the Section 515 rules are published in late 2002, the EPA will

157. See *id.* at 371 (clarifying OMB guidelines do not apply to "correspondence with individuals or persons, press releases, archival records, public filings, and subpoenas of adjudicative processes").

158. See *id.* at 375 (explaining that "the Safe Drinking Water Act . . . adopted a basic standard of quality for the use of science in agency decision-making").

159. See *id.* (allowing agencies to "adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996"). OMB explains "[t]he word 'adapt' is intended to provide agencies [with] flexibility." See *id.*

160. See 5 U.S.C. § 555(b) (2000) (providing interested persons "may appear before an agency . . . for the presentation, adjustment, or determination of an issue, request, or controversy").

provide by regulation a set of “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” for accuracy.¹⁶¹ Therefore, the printed or electronic materials will be subject to complaints that will be channeled through the new correction mechanisms. The challenge will be acknowledged, and after reaching an agreement on a correction, the change will be made.

The ability of an entity to seek remedies is decreased when it is concerned with accuracy of future hard copy publications by agencies. At the EPA, persons affected by regulatory programs can use the EPA’s Information Products Bulletin to learn how it can provide input to the design team at the appropriate EPA program office. The data quality measures used by program offices and by the states will vary, and comments about the design of the new information product may assist the program office’s design. Once the actual product is published, the internal remedies available under Section 515 may be utilized to obtain corrections.

VI. REASONS NOT TO ADOPT NEW REMEDIES

A. Abuse of the Process for Delay

A primary concern for regulators is to reduce the ability of an affected entity to prevent, remove, or mitigate the appearance of a piece of accurate data on the agency website or other information product concerning that entity. If the suggested changes were adopted, there could be abuse of the new process by affected entities seeking delay or agency silence about the violated conditions. If the piece of data is alleged to be inaccurate or misleading, then the affected entity could potentially utilize the new mechanism to delay its appearance on the website or to compel its removal from the website.

Under what scenarios could there be abuse of this new mechanism by the affected entities? Assume a trade association of seventy-five members resists an agency’s regulatory program, which features detailed website data on the members’ facilities. If the multiple owners of multiple pieces

161. See Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515(b)(2)(B) (2000) (explaining future EPA rules promulgated pursuant to § 515 rules will conform to the OMB Guidance); see also Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49720 (Sept. 28, 2001) (requiring agencies to establish mechanisms whereby “affected persons” can appropriately obtain “correction of information disseminated by the agency that does not comply with OMB or agency guidelines”).

of data each utilized the new corrective mechanisms in the same period of time, the ability of the agency (and of the states as original data collectors for federal agency analysis) to verify or dissent from the claims of inaccuracy would likely be made difficult as the requests overwhelmed the available staff. That is because this part of the agency mission has not been well-funded, and the personnel who would be needed to recheck the posted data would soon exceed the available workforce. For example, early in the notification process for new chemicals under the Toxic Substances Control Act (TSCA), a chemical firm filed thirty-five manufacturing notifications with the EPA and claimed all thirty-five were trade secrets. The TSCA process required the company to submit substantiation, which, once it was supplied, had to be reviewed by agency staff.¹⁶² While an agency's Chief Information Officer could perhaps borrow the additional employee resources to meet the spike or surge of activity, it would not be possible to expect agencies to fully staff this function.

By analogy, if every telephone customer in a city simultaneously challenged the accuracy of their monthly bill's charges, there would not be enough workers at the phone company office to process all of the disputed bills, and the system of billing would be overwhelmed. When the Federal Bureau of Investigation (FBI) experienced a huge increase in FOIA requests filed by prisoners and others, the FBI was overwhelmed and had to temporarily draw field agents into Washington to handle the large backlog of requests. Backlogs of FOIA requests have become endemic in the executive agencies. The backlog is especially great where data had been supplied by state entities, and the staff of the web site team must seek state verification or correction. Budgets of state environmental departments are not likely to have sufficient redundant capacity to handle a surge in administrative overhead costs passed along by the federal EPA. This is especially true if the challenge is to a data point that had been collected in the field by a person no longer employed by the agency or if records of the field sampling were not clearly kept.

B. Factors in Delays

Currently, each agency is free to establish deadlines for responses to correction requests when these requests are made. At the EPA, internal norms direct the staff to provide updates for the requested corrections every ten days, so that the correction-requesting entity is kept aware of the progress of the inquiry. This is not a regulation but an internal operating

162. See generally CASEY, *supra* note 80, at 90-91 (discussing the EPA's balancing of manufacturer's right to prevent disclosure and the Toxic Substance Control Act's provision that "the public has a right to know the identity of chemical substance in the environment").

norm, and it applies to electronic data and not to publications. Having such a timely response in the corrections program reduces the likelihood that affected entities will sue. It greatly reduces the chance that a court will entertain the suit until after the end of the administrative review of the issue.¹⁶³

The time within which agency staffs can respond to a complaint of website inaccurate data is a function of the quantity of complaints, staffing levels, ready access to measurement files or paper records, and other missions assigned to the same staff. Unlike the FOIA process for outgoing dissemination, no time deadline now exists for corrections upon complaints.

These new Section 515 mechanisms for accuracy or reproducibility of observations that an agency makes about a private entity could delay these responses, if the mechanisms were in fact utilized on a more frequent basis by the affected entities for more pieces of data.

C. Reduction in Scope of Disclosure

Satisfaction with a particular federal program may relate to the degree to which that program is perceived as effective, credible, and transparent. A program whose data is reliably accurate faces fewer difficulties than one that is not trusted by constituents. If a new mechanism for data accuracy functioned well, that mechanism would make the program more acceptable. If confidence about the accuracy of data was robust, then the additional confidence-level would probably increase the levels of public satisfaction with the underlying programs.¹⁶⁴ There could be more public use of the data, without lingering doubts about the quality of the data sets utilized. Alleviating fears of data problems has been a benefit in reducing barriers to cooperation in other programs.

D. Inherent Limitations

The completeness and accuracy of federal data will never be perfect. The information disclosed should be accurate, but the agency's ability to assure full accuracy is limited by several factors:

1. Statutes under which regulatory data are collected have inherent limitations as to classes of data, withholding authority, and so forth. Students of the environmental statutes marvel at their exhaustive complexities. Making the accuracy process

163. No comparable norms apply to challenges to the accuracy of published hard copy records. Each agency makes its own decision on a request for retraction or correction of print reports.

164. This would include those programs from which the website data had been drawn.

effective does not mean making it simple, if the underlying program is complex.

2. Clarity of what is to be collected from whom, and with what level of precision, is not always articulated well to the field staff, contractors, and industry persons who prepare reports that collect the actual data. Nor is it well understood by the employees, contractors, or regulated persons who are told to compile and report the data to the state or regional office.

3. The cooperation of the entities required to file data varies with their sophistication, information technology capabilities, management attitudes, headquarters attitude, etc., and no data set will gather one hundred percent of the answers desired from one hundred percent of all those sites that could be eligible. These human-based collection efforts are subject to many human flaws.

4. State-based programs vary tremendously in their degree of vigorous attention to detail and persistence in obtaining the requested set of information from all affected entities within their jurisdiction. State X may have made this program a showcase, while state Y lumped it with three other tasks assigned to one overworked staff member.

There are other likely reasons why data sets are incomplete, but these appear to be the four major reasons. At some level of economic outlay, a perfect data set could be completely gathered, compiled, and analyzed for one discrete environmental program. To do so for multiple agency program fields would be a budgetary challenge of huge proportions. The agency thus functions within a margin of accuracy and completeness that takes into account its resource limitations.

E. Social Costs & Benefits

The social benefit of the completeness of federal data appears self-evident: public choice about costs of regulation is a substantial area of economic and policy study. For example, studies of environmental regulation often involve surveys of public opinion that find wide support for the protection of human and environmental health. Accurate data is essential to successful community involvement on environmental issues. The improvements in ecosystem health measurements attributable to environmental control measures are studied in a large body of technical literature, which appears to correlate effective environmental control activities with measurable improvements in public health. Assuming this correlation to reflect a sound policy choice, improvements to the accuracy of the data set from which our society chooses to accept or to control levels of environmental risk produces a net societal benefit. There is little or no benefit from knowingly disseminating false or misleading environmental information.

The social cost of instituting new mechanisms cannot yet be predicted

accurately. Currently, the electronic data that is challenged remains accessible. But agencies, such as the EPA, will sometimes post an inexpensive flag that is placed in the database wherever the piece of questioned data appears. As an alternative to a flag, the removal of the data from the website, pending reviews, would presumably diminish the body of environmental information from which environmental decisions are made.¹⁶⁵

CONCLUSION

The Internet explosion of federal agency websites poses remarkable new problems, especially for a largely unprepared federal administrative structure. Not all agency data is accurate or timely. At some cost, in the billions, agencies could better screen and handle requests for sensitive data that is held by private persons.

Agencies such as the EPA are way ahead of others. Many of its yellow flag reviews of applications for corrections have been accomplished in a timely manner.¹⁶⁶ It may be that in the future, a series of additional content-related disputes will test the adequacy of the current system for the resolution of more substantive conflicts. Should that occur, litigation options will fail. The options addressed in Part V-B of this article¹⁶⁷ may be considered before legislative remedies are sought. Mechanisms could be adopted that alter the current procedures; legislation might be adopted that creates judicial review possibilities.

Ultimately, information is power. It is unacceptable in our society for defamation by government misinformation to harm the less-powerful persons who are the victims of website mistakes. Creating the ability for a person affected to exert pressure upon the agency has a useful social benefit but carries a number of risks. The remedial process will shift power away from agencies. How far the shift moves will determine how much information is lost to the public when disclosure is contested. Moving toward a responsive and fair corrections mechanism today will help to anticipate and alleviate the conflicts that will surely arise in the future of an information-empowered administrative state.

165. This presumes that the user of the system would note the flag and determine to read both the web-posted data and any statement of the data-owner or affected facility.

166. Telephone interview with Pat Garvey, EPA Corrections Group (July 1, 2001).

167. See *supra* notes 127-38 and accompanying text (discussing possible non-litigation remedies).