

From: Reece Rushing <rushingr@ombwatch.org>
To: <infoquality@nrc.gov>
Date: Thu, May 30, 2002 8:44 PM
Subject: comments on draft data quality guidelines

RECEIVED

2002 JUN -4 AM 10:13

Rules and Directives
Branch
USDO

Attached comments submitted by:

Sean Moulton
Senior Policy Analyst
OMB Watch

1742 Connecticut Avenue, NW
Washington, DC 20009
202-234-8494 x201
202-234-8584 (fax)

5/3/02

67 FR 22463

(3)

Template = ADM-013

E-RIDS = ADM-03
Add = V. Yonez (VEY)

May 29, 2002

Vicki Yanez
Web, Publishing, and Distribution Services Division
Office of the Chief Information Officer, Mail Stop: T6E7
U.S. Nuclear Regulatory Commission
Washington, DC 205550001

Re: NRC's Data Quality Guidelines

Dear Ms. Yanez:

OMB Watch appreciates the opportunity to comment on the Nuclear Regulatory Commission's draft data quality guidelines. While we support the efforts of NRC to ensure that data disseminated to the public is of high quality, we believe this should not inhibit public access to government information, which has been our cause as an organization for more than 15 years. In this spirit, we offer the following comments on your draft guidelines.

General Response

As stated above, OMB Watch supports efforts to improve the quality and accuracy of data disseminated to the public. However, the Data Quality Act (DQA), which orders the guidelines, does not alter the substantive mandates and primary missions of any agency.

Indeed, the Act was added at the last second as an appropriations rider with no congressional debate, hearings, or even report language clarifying its intent. This total lack of legislative history means that the size of the mandate is very small, and tradeoffs with major congressional priorities should be minimized. The presumption is that legislation passed in this way could not have survived open debate. Therefore, any reorganization of priorities is not required or appropriate, and the agency should retain maximum flexibility in implementing the guidelines.

In particular, NRC should clearly state that when deciding whether to disseminate or use data, "quality" is only one factor to consider. First, the agency must answer to its core substantive mission, as directed by Congress. Second, the agency must operate within budgetary constraints; the guidelines will place off-budget burdens on NRC, which could potentially cause a massive transfer of already scarce resources to addressing data quality complaints and procedural requirements. This should be avoided. And third, the agency should consider the benefits of timely dissemination in carrying out its core mission and the general goal of democratic openness.

On this last point, NRC should also include a section in the data quality guidelines emphasizing that public access to information is a central government responsibility that the agency plans to uphold. Too few agencies have taken this opportunity to acknowledge and reaffirm their commitment to the important benefits derived from providing public access to government information. If there is any question about whether information should be disclosed and accessible to the public, NRC should err on the side of the public's right-to-know. The Environmental Protection Agency's draft data quality guidelines provide a good example of this

type of statement.

Moreover, NRC's data quality guidelines should acknowledge the useful role that public access to government data plays in correcting information and improving the overall quality of data being used. EPA's Integrated Error Correction Process (IECP) is a perfect example. This system has already resolved hundreds of corrections without ever removing public access to any data.

Judicial Review

Of critical concern is the issue of whether these guidelines are to be legally binding on agencies. It seems clear that industry will attempt to use these guidelines as a vehicle to challenge federal regulation, by challenging the information that supports it. Indeed the U.S. Chamber of Commerce's William Kovacs has been quoted saying, "This is the biggest sleeper there is in the regulatory area and will have an impact so far beyond anything people can imagine."

Corporate interests will undoubtedly attempt to force agencies to rescind or "de-publish" information they dislike by trumping up questions of "quality." Where the agency denies a challenge through the administrative mechanism provided by the guidelines, the decision could be taken to the courts, bogging down the agency and hobbling its core functions. Therefore, it is imperative that the agency makes every effort to clearly assert the limits of these guidelines and preserves its own flexibility to accomplish core mandates unfettered.

NRC should clearly state that the data quality guidelines are just that – guidelines. The statement should make clear that NRC does not consider the guidelines judicially reviewable, and that they do not provide any new adjudicatory authority. This section of the guidelines should also establish that NRC is not legally bound by the guidelines and should reserve the right to depart from them when appropriate. There are several draft data quality guidelines that contain good examples of such statements, including Environmental Protection Agency, Department of Transportation, and the Department of Labor

Administrative Mechanism

OMB's implementing guidelines require agencies to establish "administrative mechanisms allowing affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines." The design of this mechanism and the procedures by which it will operate are critical. As every agency faces limited resources, this mechanism should be constructed cautiously with adequate procedural safeguards to protect the agency from becoming mired down in minor data disputes, bad faith requests, and frivolous, repetitive, or non-timely claims. In particular:

- NRC should provide a clear statement that the "burden of proof" rests upon requesters – both to demonstrate they are an "affected person" and that a change is necessary. It is not NRC's responsibility to defend the validity of information dissemination. The Department of Transportation has such a statement in its discussion of the administrative mechanism in its draft guidelines.
- The administrative mechanism should apply only to corrections of factual data and

information. The guidelines should explicitly state that the administrative mechanism will not consider interpretations of data and information, or requests for de-publishing.

- NRC should limit complaints under their administrative mechanisms to information that is not already subject to existing data quality programs and measures. This avoids duplication of agency efforts, consistent with OMB's implementing guidelines. For example, several agencies note in their draft guidelines that adequate procedures and opportunities exist in the rulemaking process to question or correct information, and therefore data disseminated from a rulemaking process cannot be disputed under the data quality administrative mechanism.
- The agency should state that if a request has been made and responded to, a new similar request may be rejected as frivolous or duplicative.
- NRC should establish a timeliness requirement for requests after which an agency has the option to reject a request (e.g., a data quality complaint must be made within three month's of the information's release).
- NRC should limit complaints for any data quality standard that presents a potential moving target (i.e., "best available evidence") to information available at the time of dissemination.

Reconsideration of Complaints

NRC should be aware that the Data Quality Act does not address reconsideration of complaints and is far outside the scope of the statutory requirements. In that context, the agency reconsideration process should remain fairly informal and limited in scope. That would be consistent with the fact that neither the initial consideration nor the agency's reconsideration is a legally enforceable process.

It should also be noted that the review mechanism is to ensure that initial agency review was conducted with due diligence. Accordingly, NRC's reconsideration should be limited to showing due diligence in the initial consideration of a request. It is also important that agencies establish a timeliness requirement for requesting reconsideration. Several agencies have proposed a 30-day time limit, which we support.

Public Disclosure

Keeping the public properly informed of the use of this administrative mechanism will be an important aspect to evaluating its progress and usefulness, as well as demonstrating the transparency that the data quality guidelines advocate. NRC should specify that it will establish a running public docket of requests and changes. The docket should include information on who requests a change, the nature of the request, any specific changes made, and why they were made.

Risk Analysis

The implications of the data quality guidelines for agency risk assessments, which generally serve as the foundation and justification for health, safety, and environmental regulation are of particular concern to us. In laying out agency-wide parameters for the guidelines, as directed by Congress,

OMB went far beyond the congressional mandate and asked agencies to “adapt or adopt” principles for risk assessment laid out in the Safe Drinking Water Act (SDWA).

NRC should make clear that they answer first to underlying statutes, as well as the particularities of each specific risk, in conducting risk analysis. The agency should explain how current practice fits with the principles of the Safe Drinking Water Act, but should not undertake new policies for risk analysis, imposing additional burdens, in response to OMB’s guidelines. Such significant and far-reaching action must come only at the direction of Congress, which has previously considered and rejected across-the-board requirements for risk assessment.

If the agency insists on establishing new policies and procedures for risk assessment within the data quality guidelines, then we urge the agency to adapt, not adopt, the SDWA principles. The SDWA requires, among other things, “the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices.” In one of the most important adaptations we have seen, EPA – the agency that operates under the SDWA and its risk assessment principles – interprets “best available” as the best available at the time the study was done. Other agencies also make conditional adaptations, noting “when possible” and “where available,” these SDWA principles or some version of them will be applied.

Peer Review

There are a number of points NRC should make clear on peer review. First, the agency should state that the sort of peer review envisioned by the Safe Drinking Water Act may not be appropriate for all types of risk analysis, and may conflict with underlying statutes. The agency should clearly reserve the option to bypass peer review at such times. Second, NRC should state that “influential” information will not be subject to new formal, external, independent peer review to meet the “objectivity” standard. And third, where peer review is employed, the agency should commit to using appropriately balanced peer review panels, avoiding conflicts of interest. Where there are conflicts, they should be disclosed not just to the agency, but also the public.

Information Coverage

Industry will strongly advocate that the agency label information as “influential.” This should be avoided, as it would be time-consuming, burdensome, and likely interfere with dissemination efforts. Instead, the agency should detail and expand on the types of information and methods of dissemination that are not covered by the guidelines. NRC should also narrowly define “influential” information, employing a high threshold for coverage. By limiting the coverage of these guidelines, NRC can maximize its flexibility and preserve their ability to act in a timely fashion.

Third Party Issues

Industry wants agency guidelines to apply to dissemination by third parties if an agency initiates or sponsors the distribution, which could raise many complications. In an effort to simplify the process and minimize any undue burden on the agency, the data quality guidelines should clearly state that they only apply to information disseminated by the agency itself.

Thank you for consideration of our views.

Sincerely,

Sean Moulton
Senior Policy Analyst
OMB Watch