Carbon Capture and the Information Quality Act

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On Jan. 8, 2014, the U.S. Environmental Protection Agency (EPA) issued a proposed new source performance standard (NSPS) under the Clean Air Act\(^1\) for carbon dioxide (CO\(_2\)) emissions from new or modified electric utility plants that will effectively require implementation of a process known as carbon capture and sequestration (CCS).\(^2\) EPA offers the following explanation of this technology:

CCS is a three-step process that includes:
1. Capture of CO\(_2\) from power plants or industrial processes;
2. Transport of the captured and compressed CO\(_2\) (usually in pipelines); and
3. Underground injection and geologic sequestration (also referred to as storage) of the CO\(_2\) into deep underground rock formations. These formations are often a mile or more beneath the surface and consist of porous rock that holds the CO\(_2\). Overlying these formations are impermeable, non-porous layers of rock that trap the CO\(_2\) and prevent it from migrating upward.\(^3\)

The new rule would limit CO\(_2\), a previously unregulated greenhouse gas emission, from such generation facilities to a rate of 1,100 pounds per megawatt-hour (MWh).\(^4\) Energy producers, especially those employing coal-fired plants, are strongly opposed to these limits.\(^5\)

On Feb. 3, 2014, the Center for Regulatory Effectiveness (CRE) sent a letter to the EPA administrator alleging that the proposed rule violates the Information Quality Act\(^6\) (IQA) in that it is based on scientific studies that were not peer-reviewed as required by the Office of Management and Budget (OMB)’s regulations implementing the IQA.\(^7\)

Since its passage in 2000, the IQA has been criticized as a tool for corporate interests to suppress unfavorable government reports and actions.\(^8\) In this case, the issue turns on whether the studies cited in the proposed NSPS rule qualify as a “Highly Influential Scientific Assessment” (HISA) within the meaning of the OMB’s regulations, thereby triggering enhanced peer-review requirements.\(^9\)

This article will introduce the reader to the IQA and explain competing views as to the extent to which the IQA is legally binding. The article will further analyze whether the science the EPA used to develop the CCS rule is, in fact, a HISA, and to what extent the IQA may or may not apply.

The Information Quality Act
The IQA was passed in late 2000 and was enacted by a lame-duck Clinton Administration.\(^10\) In its entirety, the Act reads as follows:

(a) IN GENERAL.—The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) CONTENT OF GUIDELINES.—The guidelines under subsection (a) shall—

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) require that each Federal agency to which the guidelines apply—

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a); (B) establish 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 issued under subsection (a); and

(C) report periodically to the Director—

(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and

(ii) how such complaints were handled by the agency.\(^11\)

The IQA was an amendment to the Paperwork Reduction Act of 1980.\(^12\) The OMB promulgated its first iteration of implementing regulations on Feb. 22, 2002.\(^13\) The IQA and the OMB’s implementing regulations apply to “information” that is “disseminated” by virtually all federal agencies.\(^14\) The regulation defines those terms as follows:

“Information” means “any communication or representation of knowledge such as facts or data ... .” This definition of information ... does “not include opinions, where the agency’s presentation makes it clear that what is being offered is someone’s opinion rather than fact or the agency’s views.”

“Dissemination” is defined to mean “agency initiated or sponsored distribution of information to the public.”\(^15\)

In accordance with the statutory language quoted above,\(^16\) the regulations seek to ensure information “quality” by imposing standards for “objectivity, utility, and integrity.”\(^17\) Those terms are broadly defined,\(^18\) but remain open to considerable interpretation and debate as to their value as normative standards.\(^19\)

Judicial enforceability of the IQA
Also unclear is the extent to which...
the IQA is judicially enforceable. In 2006, the Fourth Circuit Court of Appeals rejected the argument that the IQA established a right to “informational correctness.” By its terms, this statute creates no legal rights in any third parties. Instead, it orders the OMB to draft guidelines concerning information quality and specifies what those guidelines should contain. The statute does not create a legal right to access to information or to correctness.

In 2010, however, the Court of Appeals for the District of Columbia reached an arguably different result. In Prime Time International Company v. Vilsack, a cigar manufacturer challenged the Department of Agriculture’s methodology for calculating domestic tobacco farm subsidies. The lower court had dismissed the plaintiff’s IQA suit for failure to state a claim, citing judicially enforceable rights. The court still dismissed the IQA portion of the suit, but did so not for failure to state a claim but rather because the subsidy calculations qualified as an “adjudicative process” exempt from the OMB’s definition of a “dissemination.” One month later, after the CRE had touted the Prime Time decision as a victory disguised as defeat, the Department of Agriculture petitioned the circuit court for a rehearing and that the “panel amend its opinion to clarify that the Court did not decide whether the [IQA] creates judicially enforceable rights.” The court denied the rehearing request outright.

But in American Petroleum Institute v. EPA, a 2012 D.C. Circuit panel reached a different result. In American Petroleum, the industry group (API) challenged the EPA’s 2010 revision of the CAA national ambient air quality standard for nitrogen dioxide. Among other claims, API asserted that the EPA had failed to adhere to the peer review guidelines in its own 2002 information quality manual, adopted pursuant to the IQA. The court emphasized that the guidelines were precisely just that—guidelines. It found dispositive the fact that the guidelines used the word “should” rather than “shall” in places like this statement: “major scientifically and technically based work products ... related to Agency decisions should be peer-reviewed.” Dismissing API’s IQA claim, the court further noted, “No doubt the EPA believes peer review is important and it intended to impress that value upon its staff, but the agency did not bind itself to a judicially enforceable norm.

Interestingly, the American Petroleum opinion does not cite or otherwise mention Prime Time, leaving to speculation whether Prime Time indicates any judicial enforceability for the IQA and if so, how to distinguish the two cases. In other words, what facts did Prime Time have that American Petroleum did not that may have led to a different outcome on the question of enforceability? The most apparent distinction is that the plaintiff in Prime Time challenged the government’s methodology itself while API only challenged the extent to which the results were reviewed.

If that is the distinguishing point between the two cases, it would not bode well for the CRE’s chances of challenging the proposed NSPS for CO₂. But it might not necessarily foreclose the peer-review argument. As stated above, in American Petroleum the D.C. Circuit’s analysis was limited to the discretionary (“should” versus “shall”) nature of the EPA’s internal guidelines promulgated in 2002. Not subject to consideration in American Petroleum, however, was the OMB’s 2005 Final Information Quality Bulletin for Peer Review (bulletin).

The OMB’s 2005 bulletin and HISAs

The bulletin, like the EPA’s 2002 document, established a range of discretionary guidelines relating to peer review of “influential scientific information” disseminated by government agencies. But the bulletin further imposes stricter, mandatory requirements applicable to HISAs, which the bulletin notes are a subset of “influential scientific information.” The bulletin defines a HISA as information that could “have a potential impact of more than $500 million in any year, or ... [i]s novel, controversial, or precedent-setting or has significant interagency interest.”

For HISAs, the bulletin requires that agencies select a multidisciplinary pool of peer reviewers and recommends that agencies solicit outside nominations for this purpose. The reviewers must be independent of (not employed by) the agency and must be free from actual or apparent conflict of interest. Public notice and opportunity for public comment are mandatory. Each of these requirements is in addition to the more broad guidelines for influential scientific information, and the bulletin also imposes enhanced transparency and management requirements.

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NSPS compliance with the IQA

The EPA’s proposed NSPS points to four utility-scale electric generation projects, in various stages of development or construction (but none completed), as evidence that CCS is appropriate to consider the best system for emission reduction.44 Three of those four are U.S. projects that have benefitted from over $2.5 billion in government assistance in the form of Department of Energy grants and investment tax credits pursuant to the Energy Policy Act of 2005.45 One, Summit Power’s Texas Clean Energy Project, received over $1 billion by itself.46 While the proposed NSPS does not contain cost estimates,47 these large amounts of government aid suggest that CCS implementation under the proposed rule would easily surpass the $500 million HISA threshold. Even if it didn’t, it is apparent that CCS is “novel, controversial, or precedent-setting,”48 so the science upon which this technology is based would almost certainly qualify as a HISA.49

Despite this, the proposed rule evinces no effort by the EPA to comply with the OMB bulletin’s enhanced mandatory peer-review requirements for HISAs.50 Still, given the weight of case law holding that the IQA creates no judicially enforceable rights and the attendant ambiguity as to the distinctions between the Prime Time and American Petroleum holdings, the CRE’s prospects of successfully prevailing on a challenge in this regard are tenuous at best.

Prime Time will likely remain an outlier as the only precedent remotely supporting the notion that the IQA is judicially enforceable. If the CRE or a similarly situated plaintiff were to challenge the peer-review methodology of the proposed NSPS in the context of the IQA and the OMB bulletin, the D.C. Circuit would likely follow the Fourth Circuit’s reticence and its own precedent in American Petroleum to resist granting relief on these grounds. Even if such a challenge were successful, it would only delay implementation for the time it would take the EPA to remedy the deficiency, unless the results of the peer review showed that CCS was not viable or feasible as a system of emissions reduction.

Conclusion

Opponents of the proposed NSPS have attacked the rule from many different angles.51 The IQA theory asserted by the CRE in its February letter to the EPA administrator is an interesting, but possibly far-fetched, addition to those challenges. While it is facially sufficient because the science behind CCS qualifies as a HISA, the uncertainty surrounding the enforceability of the IQA and its implementing regulations casts doubt on this particular theory’s prospects for success.

Endnotes

4. 79 Fed. Reg. at 1,433. Large natural gas-fired plants would be further limited to 1,000 lbs./MW hr. Id.
5. Juan Carlos Rodriguez, EPA Delays Greenhouse Gas Emissions Rule For Public Input, Law360 (March 5, 2014), available at http://www.law360.com/articles/515523 (reporting that “[t]he proposed rule has drawn fire from energy industry groups that have called it a ‘death sentence’ for coal power”).
11. Id.
16. Supra text associated with note 11.
18. Id.
21. 599 F.3d 678 (D.C. Cir. 2010).
22. Id. at 679.
24. Prime Time, 599 F.3d at 684-86.
25. Id. at 686.
27. William S. Jordan III, D.C. Circuit – Is the Information Quality Act Ready for Prime Time?, 35 ADMINISTRATIVE & REGULATORY LAW NEWS 17 (Summer 2010), available at http://www.americanbar.org/content/dam/aba/segments/adminlaw/PublicDocuments/69034_ABA_Summer2010_FINAL acompancheck.pdf (noting that “[t]he decision so disturbed the Government that it asked the court to clarify that it had not intended such an implicit result”).
29. Id. at 1349.
30. Id. at 1345.
31. Id. at 1348.
32. Id. at 1348-49.
33. Id. at 1348 (quoting the EPA, GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE ENVIRONMENTAL PROTECTION AGENCY 11 (Oct. 2002) (emphasis added).
34. Id. at 1349.
35. Id. at 1347.
37. Id. at 2,675.
38. Id. at 2,665.
39. Id. at 2,675.
40. Id. at 2,676.
41. Id.
42. Id.
43. Id.
44. 79 Fed. Reg. at 1,434. The four facilities are Southern Company’s Kemper County Energy Facility, SaskPower’s Boundary Dam CCS Project, Summit Power’s Texas Clean Energy Project and the Hydrogen Energy California Project. Id.
46. Id. at 7.
47. 79 Fed. Reg. at 1,430-519.
49. See e.g., Rodriguez, supra note 5 (noting that “[c]ontroversy has surrounded the EPA’s proposal” and that the rule was already the subject of one lawsuit (specifically Nebraska, cited supra at note 46)).
50. 79 Fed. Reg. at 1,430-519.
51. See e.g., Nebraska, cited supra at note 46 (in which the state has challenged the NSPS on the ground that it violates the Energy Policy Act of 2005’s prohibition on the consideration of facilities receiving financial assistance pursuant to the Act as “adequately demonstrated” for the purpose of setting emissions limitations); Anthony Adragna, White House ‘Strongly Opposes’ Bill to Curb EPA Power Plant Regulations, Bloomberg BNA Energy and Climate Report (March 4, 2014) (reporting on a bill introduced in the House of Representatives, H.R. 3826, 113th Cong. (2014), which would prohibit “regulations on the greenhouse gas emissions of new plants ... until technologies like carbon capture and sequestration had been demonstrated at six different sites for at least one year”).

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