



# **Federal Agency Implementation of the Federal Information Quality Act**

## **An Empirical Study of Federal Agency Performance**

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Statute, Guidance, and Procedures




# **BACKGROUND**

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- Statute
  - Treasury and General Government Appropriations Act, FY 2001, § 515 (Pub. L. 106–554, 114 Stat. 2763, December 2000)
- Directive to OMB
  - Issue government-wide guidance or rule
  - Define critical terms
  - Direct all agencies to issue conforming IQGs
    - Establish pre-dissemination review procedures
    - Establish error correction procedures

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# Critical Content in IQG

- Substance
  - Utility
  - Integrity
  - Objectivity
    - Substantive
    - Presentational
- Process
  - Transparency
  - Reproducibility
  - Post on website
- Procedures
  - Pre-dissemination review
  - Post-dissemination error correction
  - Independent appeal
- Judicial review?

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# This Paper

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- How do 'affected parties' challenge information?
- Who is challenging what?
- How do agencies respond?

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• Is there any recourse?

◦ Independent appeal  
**Judicial review?**

# Conventional Wisdom

- Advocates are regulated entities seeking weaker regulation
  - ‘The most far-reaching reform since the Administrative Procedure Act of 1946’
  - ‘If only scientific errors were corrected, policy disputes would evaporate’
- Opponents are environmental, health and safety NGOs
  - ‘Agencies will be paralyzed by mountains of petitions filed by industry lobbyists’
  - ‘Stealth tool for undermining environmental, health and safety protections guaranteed by law’
  - ‘Could be misused to delay, manipulate, and unfairly affect the outcome of federal agencies’ activities’

Nothing interferes with a happy conclusion more than good data.

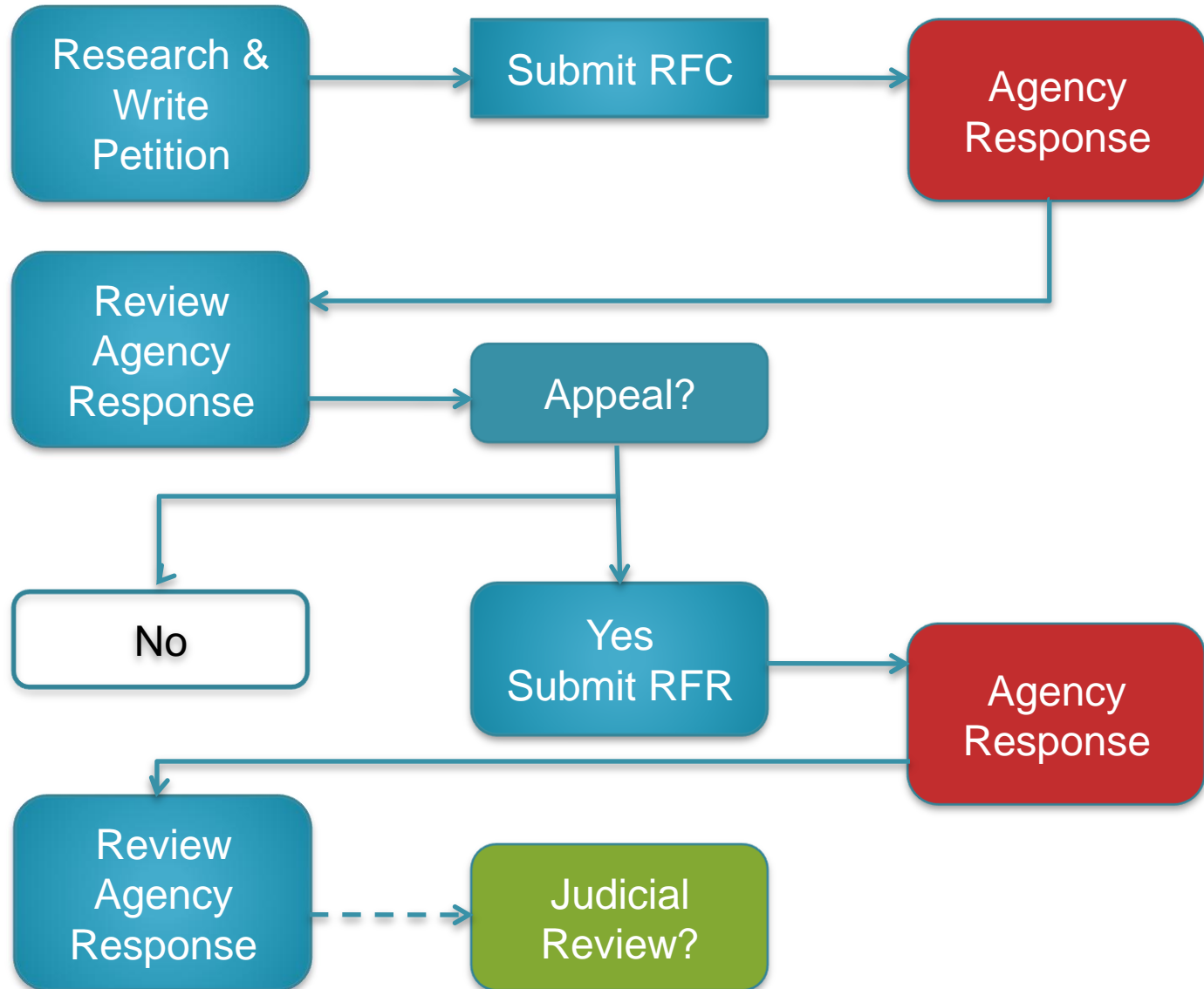


# THE DATA SPEAK

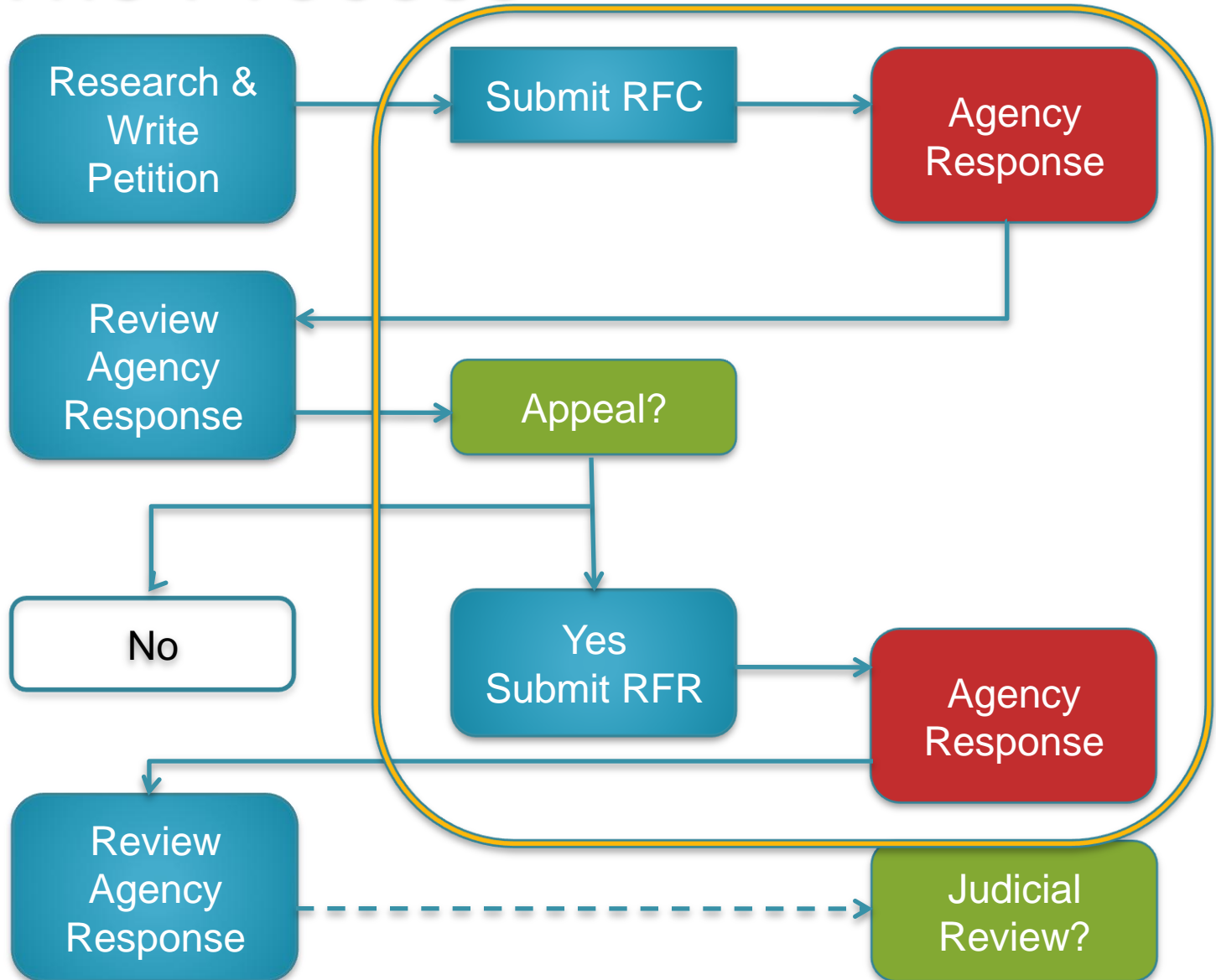
# Terminology

- ‘Request for Correction’ (RFC)
  - Any petition for correction of information believed to violate IQA principles
- ‘Request for Reconsideration’ (RFR)
  - Any administrative appeal of a partial or complete denial
- These are agency-invented terms
  - Tries to avoid the inference that petitioners have legal standing
  - Tries to avoid the implied duty to respond

# The Process



# The Process



# The Data

- Census, not sample
  - All federal agencies that post RFCs/RFRs
  - FOIAs to obtain the others
  - FY 2002 through FY 2007 (6 years)
  - $N_{RFC} = 157$ ;  $N_{RFR} = 54$
- Fancy statistical methods inappropriate
  - All agencies are not equally 'important'
  - Some agencies centralize
    - Example: EPA
  - Some agencies delegate to components
    - Department of Labor: 20
  - The Inspectors General problem

## Chemical Risk Assessments

- American Chemistry Council
- Center for Regulatory Effectiveness
- Chemical Products Corp
- Dow Chemical Co
- Kansas Corn Growers Assn
- MAA Research Task Force
- Metam Sodium Alliance
- National Association of Manufacturers
- National Paint & Coatings Assn
- Perchlorate Study Group
- Styrene Info & Research Center
- US Chamber of Commerce
- Washington Legal Foundation/ACSH
- Wood Preservative Science Council

## Environmental/ Public Health Risk Assessments

- Advocates for the West
- Advocates for Youth Sexuality Information
- Alliance for the Wild Rockies
- Americans for Safe Access
- Arkansas Wildlife Federation
- Earthjustice
- Earth Island Institute
- Greater Yellowstone Coalition
- MO Coalition for the Environment Found'n
- National Association of Home Builders
- Natural Resources Defense Council
- Public Employees for Env't'l Responsibility
- Sierra Club
- Trustees for Alaska

# Who Is Challenging What?



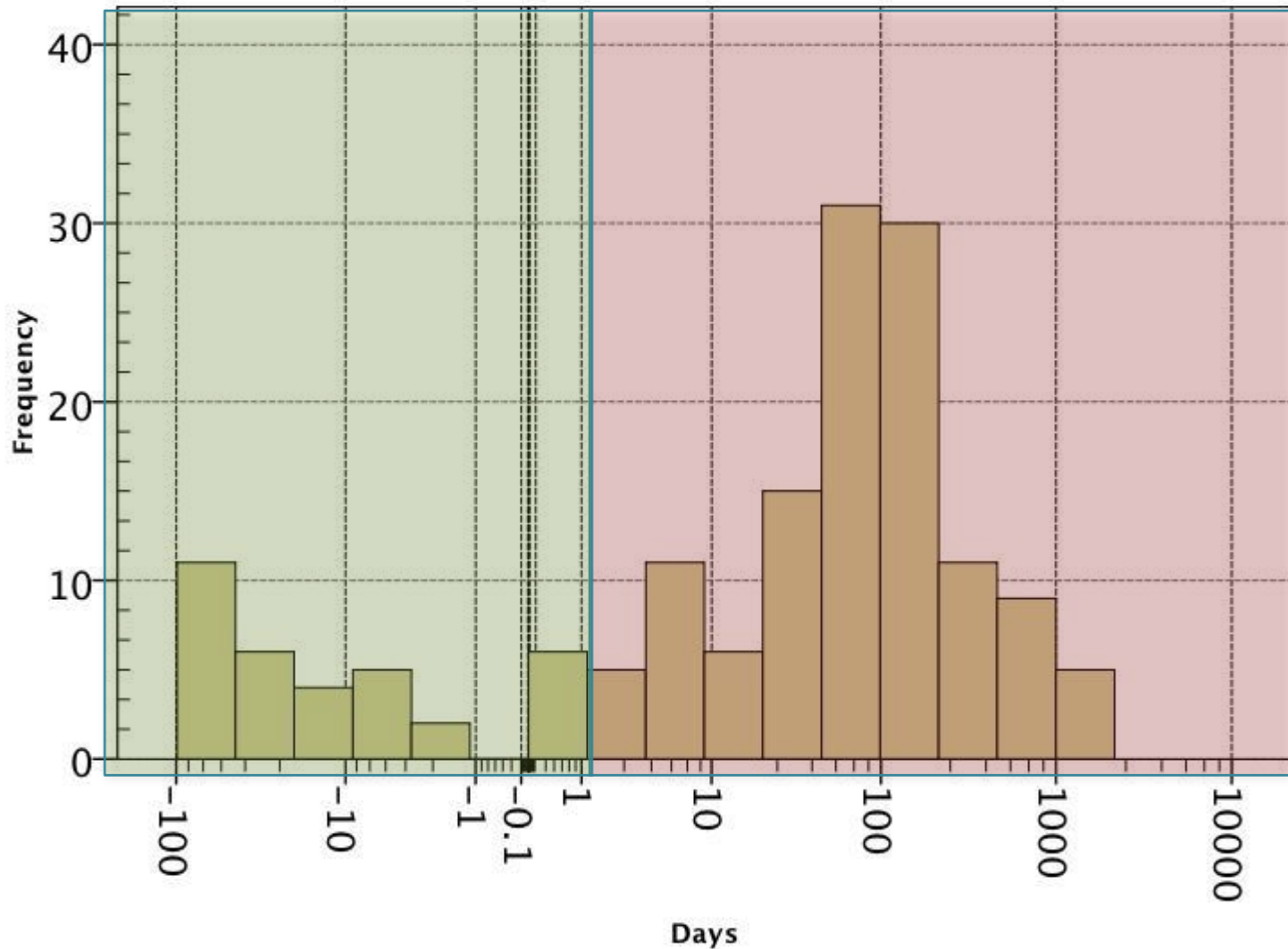
# Descriptive Statistics

	Completed Petitions Only		Appeal Time	All Petitions	
	RFC	RFR		RFC	RFR
Mean (days)	148	186	43	217	272
SD (days)	134	165	33	308	349
N	143	46	54	157	54
Max (days)	979	1,896	148	847	2,143
Kurtosis <sup>a</sup>	12	8.7	.88	13	.88
Skewness <sup>b</sup>	2.8	2.7	1.2	3.4	3.6

<sup>a</sup> Normal (0), log (1.2), Laplace (3).

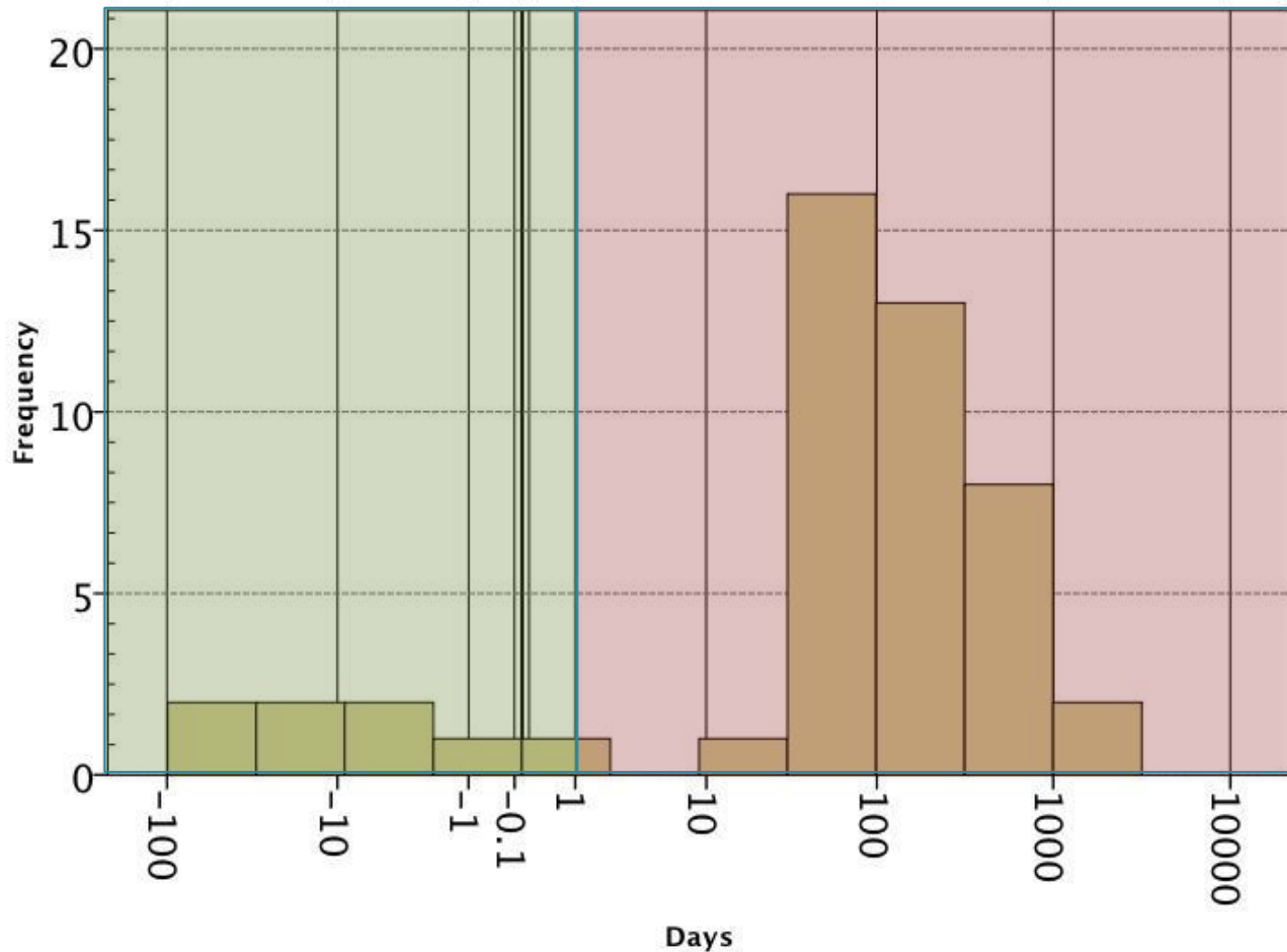
<sup>b</sup> Normal (0).

# Agency Performance: RFC Review Times Are Not



Mean = 151; SD = 311; N = 157

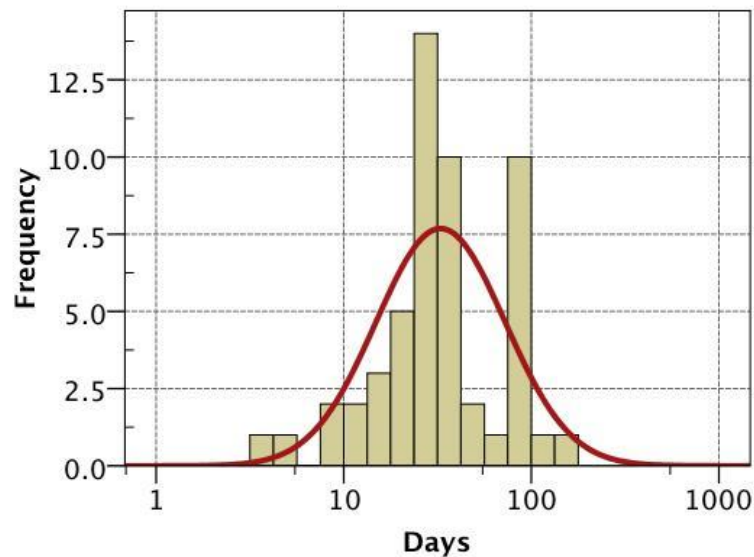
# Agency Performance: RFR Review Times Are Not



Mean = 221; SD = 365; N = 48

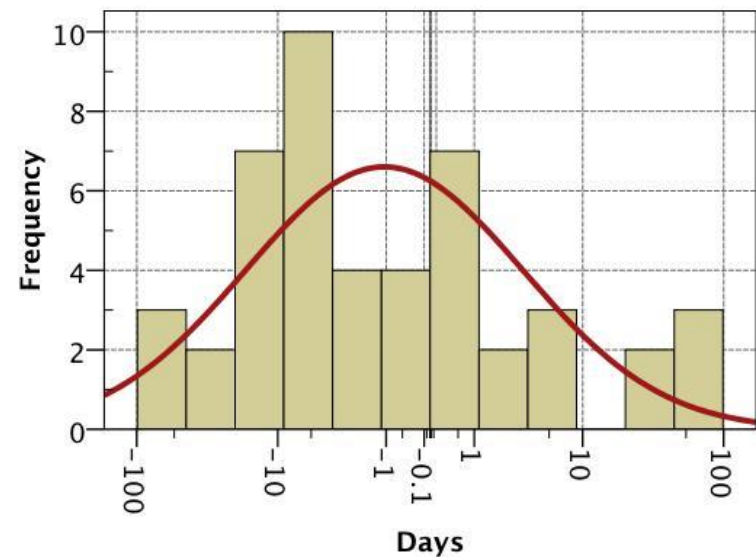
# Petitioners Have Little Time to Appeal but Mostly Meet Deadlines

Petitioners Are Allowed Little Time to Appeal...



Mean = 43  
SD = 33  
N = 48.

... and They Fear Being Deemed "Late"



Mean = 3.6  
SD = 23  
N = 48.

# How Agencies Compare

## Worst Performers *Average Days to Respond*

Agency	RFC Avg/IQG	RFR Avg/IQG
ACE	860 [60]	--- [60]
DOE	247 [60]	--- [60]
DOC	240 [60]	162 [60]
USDA	239 [60]	147 [60]
EPA	184 [90]	340 [90]
HHS	177 [60]	386 [60]
CPSC	100 [60]	--- [60]

## Best Performers *Average Days to Respond*

Agency	RFC Avg/IQG	RFR Avg/IQG
TREAS	12 [60]	--- [60]
DOL	78 [60]	106 [60]

Includes all agencies where  $N \geq 2$ .

0 protons or electrons,  
1 neutron, 75 deputy neutrons, 150 assistant neutrons,  
and  
375 deputy assistant neutrons.



# ADMINISTRATIUM

# Fringlish? It's Incumbent!

- US Secret Service
  - 'After the petitioner receives a response or decision from the agency on complaint, the incumbent must send their appeal of the ruling within 30 calendar days of the decision date.'

# Entropic File Quality

- Electronic requests for correction
- Printed, scanned (often poorly), and uploaded
- Reduced resolution
- Color charts & graphs not readable
- TIFF images not searchable



# Inattentiveness to Detail

- Justice Dept OIG
  - ‘RFRs must be filed ... within 35 calendar days of the date of decision on the RFC. RFRs that are received after the 45-calendar day deadline may be denied as untimely.’
- Federal Housing Finance Board
  - Announced its IQG in the *Federal Register*
  - Never published on the Board’s website.
  - Merged in 2008 with OFHEO to create Federal Housing Finance Agency
    - “Act created a world-class, empowered regulator with all of the authorities necessary to oversee vital components of our country’s secondary mortgage markets”
    - Still no agency-wide IQG
- Army
  - Published IQG as an internal memorandum
  - Memorandum expired by design October 28, 2005
  - [http://www.usace.army.mil/CECI/IQA/Documents/HQDA\\_Ltr\\_25\\_03\\_2.pdf](http://www.usace.army.mil/CECI/IQA/Documents/HQDA_Ltr_25_03_2.pdf).

Exemptions, provisos, exceptions, variances,...



# **AGENCY GAMESMANSHIP**

# Ease of Public Access

- Link on home page
  - USDA & its components
  - Farm Credit Admin
  - Surface Transportation Board
  - Selective Service System
  - Small Business Admin
  - EOP
    - CEQ
    - ONDCRP
- Difficult to find IQG even by searching
  - Army, State Dept, some Labor Dept components
  - FTC, CPSC
  - Ofc Govt Ethics
  - NASA, IRS
  - **OMB**
- Hidden procedures
  - DoD (except ACE)
  - DOI
  - NASA

# Ease of Submission

- Online form
  - HUD
  - CFTC
  - Federal Reserve
  - State Dept
  - GSA
  - NRC
  - Selective Service
  - Social Security Admin
  - TVA
- Snail mail &/or fax
  - Commerce Dept
  - Labor Dept
  - Veterans Affairs Dept
  - IRS
  - NTSB
  - NSF
  - OPM
  - USITC
  - OPIC

# A Dismissive Attitude

- ‘You gotta find us’
  - ‘All requests for correction of [DOI] OIG information must be submitted by letter, fax, or e-mail to the OIG's OGC.’
- ‘Not responsible for errors we propagate’
  - ‘If the information disseminated by SSS ... was previously disseminated by another Federal agency in virtually identical form, then the complaint should be directed to the originating agency.’ [US Secret Service]

# A Not-So Level Playing Field

- Agency's assert the authority to decide
  - Is petitioner an 'affected person'?
  - Is RFC 'frivolous' or submitted in 'bad faith'?
  - What is a 'timely' response?
  - How 'responsive' is responsive?
  - What is a 'reasonable' appeal process?
  - When is an 'error' an error?
  - Is it worth the agency's time to correct?

# Our Time is Extremely Valuable Yours? Not So Much

- Short appeal deadlines
  - 20 days
    - SEC
  - 30 days
    - DOC, DoD, HHS, **OMB**
    - Dozens more
- Long appeal deadlines
  - 90 days (EPA)
  - No deadline (DOI)
- Firm or flexible?
  - 'Must', 'shall'
  - 'May', 'can'
  - 'Should', 'recommend'

# The Invented 'Stale' Information Exemption

- Customs and Border Protection
  - 'Request for correction of information must be submitted within a reasonable time, not to exceed one year from the initial data dissemination, or October 1, 2002, whichever is later.'
- Similar language
  - NPS, DOT, HUD, SBA, USDA



# Planned Unresponsiveness

- Firm deadline for RFC resp
  - US Secret Service (60)
  - Interior Dept (60)
- Firm deadline for RFR resp
  - OPIC (42)
  - NARA, SBA (45)
  - Justice Dept (45)
    - Except BJS (60, no limit)
    - Except ARB (no limit)
  - EOP/CEQ, USCCR (60)
- No firm deadline for RFC response
  - All other agencies
- No firm deadline for RFR response
  - Interior Dept, USCG
  - FMC, FTC, NRC, PBGC
- Unilateral authority to delay responding
  - All other agencies

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Oops.



# IRONIES

# U.S Air Force

- Petitioned Fish & Wildlife Service regarding information related to a threatened/endangered determination concerning Slickspot Pepper Grass
- USAF has not issued its own IQG, and thus has no error correction procedure for information it disseminates

# Federal Highway Administration (FHWA)

- 'White Paper' on Information Quality
  - Posted May 19, 2008
  - Promotes IQ principles, contests “seven myths”
  - Posting implies FHWA endorsement under IQA
  - Paper promotes some principles that violate IQA
- FHWA does not comply with IQA
  - Difficult to locate the IQG
  - Nonfunctioning links
  - No submission mechanism
  - Petitions not posted

# Executive Office of the President

- IQGs published
  - Office of Management and Budget
  - Office of Environmental Quality
  - Office of Science and Technology Policy
  - Office of Nat'l Drug Control Policy
- No IQGs published
  - Office of Administration
  - Council of Economic Advisors
  - US Trade Representative
  - White House Office
  - Office of the Vice President

The administrative procedure exemption.



# **JUDICIAL REVIEW**

# Alternative Administrative Procedures

- OMB IQG encourages use of existing mechanisms for correcting errors
- Most regulatory agencies require petitioners to use public comment process
- Does this obligate adherence to IQA standards in rulemaking?



# Can the Public Compel Agency Adherence Through Judicial Review?

- The law and OMB guidance are silent
- Until March 2010, courts have said 'no'
  - Only weak cases have been litigated
  - But see *Prime Time v. Vilsack* (CADDC)
- What would a strong test case look like?
  - Substantive merit
  - Information is crucial to major rulemaking
  - Agency committed itself to achieve IQA objectives in notice and comment process, but didn't actually do so
  - Petitioner followed prescribed procedures but obtained no relief
  - Agency response was missing or dismissive

A game-changing legal opinion



**PRIME TIME V. VILSACK**

Court of Appeals for the District of Columbia Circuit,  
No. 09-5099, Decided March 26, 2010

# Case Synopsis [1]

- Fair and Equitable Tobacco Reform Act levies assessments on manufacturers and importers based on market share
- Prime Time used IQA to petition to correct factual inaccuracies in the assessment procedure
- USDA did not respond to the petition

# Case Synopsis [2]

- Prime Time sued on multiple grounds including IQA violations
- District Court granted summary judgment to the government
- CADC reversed, ruling that
  - OMB's guidelines deserved *Chevron* deference.
  - Prime Time's IQA claim was barred by OMB's exclusion of adjudications from the definition of information 'dissemination' (§ V.8)

# Case Implications

- *Chevron* deference to OMB IQG would give them the force of law in any case where standing can be established
- Material agency noncompliance with OMB's IQG (or its own IQG) may be arbitrary and capricious conduct under the Administrative Procedure Act
- High-quality cases of material agency noncompliance are pending at the CADC
- IQA compliance will become mandatory

A user friendly database, public accountability.



## **FUTURE WORK**

# Improving Agency Compliance

- Publicize agency performance
  - Procedure
  - Substantive responses
- Themes to substantive responses
  - Petitioner claims exceed reach of the statute
  - Petitioner claims are valid
    - Correction does not threaten agency
    - Correction undermines past agency decisions
    - Correction undermines current agency policies

# Acknowledgements and Caveat

- Acknowledgements
  - Thanks to donors for unrestricted grants
- Caveat
  - All information quality errors in this presentation are mine

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