

POISONOUS PROCEDURAL “REFORM”:

In Defense of Environmental Right to Know

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I. INTRODUCTION AND SUMMARY

Information disclosure has become a widely used and highly valued government tool for protecting public health and the environment.¹ Disclosure, or “right to know,” programs are credited with bolstering traditional regulatory approaches and helping achieve significant reductions in pollution levels.² They also educate citizens about public health and environmental issues and empower them to take more active roles in addressing threats to their communities.³

At the same time, information disclosure programs have been the focus of increasing criticism, principally by representatives of the industries whose facilities, emissions, and products are subjected to public scrutiny as a result of these programs. One leading critic of disclosure programs is the Coalition for Effective Environmental Information (“CEEI”), which “includes representatives from the chemical, automobile, forest products, energy, electronics, petroleum, pharmaceutical, aerospace and consumer products industries”⁴ CEEI has produced

¹ See David Case, “The Law and Economics of Environmental Information as Regulation,” 31 Envtl.L.Rep. 10773 (2001); Bradley C. Karkkainen, “Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm,” 89 Geo. L. J. 257, 290 (2001).

² See Mark A. Cohen, “Information as a Policy Instrument in Protecting the Environment: What Have We Learned?” 31 Envtl.L.Rep. 10425 (2001); EPA, “Addition of Reporting Elements; Toxic Chemical Release Reporting: Community Right-to-Know,” 61 Fed. Reg. 51322 (1996) (“EPA considers Right-to-know to be among its most effective strategies for improving environmental performance.”).

³ See Stephen M. Johnson, “Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?” 56 Wash.& Lee L.Rev. 111, 150 (1999); Cass R. Sunstein, “Informational Regulation and Informational Standing: Akins and Beyond,” 147 U.Pa.L.Rev 613, 625 (1999).

⁴ See Letter from Mark Greenwood, CEEI, to Susan Wyatt, EPA (December 13, 1999) (on file at Georgetown Environmental Law and Policy Institute). See also id. (stating that CEEI is “a group of major companies and business organizations which share a common interest in federal policy on the collection, use and dissemination of environmental information”).

numerous position papers and other materials critiquing information disclosure programs, including a widely circulated "White Paper From Industry Coalition to EPA on Concerns Over Information Programs."⁵

Another group, the Center for Regulatory Effectiveness ("CRE"), a pro-business advocacy and consulting organization,⁶ has called for new restrictions on information disclosure and other reforms of EPA's information polices.⁷ CRE was a leading supporter of the controversial "data quality rider," which we discuss in some detail below.⁸ Another group, the American Chemistry Council (formerly the Chemical Manufacturers Association), has advocated

⁵ See Mark Greenwood, "White Paper from Industry Coalition to EPA on Concerns Over Information Program," reprinted in Daily Environment Reporter (BNA), E-1 (May 4, 1999) (hereafter cited as "White Paper").

⁶ The Center has been described in published reports as "industry-supported," see Bureau of National Affairs, Daily Environment Report, at A-1 (November 26, 2001), and as "conservative [and] business oriented." See Cynthia Skrzycki, "The Regulators," The Washington Post, at E-1 (April 24, 2001). The Center's leader on right to know issues, Jim Tozzi, was the Deputy Administrator at the Office of Management and Budget from 1972 to 1983. See id. The Center's web address is www.thecre.com. (last visited September 19, 2002).

⁷ See, e. g., Letter from Jim Tozzi to Mr. Edwin A Levine, EPA (May 2, 2000) (petitioning EPA to issue regulations to involve the public in development, maintenance, and modification of information products, and to ensure prompt correction of data errors in EPA internet resources); Letter from Jim Tozzi, CRE, to Brooke Dickson, OMB (August 10, 2001) (commenting on OMB's proposed guidelines implementing the data quality rider) (on file at Georgetown Environmental Law and Policy Institute).

⁸ See Jim Tozzi, "The Federal Information Triangle," Risk Policy Report (September 18, 2001) (describing CRE's role in developing and promoting the data quality rider). See also Andrew Revkin, "Law Revises Standards for Scientific Study," The New York Times (March 21, 2002) (describing data quality legislation as "supported, and largely written, by industry-backed groups"); Robert Gellman, "What? You Haven't Heard About Section 515?" 20 Government Computer News, No. 24 (August 20, 2001) ("Rumor has it that a lobbyist dreamed up the original idea [of the data quality rider] and sold it to a paying client and a gullible member of Congress.").

greater restrictions on commercially valuable business information and on the disclosure of information which could create risks to national security.⁹

The critics do not challenge the legitimacy or value of information disclosure programs *per se*. Instead, they criticize the administration of the programs by federal agencies (the Environmental Protection Agency (EPA) in particular), as well as the scope and volume of the information disclosed to the public. They contend that the use of information disclosure has become so important in advancing environmental protection goals that it should be subject to many of the same kind of restraints which apply to regulatory programs. Collectively, the industry critics have advocated three basic limitations on government disclosure of environmental information: (1) greater procedural rights to comment on and otherwise influence the information federal agencies disclose to the public related to private firms' facilities, emissions and products, including tighter controls on the "quality" of the data agencies disclose to the public; (2) more opportunities to go to court to challenge the administration of disclosure programs; and (3) new substantive restrictions on the disclosure of commercially valuable business information and information which may involve national security issues.

The purpose of this paper is to evaluate the industry criticisms of information disclosure programs and industry's agenda for reform. The basic conclusion is that many of the industry proposals related to administrative procedures and judicial review would undermine information disclosure programs in order to address unwarranted or exaggerated concerns about the possible adverse effects of information disclosure. In general, industry has not substantiated the premise of its proposals that environmental data disclosed to the public are of poor quality or that disclosures of environmental data have inflicted unfair harm on private firms. Moreover, the proposed reforms would likely have serious adverse consequences for the effectiveness of

⁹ See, e.g., Comments of American Chemistry Council to EPA on EPA's Advance Notice of Proposed Rulemaking on Public Information and Confidentiality (June 13, 2001); Letter from American Chemistry Council to Christine Todd Whitman, EPA (October 3, 2001) (on file at Georgetown Environmental Law and Policy Institute). The Council also submitted comments to EPA on the agency's proposed data quality guidelines. See EPA Docket # OEI-10014 at www.epa.gov/oei/qualityguidelines/dockets/docketsposted.htm (last visited September 19, 2002.)

disclosure programs. Greater procedural hurdles to information disclosure and more frequent judicial review would delay the disclosure of information to the public, divert agency resources from information disclosure activities to costly and time-consuming internal reviews, and enhance opportunities for industry to influence specific decisions about whether and how environmental information should be disclosed. Thus, seemingly innocuous “procedural” reforms would impede the flow of information to the public, defeating the important public objectives which the programs were set up to advance.

Industry proposals for new substantive limitations on information disclosure present a more complicated issue. Private firms which sell products to the public or which emit pollutants into the environment do not have an absolute legal right to block dissemination of information about their products or facilities to the public, even if such information can be classified as a “trade secret” or some other type of commercially valuable business information. Thus, determining whether to disclose this type of information ultimately requires a balancing of competing policy considerations. In our view, sound public policy will generally dictate public disclosure when it can reasonably be expected to advance an important public health or environmental protection goal.

On the other hand, in the aftermath of September 11, industry has raised some valid and important questions about whether the disclosure of certain environmental data, in particular related to releases of hazardous chemicals, needs to be more tightly controlled. The EPA and other agencies already have taken a number of steps to control access to information which might aid domestic or foreign terrorists. Nonetheless, there is a need for balance in this sensitive area as well. Disclosure of most kinds of environmental data does not raise a legitimate national security concern. Furthermore, over the long-term, the greater danger may well be created, not by public knowledge of the risks associated with potential releases of hazardous substances at certain facilities, but by the failure to eliminate or minimize the hazards and the lack of emergency response plans. Because public awareness of hazards can be a powerful spur to corrective action, disclosure of certain hazard information might ultimately do more to reduce risks than shielding the information from public view.

Two current controversies highlight the critical legal and policy issues raised by the debate over environmental information disclosure. First, federal agencies are in the process of implementing the “data quality rider,” a piece of substantive federal legislation adopted as a rider to the FY 2001 Treasury Department appropriations bill.¹⁰ The rider was reportedly added to the appropriations bill at the instigation of Representative Jo Ann Emerson,¹¹ with the support and encouragement of the Center for Regulatory Effectiveness. The rider advances some key elements of the industry agenda to obtain greater opportunities to intercede in and challenge the administration of disclosure programs. At the same time, there is significant uncertainty about how far this legislation goes, in particular with respect to judicial review of agency determinations to disclose information. In February 2002, the Office of Management and Budget promulgated guidelines to assist federal agencies in implementing the rider,¹² and individual federal agencies are in the process of developing their own agency-specific guidelines.

Second, Congress is considering a variety of legislative proposals to limit public access to environmental (and other) information in response to September 11. Two types of legislative proposals are being debated. One approach is to shield more information about potentially vulnerable plants and other facilities from public view. Another, not necessarily inconsistent approach, is to mandate that operators of vulnerable facilities take direct steps to minimize the risk of a disaster due to an accident or a terrorist attack. These issues may be thrashed out in the 107th Congress in the context of the debate over “homeland security” legislation.

Section II of this paper provides an overview of current environmental “right to know” programs. Section III explains, in theoretical terms, the functions and values served by information disclosure. Section IV is a thumbnail sketch of industry’s reform agenda. Sections

¹⁰ FY 2001 Consolidated Appropriations Act, P.L. No. 106-554.

¹¹ See OMB Watch, “Background on Data Quality Guidelines” (May 28, 2002), www.ombwatch.org/article/articleview/773/1/1/ (last visited September 19, 2002). See also www.thecre.com (documenting Representative Emerson’s advocacy of data quality guidelines) (last visited September 9, 2002).

¹² “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication,” 67 Fed. Reg. 8452-8460.

V through VII analyze and critique the three major elements of the industry's reform agenda. Finally, section VIII applies the analysis developed in the previous sections to comment on the data quality rider and information-related provisions of proposed national security legislation.

II. INTRODUCTION TO ENVIRONMENTAL INFORMATION DISCLOSURE PROGRAMS.

The primary reason information disclosure has recently emerged as an important environmental protection tool is that it is especially well adapted to an era in which massive quantities of information can be transmitted around the globe at lightening speed and at minimal cost. Computer technology makes information ever cheaper to “sift, analyze, and use,”¹³ allowing diverse users to assemble environmental data to suit their particular needs.¹⁴ On the other hand, industry critics also cite modern computer technology as one of the grounds for their concern about information disclosure policies. As observed by one commentator, “Through the Internet the government can now deliver a message about a company, product or facility to an unlimited number of world-wide customers instantaneously.”¹⁵

The following is a concise summary of the leading government (and private) right to know programs. (Readers thoroughly familiar with the existing programs may wish to skip ahead to the next section).

_____A. Federal Right to Know Programs.

_____ *Toxics Release Inventory (TRI)*. The TRI, probably the best known environmental disclosure program, is a national, electronic database providing public access to large volumes of pollution data. The Emergency Planning and Community Right-to-Know Act (EPCRA), which

¹³ Daniel Esty, “Toward Optimal Environmental Governance,” 74 *N.Y.U.L. Rev.* 1495, 1540 (1999).

¹⁴ Mary Graham, “Structuring Disclosure as Environmental Regulation” 7 (2000) (unpublished manuscript, on file at Georgetown Environmental Law and Policy Institute). See also Karkkainen, *supra* note 1, at 290 (“TRI multiplies the information value of reported data, allowing previously dispersed, fragmentary, and little-used bits of information to be assembled, manipulated, analyzed, and put to a variety of powerful new uses by environmental regulators, other public officials, interested community residents, investors, workers, and firms themselves”).

¹⁵ White Paper at E-1.

authorized the creation of the TRI, requires companies to report to EPA on their annual releases of toxic chemicals, facility by facility, chemical by chemical, and for all environmental media (land, air, and water).¹⁶ EPA personnel transfer the data into the TRI database, making the information accessible from any public or private computer. EPA's "TRI Explorer" website allows the public to access TRI data by facility, chemical, year, industry type, or geographic area.¹⁷

The primary impetus for the creation of the TRI was public concern about the hazards associated with industrial chemicals following the 1984 disaster at a Union Carbide plant in Bhopal, India, and several other, less publicized chemical accidents in the United States in 1985.¹⁸ In addition, the federal legislation helped promote a uniform national standard for toxic release reporting.¹⁹

The TRI has made enormous quantities of new information available to the public, and provided some firms with information that they themselves had not previously collected.²⁰ One widely cited statistic is that the TRI was associated with a 44 percent reduction in reported

¹⁶ 42 U.S.C. § 11023; 40 C.F.R. § 372.1 *et seq.*

¹⁷ See <http://www.epa.gov/triexplorer/reports.htm> (last visited September 19, 2002).

¹⁸ See 131 *Cong. Rec.* H11204 (Daily ed., Dec. 5, 1985) (statement of Rep. Sikorski) (referring to the Bhopal incident and the aldicarb and oxime releases at Institute, West Virginia); *id.* at S11665 (Daily ed., Sept. 18, 1985) (statement of Senator Lautenberg) (referring to "a series of less serious, but significant releases in the United States that suggest that we are far from immune from such dangers").

¹⁹ More than 25 states and numerous local governments had adopted community right to know laws at the time EPCRA was passed. Susan G. Hadden, *A Citizen's Right-to-Know*, 76 (1989).

²⁰ See Office of Pollution Prevention and Toxics, "EPA Issues Paper #2: Expansion of the TRI to Gather Chemical Use Information: TRI-Phase 3: Use Expansion" (1995) (<http://www.epa.gov/tri/programs/p3-ip2.htm>) (last visited September 23, 2002); (hereafter "EPA Issue Paper #2"). At the close of the Clinton administration, the TRI was expanded by lowering the threshold for mandatory reporting of lead pollution. See "Lead and Lead Compounds: Lowering of Reporting Thresholds; Community Right-to-Know Toxic Chemical Release Reporting," 66 *Fed. Reg.* 4499-4547 (2001).

releases of listed chemical over the first eight years of reporting after 1988,²¹ strongly suggesting that the availability and dissemination of TRI data spurred significant new public and private pollution control and prevention efforts.²² Another illustration of the TRI's impact is that the head of the Monsanto corporation, upon learning about the large volume of chemical releases by the company recorded in the TRI, pledged that the company would reduce its releases by 90 percent within four years.²³

TRI data reportedly serve a wide variety of purposes.²⁴ Congress has relied on TRI data in developing environmental legislation, such as the Clean Air Act Amendments of 1990. EPA uses TRI data to monitor companies' compliance with environmental standards, to target enforcement efforts, and to help assess whether new regulations are needed to address environmental problems. Educators and researchers use TRI data to study chemical compounds and develop technologies to prevent toxic releases. Labor unions use TRI data to press for safer working conditions. Public interest and community groups publish reports based on the data, and use the information to attempt to persuade private firms to reduce their emissions or press the government to impose new regulatory controls. The TRI also helps alert industry to unnecessary losses of raw materials in its production processes.²⁵

²¹ See EPA, "Addition of Reporting Elements; Toxic Chemical Reporting; Community Right-to-know," 61 Fed. Reg. 51322 (1996). According to EPA, the year 2000 TRI reports showed an eight percent decline in toxic releases posing serious health risks. Eric Pianin, "EPA Reports Decline in Pollution," The Washington Post, at 2 (May 24, 2002). However, environmental groups argue that this decline was more than offset by increases in production-related wastes. See id.

²² See EPA, "Proof Positive: TRI Success Stories," Chemicals in the Environment: Public Access Information, EPA 749-96-001b (Fall 1997) (describing companies who have decreased emissions and increased recycling based in whole or in part on the TRI program) (on file at Georgetown Environmental Law and Policy Institute).

²³ Graham, supra note 14, at 8.

²⁴ See OMB Watch, *A Citizen's Platform for Our Environmental Right-To-Know* 36 (March 2001) (on file at Georgetown Environmental Law and Policy Institute).

²⁵ Susan Hazen, "The History of TRI," Chemicals in the Environment: Public Access Information, EPA 749-R-96-001b (Fall, 1997) (on file at Georgetown Environmental Law and

OSHA Hazard Communication Standard. Another federal disclosure program, administered by the Occupational Safety and Health Administration (OSHA), requires employers to identify and warn their workers about chemical hazards.²⁶ OSHA’s Hazard Communication Standard, which was established by agency rule in 1983,²⁷ mandates the posting of warning notices in the workplace, training for chemical safety, and labeling requirements for containers and conduits.²⁸ Employers are required to post in the workplace Material Safety Data Sheets (MSDS), which describe the toxicity of chemical substances, primary routes of chemical entry or exposure, and applicable regulatory provisions and safety precautions as well as appropriate emergency first aid procedures.²⁹

Clean Air Act Section 112. Section 112 of the Clean Air Act directs EPA to promulgate regulations requiring facilities which handle large amounts of extremely hazardous chemicals to prepare and implement “risk management” plans to prevent accidental releases of these chemicals and to mitigate the potential adverse effects of releases on public health and the environment.³⁰ The regulations cover all regulated sources under the Clean Air Act which handle more than threshold amounts of hazardous substances.

The statute provides that a risk management plan must include (1) a hazard assessment and an evaluation of the potential consequences of releases for surrounding communities, including “worst case accidental releases;” (2) a prevention program; and (3) an emergency response plan. Covered facilities are required to file their risk management plans with EPA, which in turn is required to make the plans available to the public. As discussed in greater detail

Policy Institute).

²⁶ 29 C.F.R. § 1910.1200 (2001).

²⁷ 48 Fed. Reg. 53280 (1983). The program also benefits industry by establishing a uniform federal standard. See id. at 53281.

²⁸ 29 C.F.R. §§ 1910.1200(a),(b),(d)(2),(d)(5) (requirement to report adverse health effects), 1920.1200(g) (material safety data sheets); 1910.1200(h) (worker training) (2001).

²⁹ Id. at § 1200(g).

³⁰ 42 U.S.C. § 7412(r)(K).

below, in response to a public controversy over making the plans available to the public, Congress imposed a one-year moratorium on posting of off-site consequence analysis information on the internet,³¹ and EPA later revised its procedures to permit public access to the “worst-case” information only in designated reading rooms under tight restrictions.³² After September 11, EPA imposed even tighter restrictions on access to portions of the plans.

Safe Drinking Water Act. The Safe Drinking Water Act amendments of 1996 require public water companies to inform their customers when they violate contamination standards, fail to follow a treatment requirement or mandatory testing procedure, or neglect to perform required monitoring.³³ When a violation “has the potential to have serious adverse effects on human health as a result of short-term exposure,” companies must follow detailed procedures for alerting citizens about the dangers and the remedial steps being taken.³⁴ In addition, the statute requires each community water system to mail to customers an annual “consumer confidence report” describing the level of contaminants in the system’s water and the health concerns associated with each contaminant.³⁵ The Act’s reporting structure -- the first of its kind -- is described as a “dual” notification system, requiring reporting that is both local and direct as well as national and electronic.

Beach Bill. Another example of a right to know program at the federal level, also with a dual reporting structure, is the “Beach Bill.” In 2000, Congress amended the Clean Water Act to require states to notify the public when contamination levels make beach water unsafe for

³¹ The Clean Air Act defines “off-site consequence analysis information” to include “those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of 1 or more worst-case release scenarios or alternative release scenarios . . .” 42 U.S.C. § 7412 (7) (H) (I) (III).

³² See “Distribution of Off-Site Consequence Information,” 65 Fed.Reg. 48132 (2000), 40 C.F.R. § 1400.1 et seq.

³³ 42 U.S.C. § 300g-3(c)(1)(C).

³⁴ 42 U.S.C. § 300g-3(c)(2)(C).

³⁵ 42 U.S.C. § 300g-3(c)(4)(C).

swimming, surfing, and other recreational activities.³⁶ The legislation also requires coastal states to adopt minimum health-based criteria for water quality, and to comprehensively test recreational beach waters for pathogens. In addition, EPA is required to maintain a national database of contaminated waters. According to reports by the Natural Resources Defense Council, the number of beach closings and public warnings of beach contamination more than doubled over the past two years.³⁷ NRDC attributes most of the rise to increased monitoring, better testing and more thorough reporting. The bill's supporters maintain that the bill should provide an incentive for states and local communities to clean up their coastal waters and ultimately lead to a reduction in the number of required public warnings.

B. State Right to Know Programs.

Proposition 65. At the state level, the most prominent right to know measure is Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, adopted by California voters at the ballot box in 1986.³⁸ Proposition 65 uses public disclosure both as a public education tool and as an incentive for the establishment of strict controls on toxic releases. Proposition 65 requires firms which “knowingly and intentionally” expose any individual to chemicals on a state-maintained list to either eliminate the exposures or provide “clear and reasonable warning” to exposed individuals.³⁹ Both the government and citizens can enforce these obligations through civil enforcement actions. In order to avoid having to provide the required warnings, firms can choose to eliminate their toxic releases. However, Proposition 65 also provides an avenue for firms to obtain regulatory authorization to make limited releases of listed chemicals without public warnings. To obtain this authorization, the firms must

³⁶ P.L. No. 106-284, Beaches Environmental Assessment and Coastal Health Act of 2000 (codified at 33 U.S.C. §§ 1346, 1375a).

³⁷ Natural Resources Defense Council, “Testing the Waters: A Guide to Beach Water Quality at Vacation Beaches” (August 8, 2001); Natural Resources Defense Council, “Testing the Waters (2002): A Guide to Beach Water Quality at Vacation Beaches” (July 2002). (www.nrdc.org/water/oceans/ttw/titinx.asp) (last visited September 19, 2002).

³⁸ California Health and Safety Code, §§ 25249.5 to 25249.13 (West 1999 & Supp.2001).

³⁹ *Id.* at § 25249.6

demonstrate that the proposed exposure levels pose “no significant risk” of cancer and will have no “observable effect” in terms of reproductive toxicity.⁴⁰ Thus, in contrast to the usual incentives created by environmental laws for firms to resist the establishment of regulatory standards, Proposition 65 actually creates an incentive for firms to support the establishment of standards.⁴¹

Proposition 65 is credited with producing substantial reductions in releases of listed chemicals, such as lead.⁴² Proposition 65 "has been especially effective in the consumer marketplace. Because consumer demand can be extremely sensitive to disclosure of adverse health and safety information, . . . many businesses have elected to reformulate their products rather than provide warnings and risk significant sales losses."⁴³

Other State Laws. States also have adopted a broad range of right to know programs. A number of states have adopted disclosure programs which are similar to the TRI.⁴⁴ Some of these states enacted disclosure laws before Congress enacted EPCRA in 1986.⁴⁵ A few states have gone beyond federal law. For example, in Massachusetts and New Jersey manufacturers are required to report “materials accounting” information, that is, data about all the chemicals they use in their production processes.⁴⁶ The collection and reporting of materials accounting

⁴⁰ *Id.* at § 25249.10.

⁴¹ Karkkainen, *supra* note 1, at 345.

⁴² *Id.* at 345 & n. 369. *See also* Clifford Rechtschaffen, “How to Reduce Lead Exposures with One Simple Statute: The Experience of Proposition 65,” 29 *Envtl. L. Rep.* 10581, 10583 (1999) (Proposition 65 reportedly led companies to “shift[] long-standing means of production to avoid or minimize the use of lead”).

⁴³ Rechtschaffen, *supra* note 42, at 10591.

⁴⁴ *See, e.g.*, Worker and Community Right-to-Know Act, N.J. Stat. Ann., §§ 34:5A-1 to 34:5A-31 (West 2000); Pennsylvania Worker and Community Right-to-Know Act, Pa. Stat. Ann., tit. 35, §§ 7301-7320.

⁴⁵ Hadden, *supra* note 19, at 45.

⁴⁶ *See* David Case, “Legal Considerations in Voluntary Corporate Environmental Reporting,” 30 *Envtl. L. Rep.* 10375 (2000) (discussing Toxics Use Reduction Act, Mass. Gen.

information are credited with identifying opportunities for firms to achieve significant cost savings and to measure their progress in pollution prevention.⁴⁷ EPA has considered expanding the TRI database to include material accounting information,⁴⁸ but has not adopted this approach to date.

C. Private Environmental Information Programs.

The numerous government right to know programs have spawned various private information projects which utilize and build on the federal databases. The environmental advocacy organization Environmental Defense has established the “Scorecard” program which allows citizens to obtain information about sources of pollution in their own communities, and their possible health effects, by entering their zip codes into their home computer.⁴⁹ Another non-governmental program, “RTK Net,” run by OMB Watch, allows the public to search EPA databases for information on chemical accidents by facility, chemical, or geographic area.⁵⁰

Laws Ann. Ch. 211 §§ 1-23 (West 1991 and Supp. 2001), and Worker and Community Right-to-Know Act, N.J. Stat. Ann, §§ 34:5A-1 to 34:5A-31 (West 2000)).

⁴⁷ EPA Issues Paper #2, *supra* note 20; Carl Bruch & Roman Czebiniak, “Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters,” 32 *Envtl. L. Rep.* 10428 (2002).

⁴⁸ See EPA, “Addition of Reporting Elements: Toxic Chemical Release Reporting, Community Right-to-Know,” 61 *Fed. Reg.* 51322 (1996).

⁴⁹ See www.scorecard.org (last visited September 19, 2002).

⁵⁰ See <http://www.rtknet.org/rtkdata.html> (last visited September 19, 2002).

III. THE FUNCTIONS AND VALUES OF INFORMATION DISCLOSURE.

Advocates of environmental right to know programs maintain that information disclosure generates many environmental and other social benefits. Web sites are reportedly deluged with visitors and there is a good deal of anecdotal information about the effectiveness of disclosure programs. Nonetheless, how, exactly, does disclosure of data and other information help protect public health and the environment? Part A of this section seeks to answer this question. Part B describes the other apparent social benefits of information disclosure programs.

A. Information Disclosure Protects Public Health and the Environment.

Correcting Economic Market Failures. The case for government information disclosure programs rests in part on the concepts of “market failure” and “negative externalities” which explain why government intervention is needed to protect the environment in general.

From an economic standpoint, public health and environmental problems result from the failure of private firms to shoulder the full costs of their business decisions. Industrial activities can create significant costs by, for example, creating pollution problems for downwind or downstream neighbors or long-term risks for future generations. A firm could address these costs by installing pollution control equipment or implementing pollution prevention measures. But in a competitive market a firm usually has no incentive to take such steps because they will increase the firm’s expenses without increasing its revenues. Thus, the brutal logic of the market tends to encourage firms not to take on expensive environmental protection responsibilities. Or at least market forces have this effect in the absence of a reasonable guarantee, enforced through regulation or otherwise, that similarly situated firms will be required to shoulder the same responsibilities.

For the same reasons that firms in a competitive market generally lack an incentive to address the environmental problems they create, they also generally lack an incentive to disclose information about their environmental problems to either the government or the public.⁵¹

⁵¹ See generally Mary Lyndon, “Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data,” 87 *Mich. L. Rev.* 1795 (1989) (so long as buyers

Disclosure of information about the environmental problems created by a firm's operations could lead government officials to commence enforcement proceedings or to impose new environmental restrictions. New regulatory burdens would almost invariably reduce a firm's profits. Thus, just as firms in a competitive market have no incentive, in the absence of a government requirement, to solve their environmental problems, they also have no incentive, in the absence of a government requirement, to disclose information about their environmental problems.⁵²

The common sense conclusion that firms will not be inclined to disclose voluntarily information about public health or environmental problems has been repeatedly borne out by experience. A recent television program, entitled "Trade Secrets: A Moyers Report," disclosed that for many years chemical companies possessed but did not reveal to the public information about the health threats posed by vinyl chloride.⁵³ At the same time, the companies lobbied against new government information disclosure requirements.⁵⁴ More recently, a number of trade

have no way to identify the toxic effects of specific chemicals, chemical producers have no incentive to identify and publicize these effects); Tom Tietenberg & David Wheeler, "Empowering the Community: Information Strategies for Pollution Control" 2 (unpublished manuscript, October 1998) (paper prepared for Frontiers of Environmental Economics Conference, Arlie House, Va.) (October 23-25, 1998) (absent outside pressure, polluters do not normally share information on toxic emissions with the public) (on file at Georgetown Environmental Law and Policy Institute).

⁵² See Karkkainen, *supra* note 1, at 283-84 (private firms "lack adequate incentives to produce and disclose much of the information relevant to solving environmental problems"); Lyndon, *supra* note 51, at 1817 (tort system imposing liability for harm discourages manufacturers from producing information about harmful effects of products).

⁵³ See www.pbs.org/tradesecrets (last visited September 19, 2002).

⁵⁴ See *id.* The American Chemistry Council, formerly the Chemical Manufacturers Association, has frequently sought to limit the scope of chemical manufacturers' disclosure obligations. See, e.g., Petition of American Chemistry Council to EPA (October 26, 2001) (asking EPA to stop requiring companies to report Class I injections under TRI) (on file at Georgetown Environmental Law and Policy Institute); Chemical Manufacturers Association et al v. Browner, 924 F.Supp.1193, aff'd in relevant part, Troy Corp. v. Browner, 120 F.3d 277 (1997) (resolving in EPA's favor challenge by CMA to EPA's inclusion of 152 additional chemicals on list of chemicals companies must disclose under TRI).

associations working with the U.S. chemical, beef, and poultry industries sought to prevent the release of an EPA study on the dangers of dioxin.⁵⁵ The study reportedly concluded that consuming animal fat and dairy products with traces of dioxin can cause cancer in humans. As a matter of economics, it was entirely logical for the companies to oppose release of the study because it could have prompted the adoption of more stringent dioxin regulations.

Disclosure programs counteract the market forces which tend to deprive the public and government of the information they need to identify and address environmental problems. They help reveal pollution and other harms to the environment which have not previously been disclosed. If information disclosure leads to the public identification of new environmental problems, or if it makes the nature of problems clearer, legislators and other government officials can develop needed laws and regulations.⁵⁶ Information disclosure also helps counteract market forces by increasing public understanding and concern about environmental problems, creating a stronger constituency for the enactment of new laws and vigorous enforcement of existing laws.

Information disclosures also can help overcome market forces by prompting companies to take steps to address environmental problems they would not take voluntarily. Disclosure programs educate the general public, government officials, and private firms about problems at their facilities about which they were unaware.⁵⁷ The resulting threat of enforcement proceedings or of new restrictions may lead firms to take affirmative actions to eliminate a problem before the government intervenes. Disclosure programs also create a risk of loss of good will or of corporate embarrassment which may induce companies to take voluntary corrective action.

Finally, information disclosure programs counteract market forces because individual citizens and citizen groups can use environmental data directly to enhance protection of human health and the environment. Many federal environmental laws allow citizens to bring

⁵⁵ Eric Pianin, "Dioxin Report EPA On Hold: Industries Oppose Finding of Cancer Link, Urge Delay," The Washington Post at A-1 (April 12, 2001).

⁵⁶ Robert Percival, Environmental Regulation: Law, Science, and Policy, at 534-535 (3rd ed. 2000) (both Congress and EPA have used TRI data to develop additional environmental law and regulation).

⁵⁷ Karkkainen, supra note 1, at 295-305; Graham, supra note 14, at 21-22.

enforcement proceedings, and public access to environmental data can lead to evidence to support these cases. Community groups can use data on a firm's environmental problems to attempt to lobby the firm to address the problems. Consumers can rely on environmental data to assess a firm's environmental record and determine whether or not to purchase the firm's products or services.⁵⁸ Workers can choose to avoid workplaces which are likely to expose them to hazardous substances. Investors armed with environmental data may choose to avoid acquiring securities of a firm with a poor environmental record, both as matter of personal choice and out of concern about the firm's potential financial liabilities.

Correcting Political Failures. Just as information disclosure programs can help overcome the failures of the economic marketplace, they also can help overcome some of the failures of the political process which lead to environmental problems.

While the United States has a strong tradition of citizen advocacy for environmental protection, regulated businesses and the general public have widely divergent capacities to advocate on behalf of their different interests on environmental issues. A large segment of the public – indeed every citizen, arguably – has a broad, shared interest in protecting the environment. However, the very size of the constituency for environmental protection, and each citizen's relatively modest stake in each issue, makes it difficult to communicate with those who share this common interest, educate them about new problems, or generate political influence on any particular issue.⁵⁹ In economic terms, the public faces high "transaction costs" in trying to create an effective political force to advocate for environmental protection.⁶⁰

⁵⁸ See Graham, *supra* note 14, at 20. See also Percival, *supra* note 56, at 516-517. ("when individuals are informed and have choices, market forces can serve as a powerful complement to regulation to prevent environmental damage").

⁵⁹ See Jonathan R. Macey, "Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model," 86 *Colum. L. Rev.* 223, 229 (1986).

⁶⁰ See generally, Mancur Olson, *The Logic of Collective Action* (1965). Cf. Rena Steinzor, "Regulatory Reinvention and Project XL, Does the Emperor Have Any Clothes?" 26 *Envtl. L. Rep.* 10527 (October 1996) (local public interest groups lack the resources to evaluate "XL" proposals submitted to EPA when evaluation requires technical expertise).

By contrast, businesses subject to environmental regulation can be organized into an effective political force with relative ease.⁶¹ Regulated firms are relatively few in number, and many have major financial stakes in addressing the expenses imposed on them by environmental regulation. Private firms have little difficulty determining whether and how their self interests are affected by environmental decision-making.⁶² They have the resources to obtain expert scientific and other technical expertise and to support political advocacy efforts.⁶³ Thus, in comparison with advocates for environmental protection, business opponents of environmental regulation face relatively low “transaction costs.”

Second, the so-called "free-rider" problem tends to undermine the political power of advocates for environmental protection.⁶⁴ The benefits of working to achieve clean air or clean water accrue to everyone in society, and any individual citizen can share equally in these benefits regardless of how much individual effort he or she expends (e.g., by contributing financially to an environmental organization, or writing a letter to the local congressman). As a result, according to standard economic reasoning, individuals will, if they are rational economic actors, “free ride” on the efforts of others rather than invest their own time and energy in addressing the problem.

By contrast, the regulated community does not face a similar free rider problem. Because relatively few firms are subject to any particular environmental regulation, an industry coalition can more easily police and discipline potential free riders. While impassioned public advocacy

⁶¹ See Thomas McGarity, “The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld,” 75 Tex. L. Rev. 525, 532-33 (1997); Bruce Ackerman, “Beyond Caroline Products,” 98 Harv. L. Rev. 713, 727 (1985).

⁶² See Esty, supra note 13, at 1547-1548.

⁶³ Id.

⁶⁴ See E. Donald Elliot, *et al.*, “Toward a Theory of Statutory Evolution: The Federalization of Environmental Law,” J.L. Econ. & Org. 313, 342 (1985); Esty, supra note 13, at 1515-1516 (“Where pollution control is the central issue, each victim generally has too small a stake in the outcome . . . to be motivated to defend his or her interest”).

can overcome some of this imbalance, the free rider phenomenon also tilts the political playing field against effective expression of the public interest in environmental protection.

The final, related problem is the phenomenon of "agency capture," the tendency over time for regulatory agencies to turn into servants of the interests they are supposed to be regulating in the public interest. As stated by scholar Richard Stewart, "It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests."⁶⁵ The phenomenon of agency capture, too, often works against balanced environmental policies.

Government-mandated disclosure of information can help overcome all of these obstacles to the effective expression of society's interest in a clean and healthy environment. Disclosure programs lower transaction costs for citizens concerned about environmental issues by making it easier to obtain access to information helpful in mobilizing environmental advocates.⁶⁶

Similarly, disclosure programs can help address the free rider problem by lowering the "cost of admission" to the political process, thereby reducing the incentive to free ride.⁶⁷ Finally, disclosure programs help address the problem of agency capture by equipping the public with information it can use to monitor agency actions. As the U.S. Supreme Court observed in the case of Ruckelshaus v. Monsanto Company⁶⁸ – an important precedent on environmental right to know involving disclosure of public health data on pesticides – information disclosure provided

⁶⁵ Richard Stewart, "The Reformation of American Administrative Law," 88 Harv. L. Rev. 1669, 1713 (1975). See also Dion Casey, Note, "Agency Capture: The USDA's Struggle to Pass Food Safety Regulations," 7 Kansas J. Law & Pub. Pol. 142, 142-43 (1998) (cataloguing the explanations for agency capture). But see Bradford C. Mank, "Superfund Contractors and Agency Capture," 2 N.Y.U. Envtl. L.J. 34 (1993) ("Today, there is considerable disagreement regarding whether EPA has been captured" by industry or its own bureaucracy).

⁶⁶ See Karkkainen, supra note 1, at 316-323.

⁶⁷ See Nancy Burns, Kay Lehmann Schlozman & Sidney Verba, The Private Roots of Public Action: Gender, Equality, and Political Participation, 114 & n. 30 (2001) ("rational choice scholars have focused on the role of information . . . in generating action").

⁶⁸ 467 U.S. 986 (1984).

"an effective check on the decision-making processes of [the Environmental Protection Agency]."69

B. Other Benefits of Information Disclosure.

Apart from the environmental and public health benefits, information disclosure also advances other social goals.

Educating the Public. Information disclosure programs help educate the public about environmental and public health issues. The systematic gathering of information, combined with the technological capacity to organize and transmit vast amounts of data, offers citizens an opportunity to gain a new, far more extensive understanding of public issues. On the premise that an educated public is itself a public good, the educational value of disclosure programs represents a significant, independent social benefit of these programs.

Empowering Individual Citizens and Communities. Disclosure programs empower individual citizens exposed to environmental risks by enhancing their ability to identify the risks and take action to avoid or minimize them. To quote the Supreme Court in the Monsanto case, information disclosure "allows members of the public to determine the likelihood of individualized risks peculiar to their use of [a] product."⁷⁰ The website of the EPA Office of Information makes the same point: information disclosure "expands citizen understanding and involvement and gives people the tools to protect their families and communities as they see fit."⁷¹

Information disclosure programs also expand citizens' freedom of choice. If citizens obtain access to new information, or can obtain information more quickly and easily, they can

⁶⁹ *Id.* at 1015 (citing H.R. Rep. No. 95-343, p. 8 (1977) (remarks of Douglas M. Costle); S.Rep. No. 95-334, at 13). See also Thomas McGarity & Sidney Shapiro, "The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies," 93 *Harv. L. Rev.* 837, 841-844 (1980) ("[n]ondisclosure [of health and safety data] also may foster a pro-industry bias in agency decisionmaking"; disclosure permits independent observers to scrutinize data).

⁷⁰ 467 U.S. at 1015.

⁷¹ EPA Office of Information statement on goals: www.epa.gov/oei/goals.htm (last visited September 19, 2002).

make a host of decisions in a more informed fashion, about where to live, what products to buy, and what medical treatment to obtain. Similarly, disclosure programs allow workers to decide what type of work they are willing to undertake, what precautions to take to minimize exposure to hazardous substances, and the kind of medical care they receive. Finally, disclosure programs enhance the ability of communities, as well as governmental leaders, to understand and respond to the risks associated with specific facilities and other conditions that affect the community.

Expanding Individual Liberty and Autonomy. Another, related benefit of information disclosure programs is that they enhance individual citizens' sense of their own ability to protect their self interests and defend themselves and their families from external threats. "Members of the public have a legitimate interest in knowing the full health effects of products which receive agency approval so that they can decide for themselves whether to use them."⁷² The greater sense of individual liberty and personal autonomy fostered by disclosure programs represents an additional, independent benefit of disclosure programs. "If people are unaware of the consequences of their choices, they are, to that extent, less free."⁷³

Promoting Democratic Decision Making. Finally, information disclosure supports democratic decision-making. Information disclosure obviously helps maintain an informed citizenry. And only an informed citizenry can make the kinds of considered judgments which support meaningful and effective participation in the political process. As stated by James Madison, the principal author of the Bill of Rights:

A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.⁷⁴

⁷² McGarity & Shapiro, *supra* note 69, at 844.

⁷³ Cass Sunstein, "Informing America: Risk Disclosure, and the First Amendment," 20 *Fla.St.U.L.Rev.* 653, 655 (1993).

⁷⁴ James Madison, Letter to W.T. Barry, Aug. 4, 1822, in G.P. Hunt, ed., *The Writings of James Madison* 103 (1910).

The legislative history of the Freedom of Information Act, the original and still most important federal right to know statute, invokes the same reasoning: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."⁷⁵

Information disclosure also supports democracy by increasing the transparency of government decision making. Greater transparency helps citizens and public watchdogs evaluate whether government is addressing environmental and public health risks effectively. It also helps ferret out whether special interests might be undermining regulation in the public interest. As Justice Louis Brandeis succinctly observed, "Sunlight is . . . the best disinfectant."⁷⁶ Finally, transparency helps citizens monitor private firms' environmental performance and decide whether to support political action to correct environmental and related public health problems.

⁷⁵ See H.R.Rep. No. 1497, 89th Cong., 2d Sess., 12 (1966). See also Sunstein, supra note 3, at 625 ("From the democratic point of view, informational regulation . . . has substantial advantages. A well-functioning system of deliberative democracy requires a certain degree of information, so that citizens can engage in their monitoring and deliberative tasks. . . . A good way to enable citizens to oversee government action and also to assess the need for less, more, or different regulation, is to inform them of both private and public activity.").

⁷⁶ L. Brandeis, Other People's Money 62 (1933).

IV. PROPOSALS TO RESTRICT THE “PUBLIC RIGHT TO KNOW.”

As mentioned in the Introduction and Summary, industry critics of information disclosure programs advocate three basic types of reforms. This section provides a thumbnail sketch of these proposals. The following sections provide a critical evaluation of each set of proposals.

A. _____ Expanded Administrative Procedures.

First, the industry critics seek greater procedural rights to comment on and otherwise influence the information federal agencies disclose to the public related to their facilities and products, including tighter controls on the “quality” of the data agencies disclose to the public. This summary of this portion of the industry’s agenda is drawn from CEEI’s “White Paper from Industry Coalition to EPA on Concerns Over Information Program,” as well as other industry advocacy materials.

- *More Advance Notice.* As a logical first step in advancing its overall agenda, industry seeks greater advance notice of agencies’ plans to develop what industry calls “information products.” This novel term refers to any type of report or set of information released to the public. By using the term “product” industry no doubt seeks to reinforce the argument that information has concrete consequences in the real world and, therefore, its release should be accompanied by the full panoply of procedural safeguards which apply to other kinds of agency actions. To provide a specific illustration of what industry is seeking, CEEI proposed that EPA publish an “Information Products Agenda,” which would describe all “the information products that the EPA Headquarters and Regional offices have under development” as well as provide the schedule for their issuance and agency contacts regarding them.⁷⁷
- *Stakeholder Involvement.* Industry makes the closely related proposal that agencies provide more opportunities for stakeholder involvement in the development of information products. Thus, CEEI proposed that EPA develop a

⁷⁷ White Paper at E-13 to E-14.

policy "requiring timely public engagement on the policy aspects of [information] products (e.g., methodology, data quality, content of public message)," and that it adopt "criteria [to] determin[e] the extent of stakeholder involvement," including for defining "situations where public engagement is not necessary."⁷⁸ Another proposal is to amend the Administrative Procedure Act to mandate stakeholder involvement in the development of information products, linking the extent of stakeholder involvement "to the potential impact of the [product], its complexity, the use of data for 'secondary' purposes and the overall policy content" of the information product.⁷⁹

- *Product Stewardship.* One of the often cited virtues of federal right to know programs is that they typically provide the public the opportunity to sift and manipulate data in myriad ways to develop their own analysis and conclusions. Industry takes an opposite tack by proposing that federal agencies establish clear limitations for the appropriate use of data. In materials prepared for the Bush transition team, industry advocated that EPA "provide a clear explanation of the data's parameters and limitations (e.g., age, scope, data collection methodology)."⁸⁰ Under the heading of "product stewardship," industry proposed that EPA "define the purpose and audience for the information product that is being developed or maintained," that EPA "establish the expectations of the information product," and that EPA define "[w]hat process steps, such as peer review and public comment, are appropriate" in the development of the information product.⁸¹

⁷⁸ *Id.* at E-14.

⁷⁹ *Id.* at E-15.

⁸⁰ Bush Transition Paper, Explanations of Recommendations: Data Quality (on file at Georgetown Environmental Law and Policy Institute).

⁸¹ *Id.* at Appendix 4.

- *Product Testing.* Also under the heading of “product stewardship,” industry proposes that federal agencies “beta-test” different versions of information products before releasing them to the public. This testing would involve creating a prototype of the information product and using focus groups or similar techniques to evaluate whether the prototype will convey the intended message to the target audience.⁸² Once a product has been issued, EPA also would continually evaluate the use and usefulness of the product.⁸³
- *Notification of Change of Use of Data.* Industry proposes that EPA provide notice and an opportunity to comment before deciding to use data for a purpose which is different from the purpose for which the information was originally submitted.⁸⁴ CEEI has asserted that “when EPA tries to use its databases for purposes outside of their original intent, . . . the data is seldom well-suited to these secondary purposes.”⁸⁵ They also argue that “different objectives require different levels of data quality,”⁸⁶ and that different data users have differing abilities to understand the limits of the data. For example, CEEI questions the legitimacy of sharing data collected and used by state and EPA regulatory offices with the general public, reasoning that “[t]hese potential users of EPA’s web site will not see the data

⁸² *Id.* at 18.

⁸³ *Id.*

⁸⁴ White Paper at E-14. See also Bush Transition Paper, Appendix 2 (The Data Quality Challenge) at 9, 10 (objecting to EPA’s use of information for a purpose or audience different than original purpose or audience); CRE website, www.thecre.com/information/index.html (last visited September 19, 2002) (proposing amendment to the Paperwork Reduction Act which would “express[ly] require[] that agencies seek renewed OMB approval of previously authorized ‘collections of information’ before the agency embarks on new and different uses of the data”).

⁸⁵ Bush Transition Paper, Appendix 2 (The Data Quality Challenge), at 9.

⁸⁶ *Id.*

through the eyes of the government program managers, understanding the limitations inherent in the data."⁸⁷

- *Error Correction Process.* Industry proposes that EPA develop a rigorous system to identify and correct errors in agency databases,⁸⁸ or in the alternative that the Administrative Procedure Act be amended to impose such a mandate.⁸⁹ CEEI has proposed that errors should be corrected on an expedited basis once they are identified, that the correction process be transparent to the public, and that the agencies clearly identify all accountable public officials.⁹⁰ CEEI has gone so far to propose that, "if an error is not corrected in all government systems within a fixed time, the relevant data files should be closed for repairs." CRE has advocated that an independent ombudsman oversee the error-correction process, and that agencies be required to comply with the ombudsman's recommendations and findings within a specified time frame, unless the agencies provide a "reasoned" justification for not doing so.⁹¹
- *Right to Petition to Modify Characterization of Information or Public Message.* Industry has advocated that EPA "establish a more systematic process for stakeholders to petition the Agency to change a characterization of a particular environmental risk, condition or performance."⁹² The proposed process would permit stakeholders to "request and obtain a timely response on proposals to

⁸⁷ Id. at 10.

⁸⁸ White Paper at E-14.

⁸⁹ White Paper at E-15.

⁹⁰ Id.

⁹¹ Letter from Jim Tozzi, CRE to Brooke Dickson, OMB (August 10, 2001) (commenting on OMB's proposed guidelines on data quality) (on file at Georgetown Environmental Law and Policy Institute).

⁹² White Paper at 14.

change the messages that EPA is delivering to the public."⁹³ Proposed grounds for requesting a change in characterization would include the availability of new information or the need for fuller analysis. According to CEEL, "EPA should commit to timely response" to petitions filed with the agency, and should include "the petitioner and other interested parties" in the review process.

- *Outside Decision-Maker.* Finally, industry has proposed that an entirely new information decision-maker be created outside EPA. This proposal is based on the view that "EPA has adopted a 'right to know' philosophy as a core component of its mission" and, therefore, EPA "has difficulty maintaining neutrality in balancing disclosure and other interests."⁹⁴ The proposed outside decision-maker would determine the appropriate balance between the public interest served by disclosure and other interests, including national security and business confidentiality. EPA staff would be reduced, in effect, to "the advocate within the government for full disclosure of environmental data."⁹⁵

B. Expanded Judicial Review.

Second, industry has sought more opportunities to go to court to challenge the implementation of disclosure programs. In pursuing this specific agenda item, industry has advanced along two distinct lines – the Administrative Procedure Act and the Federal Tort Claims Act.

Administrative Procedure Act. The Administrative Procedure Act (APA) is the general federal statute establishing court review of agency actions. The APA authorizes the courts to determine, among other things, whether agency actions are arbitrary, capricious, an abuse of

⁹³ *Id.*

⁹⁴ White Paper at E-15.

⁹⁵ *Id.* In apparent contradiction to the proposal to create an independent decision-maker outside EPA, industry also has proposed establishment of "an ombudsman function in the Agency that would serve as a clearinghouse for members of the public interested in information issues." *Id.* at E-14. Staff assigned to this function would "help[] the public understand the Agency's large holdings of information" and "provide valuable advice for those seeking better information."

discretion, or otherwise not in accordance with law.⁹⁶ At the same time, the APA is only a limited waiver of the sovereign immunity of the United States and specifically does not authorize suit when a federal statute precludes judicial review,⁹⁷ or where a decision is "committed to agency discretion by law."⁹⁸

Industry has proposed to expand judicial review under the Administrative Procedure Act, first, by directly amending the APA to authorize more judicial challenges to information disclosures. For example, CEEI has proposed amending the APA to authorize suit based on "information products with a strong policy content and private sector impact,"⁹⁹ or based on "publicly disseminated information that is false or misleading."¹⁰⁰

Industry also has proposed that Congress enact specific legislation establishing procedural and substantive rules for disclosure programs, on the theory that such legislation would provide federal courts with "law to apply" in a suit brought under the Administrative Procedure Act. As discussed, the APA authorizes federal courts to determine whether agencies have acted "contrary to law." According to industry's legal theory, if a federal information statute supplies the "law," then judicial review should be available under the APA, so long as the normal jurisdictional and other prerequisites to suit under the APA have been satisfied. Thus, for example, industry proposed enactment of "a federal law that prohibits the disclosure of information about private parties that can be shown to be false or misleading," reasoning that such a law "would support the conclusion that information products can be 'agency actions' under the APA and would provide courts with 'law to apply' in resolving specific disputes."¹⁰¹

⁹⁶ 5 U.S.C. § 706 (2)(A).

⁹⁷ 5 U.S.C. § 704 (2000).

⁹⁸ 5 U.S.C. § 701(a) (2000).

⁹⁹ White Paper at E-15.

¹⁰⁰ Bush Transition Paper, Summary of Recommendations at 2; Explanations of Recommendations, Accountability at 2.

¹⁰¹ Bush Transition Paper, Summary of Recommendations at 2.

As discussed below in section VIII, industry succeeded several years ago in persuading Congress to pass the data quality rider, which requires the Office of Management and Budget and individual agencies to publish data quality guidelines. Whether that statute, or the guidelines promulgated under the legislation, supply law to apply sufficient to support judicial review under the APA is a matter of heated debate.

_____ *The Federal Tort Claims Act*. Industry also has proposed amending the Federal Tort Claims Act (FTCA) to authorize tort suits against the United States based on the adverse effects of certain types of information disclosures.

The FTCA establishes that the United States is generally liable for the tortious acts or omissions of government employees while acting within the scope of their employment, "under circumstances where the United States, if a private person, would be liable to the claimant."¹⁰² However, the FTCA preserves immunity in two contexts which are relevant for information disclosure policy. One provision bars claims against the United States based on libel, slander, or misrepresentation.¹⁰³ A government agency's disclosure of inaccurate or misleading information might conceivably support a claim under one or more of these legal theories and, thus, absent the preservation of immunity, might support a claim for damages against the United States.

Another provision broadly exempts the government from liability for claims "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹⁰⁴ Implementation of information disclosure programs might well be viewed as falling within the scope of the "discretionary function" exception.

The business coalition has proposed modifying the FTCA, first, by eliminating the provision preserving immunity from suit for claims based on libel, slander, or

¹⁰² 28 U.S.C. § 1346(b)(1) (Supp. 1999). See also *Kosak v. United States*, 465 U.S. 848, 855 (1984) ("One of the principal purposes of the [FTCA] was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault.").

¹⁰³ 28 U.S.C. § 2680(h) (1994).

¹⁰⁴ 28 U.S.C. § 2680(a) (1994).

misrepresentation.¹⁰⁵ Second, they propose to explicitly authorize suits against the United States based on “‘intentional disclosure of false information’ or ‘reckless disregard for the truth.’”¹⁰⁶ The latter proposal would limit the scope of the FTCA “discretionary function” exception for information disclosures.

C. New Substantive Limits on Information Disclosure.

Finally, the business coalition has proposed expanding restrictions on disclosure of certain types of “trade secret” information and information related to national security.

Trade Secrets. Under various federal statutes, including the Freedom of Information Act and the Emergency Planning and Community Right-to-Know Act, “trade secrets” and other confidential business information are exempt from public disclosure. According to industry critics, however, these protections are inadequate because they authorize government officials to disclose information which, though not secret or confidential in itself, could lead to the disclosure of secret or confidential information. They contend that, as a result of “modern trends in information access,” determined experts could “assemble disparate pieces of information about a facility, a product or other business-related activity into a ‘mosaic’ picture that can reveal a strategic secret about a company.”¹⁰⁷

They contend that current EPA disclosure policies fail to take account of the “mosaic” effect. They object, for example, that EPA requires disclosure of polluter emission data which includes detailed information about the operations of specific facilities. They also object that applications for discharge permits under the Clean Water Act cannot be claimed as confidential even though they may include detailed “process flow” diagrams which could lead to the disclosure of confidential or secret information.

In developing recommendations to address these concerns, the business coalition starts from the premise that if particular information can be classified as “secret” or “confidential” it should be absolutely protected from disclosure – a premise which, as we discuss in a later

¹⁰⁵ White Paper at E-2, E-15.

¹⁰⁶ *Id.* at E-15.

¹⁰⁷ White Paper at E-10.

section, is highly problematic. Building on that questionable premise, industry critics have urged EPA to investigate whether secret or confidential information may be disclosed as a result of the "mosaic" effect.¹⁰⁸ They also have urged EPA to revisit its interpretations of current law to determine whether the agency has gone too far in requiring disclosure of information which, because of the mosaic effect, could lead to the disclosure of commercially valuable information.

National Security. Finally, industry has argued for confidential treatment of information which may implicate national security interests, asserting that "public release of information, including environmental data, can assist terrorists seeking to identify targets for their operations," and that disclosure of environmental data may "provid[e] a blueprint for terrorists on how to inflict the maximum damage upon a community or a company."¹⁰⁹ Not surprisingly, the vigor with which these arguments have been expressed, the scope of the industry proposals, and the willingness of the government and the public to entertain them, have all changed significantly since September 11.

Prior to September 11, the most significant controversy over the potential effects of disclosure of environmental information on national security interests arose as a result of EPA's plan to post on the internet "risk management plans" addressing potential accidental releases of "extremely hazardous materials" at industrial and other types of facilities. EPA took this action pursuant to section 112 of the Clean Air Act which, as discussed above, mandates the preparation and public dissemination of risk management plans. The controversy centered around the proposal to disclose so-called "off-site consequence analysis information," which describes one or more worst-case or alternative release scenarios, assuming extremely hazardous materials are released. The Chemical Manufacturing Association raised the concern, which the FBI later embraced, that release of such information, including specific information about potential risks to nearby communities, could facilitate or encourage terrorist attacks on particular facilities.¹¹⁰ In

¹⁰⁸ *Id.* at E-15.

¹⁰⁹ White Paper at E-9.

¹¹⁰ *See* The Chemical Manufacturers Association, "The Terrorist Threat in America" (April 1998) (raising concern that EPA's plan to place worst-case scenario information on the internet would increase the risk of terrorist attacks).

response to these concerns, Congress in 1999 enacted the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act,¹¹¹ which imposed a one-year moratorium on posting of off-site consequence analysis information on the internet.¹¹² In August 2000, EPA issued a regulation jointly with the FBI establishing an indefinite ban on posting off-site consequences information on the web.¹¹³ Following September 11, EPA removed the remaining portions of risk management plans that had been posted on EPA's website.¹¹⁴

Industry and its allies focused on the issue of national security with a great deal more intensity following September 11. For example, the American Chemistry Council wrote to EPA on October 3, 2001, urging EPA to revisit its policies on public availability of certain industry data, and encouraging EPA to bar, at least temporarily, any public access to off-site consequence analysis data.¹¹⁵ A representative of a conservative think tank testifying before a committee of the House of Representatives urged EPA to eliminate all types of public access to off-site

¹¹¹ P.L. No. 106-40 (August 5, 1999).

¹¹² Id. at § (a)(H)(iii).

¹¹³ See “Distribution of Off-Site Consequence Analysis Information,” 65 Fed. Reg. 48108 (2000). The rules allow the public to review off-site consequences information only in designated reading rooms, and permit an individual to review information on only ten facilities per month. 40 C.F.R. § 1400.3. The public also may not photocopy the information. Id.

¹¹⁴ See EPA, “Chemical Accident Prevention and RMP,” (www.epa.gov/ceppo/review.htm) (last visited September 9, 2002) (“RMP files that do not contain OCA Information have been temporarily removed by EPA from its website in light of the September 11 [sic]. EPA is reviewing the information we make available over the Internet and assessing how best to make the information publicly available.”) (updated December 5, 2001); see also OMB Watch, Access to Government Information Post September 11th (updated May 3, 2002) (www.ombwatch.org/article/articleview/213/1/104/#agency) (last visited September 19, 2002).

¹¹⁵ See Letter from American Chemistry Council to Christine Todd Whitman, EPA (October 3, 2001) (on file at Georgetown Environmental Law and Policy Institute).

consequence data.¹¹⁶ In addition, as discussed in section VIII, a number of bills were introduced in Congress to address the issue.

In response, federal and state agencies took various steps to limit access to information the disclosure of which might create a national security concern. In addition to limiting access to risk management plans prepared under the Clean Air Act, EPA removed from its website information describing the adverse effects associated with exposures to different airborne chemicals,¹¹⁷ and eliminated the public's ability to construct its own data queries using the Envirofacts database.¹¹⁸ The President also issued an Executive Order authorizing the Administrator of EPA to classify information as "secret."¹¹⁹ Other federal agencies also eliminated access to various kinds of data related to public health and the environment. For example, the U.S. Geological Survey removed reports on water resources from the internet, the U.S. Department of Transportation removed its pipeline mapping system, and the Agency for Toxic Substances and Disease Registry removed a report on chemical plant security.¹²⁰ At the

¹¹⁶ See Testimony of Amy E. Smithson, Director, Chemical and Biological Weapons Non-Proliferation Project, the Henry L. Stimson Center, Hearings Before the House Transportation and Infrastructure Committee on Water Resources and the Environment, November 8, 2001. See also Angela Logomasini, "Innocent No More," The Washington Times, at A-25 (September 27, 2001) (Director of Risk and Environmental Policy at the Competitive Enterprise Institute calls for re-evaluation of law requiring disclosure of facilities' risk management plans in light of recent terrorist attacks); Jonathan Adler, "How EPA Helps Terrorists," The National Review, (Sept. 27, 2001) (available at <http://www.nationalreview.com/comment/comment-adlerprint092701.html>) (last visited September 18, 2002) (urging EPA to limit public access to risk management plans).

¹¹⁷ See OMB Watch, Information Restriction Policies (www.ombwatch.org/article/articleview/213/1/104) (last visited September 19, 2002) (discussing removal of exposure guidelines for short-term exposure levels of hazardous substances from EPA's website).

¹¹⁸ Id.

¹¹⁹ 67 Fed. Reg. 31109 (2002).

¹²⁰ See <http://www.ombwatch.org/article/articleview/213/1/1> (last viewed September 19, 2002).

state level, the State of New Jersey removed information about private facilities' use of chemicals from the internet.¹²¹

¹²¹ See id.

V. RESPONSES TO PROPOSALS FOR "PROCEDURAL REFORM."

This section turns to an evaluation of industry's reform agenda, starting with industry's demand for more procedural opportunities to intervene in the implementation of disclosure programs. Industry's basic case for procedural reform is that the data released through federal disclosure programs are frequently inaccurate and that business has a constitutional right to participate in information disclosure decisions affecting its interests. As discussed below, neither argument is persuasive. Ultimately, resolution of the issue turns on a balancing of public policy considerations. While the proposed procedural reforms offer potential benefits to industry, they also threaten to hamstring disclosure programs with time-consuming and largely wasteful administrative process.

A. ___ Weak Factual Basis.

An essential premise of industry's proposals is that the quality of data disclosed to the public is often poor, leading to inaccurate conclusions about environmental conditions. However, this important premise is merely implicit in industry's advocacy materials. Industry has not substantiated that there are serious and pervasive problems with data accuracy and, in fact, there is significant evidence refuting the premise. Over the past several years, in response to industry complaints, EPA has developed an elaborate process for tracking data errors on eight EPA on-line data systems."¹²² According to a recent EPA report, actual data errors detected through this process were "very few."¹²³ Many of the error notices submitted to EPA "provided updated information and were not 'errors' in data reported, data entry, data processing, and data displayed."¹²⁴ According to EPA's report, for the approximately one million pieces of

¹²² See www.epa.gov/OEI/quality.htm (last visited September 19, 2002).

¹²³ EPA Office of Environmental Information, "Integrated Error Correction: Setting the Record Straight" (Annual Report 2001) at 22 (on file at the Georgetown Environmental Law and Policy Institute).

¹²⁴ Id.

information covered by the error tracking process over a 17-month period,¹²⁵ EPA either corrected or was reviewing a total of 13 pieces of “environmental data” and either corrected or was reviewing 27 pieces of data concerning violations.¹²⁶ The majority of the data notices concerned facility characteristics rather than emissions.¹²⁷ In sum, the actual of number of significant errors recorded was extraordinarily small.

Furthermore, even on the assumption that some errors do creep into the system, industry has presented no evidence of actual impairment of corporate good will, loss of competitive advantage, or other economic injuries as a result of inaccurate data. While it is obviously worthwhile for EPA to pay attention to data quality, the case for mounting a major, costly effort to address the problem of inaccurate data requires some showing that data inaccuracies actually matter.¹²⁸

Finally, again assuming that some errors do occur, it is far from apparent that the best remedy would be to stop disclosing the information to the public pending the development of perfect information. As discussed above, one industry proposal is to shut down public access to web sites if an agency does not correct a data error within a specific time period. This approach hardly provides an incentive for businesses, which are generally in the best position to correct data errors about their operations, to identify errors and remedy them. On the other hand, if databases remain publicly accessible, firms’ self interest in correcting errors should work to help improve the accuracy of public databases.

B.____ Weak Constitutional Argument.

¹²⁵ Id. at 4, 23.

¹²⁶ Id. at 24, 25.

¹²⁷ Id.

¹²⁸ It is apparent that EPA, whether with good cause or not, is investing significant resources in addressing data quality concerns. See e.g., “EPA Strategic Information Plan: A Framework for the Future,” 6-9 (July 29, 2002) (available at www.epa.gov/oei) (last visited September 25, 2002) (cataloging ongoing agency efforts to improve data and information quality).

The other principal industry argument for greater process is that expanded process is constitutionally mandated. For example, the CEEI White Paper states:

A core value of democracy is that government must be accountable to the public for the effects of its decisions. In the U.S. Constitution this principle has been expressed as the government's duty to provide 'due process of law' before depriving a citizen of life, liberty or property. In support of this principle, a broad array of federal and state laws have been enacted to assure that administrative agencies provide fair notice to the public of their intentions . . . [and] an effective opportunity for citizens to participate in the decision making process.¹²⁹

As a legal matter, this constitutional argument is wholly unfounded.

First, while the release of environmental data and other information could potentially harm a firm's public reputation, and possibly undermine its financial position, government information disclosure is generally not viewed as affecting a protected "property" interest under the Due Process Clause. In Paul v. Davis,¹³⁰ the Supreme Court held that damage to an individual's reputation as a result of government action does not affect a property interest subject to due process protection. Numerous lower federal courts have relied on this precedent to reject due process claims based on alleged injuries to firms' reputations or corporate goodwill arising from government dissemination of information.¹³¹

¹²⁹ White Paper at E-2.

¹³⁰ 424 U.S. 693, 701 (1976).

¹³¹ For example, in Cypress Insurance Company v. Clark, 144 F.3d 1435 (11th Cir. 1998), the plaintiff claimed it was damaged by defamatory statements made by a government employee. The Eleventh Circuit held that under Paul v. Davis, "allegations of injury to reputation alone do not support a section 1983 claim for violation of due process." Id. at 1436. Similarly, in Von Stein v. Brescher, 904 F.2d 572, 582-584 (11th Cir. 1990), the plaintiff alleged that a government official's allegedly defamatory statements to the media deprived the company of its goodwill and reputation without due process of law. The court held that this claim did not suffice to invoke the guarantees of the Due Process Clause. Id. at 581. See also Doe v. Bagan, 41 F.3d 571, 575 (10th Cir. 1994) (allegation of defamation resulting from government action does not fall within protected due process property interest); Goulding v. Feinglass, 811 F.2d 1099, 1102-1103 (7th Cir.), cert. denied, 482 U.S. 929 (1987) (allegedly defamatory statements made by I.R.S. employees did not deprive tax lawyer of liberty or property interest where lawyer was not foreclosed from practicing law, even if comments made lawyer "less attractive to clients").

Second, regardless of whether the publication of certain information affects a "property" interest, such a disclosure probably does not constitute a "deprivation" of that interest within the meaning of the Due Process Clause. For example, in Waxman Technologies, Inc. v. L. Miller, Jr.,¹³² a federal appeals court rejected a due process claim based on a county's release of a report allegedly containing defamatory information about a firm. The court held that the publication of the information did not constitute a "deprivation" of the company's "goodwill or any state right or status."¹³³ Similarly, in Industrial Safety Equipment Ass., Inc. v. EPA,¹³⁴ another appeals court rejected a claim that an agency publication criticizing the plaintiff's respiratory protection devices deprived the company of a property right. The court ruled that the firm possessed a property interest in a government-issued certification for its product, but concluded that the publication did not implicate the Due Process Clause because it did not directly affect the certification and "only introduced new information into the market with a possible effect on competition."¹³⁵

Finally, the procedural protections of the Due Process Clause generally do not apply to information disclosure programs because procedural due process can only be invoked in the adjudicatory context.¹³⁶ As stated in a well-respected treatise, "Procedural due process does not apply when government makes a policy decision that has an adverse impact on an entire classification of individuals or firms."¹³⁷ Supreme Court due process decisions recognize a distinction "between proceedings for the purpose of promulgating policy-type rules or standards,

¹³² 197 F.3d 367 (9th Cir. 1999) (en banc).

¹³³ Id. at 374.

¹³⁴ 837 F.2d 1115 (D.C. Cir. 1988).

¹³⁵ Id. at 1122.

¹³⁶ Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). See also Edward Rubin, "Due Process and the Administrative State," 72 Calif L. Rev. 1044 (1984) ("There is no due process requirement that minimum [due process] procedures attend all government actions").

¹³⁷ 2 Richard J. Pierce, Jr., Administrative Law Treatise, § 9.2 (4th ed. 2002).

on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."¹³⁸ This "general-specific" distinction is rooted in the underlying rationale for procedural due process protection: government proceedings affecting specific individuals have a special potential to create unfairness and abuse. Broadly applicable government policy decisions do not carry the same risks.

In short, the Due Process Clause does not mandate that EPA and other federal agencies afford private firms any particular types of procedural protection prior to publishing information relating to their environmental performance. As a result, the case for procedural restrictions must be analyzed in conventional policy terms by identifying and weighing the relevant costs and benefits of each proposal.

C. Policy Arguments.

From the industry standpoint, the case for increased process is relatively simple. Business has an interest in ensuring that little or no negative, inaccurate information about its operations is released to the public. And private firms certainly have a legitimate argument that, as a matter of fairness, publicly released information should be as accurate as possible. But the larger question is whether the benefit to industry from more process is outweighed by the public costs of more process, especially given industry's meager showing that its proposals are designed to address a significant data quality problem.

Industry's proposals for increased administrative process must be evaluated in light of the likely effects of these proposals on the effectiveness of disclosure programs. Legal scholars have recognized, in a variety of different contexts, that increased administrative process can adversely affect the speed and effectiveness of agency decision making. As stated in one recent analysis, the "enemies of government regulation can think of no more expeditious way to frustrate the agencies than to impose on them additional requirements of procedural due process."¹³⁹

¹³⁸ United States v. Florida East Coast Railway Co., 410 U.S. 224, 245 (1973).

¹³⁹ Michael C. Dorf & Charles F. Sabel, "A Constitution of Democratic Experimentalism," 98 Colum. L. Rev. 267, 442 (1998). See also George B. Sheppard, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," 90 Nw.U.L.Rev. 1557, 1679 (1996) (characterizing conservatives' efforts during the negotiations

Furthermore, it is a commonplace observation that advocacy of more process can serve as an effective strategy to undermine regulations which may be difficult to challenge directly either through the legal or the political process. As Professor (now Justice) Antonin Scalia once observed, “An interest group which cannot advance its goals of eliminating” an agency’s authority “may, quite rationally, settle for imposition of cumbersome procedures that at the least reduce the extent to which” agency authority can be exercised.¹⁴⁰

Industry's demands for "procedural reform" threaten to impose three kinds of burdens on the administrative process.

Delay. First, greater procedural process would mean delays in the release of information to the public. For example, providing advance notice and an opportunity to comment on proposed “information products” would consume time and retard the publication of information products. The elaborate "stakeholder involvement" process would likewise delay information disclosure. These proposals and others, by creating new agency decision-making points, as well as associated opportunities for public involvement, would inevitably slow the flow of information to the public.

Delay in the release of environmental data to the public already is a serious problem. For example, according to EPA sources, it now takes about two years from the time EPA receives TRI data until EPA releases them to the public. The 2000 TRI data were not released until the end of May 2002.¹⁴¹ This delay occurs notwithstanding the fact that EPA receives about 70% of

over terms of the Administrative Procedure Act as being aimed at tying up New Deal agencies by making them jump through numerous procedural hoops).

¹⁴⁰ Antonin Scalia, “Vermont Yankee: the APA, the D.C. Circuit, and the Supreme Court,” 1978 *Sup. Ct. Rev.* 345, 402 (1979). Jim Tozzi of the Center for Regulatory Effectiveness, according to an article published in *The Washington Post*, admitted to “using paperwork technicalities as an excuse to review otherwise untouchable rules. ‘I have to plead guilty to that.’ . . . ‘The paperwork is a way in.’” Michael Grunwald, “Business Lobbyists Asked to Discuss Onerous Rules; GOP Aide Identifies 57 Regulations to Target,” *The Washington Post*, at A3 (Dec. 4, 2001).

¹⁴¹ Recently, concerns over delays in the release of TRI data prompted the OMB to send a letter to EPA recommending administrative changes to accelerate the gathering and release of TRI data to the public. See Eric Pianin, “White House Urges Faster Reporting of Polluters,” *The*

the TRI data in electronic form and could, as a technical matter, release them to the public almost as soon as they are received. Similarly, EPA's Office of Enforcement and Compliance Assistance experiences significant delays in the disclosure of data on enforcement, in part because it sends the information it plans to release to both the states and the entities to which the information pertains for verification.¹⁴²

Delay necessarily undermines the effectiveness of disclosure as a tool for protecting the environment and public health. Stale or outdated information is less useful than current information for educating the public about environmental trends or for identifying new risks. Thus, delay reduces information's utility for promoting informed public participation in environmental policy making. It also reduces the effectiveness of information disclosure as a spur for environmentally responsible business practices.

Less Information. More process also would lead to a net reduction in the amount of information disclosed to the public. The large investment of staff time required to comply with procedural requirements would divert the agency from the primary task of compiling information and making it available to the public. For example, the proposal that EPA accept petitions seeking modifications of its "public messages" concerning information resources could potentially impose a major drain on agency resources. To pick another example, the proposal that EPA establish procedures for involving stakeholders could divert significant agency attention. Given limited agency budgets for administering right to know programs, greater administrative burdens would inevitably reduce the volume and types of information disclosed to the public.

Industry's proposals for the use of existing data for new purposes, in particular, illustrates the need for balance and a sense of proportion in this area. The environmental data submitted to EPA represent an enormously valuable and generally reliable reservoir of information. A requirement that EPA go through elaborate administrative steps before using the data for a new

Washington Post, A13 (March 3, 2002).

¹⁴² Conversation with Pat Garvey, Office of Environmental Information (January 30, 2001).

or different purpose would deprive government agencies and the public of valuable uses for existing information. It is understandable why private firms would value the opportunity to object whenever information submitted for one purpose is used for some different purpose. However, this proposal ultimately seems counter-productive, given the administrative burdens it would impose. It is implausible, at least as a general matter, that the apparently modest benefits of this proposed procedural restriction could justify its significant costs to the public and government.

Some of industry's proposals are explicitly designed to reduce the volume of information made available to the public. For example, under the business coalition's "stewardship principles," EPA would only release information after the agency has first determined the disclosure has a defined purpose for specified audiences and that the information can be adequately understood by that audience. This proposal would deprive the public of a great deal of information because an agency cannot predict all the valuable uses to which the public and non-governmental groups could put information. In fact, the public has been quite creative in its use of disclosed information, and has found certain information to be useful in ways that the agency never predicted.¹⁴³

More Special Interest Influence. Finally, the proposed procedural restrictions would tend to recreate one of the very problems which environmental information disclosure is designed to overcome – the tendency, because of public advocates' high transaction costs and the "free rider" problem, for organized special interests to exert undue influence over environmental policy making.

The proposed procedural reforms would create a new set of complex legal and administrative processes in the field of information disclosure. Industrial firms and associated

¹⁴³ For example, banks, according to an EPA source, when considering mortgages, have relied on information in the Envirofact database as an initial screening device for home inspections and determining accurate property values. Conversation with Pat Garvey (January 30, 2001). Likewise, producers of pollution control equipment have used the Right To Know NETWORK database to market their equipment. See Alair MacLean, "The Right Stuff: Information in the Public Interest" (see "Improving Business") (www.rtknet.org/reports/rightstuff.html) (last visited 9/9/02).

trade associations, represented by sophisticated legal counsel and expert consultants, could frequently take advantage of the proposed procedures. They would have both the resources and the incentive to participate in time-consuming debates about how disclosure programs should be administered.¹⁴⁴ A firm subject to information disclosure requirements has a specific and significant interest in the nature, extent, and timing of any disclosure. The general public, by contrast, cannot take advantage of these procedures to the same extent, nor effectively intervene in response to all the potential initiatives by business firms under the proposed procedures. As a result, more process tilts the playing field in favor of regulated interests.

More process would ultimately lead to less balanced information disclosure. For example, participants in "stakeholder processes" for the development of information products would likely need certain types of technical or scientific expertise in order to participate effectively. This type of expertise is much more likely to be available to industry representatives than to representatives of the public. As a result, procedures which are neutral in appearance, because they are available to all, would likely be very biased in fact. Even the proposed error-correction process could create bias, in practice, in favor of regulated businesses and against the public. A firm which has submitted information to EPA has an incentive to correct errors not in its favor, but has no incentive to correct errors in its favor. As a result, an information database, once it undergoes an elaborate "data quality" review dominated by industry, could actually be more misleading, in one sense, than it was before the data correction process began.

Furthermore, the proposed procedures would increase special interest influence because many are designed, either explicitly or implicitly, to elevate businesses' concerns about information disclosure. For example, the business coalition's proposed criteria for determining the extent of stakeholder involvement in developing a new information product include "the impact of the information disclosure on particular companies, facilities, or products."¹⁴⁵ By

¹⁴⁴ At an EPA public meeting on May 15, 2002 on proposed data quality guidelines, the vast majority of those commenting represented industry, and only one of the many speakers represented advocates of greater public disclosure. (Communication from Sean Moulton, OMB Watch, May 20, 2002.)

¹⁴⁵ White Paper at E-14.

contrast, the potential value of the disclosure to an affected community, for example, is not listed as a criterion for determining stakeholder involvement. Similarly, the proposal that EPA notify information submitters before it decides to use data submitted for one purpose for a different purpose seeks to address a concern specific to business.

Expanding opportunities for public involvement, on its face, appears to provide an evenhanded way of democratizing agency decision making. For the reasons discussed, however, more process could actually enhance special interest influence over agency information policies and undermine the effectiveness of information programs.

VI. RESPONSE TO PROPOSALS FOR EXPANDED JUDICIAL REVIEW.

The industry proposals to expand judicial review of agency disclosure programs also would have adverse effects on the public's right to know. The current limits on suits against the government under the Administrative Procedure Act and the Federal Tort Claims Act reflect a careful balance between competing interests and values. Creating expanded opportunities to sue over disclosure decisions would alter this balance and allow business groups to use litigation, as well as the threat of litigation, to unfairly influence information disclosure policies and programs.

A. The Rationale for Limited Judicial Review.

Administrative Procedure Act. The basic purpose of the APA is to impose an external check on administrative agencies to prevent, and provide a mechanism for fixing, illegal or irrational agency decisions. As stated by the Supreme Court, "The theoretical justification for judicial review of agency action is grounded in concerns about constraining the exercise of discretionary power by administrative agencies."¹⁴⁶ The APA controls agency discretion by prescribing procedures agencies must follow in order to take certain actions.¹⁴⁷ To a more limited extent, the APA also imposes direct substantive constraints on agency decision making.¹⁴⁸

The APA also reflects a recognition that "[j]udicial review of agency action creates significant delay in agency decision making and imposes significant costs on agencies" and, therefore, "interferes with the societal goal of efficient and timely implementation of government programs."¹⁴⁹ Courts analyzing the scope of judicial review under the APA have frequently acknowledged these costs. Thus, the Supreme Court, in holding that an agency's issuance of a

¹⁴⁶ Bowen v. Massachusetts, 487 U.S. 879, 908, n. 46 (1988).

¹⁴⁷ See, e.g., 5 U.S.C. § 553 (prescribing procedures for agency rule making).

¹⁴⁸ See 5 U.S.C. § 706(2)(A) (2000) (reviewing court shall "hold unlawful and set aside agency action found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

¹⁴⁹ 3 Pierce, supra note 137, § 17.2 at 1235.

complaint was not judicially reviewable, observed that "the effect of the judicial review" would "likely . . . be interference with the proper functioning of the agency and a burden for the courts."¹⁵⁰ Similarly, to support the determination that agency opinion letters were not final agency action, a federal appeals court observed that affording judicial review "might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which would accrue."¹⁵¹

The APA includes various limits on judicial review designed to balance the need to control agencies' discretion with the need to protect agencies' ability to function efficiently. The Act affords judicial review for "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court."¹⁵² For an agency action to meet the finality requirement it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"¹⁵³ The APA explicitly does not apply when "statutes preclude judicial review" or when "agency action is committed to agency discretion by law."¹⁵⁴ Judicial review is also indirectly constrained by other provisions limiting the scope of the APA's procedural mandates, such as the exception for "general statements of policy" from the APA's notice and comment requirements.¹⁵⁵ The upshot of all the various provisions limiting the scope of the APA is that "[a]dministrative agencies make thousands, if not millions, of decisions every day, but only a small fraction of that massive output may be challenged immediately in court."¹⁵⁶

¹⁵⁰ Federal Trade Comm. v. Standard Oil of California, 449 U.S. 232, 241 (1980).

¹⁵¹ Taylor-Callahan-Coleman Counties District Adult Probation Dept. v. Dole, 948 F.2d 953, 957 (5th Cir. 1991), quoting National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 699 (D.C. Cir. 1971).

¹⁵² 5 U.S.C. § 704 (2000).

¹⁵³ Bennett v. Spear, 520 U.S. 154, 177 (1997).

¹⁵⁴ 5 U.S.C. § 701 (2000).

¹⁵⁵ Id. at § 553(b)(3)(A).

¹⁵⁶ Western Illinois Home Health Care, Inc. v. Herman, 150 F.3d 659, 660 (7th Cir. 1998).

With respect to information disclosures specifically, judicial review is generally precluded on the theory that information disclosure is not "agency action" within the meaning of the APA. In the seminal case of Hearst Radio, Inc. v. F.C.C.,¹⁵⁷ the U.S. Court of Appeals for the D.C. Circuit held that publication of an allegedly defamatory agency report was not "agency action" under the APA. This holding is consistent with the basic understanding that a reviewable agency action must be one by which rights or obligations are determined, or from which legal consequences flow.

More than 50 years after the Hearst decision, the basic rule remains that agency disclosure of information is not an "agency action" subject to judicial review under the APA. In recent years courts have refused to consider APA challenges to a variety of agency educational publications, including a guide evaluating the effectiveness of different respiratory protection devices,¹⁵⁸ a report on techniques for pricing trucking services,¹⁵⁹ and a publication comparing different consumer drugs and their prices.¹⁶⁰ The courts have recognized that information disclosure may have adverse practical consequences for firms, for example by making consumers less likely to purchase a particular product. However, these kinds of effects, standing alone, do not make the disclosures reviewable actions under the APA.¹⁶¹

The courts have identified two potential exceptions to the general rule that information disclosure is not reviewable under the APA. First, in the Hearst case itself, the D. C. Circuit observed that the APA definition of agency action includes "sanctions," and suggested that the

¹⁵⁷ 167 F.2d 225, 227 (D.C. Cir. 1948).

¹⁵⁸ See Industrial Safety Equipment Ass. v. EPA, 837 F.2d 1115 (D.C. Cir. 1988).

¹⁵⁹ See American Trucking Ass., Inc. v. United States, 755 F.2d 1292, 1296-97 (7th Cir. 1985).

¹⁶⁰ See Pharmaceutical Manufacturers Ass. v. Kennedy, 471 F.Supp. 1224, 1225 (D. Md. 1979).

¹⁶¹ See, e.g. Aerosource, Inc. v. Slater, 142 F.3d 572 (3rd Cir. 1998) (declining to review Federal Aviation Administration advisory warnings even though they had severe impact on businesses); American Trucking Assoc., Inc., 755 F.2d at 1296-1297 (declining to review decision to issue report even though report could result in significant revenue loss).

release of information in some circumstances could constitute a sanction. Building on this suggestion, the D.C. Circuit, in Industrial Safety Equipment Ass., Inc. v. EPA,¹⁶² indicated that, when a disclosure of information produces actual harm, "courts have a duty to decide whether there is a remedy under the APA for the release of information."¹⁶³ To make that decision, the court said, it had to determine whether the "agency [was] intent on penalizing a party through adverse publicity, especially false or unauthorized publicity." On the facts of the case, the court concluded that the agency's issuance of a guide discussing different respiratory protection devices did not represent a sanction, given that the agency had not issued the guide to penalize the manufacturers, and therefore the decision to issue the guide was not judicially reviewable.¹⁶⁴

Second, the courts have recognized an exception to the general rule of non-reviewability of information disclosure when the disclosure is intertwined with an agency action which itself is subject to judicial review under the APA, or where the disclosure triggers other regulatory effects. In Brown & Williamson Tobacco Corp. v. FTC,¹⁶⁵ a federal appeals court concluded that the FTC's announcement that a cigarette company's claims that it produced "low tar" cigarettes were inaccurate was likely insufficient, by itself, to be a reviewable agency action. However, the court concluded that the announcement was subject to review because the FTC also stated in the announcement that it had decided against issuing any figures on tar content in the company's cigarettes, an action which effectively prohibited the company from continuing to make low-tar claims for its product.

Similarly, the D.C. Circuit determined that it could review a challenge to a published report by the U.S. Department of Health and Human Services stating that the department was

¹⁶² 837 F.2d 1115 (D.C. Cir. 1988).

¹⁶³ Id. at 1119.

¹⁶⁴ The court also concluded that the statements in the guide were not false, see id., arguably begging the question of how the court would have resolved the judicial review question if the statements had been false. But it seems illogical to suggest that the reviewability of agency action can turn on the merits of an allegation that an agency acted improperly.

¹⁶⁵ 710 F.2d 1165 (6th Cir. 1983).

upgrading dioxin from the “reasonably anticipated” to the “known” category of carcinogens.¹⁶⁶ The court determined that the identification of dioxin as a known carcinogen would have “binding effect” because it would trigger other regulatory obligations.¹⁶⁷ It also found binding effect based on the procedural steps, including providing notice and an opportunity to comment, which the agency had to complete to list a substance as a carcinogen.¹⁶⁸ In addition, the court pointed out that the agency had published a notice of its proposed action in the federal register,¹⁶⁹ and that the carcinogen classification was mandated by federal statute, the Public Health Act.¹⁷⁰

In sum, there is no categorical rule that an agency action involving the disclosure of data and other information to the public is necessarily exempt from judicial review under the APA. Nonetheless, under the prevailing legal standards, most types of disclosure policies and programs do not represent agency actions subject to APA review.

Federal Tort Claims Act. Similarly, the limitations on waiver of sovereign immunity in the Federal Tort Claims Act generally preclude tort claims against the United States based on information disclosure. As discussed, the Act's waiver of sovereign immunity does not apply to claims of libel, slander, or misrepresentation, or to claims based on the exercise of so-called "discretionary functions."¹⁷¹ Industry seeks repeal of the first of these exceptions, and seeks to

¹⁶⁶ Tozzi v. U.S. Dept. of Health & Human Services, 271 F.3d 301, 303-304 (D.C. Cir. 2001).

¹⁶⁷ Id. at 310.

¹⁶⁸ Id. at 304-305, 310.

¹⁶⁹ Id. at 310.

¹⁷⁰ Id. at 311, citing 42 U.S.C. § 241(b)(4)(A). For another decision applying a similar analysis, see Synthetic Organic Chemical Manufacturers Assn. v. Secretary, Dept. of Health and Human Services, 720 F. Supp. 1244 (W.D. La. 1989). But see Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA, 857 F.Supp. 1137 (M.D.N.C. 1994) (holding that agency publication of a report describing environmental tobacco smoke as a carcinogen constituted a reviewable agency action even though the report had no direct legal consequences).

¹⁷¹ 28 U.S.C. § 2680(a)-(n) (1994).

limit the scope of second. These proposals run counter to the strong policy reasons for adopting these exceptions in the first place.

1. *The Discretionary Function Exception*. The FTCA exception for “discretionary functions” seeks to avoid litigation over what Congress regarded as quintessentially governmental functions. As the Supreme Court has stated, Congress did not “contemplate[] that the Government should be subject to liability arising from acts of a governmental nature or function.”¹⁷²

Congress believed that the threat of damages actions could prevent government officials from exercising their responsibilities in an objective and independent fashion. As the Supreme Court has explained:

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties – suits . . . the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.¹⁷³

Government immunity is necessary to avoid the disruptions, worries, and distractions that litigation and the threat of litigation would create for government officials.¹⁷⁴ “It is impossible to know whether the claim is well founded until the case has been tried, and [] to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”¹⁷⁵

¹⁷² Dalehite v. United States, 346 U.S. 15, 28-29 (1953).

¹⁷³ Barr v. Manteo, 360 U.S. 564, 571 (1959).

¹⁷⁴ Behrens v. Pelletier, 516 U.S. 299, 307 (1996) (observing that defense of qualified immunity applies both to the burden of standing trial, as well as the burden of pretrial matters); Acierno v. Cloutier, 40 F.3d 597, 608-609 (3rd Cir. 1994) (need to free public officials from “unpleasantness and demands on their time due to continued litigation”); Hoesl v. United States, 451 F. Supp. 1170, 1177 (N.D. Cal. 1978), aff’d 629 F.2d 586 (9th Cir. 1980).

¹⁷⁵ Barr, 360 U.S. at 571, quoting Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

Finally, the "discretionary function" exception reflects Congress' conclusion that, for several different reasons, the judiciary is not the appropriate branch of government "to determine whether complex governmental decisions are 'reasonable.'"¹⁷⁶ For one thing, "legislative bodies and agencies are better equipped to determine the costs and benefits of alternative government policies than the courts are."¹⁷⁷ For another, "in our democratic form of government, politically accountable institutions, rather than politically unaccountable judges, have the authority and responsibility for making policy decisions."¹⁷⁸ "If the discretion exercised by the agency involves 'political, social, or economic judgments,'" the D.C. Circuit stated, "it is the type of decision that is of the nature and quality that Congress intended to shield from tort liability through the discretionary function exemption."¹⁷⁹

2. *Exception for Slander, Libel, or Misrepresentation.* The exception for actions subject to challenge as libel, slander, or misrepresentation is based on many of the same considerations as the discretionary function exception. Thus, it is designed to avoid subjecting agency officials to the burdens of litigation and to keep the judiciary from second guessing the policy judgments of administrative agencies. This exception also reflects the judgment that the public interest is served best if government officials are accorded wide latitude when they share information with the public. "[G]overnment officials should not be hampered in their writing and speaking by the possibility that their actions would give rise to government liability."¹⁸⁰ Absent immunity from

¹⁷⁶ Louis L. Jaffe, "Suites Against Governments and Officers: Damage Actions," 77 *Harv. L. Rev.* 209, 237 (1963).

¹⁷⁷ 3 *Pierce*, *supra* note 137, § 19.4 at 1436.

¹⁷⁸ *Id.*

¹⁷⁹ *Crumpton v. P.W. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995). *See also* 3 *Pierce*, *supra* note 137, § 19.4 at 1436 ("because the constitutional and statutory boundaries on exercise of policymaking discretion are often uncertain and difficult to predict, requiring the government to pay damages for every error in overstepping those boundaries would distort policymaking").

¹⁸⁰ *Quinones v. United States*, 492 F.2d 1269, 1280 (3rd Cir. 1974).

suit for libel, slander or misrepresentation, "the prospect of governmental liability . . . [would] deter[] federal employees from speaking and writing forthrightly."¹⁸¹

B. Likely Adverse Consequences of Expanded Judicial Review.

Industry proposals to expand judicial review of information disclosure trigger concerns which go to the heart of the longstanding debate over the advantages and disadvantages of judicial review of agency action. From the perspective of any specific interest group with a legal objection to an agency action, the availability of judicial review is always salutary. However, in the view of many legal scholars, looking at the issue from a broader perspective, judicial review often has serious negative consequences for policy making and the operations of federal agencies.

As a threshold matter, access to the courts, while usually even-handed in a formal sense, is anything but in practice. In the realm of litigation "the power is held by interest groups and others who can afford the lawyers to play the process and go to the courts."¹⁸² Because "[r]egulated interests have more resources . . . than do ordinary citizens,"¹⁸³ judicial review of agency action creates an uneven playing field which favors business. Furthermore, regulated firms have greater incentives to invoke judicial remedies than the general public. Regulations impose a cost on "those who exercise economic power" in the marketplace, such that "[f]or any individual regulate[d firm], the general benefits of regulation to society rarely outweigh the expense of compliance with [government] requirements."¹⁸⁴ Thus, regulated firms often have an economic motivation to pursue litigation to challenge a government action that adversely affects

¹⁸¹ Hoesl v. United States, 451 F. Supp. 1170, 1177 (N.D. Cal. 1978), aff'd, 629 F.2d 586 (9th Cir. 1980). See also Art Metal-U. S.A., Inc. v. United States, 753 F.2d 1151, 1154 (D.C. Cir. 1985) (holding claim of "injurious falsehood" against government officials for alleged provision of false information is barred under FTCA as "claim arising out of . . . libel or slander").

¹⁸² Frank Cross, "Shattering the Fragile Case for Judicial Review of Rulemaking," 85 Va. L. Rev. 1243, 1315 (1999), quoting Philip K. Howard, "Administrative Procedure and the Decline of Responsibility," 48 Admin. L. Rev. 312, 318 (1996).

¹⁸³ Cross, supra note 182, at 1315.

¹⁸⁴ McGarity, supra note 61, at 532.

them. By contrast, ordinary citizens, who have only a small stake in any specific issue, generally have less incentive to litigate.

The one-sided nature of judicial review of agency actions skews the substance of agency decision making. Agency staff naturally deliberate with particular care about those problems and questions likely to produce litigation against the agency. Therefore, as confirmed by a good deal of empirical evidence, an agency will often shape its policies to deflect the potential for litigation. For example a study found that the Internal Revenue Service responded to frequent legal challenges by wealthy taxpayers to IRS audits by shifting its auditors to lower income taxpayers.¹⁸⁵ Similarly, exacting court review of EPA Clean Air Act decisions has been blamed for EPA's abandonment of its efforts to promulgate "best practicable technology standards" for most air pollutants.¹⁸⁶

Judicial review also imposes significant costs on the agencies. First, when actually embroiled in the litigation process, agencies must devote significant staff and financial resources "to surviving [the] . . . review process."¹⁸⁷ In addition, the constant prospect of future litigation forces agencies, in the course of day to day decision making, to "devote exorbitant levels of resources to lawyering, thereby unleashing 'an excessive focus on process rather than the substance of governmental decisions.'"¹⁸⁸ The result is an "inefficient and ineffective agency allocation of resources, as agencies become more concerned with surviving review than with advancing their commissioned agendas."¹⁸⁹

¹⁸⁵ Cross, supra note 182, at 1323, citing Robert M. Howard, "Wealth, Power, and the IRS," paper presented at the annual conference of the Midwest Political Science Association.

¹⁸⁶ Thomas McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," 41 Duke L. J. 1385, 1417 (1992).

¹⁸⁷ Frank Cross, "Pragmatic Pathologies of Judicial Review of Administrative Rulemaking," 78 N.C. L. Rev. 1013, 1036, 1037 (2000).

¹⁸⁸ Id. at 1039.

¹⁸⁹ See Cross, supra note 187, at 1020. The less deferential the standard of judicial review, the greater the magnitude of agency resources likely to be devoted to warding off judicial review. See McGarity, supra note 61, at 556 ("evaluative substantive judicial review can chew

The burdens imposed by the litigation process can make agencies reluctant to act at all. In the words of one scholar, APA review has “ossified” the administrative process, “making administrators slow and timid to address their responsibilities.”¹⁹⁰ Agencies facing potential judicial review are “constantly ‘looking over their shoulders’ at the reviewing courts” in doing their work.¹⁹¹ The extensive effort required to produce a rule that can withstand judicial review has caused some agencies to seek ways to avoid rule making altogether.¹⁹²

The net effect of all of these consequences of judicial review “is highly antiregulatory.”¹⁹³ When a regulatory agency delays taking action, or decides not to take action at all, because of the threat of a judicial challenge, the primary beneficiary is regulated industry. The direct and indirect costs of judicial review mean that fewer agency resources are available for developing, implementing, and enforcing regulations. The process of agency “ossification” catalyzed by extensive judicial review means that agencies will launch fewer new initiatives to protect public health and the environment.¹⁹⁴

up scarce agency resources as the agencies attempt to fill the rulemaking records with studies and to rebut all of the criticisms that blunderbuss attacks produce”).

¹⁹⁰ Cross, supra note 187, at 1069.

¹⁹¹ McGarity, supra note 186, at 1412.

¹⁹² Richard Pierce, “Judicial Review of Agency Actions in a Period of Diminishing Agency Resources,” 49 Admin. L. Rev. 61, 68 (1997) (“hard look doctrine – a particularly demanding version of the duty to engage in reasoned decision-making” makes it costly for agencies to issue, amend, or rescind rules); cf. Cross, supra note 186, at 1020-1027 (judicial review causes delay in promulgation of individual regulation).

¹⁹³ Cross, supra note 182, at 1321.

¹⁹⁴ Some scholars also have also raised the concern that APA judicial review improperly transfers discretionary government power from the agencies to the courts. “Judicial review can be a source of excessive discretion,” both by “conferring on reviewing courts discretion to resolve identical cases in different ways” (thereby transferring the problem of discretion from agency heads to judges), and by “reviewing courts creat[ing] obstacles to agencies’ use of rules to limit their own discretion and that of their employees” 3 Pierce, supra note 137, § 17.3 at 1236.

Finally, a number of scholars have voiced the concern that expansive judicial review entangles the courts in policy matters properly left to the popularly elected legislative and executive branches.¹⁹⁵ Agency decisions typically involve a careful weighing of different policy considerations. Judicial review of agency decisions, even under a deferential standard of review, risks judicial trumping of the political branches.

Given all of these objections and others¹⁹⁶ to judicial review of agency action, one prominent scholar has gone so far as to propose the elimination of judicial review of agency rulemaking.¹⁹⁷ Others have proposed, in the alternative, that the public interest would be served by reducing the stringency of judicial review of agency actions.¹⁹⁸

Based on the foregoing, it is fair to conclude that expanded judicial review of information disclosure programs would have predictable adverse effects on these programs. According to Professor Cross, regulated firms are well aware of the effects of judicial review on administrative agencies and, therefore, have "consistently promoted greater judicial review, beginning with the

¹⁹⁵ *Id.*, § 17.4 at 1245-46 (Courts lack political legitimacy as a source of policy-based limits); cf Stephen Smith, "Activism as Restraint," 80 *Tex. L. Rev.* 1057, 1084 (2002) ("There is little reason for faith in the institutional competence of courts, as compared to legislative bodies, to make the intensely value-laden judgments or policy required by 'noninterpretive' judicial review."); Cross, *supra* note 182, at 1244 ("Judicial review of rulemaking . . . is an arbitrary assertion of judicial power over decisions that are essentially legislative or executive in nature.").

¹⁹⁶ Extensive judicial review also has been criticized as inconsistent with the principle of democratic accountability. As stated by one scholar: "The system of judicial review represents a strategic decision by members of Congress, who can take symbolic action on a perceived societal problem at the demand of voters while at the same time emasculating the true effect of the action, thereby escaping responsibility for the costs and other consequences associated with an effective response to the issue. . . [T]he structure is contrary to democratic accountability and the interests of the general public." Cross, *supra* note 187, at 1014.

¹⁹⁷ *Id.* at 1069.

¹⁹⁸ McGarity, *supra* note 188, at 1453 ("The courts should continue the trend (if a trend does in fact exist) of reducing the stringency of substantive judicial review," or Congress should "amend[] the APA to change the scope of review of informal rulemaking.").

passage of the APA itself” to promote business interests.¹⁹⁹ Viewed from this perspective, industry’s proposals to expand judicial review of information disclosure programs can properly be viewed as a not so subtle effort to weaken these programs.

First, litigation over disclosure programs would certainly be one-sided. For all the reasons discussed above, industry would have greater resources and more incentive than the general public to challenge the administration of disclosure programs. Furthermore, the entire emphasis of industry’s judicial review agenda is to create remedies for firms whose products, emissions, or facilities have been inaccurately reported. It is not even clear that industry’s platform on judicial review is intended to address access to the courts by the general public. Finally, members of the general public may encounter greater Article III "standing" problems in seeking to challenge the administration of information disclosure problems than private firms would encounter in seeking to challenge the release of inaccurate information related to their businesses.²⁰⁰

Second, judicial review of disclosure programs would skew agency decisions on disclosure issues. The threat of industry litigation would encourage agencies not to release information, or at least to delay the release of information, especially when an information report might be controversial.²⁰¹ The staff and other agency resources diverted by the litigation process would subtract from the agency resources available to focus on actually distributing information

¹⁹⁹ Cross, supra note 182, at 321; see also McGarity, supra note 61, at 556 (1997) ("judicial review can be a potent weapon in the hands of entities that are opposed to protective legislation").

²⁰⁰ Compare Steel Company v. Citizens for a Better Environment, 524 U.S. 11 (1998) (plaintiffs lacked standing to challenge company’s failure to file reports on chemical and toxic discharges) with Federal Election Comm. v. Akins, 524 U.S. 11 (1998) (plaintiff has standing to challenge FEC dismissal of complaint alleging that political committee failed to file campaign contribution information with the FEC). See also Tozzi, 271 F.3d at 308-310 (holding that plaintiff manufacturer of dioxin has standing to challenge agency reclassification of dioxin as a human carcinogen based on evidence that company would lose profits as a result of agency action).

²⁰¹ Cf. Crumpton, 59 F.3d at 1406 (observing that judicial review of agency decisions to disclose information "would encourage agencies to withhold information, thereby completely undermining FOIA's 'general philosophy' favoring release").

to the public. More litigation also would require greater agency focus on legal process, creating a more cautious and deliberative agency culture, diverting attention from the mission of information disclosure. The upshot “would be to hamper the free flow of information,”²⁰² undermining if not defeating the purpose for establishing information disclosure programs.

Finally, expanded judicial review of information disclosure decisions would enmesh courts in policy decisions best left to the political branches. As stated by a federal appeals court, balancing the public's interest in disclosure against a private interest in withholding the information is “fraught with public policy considerations that necessarily involve the exercise of ‘political, social, and economic judgment.’”²⁰³ Under our system of separated powers, the courts are the least well equipped and have the least political authority to make these decisions.

²⁰² Pharmaceutical Manufacturers Ass., 471 F. Supp. at 1225, 1229-30.

²⁰³ Crumpton, 59 F.3d at 1403.

VII. RESPONSE TO PROPOSAL FOR INCREASED SECRECY AND CONFIDENTIALITY.

The final set of industry proposals requiring evaluation involves proposed restrictions on public availability of certain kinds of allegedly valuable business information and information related to national security. While there are arguments in favor of industry's positions, particularly when national security is genuinely at stake, industry has overlooked or ignored the significant public costs of walling off large categories of information from the public.

A. "Trade Secrets" and Confidential Information.

The proposal for greater protection for trade secret and other confidential business information raises two distinct questions. The first is the extent to which businesses have a "right" to withhold from the public confidential information about their facilities or operations. The second issue is whether public policy considerations justify broad prohibitions on the disclosure of information which, as a result of the so-called "mosaic effect," might lead to the disclosure of trade secrets.

Qualified Nature of Private "Rights" in Information. First, industry's apparent premise that there is some core set of trade secret or otherwise confidential information which a business has an absolute right to withhold from the public is demonstrably incorrect.

As a threshold matter, there is a substantial question whether the law of trade secrets should be interpreted to create any type of private right against the public, as opposed to a safeguard for the confidentiality of information between private parties. The law of trade secrets originally developed as a common law rule to govern relationships between private competitors in the marketplace.²⁰⁴ The section on trade secrets in the Restatement of Torts, for example, focuses principally on the unjust enrichment and competitive harm which can result when a competitor acquires confidential business information through breaches of contract or of

²⁰⁴ Mary Lyndon, "Secrecy and Innovation in Tort Law and Regulation," 23 N.M. L. Rev. 1, 34-35 (1993) ("The common law of trade secrecy was designed to operate in the particular forum of conflict between market rivals.").

confidential relationships.²⁰⁵ When the issue is whether the public should have access to data or other information in order to protect public health or the environment, the justifications for the traditional law of trade secrecy do not necessarily apply. As stated by the D.C. Circuit in a case addressing whether the public should have access to clinical studies on a proposed new product, information relating to public health and safety raises "important considerations which the common law [of trade secrecy] was not designed to handle."²⁰⁶

Assuming for the sake of argument that the traditional law of trade secrecy has some relevance in the context of government disclosure programs, a firm's right to demand that confidential information be withheld from the public is clearly quite limited. The Supreme Court has ruled that the owner of a trade secret has no constitutional right to prevent disclosure to the public, even if the disclosure would dilute the value of the trade secret. Under the Constitution, trade secrets have been recognized as a form of "property" within the meaning of the Takings and Due Process Clauses. However, a claim of private property rights cannot stand in the way of a disclosure requirement designed to serve a legitimate public health or safety objective.

The leading precedent is the Supreme Court's decision in Ruckleshaus v. Monsanto.²⁰⁷ The case involved a "takings" challenge under the Fifth Amendment to the Federal Insecticide, Fungicide, and Rodenticide Act, which authorizes public disclosure of certain test data submitted to EPA by pesticide manufacturers. The test data included confidential information which qualified as a trade secret. The Supreme Court ruled that, at least in the absence of an express agency commitment to safeguard the confidentiality of the data when it was submitted, the manufacturers lacked the kind of "investment-backed expectations" in the confidentiality of the information necessary to support a taking claim. "As long as [the company] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a

²⁰⁵ McGarity & Shaprio, supra note 69, at 863.

²⁰⁶ Pubic Citizen Health Research Group v. FDA, 704 F.2d 1280, 1289 n. 25 (D.C. Cir. 1983).

²⁰⁷ 467 U.S. 986 (1984).

legitimate Governmental interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a [pesticide] registration can hardly be called a taking."²⁰⁸

The ruling in Monsanto is consistent with a number of older Supreme Court decisions upholding public right to know requirements against property rights challenges. For example, in Corn Products Refining Co. v. Eddy,²⁰⁹ the Supreme Court rejected a claim that the State of Kansas effected a "taking" by requiring a manufacturer of table syrup to publicly disclose the percentage of each ingredient in the syrup. The Court said:

It is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.²¹⁰

Similarly, in National Fertilizer Assn. v. Bradley,²¹¹ the Court rejected a claim that a South Carolina law deprived fertilizer manufacturers of their property rights by requiring them to publicly disclose the ingredients in the fertilizer they sold to the public.

These precedents support the constitutionality of modern right to know legislation against property rights challenges. For example, in New Jersey Chamber of Commerce v. Hughey,²¹² a federal court rejected a takings challenge to the New Jersey Worker and Community Right to Know Act, which denies trade secret protection to substances included on a "special health hazard" list. The court recognized that the law meant that "[e]mployers may face the unpleasant choice of disclosing trade secrets or limiting or shutting down operations in New Jersey." Nonetheless, the court said, "as long as the employer is aware of the conditions under which the data are submitted and as long as the conditions are rationally related to a legitimate government

²⁰⁸ Id. at 1007.

²⁰⁹ 249 U.S. 427 (1919).

²¹⁰ Id. at 431-32.

²¹¹ 301 U.S. 178 (1937).

²¹² 600 F. Supp. 606, 611 (D. N.J. 1985), aff'd, 774 F.2d 587 (3rd Cir. 1985).

interest, a submission under the Right to Know Act does not constitute a taking." The U.S. Court of Appeals for the Third Circuit followed the same reasoning in rejecting a takings challenge to the Pennsylvania Worker and Community Right to Know Act.²¹³

Based on this understanding of the qualified nature of private rights in confidential business information, Congress has assumed broad authority to compel disclosure of trade secret information. The Trade Secrets Act,²¹⁴ the most general federal legislation on the subject, imposes a criminal fine on government employees who disclose trade secrets revealed to them in the course of their employment. However, the Act states that this sanction only applies to a disclosure "in a manner not authorized by law," indirectly recognizing that disclosures of trade secrets are permissible as long as they are legally authorized. In Chrysler v. Brown,²¹⁵ the Supreme Court ruled that a disclosure meets the "authorized by law" standard so long as it is made pursuant to a regulation which has "the force and effect of law."²¹⁶ Under this liberal

²¹³ Manufacturers Ass. of Tri-County v. Knepper, 801 F.2d 130 (3rd Cir. 1986). More recently, in Philip Morris v. Reilly, 2001 WL 1215365 (1st Cir. 2001), a panel of the U.S. Court of Appeals for the First Circuit rejected a takings challenge to a Massachusetts law requiring tobacco companies to disclose the constituents in each brand of cigarettes and other tobacco products. The panel followed the reasoning in Monsanto and held that the law was "a valid exercise of the [government's] police power and, in the absence of explicit guarantees of confidentiality from the Commonwealth, does not effect a taking." However, the court of appeals subsequently vacated the panel decision and ordered rehearing en banc, which was still pending when this paper was completed.

²¹⁴ 18 U.S.C. § 1905 (Supp. V 1999).

²¹⁵ 441 U.S. 281 (1979).

²¹⁶ Id. at 295.

standard,²¹⁷ federal agencies have broad discretion to compel public disclosure of “trade secrets” to protect the public welfare.

Relying on this broad authority, Congress has authorized disclosure of commercially valuable business information in a variety of contexts. For example, the Toxic Substances Control Act authorizes disclosure of trade secrets when "necessary to protect public health or the environment against unreasonable risk of injury to health or the environment."²¹⁸ The provision of the Federal Insecticide, Fungicide, and Rodenticide Act which was at issue in Monsanto mandates that health and safety related studies "be available for disclosure to the public" when the EPA Administrator "determine[s] that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment."²¹⁹ EPCRA requires disclosure of trade secrets where the disclosure is necessary to diagnose or treat a medical problem or where a medical emergency exists arising from exposure to a chemical.²²⁰

²¹⁷ The Supreme Court said in Chrysler that to have “the force and effect of law,” (1) the regulation must affect individual rights and obligations; (2) Congress' grant of authority to the agency must contemplate the regulations, that is, there must be "a nexus between the regulations and some delegation of the requisite legislative authority by Congress;" and (3) the disclosure regulations must be promulgated in compliance the APA procedural requirements. Id. at 302, 304, 312. Lower courts have recognized that disclosures of trade secrets were "authorized" within the meaning of the Trade Secrets Act in a number of different contexts. See, e.g., United States v. Geophysical Corp. of Alaska, 732 F.2d 693 (9th Cir. 1984) (disclosure of data produced by geological exploration authorized by the Outer Continental Lands Act); Coastal States Gas Corp. v. Dept. of Energy, 480 F. Supp. 813 (S.D. Texas 1979) (disclosure of information necessary for contractor to conduct audit authorized by Department of Energy Organization Act).

²¹⁸ 15 U.S.C. § 2613(a)(3) (1994).

²¹⁹ 7 U.S.C. § 136h (1994).

²²⁰ 42 U.S.C. § 11043 (1994). Where the specific chemical identity represents a trade secret, the statute requires the person obtaining the information to sign a confidentiality agreement, unless there is a medical emergency. Id. at § 11043.

Other federal statutes and agency rules mandate disclosure of trade secret information in certain circumstances. See 46 U.S.C. § 4310(e) (1994) (authorizing the Secretary of Transportation, in implementing a statute relating to recreational boating, to "disclose any information that contains or relates to trade secrets" if the Secretary "decides that the information is necessary to carry out" the law); 21 C.F.R. § 701.3 (2001) (requiring manufacturers to disclose

In sum, there is no real question that agencies, at least when authorized to do so by Congress, can compel disclosure of trade secret information to protect public health and the environment. Thus, as with the issue of whether businesses should be accorded greater procedural rights to influence disclosure policies, the issue of how much protection to grant confidential business information ultimately comes down to a matter of policy judgment.

Policy Concerns About Expanding Confidentiality. The basic argument for protecting trade secrets and other confidential business information is that it promotes the creation of valuable intellectual capital.²²¹ According to this argument, if firms know they will enjoy the exclusive right to exploit the economic benefits of a novel chemical formula or distinctive manufacturing process, they will invest more in coming up with such innovations, to the benefit not only of the firm but of society as a whole. On the other hand, if they lack confidence they will reap the economic benefits of investing in innovations, they will invest less, to society's detriment.

While this argument has some obvious force, there also are strong policy arguments against rigid protection for trade secrets. Some economists question the value of protecting trade secrets as a way of encouraging investment, observing that technical innovations are likely to be economically valuable even without complete confidentiality.²²² In addition, the patent system provides an alternative – and publicly transparent – means for safeguarding intellectual

ingredients in cosmetics); 21 C.F.R. § 101.4 (2001) (requiring manufacturers to disclose ingredients in foods); 21 C.F.R. §§ 201.10, .50, .57(a)(vi), .100(b)(4)-(5) (2001) (requiring disclosure of ingredients in prescription drugs). In a rulemaking proceeding related to the TRI, EPA explicitly recognized that the public is entitled to information regarding chemicals which humans may ingest or be exposed to, or which are discharged into the environment, notwithstanding potential trade secrecy concerns. See EPA Issues Paper #2; supra note 20, at 1, 27.

²²¹ Lyndon, supra, note 204, at 3 ("The strongest general argument for legal protection for trade secrecy is the claim that it plays an important role in the intellectual property system and thus functions to encourage useful innovation.")

²²² Id. at 12.

capital.²²³ Finally while protecting trade secrets can potentially produce social benefits, it also may be socially costly. In particular, as observed by scholar Mary Lyndon, trade secrecy can stifle economic activity because it “encourages wasteful duplication and lack of coordination” among different firms.²²⁴

The industry “mosaic” argument faces an especially steep uphill climb because it seeks confidential treatment of information which is not a trade secret. As discussed, the “mosaic” theory is based on the notion that a firm’s competitors could use access to information which is publicly available to form a “mosaic” that reveals confidential information. Thus, according to the industry position, in order to provide genuine protection for trade secrets, confidential treatment has to be extended beyond the actual realm of trade secrets.

The first objection to this argument is that the “mosaic” theory is unproven. While it is intuitively plausible that competitors could invade trade secrets by creating a mosaic, there is apparently no evidence that this actually occurs. EPA officials and public interest advocates have reportedly challenged industry representatives to provide examples demonstrating the existence of the mosaic effect, but industry has so far failed to meet the challenge.²²⁵ A Government

²²³ McGarity & Shapiro, supra note 69, at 849-57.

²²⁴ Lyndon, supra note 204, at 14.

²²⁵ In 1999, Mark Greenwood of CEEI identified the “mosaic effect” as a major area of controversy at a stakeholder meeting on EPA’s public information policies. “EPA/State Stakeholder Forum on Public Information Policies: Summary and Preliminary Action Plan” (Chicago, Illinois - November 15-16, 1999) (on file at Georgetown Environmental Law and Policy Institute). According to the summary, “without tangible examples [of the mosaic effect], some stakeholders are inclined to believe the mosaic argument is being used as a ‘smokescreen’ to avoid the disclosure of damaging environmental information.” Summary at 36. Participants at the meeting agreed “that there is a need to continue the dialog” regarding the mosaic effect. Id. at 37. Two participants recall that industry representatives were asked to provide examples supporting the mosaic effect claim, yet such examples were never provided. Telephone conversation with Odelia Funke, Chief, Policy and Program Management Branch, Office of Environmental Information, EPA (February 2, 2002); telephone conversation with John Chelen, President of Hampshire Research Institute (April 29, 2002).

EPA, in a notice of proposed rulemaking relating to treatment of confidential business information, again solicited examples of the harm resulting from the mosaic effect. 65 Fed. Reg.

Accounting Office report expresses doubt that competitors actually can and do mine publicly available environmental data to obtain trade secrets.²²⁶ In short, the "mosaic" argument appears to be directed primarily at a theoretical, rather than an actual problem.²²⁷

In addition, confidential treatment of information that could lead to the disclosure of trade secrets would conflict with the basic objectives of disclosure programs. Protection for trade secrets is inherently anti-right to know. Thus, expansive protection for trade secrets would

80394-01. Mr. Chelen also repeated his request for such examples at an EPA public meeting on March 7, 2001 (telephone conversation with John Chelen, April 29, 2002), yet participants only "assured the Agency that the mosaic effect does exist, but were reluctant to release any information or examples of their experiences as those descriptions might inadvertently release CBI." Summary of Public Meeting on Potential Revisions to the Confidential Business Information Regulations, at 10 (on file at the Georgetown Environmental Law and Policy Institute). Select industry comments submitted to EPA allude to the alleged mosaic effect, but do not provide examples. See Comments on Behalf of the Coalition for Effective Environmental Information, submitted by Mark Greenwood to EPA (June 4, 2001); Comments of American Chemistry Council to EPA (June 13, 2001) (on file at the Georgetown Environmental Law and Policy Institute).

²²⁶ See GAO, "Environmental Information: EPA Could Better Address Concerns About Disseminating Sensitive Business Information" June 1999 (GAO/RCED-99-156) (available at www.gao.gov) (last visited September 23, 2002).

²²⁷ Industry advocacy materials actually seem to acknowledge this point. See Letter from Mark Greenwood, CEEI, to EPA, Re. Docket Number EC-2000-004: Advance Notice of Proposed Rulemaking, at 7 (June 4, 2001) ("[A] wide range of companies want to know that intellectual property will be protected at EPA *even though there is no immediate threat to their trade secrets in their current submission of data.*") (emphasis added) (on file at Georgetown Environmental Law and Policy Institute).

Furthermore, other industry arguments against disclosure programs based on alleged threats to trade secrets have proven overblown, fueling understandable skepticism about the alleged mosaic effect. Industry initially opposed EPA's TRI program as a potential threat to trade secrecy but, once the TRI was in place, companies filed only a limited number of claims of confidentiality under the program. See Sidney Wolf, "Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act," 11 Journal of Land Use and Environmental Law 217, 243, 249 (1996). Similarly, industry groups objected to disclosure of materials accounting information under state laws based on trade secrecy concerns, yet few requests for confidential treatment were actually filed once the programs were established. Note, "Setting Priorities for Phase Three of the Toxic Release Inventory: Trade Secrets or Community Right-to-Know," 4 Envtl. Law 943, 953 (1998).

"lead[] workers to expose themselves unknowingly to chemical dangers, leav[ing] them unaware of the true causes of chemically induced diseases, and giv[ing] rise to injuries, premature deaths, lost productivity, and medical and social welfare costs."²²⁸ Secrecy also would make it more difficult for those downstream or downwind from polluters to hold them accountable; in this sense, "[l]egalizing secret exposures . . . immunizes the polluter from liability."²²⁹ Moreover, trade secrecy injects a kind of "regressive circularity" into environmental regulation, "because if it is not revealed, a chemical will not be studied and therefore will not be found toxic."²³⁰

In a more theoretical sense, a broad secrecy rule would reinforce the economic market failures which disclosure programs are supposed to help eliminate. If negative externalities cannot even be identified because of trade secrecy rules, the problems will go unremedied. More unremedied environmental problems would mean that environmental regulation would become more uneven, producing economic inefficiencies.²³¹ These inefficiencies could actually be self-reinforcing, because "the expectation of a legal shield from health research may affirmatively guide investments in the direction of secrecy."²³²

Likewise, a broad trade secrecy rule would exacerbate political failures. A broad secrecy rule would deprive the public of information it needs to take action to counter threats to public health and the environment. Thus, shielding information from the public under a veil of trade secrecy would increase the disadvantages citizens already face in expressing the broad public interest in environmental protection.

²²⁸ Susan Carle, "A Hazardous Mix: Discretion to Disclose and Incentives to Suppress under OSHA's Hazard Communication's Standard," 97 *Yale L.J.* 581 (1988).

²²⁹ Lyndon, *supra* note 204, at 35, 45.

²³⁰ *Id.* at 35.

²³¹ *Id.* at 47. *See also* Carle, *supra* note 228, at 586, 587 (arguing that lack of adequate information disclosure by industrial chemical manufacturers "produces inefficiencies in the industrial chemical market").

²³² Lyndon, *supra* note 204, at 36.

Finally, a broad secrecy entitlement would undermine or eliminate other benefits of disclosure programs. Secrecy undermines individual autonomy and freedom of choice by depriving individuals of the information they need to make informed decisions. Greater confidential treatment of environmental data also would hamper scientific research into public health and environmental problems. Finally, secrecy undermines democracy by depriving the public of information it needs for informed debates about issues.²³³

On balance, the "mosaic" approach appears to go too far in sacrificing important public interests in exchange for modest private benefits. Setting aside the question of whether the mosaic effect exists, industry's position ultimately rests on the argument that society should take every possible care to protect valuable business information, regardless of the impact on public access to useful information or the consequences for public health or the environment. The premise is that safeguarding such information is a value that trumps public concerns. The possible competitive harm that firms might suffer is surely a relevant factor in crafting appropriate information disclosure policies. But it cannot sensibly be the only criterion for establishing information disclosure policies.

National Security Issues. Proposals to limit information disclosure to safeguard national security raise important and sensitive issues, particularly in the wake of September 11. Every citizen in the United States is now aware of the need for vigilant defense against terrorism. Calls for reduction in information disclosure based on national security need to be carefully scrutinized, to avoid genuine threats to security as well as unnecessary constraints on public access to useful information.

As a threshold matter, the disclosures of public health and environmental data which could create a genuine security risk are quite limited. Disclosure of all or most of the pollution data in the TRI database would raise no serious national security issues. The same conclusion presumably applies to data on violations of public health standards under the Beach Bill or information on contaminants in drinking water which violate the Safe Drinking Water Act. On

²³³ Cf. Lyndon, *supra* note 204, at 55 ("Learning about pollution is a social project, and blocking its progress cannot credibly be made into a private privilege. Trade secret doctrines, therefore, should not be applied to health and environmental information.").

the other hand, disclosure of information about the off-site consequences of accidents involving “extremely hazardous materials” does appear to raise at least a legitimate security question.

Second, even when disclosing information has some potential to create a security problem, the risks from disclosure have to be weighed against the potential public security benefits which disclosure can produce. As discussed in preceding sections, public awareness of a hazardous situation can act as a spur to public and private actions to eliminate hazards. Congress recognized this possibility in recent legislation addressing the dangers associated with chemical plants by mandating that the executive branch study whether disclosure of dangerous conditions creates "incentives for . . . reduction in the risk of accidental releases."²³⁴ Anecdotal evidence also supports the idea that public knowledge of dangerous conditions can help eliminate them. For example, public information about the hazard posed by the large volumes of liquid chlorine stored at a wastewater treatment facility in Washington, D.C., in close proximity to the White House, Congress, and Bolling Air Force Base, reportedly led to substitution of a safer chemical for chlorine.²³⁵

In addition, public policies on the disclosure of information with security implications should take into account the fact that the availability of information allows communities and citizens to take steps to avoid or mitigate the effects of accidents or terrorist actions. For example, The Safe Hometowns Guide, a recent publication designed to help communities reassess chemical site safety and security after September 11, refers to right to know programs as the starting place for obtaining information about the hazards facing a community and improving community safety.²³⁶ Without access to this type of basic information, a community would be

²³⁴ P.L. No. 106-40, § 3(a) (August 5, 1999). See also 65 Fed. Reg. 48108 (2000) (EPA “relied on the public availability of [risk management plans] to stimulate further chemical risk reduction efforts, which occur primarily at the local level where the risk is found”).

²³⁵ See OMB Watch, “Benefits of Chemical Information Should Not Be Forgotten,” (January 16, 2002) (www.ombwatch.org/article/articleview/394/1/39) (last visited September 19, 2002).

²³⁶ See Safe Hometowns Initiative, The Safe Hometowns Guide: How To Do A Community Reassessment of Chemical Site Safety and Security After September 11, 2001, Introduction(v, vi), ES-4, 2-1 (available at www.safehometowns.org) (last visited September 23,

essentially powerless to develop meaningful plans to prevent loss of life or injury. In addition, if individual citizens lack access to this type of information they cannot bring political pressure to bear on public officials and private firms to address hazardous situations.²³⁷ Thus, over the long-term, public disclosure of environmental hazards may, in fact, do more to enhance public safety than barring public access to such information.

Furthermore, leaving information about hazardous conditions exclusively in the hands of the firms whose operations create the hazards, or a narrow group of government experts, would ignore the rationales for establishing information disclosure programs. For the reasons described, private firms lack sufficient incentives to expend their own financial resources to reduce risks to neighboring communities to reasonable levels. Anecdotal information again suggests that, in fact, firms have been slow to take meaningful action to tighten security at their facilities following September 11.²³⁸ While government officials are charged with implementing

2002). Options identified in the report to improve public safety include eliminating the hazards, implementing additional safety devices and strategies, creating larger buffer zones, and improving emergency response plans and systems.

²³⁷ See Carl Bruch, “The Right to ‘No’ Increases Vulnerability,” The Environmental Law Forum (2002) (access to risk management plans and emergency response plans allows “the public [to] demand that companies take specific measures to make facilities safer -- less vulnerable to accidents *or* terrorist attacks.”).

²³⁸ According to a recent newspaper article, “security was so lax at 30 [chemical] sites that in broad daylight a Trib reporter – wearing a press pass and carrying a camera – could walk or drive right up to tanks, pipes, and control rooms considered key targets for terrorists.” Carl Prine, “Lax Security Exposes Lethal Chemical Supplies,” Pittsburgh Tribune-Review (April 7, 2002). Also according to this article, “EPA and the Department of Defense agents have planted fake bombs under chemical rail cars and set up phony companies to order deadly gases, largely unchallenged.” Id. See also Erin Pianin, “Study Assesses Risk of Attack on Chemical Plant,” The Washington Post, at A-9 (March 12, 2002) (“Since the Sept. 11 attacks, lawmakers, federal officials and environmental groups have repeatedly warned the chemical industry that terror attacks could turn hazardous-material plants into weapons of mass destruction. Industry officials say they have instituted important safeguards, but critics say much more is needed.”); see also Associated Press, “Lax Security at Chemical Plant: Investigators Fear Terrorists Could Access Dangerous Toxins” (May 6, 2002) (describing probe of security at chemical facilities in other parts of the country which demonstrated “easy access show[ing] that industry isn’t heeding its own recommendations” for site security).

balanced security measures, their ability to carry out this responsibility will be compromised to the extent that they deal only with private firms in deciding what security measures to adopt.²³⁹ Public access to hazard information is likely to improve government decision making in this area by supporting a public-interest counter weight to industry influence over security matters.

Most importantly, the debate over whether or not to disclose certain information should not divert public attention from the highest priority tasks -- reducing the likelihood of chemical accidents or terrorist attacks with potentially devastating consequences. Highest priority tasks include, for example, modifying or relocating plants and other facilities, substituting safer chemicals for more hazardous chemicals, and reducing unnecessary inventories of stored hazardous materials. Additional controls, including everything from cut-off valves to containment facilities, should be added to industrial facilities to help contain the scope of a possible disaster. Another priority should be development and/or improvement of emergency response plans.

Overall, the best long-term strategy will generally be to acknowledge the risks that exist and to forge strong public-private partnerships to eliminate and contain the risks to the maximum extent possible, rather than curtail public access to information that itself is a cornerstone of public efforts to identify and address these risks.

²³⁹ Federal agencies have been criticized for their slow pace in addressing potential terrorist targets. See Philip Shannon, "U.S. Agencies Seen as Slow to Move on Terrorism Risk," The New York Times, at A-1, 16 (May 12, 2002). See also Joshua Dean, "Report: Agencies Need to Focus on Cybersecurity Now -- or Else," GovExec.com (January 11, 2002) (new National Research Council report, "Cybersecurity Today and Tomorrow: Pay Now or Pay Later," "describe[s] the potency of cyberattacks and their potential to destroy the country's critical infrastructure," and sets forth recommendations for agencies to avoid crises and improve cybersecurity).

VIII. __CURRENT ISSUES.

This final section briefly comments on several ongoing policy debates about information disclosure and applies some of the analysis laid out in the preceding sections to offer recommendations on how these debates should be resolved.

A. The Data Quality Rider.

One current debate involves the so-called data quality rider and ongoing federal agency efforts to implement this piece of federal legislation. As discussed above, the rider was adopted in December 2000, when it was attached to the FY 2001 Treasury Department appropriations bill. While this important piece of legislation was adopted by Congress essentially without debate, it has generated increasing controversy ever since.

The rider directed the Office of Management and Budget (OMB) to develop government-wide guidelines "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."²⁴⁰ The OMB guidelines shall "apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies." The rider also directs that individual federal agencies issue their own guidelines "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency." Each agency is required to "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 OMB guidelines, and to report periodically to the Director of OMB on "the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency," and "how such complaints were handled by the agency."

²⁴⁰ P.L. 106-554, December 21, 2000, 114 Stat 2763, §§ 515-518.

In February 2002, OMB issued its final data quality guidelines as mandated by the data quality rider.²⁴¹ The guidelines' principal provisions direct agencies "to adopt a basic standard of quality (objectivity, utility, and integrity) as a performance goal" for disclosure programs;²⁴² state that data quality should be appropriate "to the nature and timeliness of the information to be disseminated" as well as "for the various categories of information;"²⁴³ and instruct the agencies to "develop a process for reviewing the quality . . . of information before it is disseminated."²⁴⁴ The guidelines also require the 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 the OMB or agency guidelines,"²⁴⁵ and require the agencies to establish "an administrative appeal process to review the agency's initial decision," where the affected entity does not agree with that decision.²⁴⁶

In discussing the guidelines' "underlying principles," OMB states that "It is important that these guidelines do not impose unnecessary administrative burdens that would inhibit agencies from continuing to take advantage of the Internet and other technologies to disseminate information that can be of great benefit and value to the public."²⁴⁷ The OMB guidelines grant agencies fairly broad discretion in developing their own guidelines to balance the mandate to improve "data quality" with the need to avoid unnecessary administrative burdens. "The guidelines recognize [] that information quality comes at a cost," and they instruct the agencies to "weigh the costs . . . and benefits of higher information quality in the development of

²⁴¹ "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication," 67 Fed. Reg. 8452-8460 (2002).

²⁴² Id. at 8458.

²⁴³ Id. at 8453, 8458.

²⁴⁴ Id. at 8459.

²⁴⁵ Id.

²⁴⁶ Id.

²⁴⁷ Id. at 8453.

information, and the level of quality to which the information disseminated will be held."²⁴⁸

When this paper was being completed, the agencies were in the process of developing their own guidelines as mandated by the rider.

The data quality rider represents a significant victory for industry critics of information disclosure programs. The rider advances important aspects of the industry platform on information disclosure, particularly in terms of granting greater procedural opportunities for industry to influence disclosure programs. The rider will undoubtedly force agencies to devote a fair amount of time and energy to administering the mandatory process for reviewing data quality before the data are released, and to the process for handling requests for corrections as well as administrative appeals from initial agency decisions on data correction requests. The vague terminology in the rider itself and the OMB guidelines could provide fodder for a wide range of complicated, time-consuming administrative disputes. Accordingly, for all the reasons described in section V, the rider threatens to delay the release of information and generally impede the flow of information to the public. Because the rider establishes a one-sided process exclusively for the benefit of industry, the rider also threatens to skew the substantive content of information made available to the public.²⁴⁹

²⁴⁸ Id. at 8452.

²⁴⁹ The first “petition” under OMB’s data quality guidelines, filed by the Center for Regulatory Effectiveness, appears to bear out this negative assessment. The petition challenges a report EPA issued on global warming, claiming that the government’s assessment was premature and based on flawed computer models. See Letter from Jim Tozzi, CRE to John H. Marburger, Director of Office of Science and Technology Policy (Feb. 11, 2002). See there.com/quality/20020211_climate-letter.html#start (last visited September 19, 2002). According to an account in The New York Times, “Many climate scientists, even some whose criticisms of early drafts [of the EPA report] were quoted in the center’s petition, say the challenge is unfounded.” Andrew Revkin, “Law Revises Standards for Scientific Study,” The New York Times (March 21, 2002). See also Peter Suber, “When Is Government Data Good Enough to Use and Disseminate,” Free Online Scholarship Newsletter (April 1, 2002) (“Opponents [of the Data Quality Act] worry that it will give businesses an incentive to criticize the data underlying regulations they dislike and create a blizzard of paperwork, procedural objections, and statistical sophistry to supplement traditional forms of lobbying.”).

Not surprisingly, the data quality rider has itself become the focus of criticism. Senator James M. Jeffords, Chairman of the Senate Environment Committee, stated that “Opponents of government action to protect the public health and the environment” are attempting to “misuse [the Data Quality rider] to prevent the public from getting valid information about threats to their well being and quality of life.”²⁵⁰ A recent analysis of the rider predicts that it will “reduce dramatically the amount of information [agencies] release to the public.”²⁵¹ The advocacy group OMB Watch has observed that the OMB guidelines appear to “set[] up an extremely high burden of proof for regulatory action,”²⁵² suggesting that the guidelines could tie up risk assessments and other analyses in so much red tape that agencies will find it difficult to proceed.

It remains to be seen whether these dire predictions will be realized. As discussed, federal agencies have been granted broad discretion by Congress as well as the OMB guidelines to fashion their own guidelines so as to avoid “unnecessary administrative” burdens which would interfere with the implementation of right to know programs. While this instruction is subject to various interpretations, it appears to provide the agencies broad latitude to craft their guidelines in a way that minimizes the adverse effects on disclosure programs. In addition, the mandate established by the data quality rider has to be interpreted in light of agencies’ other legal responsibilities, including the mandates imposed by federal right to know legislation such as EPCRA or the Safe Drinking Water Act. Finally, the fact that the rider was adopted without

²⁵⁰ Andrew Revkin, “Law Revises Standards for Scientific Study,” The New York Times (March 21, 2002). According to another commentator, “The chief beneficiaries of the new [data quality] rule will be lobbyists. They will now have a new device for sucking money from clients who don’t like the latest bit of data from an agency and who are stupid enough to think that filing a complaint will accomplish something other than enriching the lobbyist.” Robert Gellman, “What? You Haven’t Heard About Section 515?” 20 Government Computer News, No. 24 (August 20, 2001).

²⁵¹ See Karen Robb, “Verification Rule Could Stifle Information Flow,” Federal Times (August 20, 2001).

²⁵² See OMB Watch, “Agencies ‘Adapt’ Data Quality Guidelines” (May 15, 2002) (www.ombwatch.org/article/articleview/740/1/39) (last visited September 19, 2002).

congressional debate suggests that it cannot properly be interpreted as providing the legal foundation for a major revamping of agency decision-making processes.

One critical, unresolved question is whether agency implementation of the data quality rider will be subject to federal court review under the Administrative Procedure Act. As discussed above, an important element of the industry agenda on information disclosure has been to obtain congressional enactment of a federal information statute containing legally enforceable standards. The question is whether the data quality rider fulfills that objective. OMB appears to have intentionally left open the question of whether its guidelines implementing the rider might support judicial review.²⁵³ By contrast, the EPA, in a draft version of its guidelines, has taken the position that the data quality rider should not support judicial review.²⁵⁴ For the reasons discussed in section VI, interpreting the rider as supporting judicial review would further undermine the value and effectiveness of information disclosure programs.

While the judicial review question raises complex legal issues, a number of factors appear to favor the conclusion that judicial review should not be available to enforce agency guidelines developed pursuant to the rider. One approach courts follow in deciding this issue is to ask whether the legislation and/or the legislative history reflect an intent to preclude judicial review

²⁵³ John Graham, addressing federal agencies' draft data quality guidelines, stated: "We note . . . that a number of agencies emphasize that their guidelines are not intended to provide any right to judicial review. A few agencies even stress that their guidelines may not be applicable based on unspecified circumstances and that the agency may be free to differ from the guidelines where the agency considers such action appropriate." John D. Graham, Memorandum for the President's Management Council, June 10, 2002, § V (on file at Georgetown Environmental Law and Policy Institute). The memo continues, "Regardless of what kinds of litigation-oriented disclaimers the agencies may include, agency guidelines should not suggest that agencies are free to disregard their own guidelines. . . . In addition, agencies should be aware that their statements regarding judicial enforceability might not be controlling in the event of litigation." *Id.*

²⁵⁴ See Draft Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, ¶ 1.1 at 13, line 401-404. See www.epa.gov/oei/qualityguidelines ("This document provides guidance to EPA staff and informs the public of EPA's policies and procedures. These guidelines are not a regulation. They are not legally enforceable and do not create any legal rights or impose any legally binding requirements on EPA or the public . . .").

or to commit the action to the agency’s unreviewable discretion.²⁵⁵ The fact that the rider uses the term “guidelines,” especially after a committee report issued the previous year urged agencies to adopt data quality “rules,”²⁵⁶ appears to support the conclusion that Congress did not intend for the rider to authorize judicial review. Another important criterion in determining if there is law to apply is whether the alleged rule establishes clear, enforceable mandates, or whether instead it is essentially aspirational in character or designed to preserve agency discretion.²⁵⁷ In the main, the OMB guidelines appear more aspirational than mandatory: “Overall, agencies shall adopt a basic standard of quality (including objectivity, utility, and integrity) as a *performance goal*”;²⁵⁸ “the guidelines [are designed] *to help* agencies ensure and maximize the quality, utility, objectivity and integrity of the information they disseminate”;²⁵⁹ “it is clear that agencies *should* not disseminate substantive information that does not meet a basic level of quality”;²⁶⁰ and “Quality is to be ensured and established *at levels appropriate to the nature and timeliness of the information to be disseminated*.”²⁶¹ Likewise, EPA’s draft guidelines explicitly state that “EPA

²⁵⁵ 3 *Pierce*, supra note 136, § 17.8 at 1303. See also *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

²⁵⁶ See House Report 105-592 (at 49-50), accompanying the FY 1999 Omnibus Appropriations Act (P.L. 105-277) (using language very similar to data quality rider, but urging OMB to develop rules, as opposed to guidelines).

²⁵⁷ 3 *Pierce*, supra note 136, § 17.7 at 1292 (where neither statutory provision nor legislative rule creates “one or more mandatory, justiciable standards . . . [t]he action is committed to agency discretion”); see also *Coleman v. Perrill*, 845 F.2d 876, 879 (9th Cir. 1988) (language in manual leads court to conclude that “similar treatment for co-defendants is among the Manual’s aspirations, not among its requirements” and, therefore, manual is not binding on agency); *Padula v. Webster*, 822 F.2d 91 (D.C. Cir. 1987) (“Pronouncements that impose no significant restraints on the agency’s discretion are not regarded as binding norms.”).

²⁵⁸ 67 *Fed. Reg.* at 8458 (emphasis added).

²⁵⁹ *Id.* at 8452 (emphasis added).

²⁶⁰ *Id.* (emphasis added).

²⁶¹ *Id.* at 8458 (emphasis added). See also *id.* at 8453 (“OMB designed the proposed guidelines so that agencies can apply them in a common-sense and workable manner”); *id.*

retains discretion to adopt approaches on a case-by-case basis that differ from the guidelines, where appropriate.”²⁶²

In short, there is a good deal to dislike about the data quality rider, at least from a public perspective. But there are also several important, pending questions about how the rider should be interpreted.

B. National Security Legislation.

A second current debate about information disclosure involves competing proposals in Congress to address how information policies should be revised in light of September 11. The debate is likely to come to a head in the context of the “homeland security” legislation, which may be approved in some form before the 107th Congress adjourns.

One approach is exemplified by a bill introduced by Senators Robert Bennett and John Kyl, “The Critical Infrastructure Information Security Act of 2001.”²⁶³ The bill would exempt from disclosure under the Freedom of Information Act information that private entities voluntarily provide to the government related to the security of the nation’s critical infrastructure. The bill defines “critical infrastructure” broadly to include “physical and cyber-based systems and services essential to the national defense, government, or economy of the United States.” The bill also provides that information voluntarily submitted to the federal government could not subsequently be used in any civil lawsuit against the submitter of the information. The basic argument for the bill is that government efforts to protect national security would be enhanced if government could obtain access to confidential information in the hands of private firms and individuals. Holders of such information would be more likely to make the information available

(“agencies must apply these standards flexibly, and in a manner appropriate to the nature and timeliness of the information to be disseminated).

²⁶² EPA Draft Guidelines, *supra* note 254, ¶ 1.1 at 13, line 401-404.

²⁶³ S. 1456, 107th Congress. The Bennett/Kyl bill is only the most prominent of many bills on the same general subject. See Ariana Eunjunc Cha, “Risks Prompt U.S. to Limit Access to Data,” *The Washington Post* at A-1 (February 24, 2002) (“There are now about 30 bills pending in Congress that attempt to redefine what the government is required to release to the public under the Freedom of Information Act.”).

to the government, and thereby contribute to the national defense, if they had an assurance that the government would not disclose the information.

Critics of this legislation contend that it is too broad. One scholar has observed that “The legislation covers . . . any physical infrastructure that is ‘essential’ to the ‘economy’ and that might be damaged by a physical attack.”²⁶⁴ In the words of another commentator, the bill would adversely affect “the public’s right to know about unsafe practices engaged in by the private operators of nuclear power plants, water systems, chemical plants, oil refineries, and other facilities that can pose risks to public health and safety.”²⁶⁵

Another criticism is that the bill’s broad immunity provision would provide a safe haven from liability for firms which have violated public health and environmental laws. In other words, the bill’s immunity provision “invites all sectors of the economy to submit any information they would prefer to keep confidential *in order to avoid legal liability or financial harm*.”²⁶⁶ The bill’s procedural provisions arguably exacerbate this defect, because “industry is allowed to assert that information just remain secret without making any showing as to why, and no government officials are assigned to scrutinize and validate such claims upfront.”²⁶⁷

Finally, this proposal is probably unnecessary to serve its intended purpose because FOIA exemption 4²⁶⁸ already exempts from disclosure privileged or confidential information the disclosure of which would likely “impair the government’s ability to obtain the necessary

²⁶⁴ Testimony of Rena Steinzor, Natural Resources Defense Council, before the Senate Committee on Governmental Affairs regarding Critical Infrastructure Information, May 8, 2002 (http://www.senate.gov/~gov_affairs/050802steinzor.htm) (last visited September 23, 2002).

²⁶⁵ See Testimony of David Sobel, Electronic Privacy Information Center before the Senate committee on Governmental Affairs; http://www.senate.gov/%7Egov_affairs/050802sobel.htm (last visited September 23, 2002).

²⁶⁶ Steinzor testimony, *supra* note 264 (emphasis added).

²⁶⁷ *Id.* The bill would allow industry to stamp material as confidential and turn it over to the Office of Management and Budget, which would be responsible for ensuring that the information is not used against the submitter in a court action.

²⁶⁸ 5 U.S.C. § 552(b)(4).

information in the future.”²⁶⁹ Under this exemption, information is exempt from disclosure if the submitter can show that it does not customarily release the information to the public.²⁷⁰ There are apparently no recorded instances in which information voluntarily submitted to the government has been held to fall outside of exemption 4.²⁷¹

An alternative approach to September 11 is exemplified by the Chemical Security Act of 2001, introduced by Senator Jon Corzine. Rather than focus on information disclosure, the bill would require “high-priority” chemical plants to take “adequate action” “to prevent, control, and minimize the potential consequences” of accidental or criminal releases of hazardous chemicals.²⁷² The legislation directs EPA to develop regulations implementing these mandates, and specifies that “adequate action” includes safer design and maintenance.²⁷³ It also imposes on operators of “high priority” chemical plants the obligation to identify hazards which may result from accidental or criminal releases, to take actions which are necessary to prevent such releases (including ensuring safer design and maintenance of chemical sources), and to minimize the consequences of accidental chemical releases that do occur.²⁷⁴

²⁶⁹ National Parks and Conservation Ass. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

²⁷⁰ Critical Mass Energy Project v. Nuclear Regulatory Comm., 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S.Ct. 1579 (1993). The “National Parks standard” governing Exemption 4, as modified by the Critical Mass decision remains the governing law today. See 1 James T. O’Reilly, Federal Information Disclosure, § 14:85 (3d ed. 2000); 1 Pierce, supra note 136, at § 5.10 at 273-74.

²⁷¹ Testimony of David L. Sobel, supra note 265.

²⁷² S. 1602, 107th Congress. The chemical industry has opposed this legislation. See www.americanchemistry.com (last visited September 19, 2002). On the other hand, industry recently published voluntary guidelines relating to security. See American Chemistry Council, “Site Security Guidelines For U.S. Chemical Industry” (October 2001) (www.americansecurity.com) (last visited September 19, 2002).

²⁷³ S. 1602, § 4.

²⁷⁴ Id.

The Bennett/Kyl bill raises many of the concerns, discussed above in section VII, created by proposals to wall off categories of information from public view. Whereas public access to information about hazardous conditions can prompt effective corrective action, concealing information about hazards from public view may increase the likelihood that the problem will go unremedied. As stated by one commentator, “Shrouding [information] will remove a powerful incentive for remedial action and might actually exacerbate security problems. A blanket exemption for information revealing the existence of potentially dangerous vulnerabilities will protect the negligent as well as the diligent.”²⁷⁵

On the other hand, the Corzine bill focuses on the real core issue – the nature of the hazards present at chemical plants – and mandates specific steps to reduce or eliminate the risks. Whether or not one concludes that restrictions on access to hazard information is warranted, the Corzine approach of directly attacking the problem appears worthwhile.

One or both of these responses to September 11 - perhaps in modified form – is likely to be included in the pending “homeland security” legislation which has passed the House,²⁷⁶ is being debated in the Senate, and is likely to be approved by the full Congress before the end of the 107th Congress.

CONCLUSION

Information disclosure has emerged as a vital tool in the government grab basket of tools for protecting public health and the environment. Right to know programs represent a self evidently useful, low-cost approach for improving public health and environmental quality. They also are consistent with broadly held views about the importance of democratic process and individual autonomy. Perhaps for these reasons, industry representatives have avoided a direct attack on disclosure programs, preferring instead to challenge them indirectly, making at least superficially attractive appeals based, for example, on due process values and the nation’s need for security. But there should be no mistake that these indirect attacks have the potential to

²⁷⁵ Sobel testimony, supra note 265.

²⁷⁶ The Homeland Security Act of 2002, H.R. 5005, passed in the House of Representatives on July 26, 2002.

hobble if not completely destroy information disclosure as an environmental protection tool, and they should be addressed on these terms. Information disclosure programs have demonstrated their worth in actual practice. But the defense of these programs is an immediate and, no doubt, long-term challenge.



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