

# Washington Law Review

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Volume 80 | Number 3

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8-1-2005

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### Recommended Citation

Margaret Pak, Notes and Comments, *An IQ Test for Federal Agencies? Judicial Review of the Information Quality Act under the APA*, 80 Wash. L. Rev. 731 (2005).

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# AN IQ TEST FOR FEDERAL AGENCIES? JUDICIAL REVIEW OF THE INFORMATION QUALITY ACT UNDER THE APA

Margaret Pak

*Abstract:* The Information Quality Act (IQA) directs the Office of Management and Budget (OMB) to issue guidelines to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agencies. The IQA directs agencies to develop administrative mechanisms whereby a person affected by agency-disseminated information may request correction of information that the person believes does not comply with the OMB's guidelines. The IQA is silent on whether judicial review is available to challenge an agency's decision to deny a "request for correction" (RFC). Regulated parties, legislators, scholars, and other groups have framed judicial review of RFC decisions as either a necessary quality-control mechanism for agency rulemaking or an antiregulatory effort to burden an agency's ability to promulgate rules. This Comment argues that the Administrative Procedure Act (APA) bars judicial review of an agency's decision to deny an RFC under both of the APA exceptions to judicial review. Section 701(a)(1) of the APA bars judicial review because congressional intent to preclude judicial review of an agency's RFC decision is fairly discernible in the statutory scheme of the IQA. Section 701(a)(2) of the APA bars judicial review because an agency's RFC decision is committed to agency discretion by law; neither the IQA nor the guidelines promulgated by the OMB pursuant to the IQA provide any law to apply or any meaningful standards by which to judge such agency action.

## INTRODUCTION

In 2001, Congress passed the Information Quality Act (IQA), also referred to as the Data Quality Act, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the federal government.<sup>1</sup> To this end, the IQA directs the Office of Management and Budget (OMB) to develop information quality guidelines that direct federal agencies to (1) develop agency-specific information quality guidelines based on the OMB's guidelines; (2) create administrative mechanisms allowing affected persons to request and obtain correction of agency-disseminated information that does not comply with the OMB's guidelines; and (3) report to the OMB Director

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1. See Fiscal Year 2001 Consolidated Appropriations Act § 515(a), Pub. L. No. 106-554, 114 Stat. 2763A-153 to 2763A-154 (to be codified at 44 U.S.C. § 3516). The IQA is also referred to as the Data Quality Act. See, e.g., Agency Information Quality Guidelines, [http://www.whitehouse.gov/omb/inforeg/agency\\_info\\_quality\\_links.html](http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html) (last visited June 28, 2005).

periodically on the agency's administration of the information quality guidelines.<sup>2</sup> Critics of the IQA see the law as an industry-led effort to enable interest groups either to force agencies to withdraw publicly disseminated reports that influence environmental and public safety regulations,<sup>3</sup> or to prevent agencies from creating regulations by demanding that the government use only data that has reached "rare level[s] of certainty."<sup>4</sup> Proponents of the IQA see the law as a necessary guard against the government's use of faulty information to create unnecessary and costly laws that can exacerbate the problems being addressed.<sup>5</sup> The debate over the IQA reflects the ongoing tension between regulatory decisions based on science and the inherent uncertainty of science.<sup>6</sup>

Under the IQA, affected parties may challenge information disseminated by a federal agency by filing a "request for correction" (RFC) with that agency.<sup>7</sup> Since Congress passed the IQA, various parties have used the IQA's provision of administrative mechanisms to challenge information disseminated by a federal agency.<sup>8</sup> Examples of specific RFCs include a challenge to a U.S. Environmental Protection

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2. See Information Quality Act § 515(b)(2), 44 U.S.C.A. § 3516 note (West Supp. 2004).

3. See, e.g., ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 772 (4th ed. 2003) (noting that industry lobbyists took steps using IQA procedures to force withdrawal of report on global warming even before statute went into effect (citing Andrew C. Revkin, *Law Revises Standards for Scientific Study*, N.Y. TIMES, Mar. 21, 2002, at A30)).

4. See Rick Weiss, *Data Quality Law is Nemesis of Regulation*, WASH. POST, Aug. 16, 2004, at A1.

5. See REPUBLICAN POLICY COMMITTEE, THE DATA QUALITY ACT: HISTORY AND PURPOSE 6 (2005), [http://rpc.senate.gov/\\_files/Jan1805DQAbackgroundunderPG.pdf](http://rpc.senate.gov/_files/Jan1805DQAbackgroundunderPG.pdf).

6. Compare John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, 1997 U. CHI. LEGAL F. 13, 41 (1997) (noting that because of "major implications" on regulatory response, marketplace, and tort litigation, "[i]t is therefore important that the government's risk-assessment determinations be based on sound scientific principles and procedures"), with THOMAS O. MCGARITY ET AL., SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION 32 (2004) (noting inherent limits of scientific knowledge and that while it is "important for regulatory agencies to marshal the most rigorous possible empirical evidence and scientific analysis, any regulatory decision ultimately reflects certain ethical judgments, social priorities, and . . . political values"). For a discussion of the OMB and the IQA in the context of the "sound science" movement, see Michelle V. Lacko, Comment, *The Data Quality Act: Prologue to a Farce or a Tragedy?*, 53 EMORY L.J. 305, 313-18 (2004).

7. See OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, INFORMATION QUALITY: A REPORT TO CONGRESS, FISCAL YEAR 2003, at 12 [hereinafter A REPORT TO CONGRESS], [http://www.whitehouse.gov/omb/inforeg/fy03\\_info\\_quality\\_rpt.pdf](http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf) (last visited June 28, 2005).

8. See generally *id.* (listing requests for information by agency).

Agency (EPA) manual on preventing asbestos disease among auto mechanics,<sup>9</sup> and a challenge to a U.S. Fish and Wildlife Service (FWS) Biological Opinion used as the basis for a decision to list a species under the Endangered Species Act.<sup>10</sup>

The availability of judicial review of an agency's final decision to grant or deny an RFC is an unsettled question.<sup>11</sup> Litigants seeking judicial review of federal agency action generally rely on two bases for judicial review: a private right of action provided by a statute or a cause of action provided by the Administrative Procedure Act (APA).<sup>12</sup> A private right of action is available only where there is congressional intent to provide this right, whether or not judicial review is compatible with the statute.<sup>13</sup> The APA serves as the statutory basis for judicial review over agency actions where Congress has not provided this specific statutory right.<sup>14</sup> However, judicial review of an agency action via an APA cause of action is barred in two instances.<sup>15</sup> First, judicial review is barred where it is precluded by statute.<sup>16</sup> Second, judicial review is barred to the extent that agency action is committed to agency discretion by law<sup>17</sup>— because either there is no law to apply<sup>18</sup> or because there are no meaningful standards by which to judge agency action.<sup>19</sup>

Two district courts have addressed whether judicial review of the IQA

9. See U.S. ENVIRONMENTAL PROTECTION AGENCY, INFORMATION QUALITY FY03 ANNUAL REPORT 13–14, [http://www.epa.gov/quality/informationguidelines/documents/EPA\\_IQG\\_FY03\\_Annual\\_Report.pdf](http://www.epa.gov/quality/informationguidelines/documents/EPA_IQG_FY03_Annual_Report.pdf) (January 1, 2004).

10. See A REPORT TO CONGRESS, *supra* note 7, at 53–54.

11. See, e.g., John D. Graham, Director of the Office of Management and Budget, remarks at the Ensuring the Quality of Data Disseminated by the Federal Government Workshop 9, (Mar. 21, 2002) (“Lawsuits against agencies are certainly another possibility . . . My personal hope is that the courts will stay out of the picture except in cases of egregious agency mismanagement. Yet it will probably take a few critical court decisions before we know how this law and the associated guidelines will be interpreted by judges.”) (transcript available at [http://www7.nationalacademies.org/stl/4-21-02\\_Transcript.doc](http://www7.nationalacademies.org/stl/4-21-02_Transcript.doc)); REPUBLICAN POLICY COMMITTEE, *supra* note 5, at 6 (“[T]he outstanding question of whether government actions, subject to the Data Quality Act, can be reviewed in the courts is one that Congress may need to address in the future.”).

12. *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 461 (4th Cir. 1999), *cited in* Salt Inst. v. Thompson, 345 F. Supp. 2d 589, 601 (E.D. Va. 2004).

13. See *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

14. See 5 U.S.C. §§ 701–706 (2000); *Reg'l Mgmt.*, 186 F.3d at 461.

15. See 5 U.S.C. § 701(a).

16. *Id.* § 701(a)(1).

17. *Id.* § 701(a)(2).

18. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

19. See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

is available.<sup>20</sup> Both courts concluded that (1) the IQA does not expressly or implicitly provide a private cause of action,<sup>21</sup> and (2) judicial review of an agency decision to grant or deny an RFC is not available via the APA because such agency decisions are committed to agency discretion by law under section 701(a)(2).<sup>22</sup> Both cases, however, may have little precedential value with respect to the IQA because both involved an APA threshold issue such as exhaustion, standing, or final agency action.<sup>23</sup>

This Comment argues that judicial review of an agency's decision to grant or deny an RFC is barred under both of the APA exceptions to judicial review.<sup>24</sup> First, judicial review is barred under section 701(a)(1) because congressional intent to preclude such review is fairly discernible from the structure and objectives, and from the nature of the administrative action of the IQA.<sup>25</sup> Second, judicial review is barred under section 701(a)(2) because an agency's decision to grant or deny an

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20. See *In re Operation of the Missouri River Sys. Litigation*, 363 F.Supp. 2d 1145, 1173–75 (D. Minn. 2004); *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 593–603 (E.D. Va. 2004).

21. See *Missouri River*, 363 F.Supp. 2d at 1174 (stating summarily that “[t]he IQA does not provide for a private cause of action”); *Salt Inst.*, 345 F. Supp. 2d at 601 (finding “nothing in the IQA that provides a right of action”).

22. See *Missouri River*, 363 F.Supp. 2d at 1175 (noting absence of any meaningful standard by which to judge agency action); *Salt Inst.*, 345 F. Supp. 2d at 602 (stating that “informal agency decisions concerning [the agency’s] statements and recommendations . . . were matters ‘committed to agency discretion by law’”).

In *Salt Institute v. Thompson*, a salt trade association brought an IQA challenge against the National Heart, Lung, and Blood Institute for failing to disclose data and methods underlying a study on the effect of sodium on high blood pressure. *Id.* at 592–93. The government responded by characterizing the report as an “informal agency statement” and therefore not a final agency action judicially reviewable under the APA. *Id.* at 603.

23. In *Missouri River*, defendants argued that plaintiffs failed to exhaust the administrative mechanisms provided by the IQA. See Federal Defendant’s Opposition to Blaske Marine, Inc.’s Motion for Summary Judgment for Declaration on Eleventh Claim, Information Quality Act at 11, *Missouri River* (No. 8:03CV142), 363 F.Supp. 2d 1145 (D. Minn. 2004). In *Salt Institute*, although the court reached the merits of the section 701(a)(2) argument, the court’s holding rested on threshold issues of standing, see *Salt Inst.*, 345 F. Supp. at 600, and final agency action, see *id.* at 602.

24. The scope of this Comment is narrow; it addresses the specific agency action of deciding whether to grant or deny an RFC and whether this gives rise to a cause of action under the IQA. This Comment does not address whether constitutional or other statutory claims (including patent abuse of agency discretion reviewable under 5 U.S.C. § 706) could be brought under the IQA. Similarly, this Comment does not address the threshold issues of standing, final agency action, or ripeness that may make judicial review of alleged IQA violations unreviewable.

25. See *infra* Part III.A.; 5 U.S.C. § 701(a)(1) (2000); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

RFC is committed to agency discretion by law.<sup>26</sup>

Part I of this Comment provides an overview of the IQA. Part II explains the APA as a statutory basis for judicial review and describes the two APA exceptions under which APA judicial review is barred. Part III argues that judicial review of an agency's RFC decision under the APA is not available under both of the APA exceptions.

## I. CONGRESS DELEGATED IMPLEMENTATION OF THE IQA TO THE OMB AND THE FEDERAL AGENCIES

In 2001, Congress passed the IQA as an amendment to the Paperwork Reduction Act (PRA) of 2001.<sup>27</sup> Pursuant to the IQA, the OMB issued final implementing guidelines in February 2002.<sup>28</sup> Over 130 federal agencies have issued agency-specific information quality guidelines pursuant to the OMB's guidelines.<sup>29</sup>

### A. Congress Passed the IQA in an Appropriations Rider and Left the Key Terms of the IQA to Be Defined by the OMB

Congress passed the IQA as an amendment to the PRA by way of an appropriations rider with no floor debate<sup>30</sup> and little legislative history.<sup>31</sup>

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26. See *infra* Part III.B; 5 U.S.C. § 701(a)(2) (2000); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

27. See Fiscal Year 2001 Consolidated Appropriations Act § 515(a), Pub. L. No. 106-554, 114 Stat. 2763A-153 to 2763A-154 (to be codified at 44 U.S.C. § 3516).

28. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8452-60 (Feb. 22, 2002) [hereinafter OMB Guidelines; Republication].

29. See Agency Information Quality Guidelines, [http://www.whitehouse.gov/omb/inforeg/agency\\_info\\_quality\\_links.html](http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html) (last visited June 28, 2005).

30. See CONGRESSIONAL RESEARCH SERVICE, THE INFORMATION QUALITY ACT: OMB'S GUIDANCE AND INITIAL IMPLEMENTATION 2 (September 17, 2004), [http://theocre.com/pdf/20041021\\_crs.pdf](http://theocre.com/pdf/20041021_crs.pdf) (noting that there were "no hearings or debates on this provision and no committee reports were filed"); Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339, 344-45 (2004) (noting that IQA "passed as a brief appropriations rider, without the benefit of hearings or debate"); Rick Weiss, *Data Quality Law is Nemesis of Regulation*, WASH. POST, Aug. 16, 2004, at A1 ("It is not clear whether anyone in Congress other than [Rep. Jo Ann Emerson and Sen. Richard C. Shelby (R-Ala.)] knew about the buried [rider] language.").

31. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 30, at 4 (noting "scant legislative history of the IQA"). *But see* James W. Conrad, Jr., *The Information Quality Act, Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 523 (2003) (noting that language of IQA first appeared in 1998 House report on Shelby Amendment but was "little noticed at the time"); REPUBLICAN POLICY COMMITTEE, *supra* note 5, at 3 (stating that Data Quality Act

The IQA directs the OMB to issue guidelines that provide policy and procedural guidance to federal agencies in fulfilling the purposes and provisions of the PRA.<sup>32</sup> The guidelines must direct all applicable federal agencies to (1) issue their own agency guidelines pursuant to the statutory objectives in the IQA and in the OMB's guidelines; (2) establish administrative mechanisms for RFCs; and (3) report implementation of the agency's information quality guidelines to the director of the OMB.<sup>33</sup> Congress did not define any of the key terms—"quality," "objectivity," "utility," or "integrity"—in the IQA<sup>34</sup> or in the PRA.<sup>35</sup>

Congress enacted the PRA in 1980, but it originated from the Federal Reports Act of 1942.<sup>36</sup> In 1995, the PRA was substantially amended and re-enacted in whole.<sup>37</sup> The PRA of 1995 created the Office of Information and Regulatory Affairs within the OMB to oversee agency

reaffirmed data quality provisions contained in Paperwork Reduction Act of 1995).

32. Information Quality Act § 515(a), 44 U.S.C.A. § 3516 note (West Supp. 2004).

33. See Information Quality Act § 515(b)(2), 44 U.S.C.A. § 3516 note (West Supp. 2004).

34. In its entirety, the IQA states:

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

(b) Content of guidelines. The guidelines under subsection (a) shall—

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

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

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

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

(C) report periodically to the Director—

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

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

Information Quality Act § 515, 44 U.S.C.A. § 3516 note (West Supp. 2004).

35. See 44 U.S.C. § 3502 (2000) ("Definitions").

36. See Federal Reports Act of 1942, 56 Stat. 1078; Jeffrey S. Lubbers, *Paperwork Redux: The (Stronger) Paperwork Reduction Act of 1995*, 49 ADMIN. L. REV. 111, 111 (1997).

37. See Lubbers, *supra* note 36, at 112.

resources management.<sup>38</sup> The purposes of the PRA include establishing information policies that minimize paperwork burdens on the public and the government;<sup>39</sup> ensuring the greatest possible public benefit from the federal government's creation, use, and dissemination of information;<sup>40</sup> coordinating federal information policy;<sup>41</sup> and improving the quality and use of federal information to strengthen decision-making, accountability, and openness in government.<sup>42</sup> With respect to general information resources management, the PRA directs federal agencies to manage information resources to (1) reduce information collection burdens on the public, (2) increase program efficiency and effectiveness, and (3) improve the integrity, quality, and utility of information to all users within and outside the agency.<sup>43</sup>

*B. The OMB Guidelines Implementing the IQA Define the Key Terms of the IQA and Emphasize Flexibility and Agency Discretion*

The OMB issued final implementing guidelines (OMB Guidelines) pursuant to the IQA in February 2002.<sup>44</sup> The OMB Guidelines direct federal agencies to implement procedures to ensure and maximize a basic level of quality for information those agencies disseminate.<sup>45</sup> Specifically, agencies must (1) prepare information quality guidelines that contain specific quality standards appropriate to the agency and the type of information being disseminated;<sup>46</sup> (2) develop a process for reviewing the quality of information before it is disseminated;<sup>47</sup> (3)

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38. *See id.*

39. *See* 44 U.S.C. § 3501(1), (5) (2000).

40. *See id.* § 3501(2).

41. *See id.* § 3501(3), (6), (10)–(11).

42. *See id.* § 3501(4).

43. *Id.* § 3506(b)(1)(A)–(C).

44. *See* OMB Guidelines; Republication, 67 Fed. Reg. 8452, 8452–58 (“Supplementary Information”) and 8458–60 (“Guidelines”) (Feb. 22, 2002).

On January 3, 2002, the OMB published guidelines in final form. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369 (Jan. 3, 2002). Due to a number of minor errors, however, a corrected version of the final guidelines was republished in its entirety on February 22, 2002. *See* OMB Guidelines; Republication, 67 Fed. Reg. at 8452.

45. OMB Guidelines; Republication, 67 Fed. Reg. at 8452.

46. *Id.* at 8458–59.

47. *Id.* at 8459.



establish administrative mechanisms for public review,<sup>48</sup> and (4) submit an annual report to the OMB providing information on the number, nature, and resolution of RFCs.<sup>49</sup>

The OMB relied on three principles in drafting the OMB Guidelines: (1) flexibility to accommodate specific agency information resource management and administrative practices;<sup>50</sup> (2) variable levels of information quality based on the agency's determination of costs and benefits of such levels;<sup>51</sup> and (3) common-sense implementation by agencies.<sup>52</sup> The OMB stated that its issuance of the final OMB Guidelines marked the "beginning of an evolutionary process" that anticipates increasing experience with OMB and agency guidelines and continuing refinement of both OMB and agency guidelines.<sup>53</sup>

The OMB Guidelines define the key substantive terms of the IQA<sup>54</sup>—"quality," "utility," "objectivity," and "integrity"—that the IQA itself does not define.<sup>55</sup> The OMB Guidelines define "quality" as encompassing the terms "utility," "objectivity," and "integrity."<sup>56</sup> The OMB Guidelines define "utility" as the uses of information and the usefulness of information to its intended users.<sup>57</sup> According to the OMB Guidelines, the purpose of the "integrity" standard is to ensure that information is not compromised through corruption or falsification.<sup>58</sup> The OMB Guidelines define "objectivity" with the most detail.<sup>59</sup> The "objectivity" standard states that "[i]n a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods."<sup>60</sup>

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48. *Id.*

49. *Id.*

50. *Id.* at 8452.

51. *Id.* at 8452–53.

52. *Id.* at 8453.

53. *Id.* at 8458.

54. *See id.* at 8453 (noting "four substantive terms").

55. *See id.* at 8459–60 ("Definitions"); *supra* note 34 and accompanying text.

56. OMB Guidelines; Republication, 67 Fed. Reg. at 8459.

57. *See id.* (stating that "utility" requires agency to consider uses of information from perspective of public in addition to that of agency):

58. *Id.* at 8460.

59. *See id.* at 8459–60 (defining "objectivity" in more length than other defined terms).

60. *Id.* at 8459. The OMB Guidelines do not define the phrase "sound statistical and research methods."

Although the OMB Guidelines define the key substantive terms of the IQA with some detail,<sup>61</sup> they grant agencies wide discretion in establishing administrative mechanisms.<sup>62</sup> The OMB Guidelines direct agencies to establish administrative mechanisms that allow affected persons to seek and obtain, “*where appropriate,*” timely correction of information that does not comply with OMB or agency guidelines.<sup>63</sup> In the preface to the OMB Guidelines, the OMB states that the administrative mechanisms should be appropriate to the nature and timeliness of the agency-disseminated information.<sup>64</sup> Further, the OMB explains that in determining whether to correct information, agencies “may reject claims made in bad faith or without justification, and are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved . . . .”<sup>65</sup>

*C. Information Quality Guidelines Issued by Departments, Agencies, and Sub-Agencies Pursuant to the IQA and OMB Guidelines Likewise Emphasize Flexibility and Agency Discretion*

Over 130 departments, agencies, and sub-agencies have issued information quality guidelines pursuant to the OMB Guidelines.<sup>66</sup> These agency guidelines specify procedures that complainants must comply with in order to challenge the agency’s dissemination of information in administrative hearings.<sup>67</sup> These procedural requirements include time limits on agency responses to RFCs, information required from RFC petitioners, and an appeals process to challenge initial RFC decisions.<sup>68</sup> For example, the Department of Health and Human Services (HHS) Final Guidelines instruct complainants to provide a detailed description

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61. *See id.* at 8453 (“It is not always clear how each substantive term relates . . . to the widely divergent types of information that agencies disseminate.”).

62. *See id.* at 8459 (directing that “administrative mechanisms shall be flexible” and that corrections to information be made “where appropriate”).

63. *See id.* (emphasis added).

64. *Id.* at 8458.

65. *See id.*; *see also* A REPORT TO CONGRESS, *supra* note 7, at 6 (noting that although scope of OMB Guidelines is broad, “OMB also provided agencies discretion to reject correction requests that are groundless or made in bad faith, or boil down to a difference of opinion”).

66. *See* Agency Information Quality Guidelines, [http://www.whitehouse.gov/omb/inforeg/agency\\_info\\_quality\\_links.html](http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html) (last visited May 12, 2005).

67. *See* OMB Guidelines; Republication, 67 Fed. Reg. at 8459.

68. *See id.*

of the information being challenged; specific reasons why the complainant believes such information does not comply with the OMB Guidelines, HHS guidelines, or agency-specific guidelines; specific recommendations on how to correct the information; a description of how the complainant is affected by the information error; and contact information (including organizational affiliation) for the complainant.<sup>69</sup>

Generally, agency guidelines are consistent with the OMB's discretionary language regarding an agency's decision to grant or deny an RFC.<sup>70</sup> For example, the EPA's Information Quality Guidelines state that "considerations relevant to the determination of *appropriate* corrective action include the nature and timeliness of the information involved and such factors as the significance of the error on the use of information and the magnitude of error."<sup>71</sup> The Consumer Product Safety Commission (CPSC) Information Quality Guidelines similarly state that "[t]he CPSC is required to undertake only the degree of correction that it concludes is *appropriate* for the nature and timeliness of the information involved."<sup>72</sup> Although not legally dispositive,<sup>73</sup> some information quality guidelines expressly state that the guidelines do not provide a right to judicial review.<sup>74</sup>

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69. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by HHS Agencies, 67 Fed. Reg. 61343 (Sept. 30, 2002) (announcing availability of HHS Information Quality Guidelines on HHS Web site); HHS Information Quality Guidelines, <http://www.hhs.gov/infoquality/part1.html#e>.

70. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 30, at 4 (noting that OMB's guidance in interpreting key provisions of IQA has had major effect on implementation of IQA).

71. See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, 67 Fed. Reg. 63657 (Oct. 15, 2002) (announcing availability of EPA Information Quality Guidelines on EPA Web site); EPA Information Quality Guidelines 35 (emphasis added), [http://www.epa.gov/quality/informationguidelines/documents/EPA\\_InfoQualityGuidelines.pdf](http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf).

72. See Consumer Product Safety Commission Information Quality Guidelines (emphasis added), <http://www.cpsc.gov/LIBRARY/infoguidelines.html> (last visited June 28, 2005).

73. See, e.g., *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (noting that only statutes, not agency regulations, can preclude judicial review under 5 U.S.C. § 701(a)(1)).

74. See, e.g., U.S. Fish and Wildlife Service Information Quality Guidelines 8, <http://informationquality.fws.gov/topics/FWS%20Information%20Quality%20Guidelines.pdf> (last visited June 28, 2005) (stating that guidelines are "intended only to improve the internal management of the FWS relating to information quality" and "do not provide any right to judicial review").

## II. THE APA PROVIDES FOR JUDICIAL REVIEW OF AGENCY ACTION WITH TWO EXCEPTIONS

The APA serves as the basis for judicial review of final agency action where a statute does not confer a private cause of action.<sup>75</sup> There are two exceptions to APA judicial review.<sup>76</sup> First, judicial review under the APA is barred where judicial review is precluded by statute.<sup>77</sup> Second, judicial review is barred where agency decisions are committed to agency discretion by law.<sup>78</sup>

### A. *The APA Is a Statutory Basis for Judicial Review*

The APA governs federal agencies' decision-making procedures.<sup>79</sup> The APA serves as the basis for judicial review of final agency action for which Congress has not expressly provided a statutory right to judicial review.<sup>80</sup> In enacting the APA, Congress recognized the need to balance the goal of efficient and effective agency action with the goal of ensuring rationality and fairness in agency decision-making.<sup>81</sup>

Section 704 of the APA provides for judicial review of final agency action for which there is no other adequate remedy.<sup>82</sup> APA review is available to any person suffering a legal wrong due to agency action within the meaning of a relevant statute.<sup>83</sup> The APA defines "agency action" to "include the whole or a part of an agency rule, order, license, sanction, or relief, or the equivalent denial thereof or failure to act."<sup>84</sup> An

75. See *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 461 (4th Cir. 1999).

76. See 5 U.S.C. § 701(a) (2000).

77. *Id.* § 701(a)(1).

78. *Id.* § 701(a)(2).

79. 5 U.S.C. §§ 551–583, 701–706, 801–808, 3105, 3344, 6362, 7562.

80. See *id.* §§ 701–706; *Reg'l Mgmt.*, 186 F.3d at 461.

81. See Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review* "On the Record," 10 ADMIN. L.J. AM. U. 179, 181 (1996) (noting that opposing impulses of desire for broad agency discretion and yearning for vigorous judicial review of agency action has led to conflicted and vague doctrinal formulations of judicial review of agency action); see also STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 984 (5th ed. 2002) ("[T]he APA was a compromise between New Deal enthusiasts hostile to control of administrative action and skeptics who saw judicial control as an indispensable safeguard of rule of law values.").

82. 5 U.S.C. § 704.

83. *Id.* § 702.

84. *Id.* § 551(13). *But see* *Indus. Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1117 (D.C. Cir. 1988) (noting that definition of "agency action" set forth by APA is "imprecise, and courts have

agency action is “final” if the action marks the consummation of the agency’s decision-making process and if the action is one by which legal rights or obligations have been determined.<sup>85</sup> Upon judicial review, a court may compel agency action unlawfully withheld or hold unlawful and set aside agency findings and conclusions under six different standards of review.<sup>86</sup>

The availability of review of final agency action depends heavily on the type of claim the petitioner raises,<sup>87</sup> the basis upon which the petitioner alleges unlawfulness,<sup>88</sup> and the agency and agency decision involved.<sup>89</sup> For example, a court is more likely to review a claim against an agency that involves a constitutional issue.<sup>90</sup> Whether the petitioner claims that the agency made an erroneous finding of fact, violated its own regulations, or wrongly applied a statute to a particular set of facts will also influence the availability of judicial review.<sup>91</sup>

Two decades after Congress passed the APA, the U.S. Supreme Court interpreted the APA as reinforcing or embodying “the basic presumption of judicial review” over agency action.<sup>92</sup> Perhaps out of constitutional concerns,<sup>93</sup> courts have long exercised judicial review over unauthorized agency action that infringes on individual rights.<sup>94</sup> The presumption of reviewability may be rebutted by evidence of congressional intent to bar judicial review.<sup>95</sup> The U.S. Supreme Court and legal scholars, however,

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made the threshold determination of reviewable agency action on a case-by-case basis”).

85. See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

86. See *id.* § 706(1)–(2).

87. See BREYER ET AL., *supra* note 81, at 985.

88. See *id.*

89. See *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970) (noting great difference between administrative agencies in respect to “the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action” (quoting *Stark v. Wickard*, 321 U.S. 288, 312 (1944) (Frankfurter, J., dissenting))).

90. See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting “heightened showing” of congressional intent required to limit judicial review over constitutional claims).

91. See BREYER ET AL., *supra* note 81, at 985–86.

92. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

93. See *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 44 (2000) (Thomas, J., dissenting) (noting that constitutional structure contemplates judicial review as check on administrative action).

94. See *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (“[U]nder Article III, Congress established courts to adjudicate . . . claims of infringement of individual rights whether by unlawful action of private persons or the exertion of unauthorized administrative power.”). Cf. BREYER ET AL., *supra* note 81, at 984 (noting that American courts started recognizing presumption of reviewability in 1960s).

95. See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984).

have noted that courts have relaxed the presumption of reviewability in recent case law.<sup>96</sup>

### *B. The APA Provides Two Exceptions to Judicial Review*

The APA codifies two instances where the presumption of judicial review does not apply: where the “statute precludes judicial review” or where “agency action is committed to agency discretion by law.”<sup>97</sup> Section 701(a)(1) of the APA bars judicial review where congressional intent to preclude judicial review is “fairly discernible” in a statutory scheme.<sup>98</sup> Section 701(a)(2) bars judicial review where agency action is committed to agency discretion by law because there is “no law to apply.”<sup>99</sup> The legal analyses applying sections 701(a)(1) and 701(a)(2), however, are not always clearly distinct.<sup>100</sup>

#### *1. Judicial Review Is Not Available Under the APA Where Such Review Is Precluded by Statute*

If not explicit, statutory preclusion of judicial review may be implicit.<sup>101</sup> Courts have found implicit preclusion in a number of

96. See *Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1994) (“[a basic presumption of judicial review] is ‘just’ a presumption” (citing *Block*, 467 U.S. at 349)); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1281 (4th Ed. 2002) (noting that U.S. Supreme Court has continued to gradually reduce scope and strength of presumption of reviewability); BREYER ET AL., *supra* note 81, at 983 (noting that although courts have recognized presumption of reviewability since 1960s, presumption “has been weakened a bit” since 1990s).

97. See 5 U.S.C. § 701(a)(1)–(2) (2000); see also *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (noting that if party overcomes hurdles of section 701(a) then all final agency action for which there is no other adequate remedy in court is reviewable under APA).

98. See *Block*, 467 U.S. at 351.

99. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). There is also a line of case law under section 701(a)(2) that precludes APA judicial review where, by tradition, agency decisions are committed to agency discretion by law. See *infra* note 131.

100. See *Heckler*, 470 U.S. at 828 (1985) (“[I]ndeed, one might wonder what difference exists between § (a)(1) and § (a)(2).”); BREYER ET AL., *supra* note 81, at 1002 (“[T]he line between implicit [statutory] preclusion of review and commitment to agency discretion may be thin.”); PIERCE, *supra* note 96, at 1303 (noting that in many cases where Congress has neither explicitly provided nor barred review of agency action, “the analysis under APA § 701(a)(1) is indistinguishable from the analysis under APA § 701(a)(2)”).

101. See *Barlow v. Collins*, 397 U.S. 159, 165 (1970) (“Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.”).

instances.<sup>102</sup> Congressional intent is the key factor in determining whether the section 701(a)(1) exception to APA review applies.<sup>103</sup> Congress may implicitly preclude judicial review of agency action where congressional intent to do so is “fairly discernible” in the statutory scheme.<sup>104</sup> The U.S. Supreme Court, borrowing language from the legislative history of the APA,<sup>105</sup> stated that absent a showing of “clear and convincing evidence” of contrary legislative intent, courts should not restrict access to judicial review under section 701(a)(1).<sup>106</sup> The Court has since explained that the “clear and convincing evidence” standard should not be used in a strict evidentiary sense.<sup>107</sup>

In *Block v. Community Nutrition Institute*,<sup>108</sup> the U.S. Supreme Court held that Congress implicitly precluded judicial review of consumer suits brought under the Agricultural Marketing Agreement Act (AMAA).<sup>109</sup> The Court found evidence of congressional intent to

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102. See, e.g., *United States v. Fausto*, 484 U.S. 439, 444, 447 (1988) (relying on purpose, “entirety of its text,” and structure of review established in Civil Service Reform Act to imply congressional intent to preclude judicial review of claims brought by non-preference employees under Act); *United States v. Erika*, 456 U.S. 201, 206, 211 (1982) (relying on statutory language, legislative history, and subsequent amendments to Medicare statute to find congressional intent to preclude judicial review of adverse Medicare payment determinations in Court of Claims).

103. See *Block*, 467 U.S. at 345 (noting that whether particular statute precludes judicial review is determined by congressional intent); see also *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (noting that section 701(a)(1) exception applies where Congress has expressed intent to preclude review and section 701(a)(2) can apply even where Congress has not affirmatively barred review).

104. See *Block*, 467 U.S. at 351. However, *Block* also notes that where “substantial doubt” about congressional intent exists, a general presumption favoring judicial review of administrative action is controlling. *Id.*

105. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 n.2 (1967) (quoting H.R. REP. NO. 79-1980, at 41 (1946)).

106. See *id.* at 140–41. Scholars have noted the U.S. courts of appeals’ difficulty applying the U.S. Supreme Court precedent on implicit preclusion. See, e.g., PETER L. STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW, CASES AND COMMENTS 1199 (10th ed. 2003) (“[C]ourts of appeals have responded to the uncomfortable pair of [U.S. Supreme Court] cases by either . . . emphasizing [*Block v.*] *CNI* when finding preclusion [or *Bowen v.*] *Michigan Academy* when finding reviewability.”).

107. See *Block*, 467 U.S. at 351.

108. 467 U.S. 340 (1984).

109. See *id.* at 352–53. In reversing the judgment of the U.S. Court of Appeals for the D.C. Circuit, the *Block* Court held that the suit was precluded under the section 701(a)(1) exception to APA review. See *id.* at 345. Although the Court expressly noted that it did not reach the standing issue, see *id.* at 353 n.4, a number of scholars understand *Block* to be a case about standing, not preclusion. See, e.g., PIERCE, *supra* note 96, at 1270 (claiming that *Block* Court “held that consumers lacked standing” to obtain judicial review); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 263–64 (1988) (claiming that *Block* Court “denied standing to consumers to challenge a marketing order”).

preclude judicial review of consumer suits in the AMAA's statutory structure and objectives, and in the nature of the administrative action involved.<sup>110</sup> The Court stated that the presumption of judicial review under the APA "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent."<sup>111</sup> In the absence of express statutory language, whether Congress intended a particular statute to preclude judicial review under section 701(a)(1) can be inferred by "the statutory scheme as a whole."<sup>112</sup> The "statutory scheme as a whole" includes the structure, objectives, and legislative history of the statute, and the nature of administration action involved.<sup>113</sup>

In looking to the statutory structure of the AMAA, the *Block* Court applied the canon *expressio unius est exclusio alterius*—"to express or include one thing implies the exclusion of the other"<sup>114</sup>—to find evidence of congressional intent to preclude judicial review.<sup>115</sup> In applying this canon, the Court relied on the absence of statutory language providing judicial review for dairy consumers in the AMAA coupled with the statutory language providing judicial review for dairy handlers.<sup>116</sup> The AMAA allows dairy handlers to seek judicial review after they have exhausted the administrative remedies available under the Act, but is silent on whether consumers can participate in any proceeding under the Act.<sup>117</sup> However, the *Block* Court did not rely solely on the *expressio unius* canon to preclude judicial review,<sup>118</sup> nor

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110. See *Block*, 467 U.S. at 352.

111. See *id.* at 349.

112. See *id.*

113. See *id.* at 345.

114. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

115. See BREYER ET AL., *supra* note 81, at 993 (noting *Block* Court's principle use of canon *expressio unius est exclusio alterius* but that use of such canon "can be a hazardous guide to interpretation"). The *Block* Court did not expressly state that it was relying on the *expressio unius* canon; however, the Court's analysis is congruent with the canon. See, e.g., *Block*, 467 U.S. at 347 ("Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.").

116. See *Block*, 467 U.S. at 346–47 ("In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.").

117. See *id.* at 346.

118. See *id.* at 346–48 (applying *expressio unius* canon and relying on objectives of statute and provision of administrative remedies in statute as further evidence of congressional intent to preclude review); see also *United States v. Erika*, 456 U.S. 201, 208–09 (1982) (applying *expressio unius* canon and relying on legislative history and subsequent amendments of statute as further



did the Court extend the canon to bar any constitutional or statutory claims.<sup>119</sup>

For further evidence of congressional intent to preclude judicial review, the *Block* Court looked to the objectives of the AMAA.<sup>120</sup> The primary objective of the AMAA was to control the “destabilizing competition” among dairy farmers by authorizing a market order scheme setting minimum prices that dairy handlers must pay to dairy producers.<sup>121</sup> The purpose of the market order scheme was to raise the prices received by dairy producers and handlers.<sup>122</sup> The Court concluded that permitting consumer suits could possibly frustrate the statutory purpose and threaten the fundamental objectives of the AMAA.<sup>123</sup> The Court also noted that the preclusion of consumer suits would not threaten the objectives of the AMAA<sup>124</sup> and held that the objectives of the AMAA must be realized through the specific remedies already provided by Congress.<sup>125</sup>

In addition to the statutory structure and objectives of the AMAA, the *Block* Court considered the nature of the administrative action involved in the AMAA—namely the statute’s provision for administrative remedies and judicial review for dairy handlers—as evidence of congressional intent to preclude judicial review for consumer suits.<sup>126</sup> The AMAA requires handlers to exhaust administrative remedies made available by the Secretary of Agriculture before seeking judicial review in federal district court.<sup>127</sup> The Court concluded that allowing consumer

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evidence of congressional intent to preclude review); *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977) (noting that existence of express preclusion of judicial review in one section of statute is relevant factor, but not conclusive, in determining whether there is congressional intent to preclude judicial review in another section of statute).

119. See *Block*, 467 U.S. 340; see also *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 678 (1986) (noting that in light of Congress’ provision for review of claims that were characterized as trivial, it is not likely that Congress intended that there be no review to challenge legislation on statutory or constitutional grounds); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting “heightened showing” of congressional intent required to preclude judicial review over constitutional claims).

120. See *Block*, 467 U.S. at 347.

121. See *id.* at 341–42.

122. See *id.*

123. See *id.* at 352.

124. See *id.*

125. See *id.* at 352–53.

126. See *id.* at 346.

127. *Id.*

suits would provide a mechanism that would frustrate Congress's scheme and preference for administrative remedies for dairy handlers.<sup>128</sup> The Court noted that if consumer suits were allowed, handlers could bypass the congressionally provided exhaustion requirement for handlers by either joining suit with a consumer or bringing suit in their capacity as a consumer.<sup>129</sup> Allowing judicial review for consumer suits under the AMAA would have effectively mooted the administrative remedies Congress provided for dairy handlers.<sup>130</sup>

## 2. *Judicial Review Is Not Available Under the APA Where Agency Action Is Committed to Agency Discretion by Law*

Under the section 701(a)(2) exception to APA review,<sup>131</sup> judicial review is barred where action is committed to agency discretion by law.<sup>132</sup> In *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>133</sup> the U.S. Supreme Court used language from the APA legislative history to conclude that section 701(a)(2) precludes judicial review “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”<sup>134</sup> In *Heckler v. Chaney*,<sup>135</sup> the Court added to *Overton Park*'s “no law to apply” test, stating that section 701(a)(2) precludes judicial review where there are no judicially manageable standards for judging how and when an agency should exercise its discretion.<sup>136</sup>

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128. *See id.* at 352.

129. *See id.*

130. *See id.* at 351–52.

131. Interpretations of section 701(a)(2) have diverged into two lines of case law. *See, e.g.,* BREYER ET AL., *supra* note 81, at 1002 (noting that there are two independent tests under section 701(a)(2) exception to judicial review—one that looks for legal standards in statute by which to review claim, and one that looks for legal standards but also considers prudential factors leaning towards unreviewability). Section 701(a)(2) precludes judicial review of certain classes of agency action that have traditionally been recognized as “committed to agency discretion by law,” including prosecutorial decisions, *see Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985), an agency's refusal to reopen an administrative proceeding because of material error, *see Interstate Commerce Comm'n v. Bd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987), and allocation of lump-sum appropriations, *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

132. *See* 5 U.S.C. § 701(a)(2) (2000).

133. 401 U.S. 402 (1971).

134. *See id.* at 410 (quoting S. REP. NO. 79-752, at 26 (1945)). *But see* PIERCE, *supra* note 96, at 1262 (noting that U.S. courts of appeals have held number of statutes to be drawn so broadly that there is no law to apply).

135. 470 U.S. 821 (1985).

136. *See id.* at 830.

The presence or absence of “law to apply” under section 701(a)(2) is controlled by the language of the statute at issue<sup>137</sup> and regulations issued pursuant to the statute.<sup>138</sup> Because the prevailing consideration is the language of the statute or pursuant regulations, courts evaluate the existence of meaningful standards on a case-by-case basis.<sup>139</sup> Scholars note that the “no law to apply” standard is difficult to apply.<sup>140</sup> Courts have reached conflicting interpretations in their search for standards by which to review agency actions.<sup>141</sup>

In *Overton Park*, the Supreme Court held that the language of the Federal-Aid Highway Act (FAHA) and the Department of Transportation Act of 1966 (DTA) provided “law to apply” and therefore that judicial review was not barred under section 701(a)(2) of the APA.<sup>142</sup> The petitioners in *Overton Park* alleged that the Secretary of Transportation violated the FAHA and the DTA by authorizing the use of federal funds to construct a six-lane highway through a public park in Memphis, Tennessee.<sup>143</sup> The FAHA and the DTA prohibited the use of federal funds to construct highways through parks unless there was “no

137. See *Overton Park*, 401 U.S. at 410; *Webster v. Doe*, 486 U.S. 592, 600 (1998) (“Both *Overton Park* and *Heckler* emphasized that § 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based . . .”).

138. See, e.g., *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 346 (4th Cir. 2001) (noting that “even if the underlying statute does not include meaningful (or manageable) standards, ‘regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review’” (quoting *C.C. Distribs., Inc v. United States*, 883 F.2d 146, 154 (D.C. Cir. 1989))); *McAlpine v. United States*, 112 F.3d 1429, 1433 (10th Cir. 1997) (recognizing that “law to apply” can be derived from agency’s regulations); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1123–24, 1127 (6th Cir. 1996) (finding no meaningful standards to apply in statute, coordinating/implementing regulation, or agency-specific regulation).

139. See, e.g., *Overton Park*, 401 U.S. at 411 (holding that “feasible and prudent” and “minimize harm” standards provided law to apply); *Colo. Envtl. Coalition v. Wenker*, 353 F.3d 1221, 1234 (10th Cir. 2004) (stating that “fair balance” requirement in regulation was reviewable); *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998) (holding that phrases “judgment of the Secretary” and “opinion of the Secretary” and structure of statute barred judicial review under APA); *Dickson v. Sec’y of Def.*, 68 F.3d 1396, 1403 (D.C. Cir. 1995) (holding that “in the interest of justice” is meaningful standard); *W. Med. Enters. v. Heckler*, 783 F.2d 1376, 1381 (9th Cir. 1986) (holding that “good cause” standard provides law to apply).

140. See, e.g., *PIERCE*, *supra* note 96, at 1261 (noting that standard is difficult to apply).

141. Compare *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450–51 (9th Cir. 1985) (holding that there is no judicial review of 8 U.S.C. § 1182(e) because statute contained no judicially manageable standards to apply), with *Chong v. United States Info. Agency*, 821 F.2d 171, 176 (3d Cir. 1987) (acknowledging that its finding that agency regulation, 22 C.F.R. § 514.31(b)(2), implementing 8 U.S.C. § 1182(e), contains sufficient guidelines for judicial review, is in conflict with *Abdelhamid*).

142. See *Overton Park*, 401 U.S. at 413.

143. *Id.* at 406.

feasible and prudent alternative to the use of such land” and “such program includes all possible planning to minimize harm to such park . . . resulting from such use.”<sup>144</sup> The Court rejected both the government’s statutory preclusion argument and its “committed to agency discretion by law” argument.<sup>145</sup> The Court determined that the language of the statute provided law to apply because the language supplied “clear and specific directives” and in “plain and explicit” terms barred the use of federal funds to construct highways through parks absent unusual circumstances.<sup>146</sup> Thus, the Court held that the FAHA and DTA directives presented law to apply and that “the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.”<sup>147</sup>

In contrast to *Overton Park*, the U.S. Supreme Court in *Webster v. Doe*<sup>148</sup> applied section 701(a)(2) to find that the structure and language of the National Security Act (NSA) indicated congressional intent to preclude judicial review of the Central Intelligence Agency (CIA) Director’s employment decisions.<sup>149</sup> Section 102 of the NSA provided that the CIA Director “may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .”<sup>150</sup> The Court emphasized the word “deem” in determining that the standard in section 102 foreclosed any meaningful judicial standard by which to judge the Director’s decision.<sup>151</sup> The Court noted, after concluding that the language of section 102 “strongly suggests that its implementation was ‘committed to agency discretion by law,’”<sup>152</sup> that the overall structure of the NSA also supported the Court’s conclusion.<sup>153</sup>

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144. See *id.* at 405 n.3 (quoting 49 U.S.C. § 1653(f) (1964 Supp. V)).

145. See *id.* at 410.

146. See *id.* at 411.

147. See *id.* at 413.

148. 486 U.S. 592 (1988).

149. See *id.* at 599–601 (relying on “no law to apply” in *Overton Park*, 401 U.S. at 410, and “no meaningful standard against which to judge the agency’s exercise of discretion” in *Heckler*, 470 U.S. at 830).

150. See *Webster*, 486 U.S. at 594 (quoting 50 U.S.C. § 403(c) (1947)).

151. See *id.* at 600 (“This standard [‘shall deem such termination necessary or advisable in the interests of the United States’] fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.”).

152. See *id.* at 600 (quoting *Heckler*, 470 U.S. at 830).

153. See *id.* (noting that goal of ensuring integrity in CIA depends in large part on trustworthiness

In *Steenholdt v. Federal Aviation Administration*,<sup>154</sup> the U.S. Court of Appeals for the D.C. Circuit held that the phrase “considers appropriate” in section 44702(d)(2) of the Federal Aviation Act (FA Act) was a clear sign to commit agency decision-making to agency discretion.<sup>155</sup> Under section 44702(d)(2), the Administrator of the Federal Aviation Administration (FAA) is authorized to appoint a private individual, called a Designated Engineering Representative (DER), to perform FAA compliance inspections on aircraft.<sup>156</sup> The Administrator may rescind a DER designation “at any time for any reason the Administrator considers appropriate.”<sup>157</sup> The petitioner in *Steenholdt* was challenging the FAA’s decision not to renew his DER status.<sup>158</sup> The court held that the agency’s decision to designate renewal/nonrenewal status was committed to agency discretion,<sup>159</sup> and barred judicial review of both the substance and procedure of the Administrator’s renewal/nonrenewal decision.<sup>160</sup>

In sum, there are two statutory bases for barring judicial review under section 701 of the APA. First, judicial review is implicitly precluded under section 701(a)(1) where congressional intent to bar review, as evidenced through a statute’s structure, objectives, and preference for certain administrative remedies, is “fairly discernible” in the statutory scheme as a whole. Second, judicial review is barred under section 701(a)(2) where the language of a statute provides no “law to apply.” In cases where a statute describes the agency’s decision with language such as “deem” or “considers appropriate,” courts have found neither “law to apply” nor “judicially manageable standards” by which to judge final

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of its employees and that Director’s determination of employee’s trustworthiness is barred from judicial review under APA). *But see* *Dickson v. Sec’y of Def.*, 68 F.3d 1396, 1403 (D.C. Cir. 1995) (refusing to apply *Webster*, despite similar statutory language, on basis that NSA is “substantially different” from statute authorizing correction boards).

154. 314 F.3d 633 (D.C. Cir. 2003).

155. *See id.* at 638; *see also* *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 602–03 (E.D. Va. 2004) (pointing out similar discretionary language in FA Act in *Steenholdt*, IQA, and OMB guidelines); Memorandum in Support of Defendant’s Motion to Dismiss at 34, *Salt Inst.*, 345 F. Supp. 2d 589 (No. 04-CV-359 GBL) (pointing out similar discretionary language in FA Act in *Steenholdt* and OMB guidelines).

156. *See Steenholdt*, 314 F.3d. at 634–35.

157. *See id.* at 638.

158. *See id.* at 637–38.

159. *See id.* at 638.

160. *See id.* (supporting government’s argument that “substance and procedure of that decision are committed to agency discretion by law” and noting that among factors that agency used to base its DER renewal decision were integrity, sound judgment, and quality of submittals).

agency action.

### III. JUDICIAL REVIEW OF AN AGENCY'S RFC DECISION IS BARRED UNDER BOTH APA EXCEPTIONS

Judicial review of an agency's decision to grant or deny an RFC is not available under either of the section 701(a) exceptions to APA review.<sup>161</sup> First, section 701(a)(1) bars judicial review because congressional intent to preclude judicial review is "fairly discernible" in the statutory scheme of the IQA.<sup>162</sup> Second, section 701(a)(2) bars judicial review because the IQA and its subsequent guidelines provide no law to apply and no meaningful standard by which to evaluate an agency's exercise of discretion.<sup>163</sup>

#### A. *Judicial Review of an Agency's Decision to Grant or Deny an RFC Is Barred Under Section 701(a)(1) of the APA Because Such Review Is Implicitly Precluded by Statute*

Applying the implicit preclusion analysis used in *Block*, congressional intent to preclude judicial review of RFC decisions under section 701(a)(1) of the APA is "fairly discernible" in the IQA's statutory scheme as a whole: the IQA's structure and objectives, and the nature of the administrative action involved.<sup>164</sup> The text of the IQA does not explicitly preclude judicial review.<sup>165</sup> With only sparse legislative history,<sup>166</sup> courts must use the structure and objectives in the IQA, and the nature of the administrative action involved, to determine whether there is a "fairly discernible" congressional intent to preclude judicial review of RFC decisions.<sup>167</sup>

Courts should infer congressional intent to preclude judicial review of an agency's decision to grant or deny an RFC from the structure of the

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161. See 5 U.S.C. § 701(a) (2000). This Comment discusses the narrow question of whether the APA provides a cause of action to review an agency's final refusal to grant an RFC. This analysis begins on the presumption that the threshold issues of standing, final agency action, exhaustion, and ripeness have been satisfied.

162. See *supra* Part II.B.1

163. See *supra* Part II.B.2.

164. See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 349 (applying these elements to preclude judicial review).

165. See Information Quality Act § 515, 44 U.S.C.A. § 3516 note (West Supp. 2004).

166. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 30, at 2.

167. See *Block*, 467 U.S. at 345–46.

IQA.<sup>168</sup> Courts should apply the *expressio unius* canon, as the *Block* Court did in its implicit preclusion analysis.<sup>169</sup> The IQA's explicit provision of administrative mechanisms to address RFCs and the absence of any provision for judicial review provide evidence of congressional intent to preclude judicial review of decisions to grant or deny an RFC.<sup>170</sup> The IQA is silent on judicial review of an agency's decision and specifically authorizes only *administrative mechanisms* to challenge RFC decisions.<sup>171</sup>

The objectives of the IQA and the PRA—and the likely frustration of these objectives if judicial review were allowed—provide further evidence of congressional intent to preclude judicial review of agency decisions to grant or deny an RFC.<sup>172</sup> The objective of the IQA is to ensure and maximize the quality of information disseminated by federal agencies in fulfillment of the purposes and provisions of the PRA.<sup>173</sup> The IQA gives the OMB the responsibility of providing policy and procedural guidance to federal agencies for ensuring and maximizing the quality of information.<sup>174</sup> Judicial oversight of agency decisions to grant or deny RFCs would frustrate the three principles of the OMB Guidelines.<sup>175</sup> The principles of the OMB Guidelines recognize the agency's expertise in (1) determining their own specific information resource management and administrative practices,<sup>176</sup> (2) weighing costs and benefits to determine varying levels of quality for different types of information,<sup>177</sup> and (3) implementing the guidelines in a common-sense and workable manner conducive to existing agency practices.<sup>178</sup> Judicial review of RFC decisions may serve some of the purposes of the PRA, such as improving the quality of federal information to strengthen

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168. *See id.* at 347.

169. *See Block*, 467 U.S. at 347; BREYER ET AL., *supra* note 81, at 993; *supra* note 115.

170. *See Block*, 467 U.S. at 347.

171. *See* Information Quality Act § 515(b), 44 U.S.C.A. § 3516 note (West Supp. 2004). This Comment does not argue that the *expressio unius* canon extends to any constitutional or statutory claims that could be brought under the IQA. *See supra* notes 24, 90.

172. *See Block*, 467 U.S. at 347.

173. *See* Information Quality Act § 515(a), 44 U.S.C.A. § 3516 note.

174. *See id.*

175. *See* OMB Guidelines; Republication, 67 Fed. Reg. 8452–53 (Feb. 22, 2002).

176. *See id.* at 8452 (discussing “flexibility”).

177. *See id.* at 8452–53 (“The guidelines recognize, however, that information quality comes at a cost.”).

178. *See id.* at 8453 (noting that “[i]t is important that these guidelines do not impose unnecessary administrative burdens” on agencies).

decision-making and accountability.<sup>179</sup> Such judicial review, however, could unnecessarily frustrate other purposes of the PRA, such as ensuring the greatest possible public benefit from information created, used, or disseminated by or for the federal government.<sup>180</sup> Like the U.S. Supreme Court's preclusion of consumer suits in *Block*, preclusion of judicial review of RFC decisions would not threaten the goal of improving the quality of federal information.<sup>181</sup> In addition to the statutorily granted administrative mechanisms in the IQA,<sup>182</sup> Congress has provided an opportunity, before a regulation becomes binding, for affected persons to challenge information relied on by federal agencies.<sup>183</sup>

The IQA's preference for administrative mechanisms is further evidence of congressional intent to preclude judicial review of agency RFC decisions.<sup>184</sup> Congress delegated to the OMB and federal agencies the discretion to establish RFC administrative review mechanisms<sup>185</sup> and define the key terms of the IQA.<sup>186</sup> The IQA provides that agencies will determine what remedies are available to affected persons seeking review<sup>187</sup> and delegates discretion to the agencies in making such

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179. See 44 U.S.C. § 3501(4) (2000) (stating that purpose of Paperwork Reduction Act is to "improve the quality and use of Federal information to strengthen decision-making, accountability, and openness in government and society"); see, e.g., REPUBLICAN POLICY COMMITTEE, *supra* note 5, at 3–6 (noting examples where Data Quality Act was successful in improving quality and reliability of information disseminated by government).

180. See *id.* § 3501(2) (stating that purpose of Paperwork Reduction Act is to "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government"); see, e.g., MCGARITY ET AL., *supra* note 6, at 32 (noting that while it is "important for regulatory agencies to marshal the most rigorous possible empirical evidence and scientific analysis, any regulatory decision ultimately reflects certain ethical judgments, social priorities, and . . . political values" because of inherent limits of scientific knowledge).

181. See Information Quality Act § 515(a), 44 U.S.C.A. § 3516 note (West Supp. 2004); 44 U.S.C. § 3501(4) (2000); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 352–53 (1984); see, e.g., CONGRESSIONAL RESEARCH SERVICE, *supra* note 30, 7 (reporting that OMB representatives contemplated IQA procedures as complementary, not in lieu of, APA commenting procedures).

182. See Information Quality Act § 515(b)(2)(B), 44 U.S.C.A. § 3516 note.

183. See, e.g., 5 U.S.C. § 553(b)–(c) (2000) (describing notice and comment requirements of rulemaking under APA).

184. See *Block*, 467 U.S. at 348 (stating that preference for administrative mechanisms is element used to determine whether Congress intended to preclude judicial review).

185. See Information Quality Act § 515(b)(1)(B), 44 U.S.C.A. § 3516 note.

186. See Information Quality Act § 515(a), 44 U.S.C.A. § 3516 note (directing OMB to establish guidelines to ensure and maximize quality, objectivity, utility and integrity of information without defining standards).

187. See OMB Guidelines; Republication, 67 Fed. Reg. 8452, 8459 (Feb. 22, 2002) ("Agencies



determinations.<sup>188</sup>

In sum, congressional intent to preclude judicial review is implicit in the IQA's structure and objectives, and in the nature of administrative action involved. In the absence of an express statement on judicial review and with almost no legislative history, these three factors control the determination of congressional intent to preclude judicial review. Taken together, the factors demonstrate a "fairly discernible" intent to preclude judicial review of an agency's RFC decisions.

*B. Judicial Review of an Agency's Decision to Grant or Deny an RFC Is Barred Under Section 701(a)(2) of the APA Because the Decision Is Committed to Agency Discretion by Law*

Section 701(a)(2) bars judicial review of an agency's RFC decision because neither the IQA nor the OMB Guidelines provide any law to apply, or any meaningful standards by which to judge, agency decisions.<sup>189</sup> Although the OMB Guidelines define the information quality standards in the IQA with some detail,<sup>190</sup> the IQA and the OMB Guidelines do not provide "clear and specific" directives to confine an agency's decision to grant or deny an RFC.<sup>191</sup> The language guiding the agency's decision to grant or deny an RFC in the OMB Guidelines is similar to the language in *Webster* and *Steenholdt*, where the courts held that the agency decision was committed to agency discretion by law.<sup>192</sup>

The IQA and the OMB Guidelines do not provide any "law to apply" or "judicially manageable standards" by which to judge an agency's refusal to grant an RFC.<sup>193</sup> The OMB Guidelines state that "agencies

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shall specify appropriate time periods for agency decisions on whether and how to correct the information.").

188. See Information Quality Act § 515(b), 44 U.S.C.A. § 3516 note.

189. See 5 U.S.C. § 701(a)(2) (2000); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (applying 701(a)(2) exception where there is "no meaningful standard against which to judge the agency's exercise of discretion"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (applying 701(a)(2) exception where there is "no law to apply").

190. See OMB Guidelines; Republication, 67 Fed. Reg. at 8453.

191. See *Overton Park*, 401 U.S. at 411, 413 (noting that statutes at issue were "clear and specific" directives not to use federal funds to construct highways through parks absent unusual circumstances).

192. See OMB Guidelines; Republication, 67 Fed. Reg. at 8459 ("where appropriate"); *Webster v. Doe*, 486 U.S. 592, 594 (1988) ("deem"); *Steenholdt v. Fed. Aviation Admin.*, 314 F.3d 633, 638 (D.C. Cir. 2003) ("considers appropriate").

193. See Information Quality Act § 515(b)(2)(A), 44 U.S.C.A. § 3516 note; OMB Guidelines; Republication, 67 Fed. Reg. at 8459-60 ("Definitions").

shall establish administrative mechanisms allowing affected persons to seek and obtain, *where appropriate*, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines.”<sup>194</sup> Further, the OMB Guidelines state that “[t]he agency shall respond to complaints in a manner *appropriate* to the nature and extent of the complaint.”<sup>195</sup> The language “where appropriate” in the OMB Guidelines regarding an agency’s decision to grant or deny an RFC parallels the “deem” language of section 102 of the National Security Act at issue in *Webster*<sup>196</sup> and the “considers appropriate” language of section 44702(d)(2) of the FA Act at issue in *Steenholdt*.<sup>197</sup> In both *Webster* and *Steenholdt*, the courts found that the agency decision was committed to agency discretion by law under the section 701(a)(2) exception of the APA.<sup>198</sup> Even if an affected party claims that information disseminated by a federal agency does not comply with one of the IQA information quality standards (i.e. objectivity, utility, or integrity), the OMB Guidelines require a decision to grant an RFC only “where appropriate.”<sup>199</sup>

Unlike the Federal-Aid Highway Act at issue in *Overton Park*, the IQA and subsequent guidelines do not provide any “clear and specific directives” on what agencies should consider when deciding whether it would be appropriate to grant or deny an RFC or how to reach the goal of ensuring and maximizing the quality of information disseminated by the federal government.<sup>200</sup> The IQA requires only that the OMB and federal agencies issue guidelines that ensure and maximize the quality of government information.<sup>201</sup> In the IQA, Congress left it to the OMB and federal agencies to define the key terms of the IQA—“quality,” “objectivity,” “utility,” and “integrity.”<sup>202</sup> The OMB Guidelines define

194. See OMB Guidelines; Republication, 67 Fed. Reg. at 8459 (emphasis added).

195. See *id.* (emphasis added).

196. See *Webster*, 486 U.S. at 600.

197. See *Steenholdt*, 314 F.3d 633 at 638; see also *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 602–03 (E.D. Va. 2004) (pointing out similar discretionary language in FA Act in *Steenholdt* and IQA).

198. See *Webster*, 486 U.S. at 600–01; *Steenholdt*, 314 F.3d at 638.

199. See OMB Guidelines; Republication, 67 Fed. Reg. 8452, 8459 (Feb. 22, 2002).

200. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

201. See Information Quality Act § 515(a), 44 U.S.C.A. § 3516 note (West Supp. 2004).

202. See *id.* § 515(b)(2)(A), 44 U.S.C.A. § 3516 note; OMB Guidelines; Republication, 67 Fed. Reg. at 8459–60 (“Definitions”).

the substantive terms of the IQA with some detail,<sup>203</sup> but the OMB recognized the uncertainty of how the substantive terms would relate to the “widely divergent types of information that agencies disseminate.”<sup>204</sup> The language in the OMB Guidelines affords great discretion to agencies’ decisions to grant or deny an RFC.<sup>205</sup> Unlike the FAHA and the DTA in *Overton Park*, which barred the use of federal funds to construct highways through parks absent unusual circumstances,<sup>206</sup> there is no “plain and explicit” bar to when an agency can refuse to correct an RFC. The OMB Guidelines call for “flexible” administrative mechanisms and correction of information only “where appropriate.”<sup>207</sup>

#### IV. CONCLUSION

Judicial review of an agency’s decision to grant or deny an RFC under the APA is barred because such review falls within both section 701(a) exceptions to APA review. Under section 701(a)(1), congressional intent to preclude judicial review of the IQA is “fairly discernible” through the structure, objectives, and nature of administrative action involved in the statutory scheme. Under section 701(a)(2), judicial review of the IQA is not available because the IQA and its pursuant guidelines do not provide any law to apply, nor do they provide any meaningful standards by which to judge agency action.

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203. See OMB Guidelines; Republication, 67 Fed. Reg. at 8453.

204. See *id.*

205. See *id.* at 8459.

206. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

207. See OMB Guidelines; Republication, 67 Fed. Reg. at 8459.