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SUBJECT:: Requests for Reconsideration of Climate Report Denials under Data Quality

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TEXT:

Please see the attached. I apologize for the volume (appx 33 pgs.), but these two documents are required to illustrate the ruses that OSTP and EPA have undertaken to shield the National Assessment on Climate Change and Climate Action Report, respectively, from the Data Quality Act's requirements.

Our reasoning, in short though exhaustively documented in our Requests and Appeals, is that NACC relies on climate projections based upon computer models that have been demonstrated to perform more poorly than a table of random numbers. This is not in dispute, as when presented with this assertion the National Oceanic and Atmospheric Administration (NOAA) confirmed it through its own tests. CAR relies upon NACC for its Chapter 6.

Both documents, therefore, fail the FDQA test of "utility", for reasons CEI amply documented. Arguably, as OSTP's NACC production team was aware of this reality prior to producing the report, their intentional selection of two outlying models with such unacceptable performance satisfies the lack of "objectivity" threshold. Both Appeals are pending at the respective agencies.

OSTP denied CEI's Request on the grounds that NACC is not "information" subject to FACA because OSTP did not in fact produce NACC, but it is the product of a FACA committee. While for the instant purposes the truthfulness of that claim is not an issue, please note that a substantial record of OSTP and subservient offices acknowledge that this is not accurate for, numerous reasons, again well documented by CEI in its Request and Appeal. For now please merely note that the statute authorizing NACC asserts that two agencies subservient to OSTP for purposes of the NACC "shall prepare and submit to the President and the Congress an assessment which" (15 U.S.C. 2936. That is, by statute, OSTP produces any report purporting to be the National Assessment. If permitted to stand, OSTP's argument establishes that FDQA permits a covered agency to merely convene a FACA committee to produce work in order to exempt its product from otherwise applicable data quality requirements.

EPA denied CEI's Request on the grounds that CAR is not "disseminated" by EPA and thereby subject to FACA because EPA did not in fact produce CAR, but it is the product of the State Department : EPA claims that it merely

5 May 2003

Director of the Office of Science and Technology Policy
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20502.

Re: Information Correction Appeal, National Assessment on Climate Change

To Whom It May Concern,

In its April 21, 2003 correspondence to me from Kathie Olsen, Ph.D., OSTP provided its Initial Determination, rejecting CEI's Request for Correction of Information under the Federal Data Quality Act. Pursuant to OSTP's "Final Guidelines for Ensuring Quality of Disseminated Information", III(B) -- (8) ("Appeal Requests"), CEI hereby appeals this Initial Determination on the following grounds.

OSTP's asserted basis for its rejection is that "the National Assessment [NACC], as a FACA committee document, does not meet the [OSTP implementing] Guidelines' definition of 'information' subject to correction." Additionally, OSTP incorrectly asserts that it "has not adopted the contents of the National Assessment as its own, or otherwise expressly relied upon it." Neither prong of this argument is supportable given the relevant statutory authority, NACC's text, OSTP admissions elsewhere, and otherwise an extensive record.

The USGCR Act of 1990 can only be read such that any document purporting to be a National Assessment, regardless of the origin of the whole or parts, by act of submission to Congress and the President is the product of CENR, NSTC and thereby OSTP. Further, even disregarding the plain statutory assignment of this function for these purposes, the multiple layers of actual governmental review and approval -- that is, production -- between the FACA committee and publication of the NACC by USGCRP (thereby, OSTP) expose that neither FACA, nor either OMB's or OSTP's own FDQA implementing guidelines feasibly exempt this document from FDQA's requirements.

OSTP's argument is distilled as: OSTP relieved itself of FDQA's statutory requirements for data integrity, and responsibility under the NACC's authorizing statute, by claiming it delegated its responsibility for the NACC to a third party. This claim is unsupported by any reasonable reading of the USGCR Act of 1990 (relevant sections being 15 U.S.C. 2932 and 2936), and belied by an extensive record as factually incorrect.

Therefore, and as detailed herein, CEI respectfully requests OSTP promptly grant CEI's Request on its merits and immediately cease dissemination of the "National Assessment of the Potential Consequences of Climate Variability and Change for the United States."

National Assessment Qualifies as "Information" Subject to FDQA Requirements

Summary

The "*National Assessment of the Potential Consequences of Climate Variability and Change for the United States*" (National Assessment, or NACC) is a document statutorily assigned to and prescribed as a product of OSTP via CENR/NSTC and USGCRP.

The statute creates a role for contribution from federal agencies as members of CENR, likely allowing for contribution to *their function* from, e.g., a FACA committee.¹ These provisions offer no room, however, to read any assignment or delegation of production of and responsibility for the NACC itself to a private or quasi-private entity. Also per OSTP acknowledgements USGCRP products are attributable as a matter of law to OSTP.

Citing input to CENR under the "sunshine act" FACA as a rationale to avoid application of data quality laws to OSTP's statutory product makes OSTP's proffered interpretation of FDQA even less likely to receive judicial sanction.

OSTP acknowledges relying upon CENR's FACA documents in its "National Assessment," the sole document at issue in CEI's Request -- the "*National Assessment of the Potential Consequences of Climate Variability and Change for the United States*."

Pursuant to the plain language of USGCR Act of 1990, a document submitted as a "National Assessment", upon such submission, can be nothing but the "National Assessment" assigned to CENR/NSTC, be its or its components' prior incarnation(s) be the FACA "*Synthesis Report*" or any other document. The NACC is a statutorily prescribed OSTP product -- any document purporting to be the National Assessment is thereby an OSTP product.

No exemption exists on FDQA, OMB's Guidelines or OSTP's implementing guidelines for agency documents disseminating information that includes FACA product.

Regardless, OSTP has expressly relied upon NACC by its submission, and elsewhere.

OSTP attempts to redefine the NACC and responsibility for its production to torture an exemption out of its own guidelines, but the arguments are without merit in fact and law.

¹ CEI notes the irony in OSTP seeking to use FACA to shield its actions from accountability, given that FACA is a "sunshine" statute enacted to promote openness and accountability, requiring public accessibility to the process and information. See, e.g., *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton, et al.*, 997 F.2d 898 (DDC 1994); see also *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989). CEI is confident no judicial interpretation of FACA in an FDQA context would allow a "sunshine" act to be employed as OSTP seeks in the instant case.

CENR/NSTC, USGCRP and thus OSTP Clearly Produced the National Assessment²

I. NACC's Statutory Authorization Asserts NACC is an OSTP Product

NAST proclaims and OSTP accepts that NAST's documents are produced under the auspices of FACA.³ The NACC record confirms the statutory reality, however, that prior to publication by USGCRP (and thereby OSTP), the NAST product underwent review and ultimately adoption – by fact of its publication (see pp. 6-9, *infra*) -- by governmental entities all of whose actions in this matter are ultimately attributable by statute to OSTP.

In its Initial Determination OSTP provided no substantiation in law, as none exists, for its assertion that the National Assessment itself is a FACA document. The NACC was, and remains, pursuant to statute a document produced by (OSTP):

“Sec. 2936. - Scientific assessment

On a periodic basis (not less frequently than every 4 years), the Council, through the Committee, shall prepare and submit to the President and the Congress an assessment which...” 15 U.S.C. 2936 (emphasis added)

FACA's contribution to CENR was performed under the express authorization of this language. The submitted “National Assessment” purports to be the authorized document. Nowhere does this statute make relevant that NAST compiled several products purportedly pursuant to, regardless of what portion emerged in the document that OSTP disseminated as the National Assessment, and regardless of what credit it accords NAST. This is simply inescapable.

Clearly, as a matter of law and regardless of content or source, if OSTP receives data, then “submit[s it] to the President and the Congress” purporting it to be the National Assessment to satisfy a statutory obligation of producing a document, then OSTP “relied” upon it, as well. Nowhere is OSTP authorized to delegate either function. No construction allows a claim that the “*National Assessment of the Potential Consequences of Climate Variability and Change for the United States*” is a FACA document.⁴

Alternately, OSTP appears to argue not that it delegated its NACC function but that a covered agency may employ FACA at some point in a process in order to circumvent its data integrity obligations. The courts will of course not tolerate such a construction.

² Note, all information presented in this subpart also affirms approval, adoption and otherwise “reliance” upon NACC directly by and otherwise attributable to OSTP. That is, even were NACC a FACA document it would clearly be covered by FDQA nonetheless: This same information affirms not only that NACC is not a FACA document but in fact one ultimately produced *de facto*, as well as *de jure*, by governmental entities – it also defeats OSTP's position that NACC is a document merely received by, but never adopted or “expressly relied upon” by OSTP – the source for this purported standard OSTP does not cite.

³ Notwithstanding NAST's refusal to comply with FACA's requirements as was amply established in the attachments to CEI's Request.

⁴ See demonstration, *infra*, that the record confirms the case in law is also the case in fact: this document purporting to be the NACC was actually approved and produced by (OSTP), so is subject to FDQA

II. OSTP Serially Acknowledges NACC is an OSTP Product

OSTP's abandonment of credit for producing the National Assessment, impossible though that argument may be as a matter of law, is indeed a sudden reversal of its longstanding acknowledgements. See, for example, OSTP's March 1998 Transmittal Letter of that year's "Our Changing Planet" from Director John Gibbons to Congress.

"As you know, the **authorizing legislation of the USGCRP mandates a National Assessment** of Climate Change Impacts. In January of this year, **it was my pleasure to initiate this effort.**" (emphases added)

The subsequent September 2000 transmittal letter reaffirms the truth:

"In a natural outgrowth of the progress in global-scale analysis, the **USGCRP will soon complete its first National Assessment** of the Potential Consequences of Climate Variability and Change, which describes the projected impacts of climate change and variability in the United States on a regional scale."

There is little ambiguity there. Reality is further made inescapable by subsequent September 2001 transmittal letter to Congress from Margaret Leinen, asserting:

"I am pleased to transmit to you a copy of *Our Changing Planet: The FY 2002 U.S. Global Change Research Program*. This document, which is produced annually, **describes the activities and plans of the U.S. Global Change Research Program (USGCRP)**, which was established in 1989 and authorized by Congress in the Global Change Research Act of 1990." (emphasis added)

What were these activities? Under "Accomplishments, **USGCRP acknowledges it:**

"**Submitted to Congress an assessment of climate change titled *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change***, which was produced by a team of authors operating under the auspices of the Federal Advisory Committee Act. The assessment includes an overview of about 150 pages and a foundation volume that is about 600 pages long."

Before OSTP predictably seeks to hang its rhetorical hat on the "produced" attribution, recall that delegation of the production function (that is, "responsibility"), is as a matter of law clearly not available pursuant to USGCR Act of 1990. OSTP has yet to present any support for its implicit argument that USGCRA permits OSTP to delegate *responsibility* to a third party to, *inter alia*, avoid applicable laws including data quality standards.

Moreover, OSTP should note that the USGCRP (OSTP) could submit the New York Yellow Pages to Congress and the President, but so long as it purports to be the National

Assessment, it remains OSTP's product pursuant to the USGCR Act of 1990, and subject to FDQA.

Please also note that this 2001 (FY2002) version of USGCRP's (OSTP) "Our Changing Planet" further belies OSTP's untenable claim that it has not expressly relied upon the NACC, expressly citing NACC in this report as authoritative (see e.g. Sec. 3, p. 13).

These documents, alone, indeed merely the latter citation, refute OSTP's cited basis for refusing CEI's FDQA Request.

III. FACA Committee only Charged with Producing a NACC Component

In addition to the utter absence of statutory authority to permit such an action, also fatal to OSTP's *ad hoc* claim that the FACA committee actually produced NACC is that USGCRP charged the NAST FACA committee merely with preparing the Synthesis Report, such "that the Synthesis Report and the companion sectoral and regional assessment reports are completed, externally reviewed, and **submitted to the SGCR so that these reports can be completed and published** by January 1, 2000." (<http://www.usgcrp.gov/usgcrp/nacc/background/organization/charge-nast.html>) (emphasis added)

That is, USGCRP charged the FACA committee with providing a Synthesis Report to a governmental office (SGCR), for review and publishing as part of NACC for which OSTP bears ultimate the responsibility. As demonstrated herein, the record is that in addition to being the maximum third party participation allowed *de jure*, this is also what occurred, in fact.

IV. NACC Text Acknowledges it is, as Matter of Law, an OSTP Product

OSTP relies upon an attribution in the NACC of credit to NAST to support its contention that NACC is actually a FACA product and therefore somehow exempt from FDQA's requirements. Specifically, OSTP gives great meaning to "[t]his report was produced by the National Assessment Synthesis Team, an advisory committee chartered under the Federal Advisory Committee Act to help the US Global Change Research Act of 1990. The National Science and Technology Council has forwarded this Report to the President and Congress for their consideration as required by the Global Change Research Act".

The wishful tack of "saying it's so makes it so" is reliably unsuccessful. In fact, this excerpt proves rather too much, actually defeating OSTP's own argument, as follows:

"This report was produced by the National Assessment Synthesis Team, an advisory committee chartered under the Federal Advisory Committee Act to help the US Global Change Research Program fulfill its mandate under the US Global Change Research Act of 1990."

Whose statutory mandate? USGCRP, not NAST.

What mandate is that which NAST “helped” *USGCRP meet*? USGCRP’s production of a National Assessment. 15 U.S.C. 2936. *NAST* did not produce a document in compliance with a law, but *USGCRP* did. OSTP acknowledges in its Initial Determination that this act is attributable for FDQA purposes to OSTP.

Moreover:

“The National Science and Technology Council has forwarded this Report to the President and Congress for their consideration as required by the Global Change Research Act.”

Who forwarded this USGCRP document to the President and Congress to fulfill its own mandate? *NSTC*, not NAST. *NSTC* is for these purposes OSTP, as OSTP is forced to acknowledge in its Initial Determination. Forwarding the document in satisfaction of a statutory mandate is “reliance.” In fact, regardless of what editing *NSTC* might or might not engage, that is for these purposes adoption (see pp. 6-9, *infra*).

Belaboring the obvious, no attribution of credit can supercede the statutory mandate for production, and of responsibility. That mandate is that this document is by law an OSTP product whose ultimate production and responsibility for which could not be, and was not, assigned to a third party. CEI is confident no court will tolerate a reading of the law allowing such a transparent, extra-statutory construction to facilitate evasion (of data quality requirements)-by-delegation.

Further, other NACC excerpts yield more revealing language contributing to the totality of the record entirely undermining OSTP’s legally untenable claim that NACC is a FACA product. This thread first picks up on the very page containing OSTP’s selective excerpt, with the acknowledgement of statutory and worldly reality:

“The report was turned in to the Subcommittee on Global Change Research on October 31, 2000. The National Science and Technology Council has forwarded this report to the President and Congress for their consideration as required by the Global Change Research Act.”

This is “reliance,” to the extent it is relevant that OSTP continues to maintain that whether it relied upon its own product.

To date OSTP continues to publish then-Director Dr. Neal Lane’s acknowledgement that the NACC is in fact a government report, in his September 2000 address to the Baker Center at Rice University: “The federal government has taken a first step in addressing such questions by completing a National Assessment of the Potential Impacts of Climate Change on the United States.” found at http://www.ostp.gov/html/00911_4.html. OSTP again admits that the federal government – OSTP – completed a National Assessment.

Also in this regard, NSTC confirms that OSTP was the final of several layers of governmental sign-off on NACC, fulfilling its statutory duty by transmitting, and thereby adopting, this document that it informs CEI is actually a FACA product:

“The U.S. National Assessment of the Potential Consequences of Climate Variability and Change, conducted under the USGCRP pursuant to the Global Change Research Act of 1990 and a request by the Assistant to the President for Science and Technology, continued in 2000. In November, the National Assessment Synthesis Team (NAST) transmitted *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change* to the Subcommittee on Global Change Research of the NSTC Committee on Environment and Natural Resources and to the OSTP. In turn, the OSTP provided copies of the report to the President and to the leaders of Congress and appropriate committees.” NSTC FY 2000 Annual Report, found at http://www.ostp.gov/NSTC/html/nstc_ar.pdf (emphasis added)

This record makes it inescapable that OSTP, by transmitting NAST and other data specifically to satisfy its own statutory duty of production, also thereby relied upon such product, authority and responsibility for which remains statutorily assigned to OSTP.

V. USGCRP, NAST Minutes Affirm OSTP Ownership, Defeat “FACA” Claim

Further affirming this reality, the Meeting Minutes that chronicle development of the “National Assessment” reveal not only the evolution of the dicta purporting to assign credit for NACC to NAST⁵ – though never authority or responsibility, which clearly are not delegable. These Minutes also offer other acknowledgements, beyond the insignificant claim that OSTP cites in its Initial Determination, all damning to OSTP’s contentions, inconsistent with a third party product and entirely consistent with a product of a process and authority as statutorily prescribed.

As NAST acknowledges in, *e.g.* Minutes of the First NAST Meeting 2-3 April 1998, OSTP undertook “*approval*” of the FACA submissions for the Subcommittee on Global Change Research/CENR, then NSTC, for both the Assessment Plan *and any ensuing product submitted for inclusion in the National Assessment*. By, *inter alia*, this approval and as the statute dictates, CENR/NSTC make the NACC OSTP’s very own.

⁵ See the following revealing note buried in the NAST Meeting Minutes, 31 May – 1 June 2002. “Suggestions that were made concerned...more clearly indicating in the Overview the role of USGCRP in making the assessment possible.” NAST’s desire to assert or usurp authority and credit was thereby apparent from the beginning, but nonetheless is not statutorily permissible. Its origin is certainly of interest to CEI, and cannot be entirely blamed on NAST. For example, from the same Minutes, note the apparent impermissible attempt at abdication to NAST, fairly presumably for political reasons (so a political unit, the White House, is seen as having arm’s length from what might be subject to characterization as “political science”). “More detailed discussions of the planned release indicated that this report will be the NAST’s to present, and it is expected that the agencies will have little to say during the comment period in that this is a draft report.” *Such discussions may have indicated this – note no reference to any authority for such a move – but the statute most certainly does not. It seems unnecessary to argue the obvious, that such vocalized desires, whatever their motivation, cannot supercede statutorily prescribed authority.*

NAST Meeting Minutes, 31 May – 1 June 2000, further put the “FACA product” issue to rest with a single notation:

“After completing a quick update, the revised version would be submitted through the USGCRP agencies to the NSTC **for a formal review and signoff**. Publication and submission to Congress would follow.” (emphasis added)

Also see the Minutes of the Second NAST Meeting 23-28 August 1998, reaffirming the final production and signoff functions (emphasis added):

November 1999	<ul style="list-style-type: none">• Synthesis Team revises draft (as needed) based on comments from Editorial/Responsiveness Review.• NSTC/CENR Review (followed by revision as needed).
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Therefore, the Minutes chronicling the NACC’s development confirm that NAST, followed by several *governmental* offices, followed the clear statutory progression of OSTP producing a National Assessment. CEI has thereby presented OSTP with NACC’s own references, and numerous acknowledgements in the record, confirming that not only is the NACC not an impermissibly delegated FACA committee product, but that review and approval of the FACA product constituted OSTP tripping the straw “reliance” threshold it struggles to create for purposes of denying. Regardless, that threshold is crossed by OSTP’s submission of a document claiming to be the “National Assessment.”

This begs the mystery: how can OSTP contend that overseeing, editing, approving, then submitting a document, all in fulfillment of a specifically assigned statutory duty, is not “reliance”? This is simply not a plausible argument to duck FDQA coverage.

VI. Other Documents in NACC’s NSF Docket Affirm NACC is OSTP Product

Consider further “President Clinton’s Internet Address to the Nation: Meeting the Challenge of Global Warming (11/11/00) (http://clinton4.nara.gov/textonly/library/hot_releases/November_11_2000.html):

“Assessing the Potential Impacts of Climate Change on the United States. A report today to the President and Congress provides the most detailed assessment ever of ways in which climate change may affect our nation. **The report**, Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change, **was requested by Congress and undertaken by the U.S. Global Change Research Program, a federal interagency science program** [...] with *contributions from* hundreds of the nation’s leading climate scientists.” (emphases and italics added).

Yet OSTP implausibly contends that the NACC is a “non-governmental product” in order to avoid applicable data quality requirements.

See also USGCRP's website for: "~~New~~ National Assessment of the Potential Consequences of Climate Variability and Change, Final approved version." "Undertaken" and "approved" by...but somehow not really the product of...OSTP.

Also, prior to publication of dicta inaccurately crediting NAST with production of the NACC -- the remarkably thin reed upon which OSTP's bases its attempt to avoid FDQA coverage -- note the starkly plain, accurate characterization of the process in the *NACC Plan Abstract* affirming that the statutory prescription was also in fact reality, that OSTP produced the NACC, and NAST in fact offered merely one element of the NACC:

"The interagency Subcommittee on Global Change Research, which coordinates implementation of *the U.S. Global Change Research Program and the Office of Science and Technology Policy began work on the first national assessment of the potential consequences of climate change for the U.S. in early 1997. The effort has included* approximately twenty regional workshops; an intensive two-week summer study; a National Forum; extensive discussions among Federal Agencies, the scientific community, and a wide variety of stakeholders; *and* the establishment of an advisory committee named the National Assessment Synthesis Team (NAST), chartered through the National Science Foundation." (emphases added)

The FACA charter was of course granted in March 1998. This admission adds to the difficulties of claiming the National Assessment, production of which predates the FACA committee and which is by law OSTP's product, is somehow actually a FACA product.

In truth, if a document is a FACA product, it is not the National Assessment; if it purports to be a National Assessment, it is not a FACA product. That is, quite simply, the law.

Again, OSTP holds forth an unsupportable position that it successfully maneuvered NACC outside of the coverage of applicable laws, *e.g.*, FDQA, a) by somehow extra-statutorily delegating its function of and responsibility for producing a NACC, therefore disclaiming ownership despite that NACC is *de jure* and inescapably an OSTP product, and b) given that OSTP wrongly claims to have not relied on its own document that it asserts is a FACA product, despite OSTP having formally submitted it to the Executive and Congress specifically to satisfy a statutory obligation to produce such a document. This is a remarkable, untenable contortion of events and legal authority.

The *NACC Plan Abstract* further reminds OSTP that the NACC is not a FACA product but a governmental one, authority for which resides by statute with OSTP, specifically regarding the governmental approval of and imprimatur placed upon the FACA product without which it is not the statutorily prescribed NACC:

"VII. Review... The third level of review for the National Assessment Synthesis Report is explicitly governmental. Once the first two reviews are complete, *the NAST will submit the National Assessment Synthesis Report for approval by the CENR/NSTC*, as requested in the letter from the White House to the SGCR

(Appendix 1). Because all public and private participants will already have had the opportunity to comment on technical issues, and there will already have been an external review of the responsiveness of the NAST and the Synthesis Report to its charge and of the responsiveness to the technical peer-review, *the CENR/NSTC review will focus on final acceptance of the report, and whether it will be transmitted to the Congress.*" (italics and emphases added)

This statement, too, in and of itself defeats OSTP's argument that the NACC was in fact a FACA product, and one upon which OSTP has not relied. OSTP was responsible for approval of NACC as well as determining whether or not to submit it. Finally, OSTP, upon review, approval, did submit the document, as its own "National Assessment".

As if this point could possibly be made any less arguable, further acknowledgements abound defeating the spurious attribution to NAST of producing the NACC on the basis of NAST's preparation of the Synthesis Report (it is *that* product which NAST and OSTP subsequently and inaccurately assert is the NACC, in the face of statutory delegation of NACC production to CENR/NSTC then OSTP for approval and adoption). Consider the *NACC Organization and Mandate*, affirming ultimate governmental production and the limited role of the NAST, in its language leading up to assignment of the Synthesis Report to NAST:

"The National Assessment will be a core activity of the U.S. Global Change Research Program (USGCRP). It will be conducted within the National Science and Technology Council's framework, through its Committee on Environment and Natural Resources and its Subcommittee for Global Change Research (SGCR). To assure a fully open process, the Assessment will include both public and private sector partners across the spectrum of stakeholder interests in the U.S. The following describes the overall management framework of the National Assessment:

Organized under the framework of the NSTC's Committee on Environment and Natural Resources (CENR)

The parent body for the National Assessment within the U.S. Government is the Committee on Environment and Natural Resources (CENR), which is a subsidiary body of the National Science and Technology Council (NSTC), chaired by the President. See the Letter from Dr. John H. Gibbons.

Responsibility delegated to the Subcommittee on Global Change Research

The CENR has delegated responsibility for oversight to its Subcommittee on Global Change Research (SGCR), which is the parent committee for the USGCRP. The SGCR has been charged with overall coordination, implementation, and sponsorship of the National Assessment process."

(italics and other emphases added)

Nowhere is *responsibility for NACC* delegated to a third party, that is, to other than a governmental office whose responsibility ultimately rests for these purposes with OSTP. The reason is that no statutory authority for such delegation exists.

Consider further the USGCRP's NACC "FAQs" webpage, belying OSTP's argument that a FACA committee is actually *responsible for NACC*, contrary to the authorizing statute:

"Who is 'in charge' of the National Assessment?"

The parent body within the US Government for the National Assessment is the Committee on Environment and Natural Resources (CENR), which is a subsidiary body of the National Science and Technology Council, chaired by the President. The CENR has delegated responsibility for oversight of assessment activities to its Subcommittee on Global Change Research (SGCR), which is the parent committee for the USGCRP. The SGCR has broad responsibilities for research planning and coordination among the Federal agencies. With respect to the National Assessment, the SGCR has been charged with overall coordination, implementation, and sponsorship of the national assessment process."

Finally, it has also remained quite clear for quite some time that the USGCRP (thereby OSTP), is the party producing the National Assessment. Note the 8 August 2000 "Introduction" to the NACC, by Mike McCracken:

"In 1997, the U. S. Global Change Research Program initiated the 'National Assessment of the Potential Consequences of Climate Variability and Change for the United States.' This national level assessment included analyses of the importance of climate variability and change in twenty regions around the US, in five cross-cutting sectors focused around natural resources and public health, and for the US as a whole....

To address these issues, the US Congress established the U.S. Global Change Research Program (USGCRP) and instructed US federal research agencies to cooperate in developing and coordinating a 'comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural process of global change...'. Thus was born the *National Assessment of the Potential Consequences of Climate Variability and Change for the United States*, commonly called simply the National Assessment."

Note the date production of NACC began: "In 1997, the U. S. Global Change Research Program initiated the 'National Assessment of the Potential Consequences of Climate Variability and Change for the United States'."

Note the date of the FACA charter: March 1998. This affirms what the statute tells us: USGCRP (OSTP), neither NAST nor any FACA committee, produced the NACC.

Note that the title of the document initiated in 1997 is the same title of the 31 October "National Assessment" which is the subject of CEI's Request.

Note, for emphasis, that this document is *not* titled "Synthesis Report" -- which is that which was produced by the FACA committee to assist CERN, and chartered one year after initiation of the "National Assessment" -- but the actual National Assessment. NAST may produce a synthesis report. There is neither any statutory authority indicating that NAST can produce anything purporting to be a National Assessment, nor that such a document may be produced by a non-governmental body, or in fact, for purposes of responsibility, any office other than OSTP.

Note that Mr. McCracken of course makes no assertion that NAST or a FACA committee produced the actual USGCRP (OSTP) product, the National Assessment.

Truly, it cannot get any more clear than this acknowledgement that OSTP's argument to deny FDQA coverage of the NACC is entirely without merit.

VII. OSTP Guidelines Defeat its Own Claims of Avoiding FDQA Coverage

OSTP cites to a provision in its October 1, 2002 Final Guidelines for Ensuring the Quality of Disseminated Information. On its own this does nothing to aid OSTP's unsupportable contention to evade FDQA coverage of the National Assessment:

"III. 6 Once received, the AD shall initially determine whether the request meets threshold requirements for standing, such as whether the request...4. Alleges errors in information subject to correction (*i.e.*, implicates 'information' as defined in these guidelines)."

This requires reference to OSTP's definition of "information" subject to correction.

"2) 'Information' means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that OSTP disseminates from its web page."

Clearly, the NACC meets this definition of information, consistent with FDQA's intent to broadly cover the range of information produced, adopted, or relied upon in any way by a federal office. That is an important statutory intent to recall in addressing OSTP's arguments seeking exemption for a multi-billion dollar Assessment, authority and responsibility for which is statutorily designated exclusively within OSTP.

Here, the devil is OSTP's interpretation of the exemptions it granted itself, as the basis for denying FDQA coverage of NACC.

Though OSTP does not cite which of the 8 exemptions it invokes, OSTP does make reference to having not “expressly relied” upon NACC. This likely indicates OSTP bases its rejection of CEI’s Request on exemption “b”.

“This definition does not include...b) Information *originated by, and attributed to, non-agency sources*, provided OSTP *does not expressly rely upon it*. Examples include: non-U.S. government information reported and duly attributed in materials prepared and disseminated by OSTP; hyperlinks on OSTP’s web site to information that others disseminate; and reports of advisory committees and international organizations published on agency’s web site...”. (emphasis added)

There are two components here, analysis of each of which defeats OSTP’s proffered interpretation of its own Guidelines. First, OSTP’s argument requires a claim that NACC is neither originated by, nor attributed to, an agency source. The record set forth, *supra*, flatly belies such a contention. NACC is both originated by, and attributed to, OSTP. This is made clear not just in statements by OSTP’s Director, and the record, but in simple facts such as USGCRP and CENR/NSTC, are inarguably governmental *e.g.*, see www.USGCRP.gov, and are for these purposes OSTP (OSTP, for example, chairs NSTC in the absence of the President; see, *e.g.*, OSTP Guidelines, Background, II (3)). Again, NACC as a matter of statute is attributable not to a FACA committee but to OSTP. Further, CEI specifically demonstrates, *supra*, the falsehood of OSTP’s claim to have not relied on the document – OSTP not only relied upon NACC’s underlying documents by submitting that which it did to serve as its National Assessment on Climate Change, but OSTP irrefutably, expressly, and specifically relies upon NACC when citing NACC as authoritative on its own website.

These facts quite simply, as with all else, *supra*, defeats OSTP’s argument.

Further insight into the propriety of this claim can be found, however by a more thorough review of OSTP’s own implementing guidelines, which OSTP acknowledges remain subservient to OMB’s government-wide parameters to the extent they do not run afoul of OMB’s.

In its document OSTP makes no other mention of advisory committees, outside of the context of Pre-Dissemination Review for Objectivity and Utility.⁶ Clearly, that provision does not directly apply to this November 2000 document preceding OSTP’s guidelines or a Request regarding same. Yet, it is illustrative that OSTP cites reliance upon PCAST materials as a trigger for FDQA coverage.

⁶ “(13) OSTP also works with Federal Advisory Committee Act (FACA) committees, including PCAST. PCAST is an independent advisory body established by Executive Order, and other FACA committees have a similar measure of independence. Once these FACA committees gather information, exercise their independent judgement [sic] to formulate recommendations to the President (or other agency officials) and complete reports, FACA requires OSTP make those reports available to the public. If OSTP plans to rely upon information contained in FACA committee reports for the preparation of additional information dissemination products, OSTP will undertake a pre-dissemination review of the information’s quality as described in these guidelines.” Also especially damaging to OSTP’s position are para.s 9, 10.

Note that the attribution of credit for producing NACC – into which OSTP reads so much -- is actually shared by NAST and PCAST in the very introductory pages of NACC to which OSTP turns for support of its position that NACC is NAST's product. OSTP relied upon both, independent bodies for developing the underlying work for a product in satisfying its statutory duty of transmitting, that is, creating, a document purporting to be a National Assessment. NAST's Meeting Minutes cited, *supra*, also clearly set forth PCAST's role in approving the FACA committee's submission. OSTP's claim is, yet again, refuted by the plain words of NACC's record.

Finally, it is inarguable that the spirit and intent of FDQA is one of ensuring openness, and erring on the side of same – “sunshine” also being the underlying spirit of the FACA statute that OSTP seeks to employ for the purpose of shielding information from quality standards. Openness is hardly the spirit with which OSTP seeks to employ FACA, and FDQA, in the instant matter. The claimed exemption can not be reasonably read as enabling exclusion of the National Assessment from data quality standards.⁷

VIII. OMB Guidelines Also Undercut OSTP's Claim in Rejecting CEI Request

OMB's Guidelines offer further acknowledgement that OSTP's claim is unsupportable, and that the NACC is unavoidably subject to FDQA. Critically, and as OSTP acknowledges in its own Guidelines, these OMB parameters control. [see, *e.g.*, OSTP Guidelines, Background, I(4), Administrative Corrections Mechanism III.A(1)]

Like OSTP, OMB in its guidance also makes no such exemption from its requirements for information produced pursuant to FACA and incorporated in documents disseminated and/or relied upon by an agency, as OSTP transmitted and otherwise relies upon the National Assessment.

If OSTP continues to hold that it somewhere created this exemption in its own guidelines, it was clearly on its own initiative and not drawn from OMB's (controlling) parameters. In fact, OMB's definition of “information”, similar to OSTP's, is as follows:

“‘Information’ means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion.” OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, Federal Register Vol. 67, No. 36, p. 8460, February 22, 2002).

⁷ It is difficult to reconcile this stance with the lofty aspirations OSTP cites in touting its addition of “a new paragraph 2 [to] section I [clarifying] that OSTP will treat information quality as integral to every step of the information creation, collection, maintenance and dissemination process.” FR Vol 67 No. 205, page 65115 (23 October 2003).

No plausible argument exists that NACC falls outside this covered universe. Note the sole exclusion for obvious “opinion”. Compare this with what, as a matter of law, the NACC represents (15 U.S.C. 2936). Does OSTP argue that FDQA exempts “scientific analysis” as “opinion”, despite the *elevated threshold* for certain “*scientific information*”?

Certainly OMB’s sole invocation of FACA in this same “Final Guideline” provides the elusive loophole that OSTP seeks to exploit? Again, clearly not:

“Dissemination does not include *distribution limited to* government employees or agency contractors or grantees; intra-or interagency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, *the Federal Advisory Committee Act* or other similar law.” OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, Federal Register Vol. 67, No. 36, p. 8460, February 22, 2002).

Is OSTP’s *dissemination* of the National Assessment, clearly *pursuant to the USGCR Act of 1990*, somehow nonetheless “limited to FACA or a similar (‘sunshine’) law”? Of course not, and any agency ought dread the prospect of making such an assertion before the courts. OMB contemplated, and its Guidelines tolerate, no such exemption as that OSTP which seeks to create for the NACC.

In fact, it is relevant and illustrative that OMB created an elevated threshold of behavior, and data quality, for data such as that disseminated via the National Assessment on Climate Change, notwithstanding OSTP’s incredible claim of not having relied upon it:

“9. ‘Influential’, when used in the phrase ‘influential scientific, financial, or statistical information’, means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions. Each agency is authorized to define ‘influential’ in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.” 67 FR 36 at 8460, 22 February 2002

Again, consider the statutorily declared purpose of OSTP producing the National Assessment – to serve as the basis for policymaking by the Executive and Congress of the United States Government. This makes it further clear and OSTP simply must be aware that the courts will not be amused by OSTP’s endeavor to impose, particularly in this context, the proffered restrictive construction of FDQA.

Clearly, to the extent that OMB addresses use of FACA or like data in any way where the committee product is *in any way* relied upon by the promulgating agency, it is in the inclusive spirit of the Data Quality Act coverage – in this case, OSTP relied upon NAST’s work to produce the NACC per the statute. In sum, not only does no reasonable argument exist to exempt the NACC from FDQA, but such attempt clearly violates the

spirit of the latter as set forth by OMB in that office's government-wide guidelines, which also establish parameters for acceptable OSTP guidelines.

Now consider relevant OMB statements in its OIRA document elaborating on the parameters for agencies promulgating FDQA implementation guidelines, the OMB Supplemental DQ Guidance 10 June 2002:

"II. COVERAGE OF 'THIRD-PARTY' INFORMATION UNDER THE GUIDELINES.

The preamble to the OMB guidelines states, 'If an agency, as an institution, disseminates **information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines**'. (67 FR 8454, February 22, 2002). "Reinforcing this statement of policy, OMB also provided an example in its preamble concerning the applicability of the OMB and agency information quality standards to third-party studies relied upon by an agency as support for a proposed rulemaking, even if the third-party studies had been published before the agency's use of them (67 FR 8457, February 22, 2002)

DOT incorporated these principles from the OMB guidelines by stating that an agency disseminates information if it relies on information in support of a rulemaking. 'If the Department is to rely on technical, scientific, or economic information submitted by, for example, a commenter to a proposed rule, that information would need to meet appropriate standards of objectivity and utility' (DOT, 3)." **'The standards of these guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely upon or disseminate this information or the Department decides to do so (DOT, 8).'**" OMB Supplemental DQ Guidance 10 June 2002, p. 7. (emphases added)

OMB's Supplement continues with "Additional Quotations of Proposed Agency Provisions Organized by Topic", to provide further illustration of the appropriate inclusion of data under FDQA:

"II. COVERAGE OF 'THIRD-PARTY' INFORMATION UNDER THE GUIDELINES.

Agencies included 'third-party' information under the guidelines in a variety of contexts:

Component dissemination of information prepared by an outside party *in a matter that reasonably suggests* the Component agrees with the information, renders Component dissemination of the information subject to these guidelines (DOD, 4).

Section III mentions an important concept that may not be immediately obvious to persons reading the OMB guidelines for the first time. As Dr. John Graham, Director [sic: Administrator] of the OMB Office of Information and Regulatory Affairs (OIRA) and others have pointed out in meetings about the information quality guidelines, the standards for data quality that apply directly to Federal agencies also apply, at least indirectly, to outside parties who supply information to the Department. If the Department is to rely on technical, scientific, or economic information submitted by, for example, a commenter to a proposed rule, that information would need to meet appropriate standards of objectivity and utility. Numbers submitted by a commenter as the basis for a regulatory decision B which the Department would necessarily disseminate as part of a rulemaking issuance B should meet data quality standards no less than in the case of information the Department itself generates (DOT, 3).

The standards of these guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely upon or disseminate this information or the Department decides to do so (DOT, 8).

EPA disseminates information to the public for purposes of these guidelines when EPA initiates or sponsors the distribution of information to the public. EPA initiates a distribution of information if EPA prepares the information and distributes it to support or represent EPA's viewpoint, to formulate or support a regulation, guidance, or other Agency decision or position. EPA initiates a distribution of information if EPA distributes information prepared or submitted by an outside party in a manner that reasonably suggests that EPA endorses or agrees with it, if EPA indicates in its distribution that the information supports or represents EPA's viewpoint, or if EPA in its distribution proposes to use or uses the information to formulate or support a regulation, guidance, policy, or other Agency decision or position (EPA, 14).

What happens if information is initially not covered by these guidelines, but EPA subsequently disseminates it to the public? If a particular distribution of information is not covered by these guidelines, the guidelines may still apply to a subsequent distribution of the information in which EPA adopts, endorses or uses the information to formulate or support a regulation, guidance, or other Agency decision or position. For example, if EPA simply makes a public filing (such as facility data required by regulation) available to the public, these guidelines would not apply to that distribution of information. However, if EPA later includes the data in a background document in support of a rulemaking, these guidelines would apply to that later dissemination of the information in that document (EPA, 17).”

OMB Supplemental DQ Guidance 10 June 2002, pp. 19-20(emphases in original).

This elaboration on third party data, which OSTP claims the NACC represents – *patently clear statutory language to the contrary notwithstanding* – yet again affirms that OSTP's

claims that NACC is not covered by FDQA are entirely without merit. To repeat, both *de facto* and *de jure*, to the extent FACA product is represented by or in the NACC, it is as a component of the product – it is not, *cannot be by statute*, the product itself but data upon which the NACC relies. Claims that OSTP has not expressly relied on the NAST FACA product is simply not relevant, in addition to being flatly belied by the record. OSTP as a matter of law unavoidably relied on this data by the very act of submitting the NACC.

IX. Conclusion

To eliminate an apparent misunderstanding, the document which is the subject of CEI's Request is that submitted by OSTP to Congress and the President pursuant to 15 U.S.C. 2936 and styled as the *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change*, responsibility for which unavoidably and by statute exclusively belongs to OSTP. FACA products are not at issue here.

OSTP curiously argues in its Initial Determination, contrary to the plain reading of the statutory authorization (15 U.S.C. 2932), that NACC itself is a FACA document, and that this is subject to FDQA requirements solely if OSTP relied upon it -- which it of course did by definition upon transmitting a NACC to the President and Congress pursuant to 15 U.S.C. 2936. The above plainly proves that there is no room *in the statute or the record* for asserting that OSTP could, or did, delegate to a third party its statutory NACC responsibility for and function of producing a document pursuant to USGCRA. Reliance on FACA products in no way can or does alter this reality and statutory construct.

The NACC itself manifests that numerous government offices including PCAST, CERN and NCST were not merely involved in OSTP's compilation but served as various layers of review and approval, further defeating OSTP's claim that NACC is a FACA document, though OSTP's responsibility for which cannot be avoided by claiming extra-statutory third party delegation. (PCAST served as a "review panel" *approving* the Synthesis Report; this was followed by a NERC/NSTC review and *approval*; see Minutes of Seventh NAST Meeting, 10-20 August 1999, and OSTP acknowledges that PCAST efforts it disseminates are also subject to FDQA.)

OSTP cites no authority, as there is none, to substantiate its contention that inclusion of FACA product exempts a USGCRP Assessment, that is by law ultimately a product of OSTP, from otherwise applicable legal requirements attendant to that product and its production. To so hold would be to pervert, *inter alia*, the intention of the USGCRA and its specific delegations, and the "sunshine" intent of FACA.

OSTP's proffered interpretation would also of course turn FDQA's purpose on its head, that purpose being in large part to of wean government offices from the growing, offensive practice of "regulation by publication," or disseminating "data" for the purpose of enabling a particular regulatory and/or ideological agenda despite the data often having insufficient basis in fact, or even being, as is clearly the case in the instant matter, flagrantly in violation of accepted standards of objectivity and utility. CEI amply demonstrated this reality in the merits of its Request.

For all the foregoing reasons CEI respectfully repeats its request that OSTP immediately address CEI's Request on its merits and cease dissemination of the National Assessment on Climate Change on the basis that it violates FDQA, as detailed in CEI's Request for Correction.

Sincerely,

Christopher C. Horner

cc: Senator James Inhofe
Representative Joseph Knollenberg
Representative Jo Ann Emerson

21 May 2003

Information Quality Guidelines Staff
Information Quality Guidelines Staff, Mail Code 28220T
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Request for Reconsideration of Response to Federal Data Quality Act Petition
Against Further Dissemination of 'Climate Action Report 2002'" ("Appeal")

To Whom it May Concern,

We are in receipt of EPA's denial of CEI's Request for Correction under the Federal Data Quality Act – on the ingenious basis that EPA does not in fact disseminate the "Climate Action Report" published exclusively on EPA's website, but that EPA is merely doing a less internet-savvy federal agency a favor¹ -- despite the public record demonstrating EPA's lead role in producing the document, White House acknowledgement of same, and EPA being the sole governmental office disseminating CAR.

CEI therefore cannot permit EPA's argument to go unchallenged. Please consider the following Request for Reconsideration of this determination at your earliest convenience, so we may conclude adjudication of this matter on the merits at the earliest possible date.

In Summary, EPA's attempt to avoid application of the Federal Data Quality Act to the *Climate Action Report 2002* fails for the following reasons:

- EPA relies for its denial upon purported State Department paternity of CAR, which even were that true is not relevant under any authority regarding applicability of FDQA requirements to EPA's exclusive dissemination of CAR.
- Regardless, EPA is the sole federal government office publicly disseminating CAR.
- Further, EPA produced CAR, leading the effort as the sole office soliciting, culling, and incorporating public comment, manifested by its Federal Register publications.
- The White House acknowledges EPA produced the CAR.

¹ EPA asserts that "EPA subsequently made the document available on its Web site because of its advanced web hosting capability, which may have been interpreted as an indication that this was an EPA report....In this instance, EPA hosts the Climate Action Report on its Web site solely to assist the State Department in providing public access to the Report."

- The State Department attributes CAR authorship to EPA.
- The record therefore makes clear that CAR is EPA's product.
- This notwithstanding, regarding EPA's argument, neither OMB's FDQA Guidelines – which are controlling here – nor EPA's own Guidelines support EPA's proffered argument to avoid application of FDQA to CAR, that “third party” documents include governmental product, including even that not disseminated by any other agency.
- The Department of State cannot be demonstrated as having a role in CAR appreciatively more substantive than transmitting this document to the United Nations pursuant to the UNFCCC or Rio Treaty, as delegated to State pursuant to statute (22 U.S.C. 2656).
- EPA offers an untenable interpretation of the FDQA, permitting agencies to collaborate in order to shield the product of the federal government from data quality requirements that were enacted for the precise purpose of exposing data produced and/or promoted by the federal government to scrutiny. FDQA, as EPA surely knows, will not be read by the courts as such a malleable shield, but instead more akin to a “sunshine” statute.

EPA Publication of the Climate Action Report Constitutes “Dissemination” Under FDQA

EPA curiously claims that it is not responsible for CAR's content under FDQA -- despite that CAR's public dissemination by the federal government is exclusive to EPA -- on the asserted basis that CAR is not in fact EPA's product; yet no authority makes relevant which governmental office produces a document for which there is a sole agency by which the federal government disseminates that document.

The crux of EPA's argument seeking to avoid FDQA application to CAR is that EPA is not in fact the party having produced CAR. Whether EPA is the governmental office actually producing a document, particularly where EPA is the sole office disseminating CAR, on its own “Publications” web page no less, is not relevant to determining FDQA coverage. Were EPA to contend that a non-governmental third-party produced CAR it would be possibly relevant but, alas, this is not the instant case.

EPA's assertion of mere conduit status is not relevant given that the inescapable pivot for FDQA coverage is dissemination, not authorship. Nowhere is EPA's theory set forth in any relevant authority. In fact, this contention is gutted by the (controlling) OMB Guidelines. Still, in this vein EPA proceeds to illogically assert that it does not disseminate CAR because the document lists the State Department, which does not in fact disseminate CAR, under “how to cite” (then directs the reader to EPA's website).²

² “This document may be cited as follows: U.S. Department of State, U.S. Climate Action Report 2002, Washington, D.C., May 2002.” EPA ignores that, immediately prior to that reference, CAR also asserts that it is publicly disseminated by one governmental office, EPA. “You may electronically download this document from the following U.S. Environmental Protection Agency Web site: http://www.epa.gov/global_warming/publications/car/index.html”. This, alone, defeats EPA's attempt at using FDQA as a shield.

EPA must know it will not succeed with this tortured claim that, according to EPA's own Guidelines, data otherwise subject to FDQA's requirements simply must receive a blanket exemption so long as one agency serves as another agency's conduit. Naturally, FDQA does not contemplate such governmental documents as "third party," nor a class of "orphan" federal products exempt from its requirements merely by such subterfuge.

CEI's Request does not hinge on this analysis of "Who produced CAR?", however, because EPA's denial of paternity is belied by a clear record, as demonstrated herein.

EPA is the sole federal government office publicly disseminating CAR

CEI is confident that EPA's express motivations, as to why it purportedly manages to exempt CAR from applicable laws by serving as State's surrogate disseminating agency, are not relevant to the Data Quality Act's coverage of data that EPA inarguably publishes, in fact as the sole federal office disseminating CAR. In its denial of CEI's Request EPA of course does not provide any assistance in the form of authority to make its motivations relevant. Similarly, no support exists for the argument that claiming that a government document disseminated exclusively by EPA is not in fact "an EPA report" offers safe harbor from FDQA's coverage.

An analysis of the relevant Guidelines, *infra*, reveals the absence of support for this manufactured exemption.

Regardless, it is noteworthy that not only does the State Department's website belie EPA's argument of internet inadequacy but, though State posts thousands of documents, it makes no effort to disseminate CAR. It merely provides a hyperlink, such dissemination being specifically described by EPA in its own Guidelines as not qualifying as "dissemination". EPA thereby argues that its purported arrangement with State is a permissible method under FDQA to avoid otherwise applicable data quality requirements.

The obvious reason, of course, that State does not disseminate CAR is that CAR is not a State document in any meaning of the term other than State transmitted it on behalf of the U.S. government. EPA produced CAR, as manifested by EPA's Federal Register notices exposing this process, and State's role was largely limited to transmitting CAR to the United Nations in execution of duties delegated it under 22 U.S.C. 2656. As the sole agency disseminating CAR, EPA cannot avoid application of FDQA requirements through this artful ruse it claims.

EPA Federal Register Notices Confirm EPA Production of CAR

EPA's denial of CEI's Request ignores EPA's prior manifestation of responsibility.

EPA claims that although it may have had a hand in producing the CAR, CAR is the State Department's document. In fact, though the State Department may have had a hand in producing CAR, CAR is EPA's document. The record leaves no doubt. Further, EPA

claims it can not be reasonably attributed that EPA adopted CAR or that CAR supports EPA's viewpoint, flatly unsubstantiated, and unsubstantiable, assertions belied by its FR notices, in addition of course to publishing it. Further, EPA made no effort to even abet such a claim by publishing CAR under a "Library" file, but does so under "Publications."

This is made patently clear by EPA's own, more formal statements on the record prior to presently being called to account for CAR's content. Specifically, see Federal Register, Vol. 66 No. 221, Thursday November 15, 2001:

**"ENVIRONMENTAL PROTECTION AGENCY [FRL-7104-3]
Preparation of Third U.S. Climate Action Report
AGENCY:** Environmental Protection Agency (EPA).
ACTION: Notice; request for public comments..."

ADDRESSES: Comments should be submitted to Mr. Reid P. Harvey via e-mail at harvey.reid@epa.gov or via postal mail to Reid P. Harvey, U.S. Environmental Protection Agency, Office of Atmospheric Programs (Mail Stop 6204N), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Mr. Reid P. Harvey, Office of Atmospheric Programs, U.S. Environmental Protection Agency at (202) 564-9429."

There are three opportunities in that one excerpt to demonstrate State Department or other ownership. All three instead referred parties to EPA. Curiously, this acknowledgement is quite visibly presented on EPA's "advanced" website, on the CAR page (at <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html>).

In fact, this notice also reaffirms EPA's production of CAR by its invocation of the effort's initiation (March 19, 2001, 66 FR 15470-15471). This FR notice further debunks EPA's claim.

CAR emerged as a product of the federal government. Some agency adopted it. As the sole agency soliciting comments in preparation of CAR, EPA is the sole candidate.

EPA's argument describes a scenario that is reasonably described as unusual. Consider the Administrative Procedure Act, and any circumstance governed thereby. Would the APA permit such actions in any covered endeavor? Of course not. The reason is that would be a transparent attempt to avoid responsibility. The same reason applies here, in the FDQA context. While EPA doubtless accurately distinguishes between a Report produced in satisfaction of a treaty and rules produced under legislated regulatory authority, it should not lose sight of the lesson, and that no court will permit EPA's proffered effort in the instant matter to avoid application of data quality requirements to the CAR disseminated by EPA.

CEI remains curious as to whether the State Department objected to this usurpation (as EPA would have us believe), or if here, again, EPA was merely doing State a favor due to EPA's advanced capability for issuing Federal Register notices. In reality, of course, this publication makes clear the inescapable. Responsibility always must lie, and as regards CAR it lies with EPA.

Reading further we find:

“Public Input Process This **Federal Register** notice solicits comments on the draft chapters listed above. The individual chapters are posted on the Internet and may be downloaded from the national communication web site listed at the following web site: <http://www.epa.gov/globalwarming/nwinsite.html>.”

EPA's contention that it and the CAR are merely two ships passing in the night becomes less credible the closer one looks. Finally, of course, is the delicious reference to CAR 2002's predecessor:

“You may view the 1997 U.S. Climate Action Report on the Internet at: <http://www.state.gov/www/global/oes/97climate—report/index.html>.”

That is, <http://www.State.gov>, as in the State Department (on that primitive website, no less). Clearly, EPA assumed the role of lead sled dog with CAR 2002, out of enhanced sense of its own superior web or other capabilities, none of which matter to the obvious reality that in EPA disseminated the CAR -- from start to finish. And the CAR is EPA's.

White House Asserts CAR is EPA Product

Typical of contemporaneous press coverage attributing production of CAR to EPA – without apparent challenge by EPA – is the *New York Times*' coverage, “President Distances Himself From Global Warming Report” (June 5, 2002, Wednesday, Katherine Q. Seelye, Section A; Page 23; Column 1; National Desk):

“Under intense criticism from conservatives, President Bush distanced himself today from a report by his administration concluding that humans were to blame for far-reaching effects of global warming on the environment. The report, drafted by the Environmental Protection Agency and reviewed by several other agencies and the White House, was sent to the United Nations early last week. The report said the United States would be substantially changed in the next few decades by global warming, although it called for no rapid response. Reporters asked Mr. Bush about the report today. ‘I read the report put out by the bureaucracy,’ he said.”

This attribution is then neatly complemented by the White House confirmation:

“Q Ari, can I follow that? The President said -- I read the report of the bureaucracy. Was he referring to the EPA?”

MR. FLEISCHER: This is a report that came out of the EPA.”

Press briefing by Ari Fleischer, June 4, 2002, found at
<http://www.whitehouse.gov/news/releases/2002/06/20020604-19.html>

No Support Exists for EPA Contention that CAR is State Department Product

Again, beyond a reference in the document disseminated by EPA listing that it be referred to by its audience -- the United Nations -- as a product of the United States State Department, no authority exists to support EPA's contention that CAR is in fact a State product. The obvious evidence to review is, which agency produced the public notice and comment process? It was EPA. The next obvious inquiry is, which agency disseminated CAR on its website? Again, EPA. As made clear, *supra*, another indicator might be that State transmitted the document somehow adopting it as its own, save for the obvious -- State is delegated with this function pursuant to statute. State merely provides a hyperlink to CAR, the sort of "dissemination" that -- unlike the present case -- EPA expressly excluded from FDQA coverage in its Guidelines.

The most State does is provide a hyperlink, or, as OMB describes, a "hyperlink[] to information that others disseminate". As in, EPA disseminates CAR.

Finally, it is instructive to see if either State or EPA attribute ownership of CAR elsewhere. In fact, the State Department attributes CAR authorship to EPA.

A quick Google search for CAR turned up revealing postings including the following, from the website of the U.S. Embassy in Vienna <http://www.usembassy.at/en/policy/environ.htm>, citing related documents and the producing agency or office:

“REPORTS, DOCUMENTS and FACT SHEETS

- Global Climate Change, Issue Brief, Congressional Research Service/Library of Congress, updated February 25, 2003
- Fact Sheet: United States Policy on the Kyoto Protocol, Public Affairs Section, U.S. Embassy Vienna, Austria, February, 2003 (German version)
- Fact Sheet: The Arctic Council, Bureau of Oceans and International Environmental and Scientific Affairs/U.S. Department of State, released January 31, 2003
- Fact Sheet: The International Coral Reef Initiative, Bureau of Oceans and International Environmental and Scientific Affairs/U.S. Department of State, released January 31, 2003
- Leading By Example, A Report to the President on Federal Energy and Environmental Management (2000-2001), Office of the Federal Environmental Executive/White House Task Force on Waste Prevention and Recycling, December 2002
- Emissions of Greenhouse Gases in the United States 2001, Report, Energy Information Administration/U.S. Department of Energy, December 2002
- Fact Sheet: U.S. Takes Pro-Growth Approach to Climate Change, Bureau of Oceans and International Environmental and Scientific Affairs/U.S. Department of State, released October 23, 2002
- Fact Sheet: U.S. Cites Greenhouse Gas Emission Declines, Bureau of Oceans and International Environmental and Scientific Affairs/U.S. Department of State, released October 23, 2002
- Climate Action Report 2002 - Environmental Protection Agency
- Kyoto Protocol to the United Nations Framework Convention on Climate Change”

Note that where the State Department produces a document, even in this environmental context, the State Department asserts ownership. Note that they attribute CAR to EPA. Notice, also, that the State Department publishes many documents on its website, apparently unmoved by EPA disparagement of State's web capabilities by way of excusing their responsibility for CAR.

In fact, as news reports make clear, State's involvement with this document went little or nothing beyond submitting it to the United Nations – as the agency of the federal government charged with (22 USC 2656). See, e.g., “Bush Pans Kyoto as Japan OKs Pact” (*Washington Times* 5 June 2002, citing also the initial *New York Times* story breaking the news of EPA's report).

Further, EPA would have a court accept the argument that the FDQA permits an agency serve as “the” federal agency publicly disseminating a document that is indisputably the product of the federal government, yet claim that due to collaboration, others' primitive web abilities, or other discretion that agency may thereby avoid data quality requirements. This is a fantastic argument that will not prevail under any scrutiny.

OMB's Guidelines

OMB's Guidelines offer further acknowledgement that EPA's claim is unsupportable, and that the CAR is unavoidably subject to FDQA. Critically, these OMB parameters are expressly the standards OMB applies to itself but also provide what OMB deems the controlling, acceptable parameters for FDQA. OMB makes no exemption from FDQA's requirements for information produced by other, or more than one, governmental agency disseminated and/or relied upon by an agency, as EPA publishes and otherwise provides every indication of adopting and indeed producing CAR.

If EPA continues to hold that it somewhere created this exemption in its own guidelines, it was clearly on its own initiative and not drawn from OMB's (controlling) parameters. In fact, OMB's definition of “information”, similar to EPA's, is as follows:

“‘Information’ means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms. This definition includes information that an agency disseminates from a web page, but does not include the provision of hyperlinks to information that others disseminate. This definition does not include opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion.” OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, Federal Register Vol. 67, No. 36, p. 8460, February 22, 2002).

No plausible argument exists that EPA's publication of CAR falls outside this covered universe.

Certainly OMB's discussion of "dissemination" in this same "Final Guideline" provides evidence of OMB acceptance of the elusive loophole that EPA seeks to exploit? Again, clearly not:

"Dissemination' means agency initiated or sponsored distribution of information to the public (see 5 CFR "Conduct or Sponsor"). Dissemination does not include the pass-through of public filings or other information received from third-parties by OMB and made available for public review through posting or other means, without OMB official endorsement of its content. However, these guidelines may apply to third-party information adopted by OMB.

In addition, dissemination does not include distributions of information or other materials that are:

- (a) intended for government employees or agency contractors or grantees; intended for U.S. Government agencies;
- (b) produced in responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or similar law;
- (c) correspondence or other communication limited to individuals or to other persons, within the meaning of paragraph 7, below;
- (d) communications such as press releases, interviews, speeches, and similar statements containing information that OMB or another Federal agency has previously disseminated in compliance with the Government-wide Guidelines or the OMB guidelines; or
- (e) documents (e.g., guidance, bulletins, policy directives) intended only for inter-agency and intra-agency communications.

Also excluded from the definition are archival records; public filings; responses to subpoenas or compulsory document productions; or documents prepared and released in the context of adjudicative processes. These guidelines do not impose any additional requirements on OMB during adjudicative proceedings involving specific parties and do not provide parties to such adjudicative proceedings any additional rights of challenge or appeal."

OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, found at http://www.whitehouse.gov/omb/inforeg/iqq_oct2002.pdf.

CAR is indisputably "agency initiated or sponsored distribution of information to the public". It is therefore covered – regardless of EPA claims or even guidelines – by FDQA unless it is exempted in OMB's Guidelines. Is it exempted by a-e, above? Clearly not, which is why EPA did not cite such exemption but offered a non-specific denial on the basis that it is purportedly not EPA's document – a contention that EPA also refuses to support as relevant with any referenced authority.

EPA's contention appears to rely on CAR being "third party" document – the State Department's – and one not adopted by EPA. Yet EPA clearly has "adopted" the document. This is obvious by a) its development of CAR through the Federal Register, as the sole governmental office so doing, and b) it being the sole governmental office posting or otherwise "disseminating" CAR. As the White House says, "This is a report that came out of the EPA".

Regarding "third party", however, OMB's Guidelines make clear that such exemption does not contemplate the instant matter, whereby the sole federal agency disseminating a government product may escape FDQA coverage by claiming another *agency* produced it, and it is therefore "third party." "Third party" clearly intimates non-governmental third parties.

Nowhere is the product of other governmental agencies characterized as "third party", but the language instead indicates there are "federal agencies", and "third parties". The twain shall not coincide. The concept of one agency disseminating another's product is instead addressed on the presumption that the "producing agency" – which, again, the record indicates was EPA, not State as EPA contends – disseminated the information first. Here, EPA is the sole disseminating agency. Clearly, EPA is asserting an exemption that is nowhere contemplated by OMB's controlling Guidelines.

We know this by considering relevant OMB statements in its OIRA document elaborating on the parameters for agencies promulgating FDQA implementation guidelines, the OMB Supplemental DQ Guidance 10 June 2002. First, OMB addresses:

"Exemption for Public Filings. Some agencies refined the exemption for public filings to permit agencies to "pass through" information not subject to the guidelines while properly applying the agency and OMB guidelines to third-party information that the agency disseminates. Agencies need to qualify the public filing exemption to ensure that the agency guidelines continue to apply to third-party information that the agency disseminates, as we discuss below under II, "Coverage of 'Third-Party' Information under the Guidelines...."³

"II. COVERAGE OF 'THIRD-PARTY' INFORMATION UNDER THE GUIDELINES.

The preamble to the OMB guidelines states, "If an agency, as an institution, disseminates **information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines**". (67 FR 8454,

³ It continues, "an agency disseminates information 'where an agency has directed a third-party to disseminate information, or where the agency has the authority to review and approve the information before release' (67 FR 8454, February 22, 2002)." Clearly, EPA would be the third party were they actually publishing. Yet, for the same reasons detailed, *infra*, governmental agencies are not what OMB contemplated by third-parties, and CAR is not exempt from FDQA."

February 22, 2002). “Reinforcing this statement of policy, OMB also provided an example in its preamble concerning the applicability of the OMB and agency information quality standards to third-party studies relied upon by an agency as support for a proposed rulemaking, even if the third-party studies had been published before the agency’s use of them (67 FR 8457, February 22, 2002)

DOT incorporated these principles from the OMB guidelines by stating that an agency disseminates information if it relies on information in support of a rulemaking. ‘If the Department is to rely on technical, scientific, or economic information submitted by, for example, a commenter to a proposed rule, that information would need to meet appropriate standards of objectivity and utility’ (DOT, 3).” **‘The standards of these guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely upon or disseminate this information or the Department decides to do so (DOT, 8).’** OMB Supplemental DQ Guidance 10 June 2002, p. 7. (emphases added)

Clearly, OMB contemplates that “third party” submissions are non-governmental (*e.g.*, “public filings”). Further, either of these examples make clear EPA’s claim is without merit. OMB’s Supplement continues with “Additional Quotations of Proposed Agency Provisions Organized by Topic”, to provide further illustration of the appropriate inclusion of data under FDQA:

“II. COVERAGE OF ‘THIRD-PARTY’ INFORMATION UNDER THE GUIDELINES.

Agencies included ‘third-party’ information under the guidelines in a variety of contexts:

Component dissemination of information prepared by an outside party *in a matter that reasonably suggests* the Component agrees with the information, renders Component dissemination of the information subject to these guidelines (DOD, 4).

Section III mentions an important concept that may not be immediately obvious to persons reading the OMB guidelines for the first time. As Dr. John Graham, Director [sic: Administrator] of the OMB Office of Information and Regulatory Affairs (OIRA) and others have pointed out in meetings about the information quality guidelines, **the standards for data quality that apply directly to Federal agencies also apply, at least indirectly, to outside parties who supply information to the Department.** If the Department is to rely on technical, scientific, or economic information submitted by, for example, a commenter to a proposed rule, that information would need to meet appropriate standards of objectivity and utility. Numbers submitted by a commenter as the basis for a regulatory decision B which the Department would necessarily disseminate as part of a rulemaking issuance B should meet data quality standards no less than in the case of information the Department itself generates (DOT, 3).

The standards of these guidelines apply not only to information that DOT generates, but also to information that other parties provide to DOT, if the other parties seek to have the Department rely upon or disseminate this information or the Department decides to do so (DOT, 8).

EPA disseminates information to the public for purposes of these guidelines when EPA initiates or sponsors the distribution of information to the public. EPA initiates a distribution of information if EPA prepares the information and distributes it to support or represent EPA's viewpoint, to formulate or support a regulation, guidance, or other Agency decision or position. EPA initiates a distribution of information if EPA distributes information prepared or submitted by an outside party in a manner that reasonably suggests that EPA endorses or agrees with it, if EPA indicates in its distribution that the information supports or represents EPA's viewpoint, or if EPA in its distribution proposes to use or uses the information to formulate or support a regulation, guidance, policy, or other Agency decision or position (EPA, 14).

What happens if information is initially not covered by these guidelines, but EPA subsequently disseminates it to the public? If a particular distribution of information is not covered by these guidelines, the guidelines may still apply to a subsequent distribution of the information in which EPA adopts, endorses or uses the information to formulate or support a regulation, guidance, or other Agency decision or position. For example, if EPA simply makes a public filing (such as facility data required by regulation) available to the public, these guidelines would not apply to that distribution of information. However, if EPA later includes the data in a background document in support of a rulemaking, these guidelines would apply to that later dissemination of the information in that document (EPA, 17)."

OMB Supplemental DQ Guidance 10 June 2002, pp. 19-20(italics are original emphases, bold is added emphasis).

This language makes clear that there are "federal agencies", and there are "third parties". Federal agencies are not contemplated as "third parties" for purposes of FDQA. Claims that EPA has not adopted the CAR are simply not relevant, in addition to being flatly belied by the record. EPA as a matter of law unavoidably is reasonably seen as agreeing with this data.

EPA's Guidelines

EPA clearly did not argue that CAR is not "information," avoiding one unnecessary argument. Still, EPA argues that it does not disseminate CAR. What is EPA's speculation as to whether State may assert that the document disseminated on EPA's website is not disseminated by State? It would, of course and, in one sense relevant to the instant matter, State would be entirely correct. This argument is sophisticated.

More specifically invoking EPA's Guidelines, unlike OMB EPA elected to not define "dissemination" in its Guidelines⁴. However:

"5.3 When do these Guidelines Apply?"

For purposes of these Guidelines, EPA disseminates information to the public when EPA initiates or sponsors the distribution of information to the public.

- EPA initiates a distribution of information if EPA prepares the information and distributes it to support or represent EPA's viewpoint, or to formulate or support a regulation, guidance, or other Agency decision or position.
- EPA initiates a distribution of information if EPA distributes information prepared or submitted by an outside party in a manner that reasonably suggests that EPA endorses or agrees with it; if EPA indicates in its distribution that the information supports or represents EPA's viewpoint; or if EPA in its distribution proposes to use or uses the information to formulate or support a regulation, guidance, policy, or other Agency decision or position.
- Agency-sponsored distribution includes instances where EPA reviews and comments on information distributed by an outside party in a manner that indicates EPA is endorsing it, directs the outside party to disseminate it on EPA's behalf, or otherwise adopts or endorses it.

EPA intends to use notices to explain the status of information, so that users will be aware of whether the information is being distributed to support or represent EPA's viewpoint."

Accepting *arguendo* EPA's *ad hoc* and untrue claim that it did not produce CAR, does EPA claim that CAR does not represent its viewpoint? Does this publication under not reasonably suggest that EPA endorses or agrees with it? Is the Federal Register lying, that is, did EPA not in fact review and comment on information distributed by outside parties even if EPA asserts that State is such a party? Under which of these items, does EPA seek refuge. None offer such haven, quite plainly.

EPA's Guidelines then offer "What is not covered by these Guidelines?". In this section, EPA cites 9 examples of information publication that do not constitute "dissemination" -- the alleged basis for EPA's denial of CEI's Request -- as it seeks to illustrate that which is excluded under (EPA's interpretation of) the FDQA. None of these remotely apply.

Immediately preceding its effort to illustrate what constitutes "dissemination", EPA Guidelines offer the Agency's take on "information", the other half of "information disseminated...", the threshold for FDQA coverage:

⁴ "Some commenters encouraged EPA to provide additional process details, provide more detailed definitions," EPA Guidelines, A.2, General Summary of Comments, p. 37.

“If an item is not considered ‘information,’ these Guidelines do not apply. Examples of items that are not considered information include Internet hyperlinks and other references to information distributed by others, and opinions, where EPA’s presentation makes it clear that what is being offered is someone’s opinion rather than fact or EPA’s views.”

So, EPA makes clear that it does not consider the Climate Action Report to be information disseminated by the State Department, given that State’s sole publication of CAR is found in such a hyperlink (found at <http://www.state.gov/g/oes/climate/rmks/c6131.htm>). EPA contends that CAR is not information disseminated by EPA, either.

Therefore, EPA indicates it will request a court to sanction a reading of FDQA that excludes the Third National Communication to the United Nations submitted by State pursuant to the UNFCCC, disseminated on EPA’s website, as not constituting data subject to FDQA because State and EPA bifurcated the production and publication functions thereby circumventing the law. EPA certainly knows this will not withstand one level of judicial scrutiny.

Also, see:

“A.3.3 Sources of Information. Some commenters suggested that our Guidelines must apply to all information disseminated by EPA, including information submitted to us by States. Whereas some commenters stressed that the quality of information received by EPA is the responsibility of the providers, others expressed concern about the potential impact that EPA’s Guidelines could have on States. We believe it is important to differentiate between information that we generate and data or information generated by external parties, including States. State information, when submitted to EPA, may not be covered by these Guidelines, but our subsequent use of the information may in fact be covered.”

That is, information provided EPA by external parties – that, of course, are not co-components of the federal government with EPA -- might not be subject to FDQA unless EPA submitting information, but EPA use of the information triggers FDQA. CEI suggests that a review of EPA’s website manifests that EPA has made use of CAR.

For the above reasons CEI respectfully requests on appeal that EPA promptly correct the Climate Action Report consistent with the Federal Data Quality Act by immediately ceasing dissemination.

Sincerely,

Christopher C. Horner

cc: Dan Reifsnyder
Jeffrey R. Holmstead
Senator James Inhofe
Representative Jo Ann Emerson
Representative Joseph Knollenberg