10 February 2003

Office of Environmental Information
Information Quality Guidelines Staff, Mail Code 28221T
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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

Dear Information Officer,

Pursuant to our 4 June 2002 "Petition under Federal Data Quality Act (FDQA) To Prohibit Further Dissemination of 'Climate Action Report 2002' (CAR)" (attached), we write 1) seeking a substantive response to that Petition, and 2) to formally renew our pending request for "correction" of CAR's fatal data flaws (ceasing dissemination).

As CEI detailed both in its Petition and subsequent Comments on EPA's Proposed FDQA Guidelines (also attached), the White House Office of Management and Budget's (OMB) Interim Final Guidelines for agency compliance with FDQA requirements (66 FR 49718), finalized by OMB's January 3, 2002 Final Guidance (67 FR 369), were expressly "government-wide" (see FDQA Section 515(b)(1)). We continue our proceeding under EPA's finalized "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency", as an "RFC", to the extent these Guidelines further and are not in conflict with OMB's government-wide guidelines and/or FDQA.

As also earlier detailed, particularly in CEI's Comments, to the extent that the United States EPA or any subdivision, branch, or office thereof cites, refers or links to, or otherwise disseminates the CAR (http://www.epa.gov/globalwarming/publications/car/ index.html), as a product of, inter alia, EPA, it is in violation of the FDQA. This is because CAR cites, relies on, and further disseminates data failing to meet FDQA's requirements (see esp. CAR "Chapter 6"). Specifically, CAR disseminates the first National Assessment on Climate Change ("National Assessment" or "NACC") (http://www.usgcrp.gov/usgcrp/nacc/default.htm), in violation of FDQA.

This Request, incorporating by reference and attachment both referenced prior submissions, formally reiterates the request that EPA immediately remove all electronic dissemination and cease other dissemination of the CAR, because CAR fails to meet FDQA's requirements for the

same reasons that NACC fails FDQA's requirements and, in relying in significant part upon NACC and re-circulating the discredited data as CAR Chapter 6, in effect constitutes dissemination of the impermissible NACC.

As detailed (attached), FDQA prohibits - and therefore, EPA must cease -- dissemination of CAR as the sole feasible "correction" given the errors' endemic nature and CAR's reliance upon and dissemination of the findings of the National Assessment (NACC), because of that document's rampant violations of the data quality requirements of "objectivity" (whether the disseminated information is presented in an accurate, clear, complete and unbiased manner and is as a matter of substance accurate, reliable and unbiased), and "utility" (the usefulness of the information to the intended users (per the US Global Change Act of 1990, these are Congress and the Executive Branch).

This invokes NACC's and therefore CAR's inappropriate use of and reliance upon computer models and data that upon scrutiny are demonstrably meaningless. Further, in developing the published version of NACC which CAR relies upon and further disseminates, the US Global Change Research Program (USGCRP) also admittedly failed to perform the necessary science underlying regional and sectoral analyses (that Congress contemporaneously notified USGCRP was a condition precedent to the release of even a draft National Assessment). FDQA ratifies those objections, and is violated by continued dissemination of this product by any federal agency.

As the statutorily designated steering document for policymaking - despite that the particular document at issue admittedly failed to complete the statutory mission required to qualify as a "National Assessment," and was disavowed by the White House Office of Science and Technology Policy in order to resolve litigation also brought by, inter alia, CEI -- NACC qualifies as "influential scientific or statistical information" for purposes of FDQA. Therefore it must meet a "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "as a quality standard above and beyond some peer review quality standards."

Pursuant to these prior filings and specifically CEI's pending Petition/RFC, CEI reiterates its request that EPA immediately comply with FDQA and cease dissemination of the National Assessment on Climate Change in whole or part and in any form including any product relying on NACC, e.g., Climate Action Report. We therefore also request that you notify us at your earliest convenience of EPA's substantive response to the violations set forth in this series of communications and the docket number assigned.

Please do not hesitate to contact me with any questions.

Sincerely,

Christopher C. Horner

Enc

June 4, 2002

Administrator Christie Todd Whitman
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Petition under Federal Data Quality Act
To Prohibit Further Dissemination of "Climate Action Report 2002"

Dear Administrator Whitman,

For the reasons detailed herein, to the extent that the United States Environmental Protection Agency ("EPA") or any subdivision, branch, agency or office thereof cites, refers or links to, or otherwise disseminates the "Climate Action Report 2002" ("CAR") (http://www.epa.gov/globalwarming/publications/car/index.html or), a product of, inter alia, EPA, it is in violation of the Federal Data Quality Act ("FDQA"). This is because CAR cites, relies on, and further disseminates data failing to meet FDQA's requirements (see esp. CAR "Chapter 6"), presently applicable to EPA (see 67 FR 370). Specifically, CAR disseminates the first National Assessment on Climate Change ("National Assessment" or "NACC") (http://www.usgcrp.gov/usgcrp/nacc/default.htm), which is unacceptable under FDQA.

This petition formally requests that EPA immediately remove all electronic dissemination and cease other dissemination of the CAR.

Specifically, and as detailed below, FDQA prohibits - and therefore, EPA must cease -- dissemination of CAR given its reliance upon and dissemination of the findings of the National Assessment (NACC) on the basis of that document's failure to satisfy the data quality requirements of "objectivity" (whether the disseminated information is presented in an accurate, clear, complete and unbiased manner and is as a matter of substance accurate, reliable and unbiased), and "utility" (the usefulness of the information to the intended users (per the US Global Change Act of 1990, these are Congress and the Executive Branch). See 67 FR 370. As the statutorily designated steering document for policymaking, NACC qualifies as "influential scientific or statistical information", therefore it must meet a "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "as a quality standard above and beyond some peer review quality standards."

The reasons, as detailed, infra, include NACC's and therefore CAR's inappropriate use of and reliance upon computer models and data that upon scrutiny are demonstrably meaningless.

Further, in developing the published version of NACC which CAR further disseminates, the US Global Change Research Program (USGCRP) also admittedly failed to perform the necessary science underlying regional and sectoral analyses (that Congress contemporaneously notified USGCRP was a condition precedent to the release of even a draft National Assessment). FDQA ratifies those objections, and is violated by continued dissemination of this product by any federal agency.

An extensive record obtained through the Freedom of Information Act (FOIA) provides additional evidence requiring a prohibition on further CAR/NACC dissemination. This record exposes that the purported internal "peer review" of the draft NACC did not in fact occur, and also ratifies the inappropriate use of computer models, detailed herein. As the obtained documents demonstrate, commenting parties expressly informed USGCRP that they were rushed and given wildly inadequate time for substantive review or comment. USGCRP published and continues to disseminate the product nonetheless, as do all agencies such as EPA which reference, cite, link or otherwise disseminate NACC directly and/or through the CAR.

All of these failings ensure that dissemination of NACC/CAR violates FDQA's requirement, manifested in OMB's Guidelines and as necessarily manifested by EPA final guidelines, that data disseminated by Federal Agencies meet standards of quality as measured by specific tests for objectivity, utility and integrity.

As you are also aware and as reaffirmed by OMB in its FDQA Final Guidance, though EPA is only now developing agency-specific guidelines and mechanisms, for complaints invoking OMB's Guidelines in the interim EPA should already have in place requisite administrative mechanisms for applying OMB's standards. Please detail these.

I. FDQA Coverage of USGCRP, therefore its Product the NACC, and CAR

However and by whatever government agency NACC, and therefore CAR, are originally produced and/or disseminated they are inescapably covered by FDQA when disseminated by a Federal Agency. First, it is noteworthy that, whatever the status of the governmental office producing NACC, as directed by the Executive Office of the President (EOP), the United States Global Change Research Program (USGCRP), producer of the National Assessment on Climate Change (NACC or Assessment) is subject to the Federal Data Quality Act (FDQA). FDQA covers the same entities as the Paperwork Reduction Act (44 U.S.C. Sections 3501 et seq.; see esp. 44 U.S.C. 3502(1)).

By statute the President serves as Chairman of the National Science and Technology Council ("NSTC"), operating under the White House Office of Science and Technology Policy ("OSTP"), and which has under its authority the Committee on Environment and Natural Resources ("CENR") (15 U.S.C. 2932 (originally "Committee on Earth and Environmental Sciences")). All of these offices are therefore EOP entities, subject to PWRA, thus FDQA.

Per 15 U.S.C. 2934 the President, as Chairman of the Council, shall develop and implement through CENR a US Global Change Research Program. The Program shall advise the President and Congress, through the NACC, on relevant considerations for climate policy.

Though the composite USGCRP is an "interagency" effort staffed in great part by seconded employees from federal agencies, it remains under the direction of the President and is therefore a "covered agency" pursuant to 44 U.S.C. 3502(1).

Collectively and pursuant to statutory authority, under the direction of these Executive offices the USGCRP directed an effort statutorily dedicated in part to studying the state of the science and its uncertainties surrounding the theory of "global warming" or "climate change," producing a National Assessment on Climate Change ("NACC"). Though originally produced prior to FDQA, the data asserted by the NACC (issued in final in December 2000; see http://www.usgcrp.gov/usgcrp/nacc/default.htm), current or continued dissemination is subject to the requirements of the Federal Data Quality Act. Such an argument of "pre-existing study" is not available as regards the CAR, or any other disseminated document under FDQA.

II. Development of NACC

The Assessment was produced as follows:

1. Pursuant to and/or under the auspices of the Global Change Research Act of 1990, 15 U.S.C. 2921, et seq., USGCRP is assigned the responsibility of producing a scientific assessment, particularly that which is at issue in this Petition, as follows:

"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 -

(1) integrates, evaluates, and interprets the findings of the [USGCR] Program and discusses the scientific uncertainties associated with such findings;
(2) analyzes the effects of global change on the natural environment, agriculture, energy production and use, land and water resources, transportation, human health and welfare, human social systems, and biological diversity; and
(3) analyzes current trends in global change both human-inducted (sic) and natural, and projects major trends for the subsequent 25 to 100 years." (15 U.S.C. 2934).

2. The document at issue in this Petition, the "First National Assessment on Climate Change," disseminates data rising to the requisite FDQA levels of "quality", as described herein.

3. USGCRP's surge to release a flawed, partial, and partially unauthorized report came despite requests of lawmakers and outside interests concerned with the issues at hand to withhold releasing any such document lacking particular required scientific foundations, in violation of several laws and public policy.

III. The Assessment violates the requirements of the FDQA in the following ways:

1. NACC Relies Upon and Promotes Improper Use of Computer Model Data

For the following reasons, NACC violates FDQA's "objectivity" and "utility" requirements. For

these same reasons, as "influential scientific or statistical information", NACC also fails FDQA's "reproducibility" standard, establishing transparency requirements for data and methods of analysis, "a quality standard above and beyond some peer review quality standards."

First, consider excerpts from the review of NACC by Patrick Michaels, Professor of Environmental Sciences at University of Virginia, dated and submitted to USGCRP August 11, 2000, detailing the above-noted concerns placing the NACC in violation of FDQA. Where appropriate, additional explanatory text is included. USGCRP made no apparent alterations of the original text in response to these comments, therefore the comments apply to NACC as disseminated.

"August 11, 2000…

"The essential problem with the USNA [elsewhere cited in this Petition as the NACC] is that it is based largely on two climate models, neither one of which, when compared with the 10-year smoothed behavior of the lower 48 states (a very lenient comparison), reduces the residual variance below the raw variance of the data. The one that generates the most lurid warming scenarios-the Canadian Climate Centre (CCC) Model-produces much larger errors than are inherent in the natural noise of the data. That is a simple test of whether or not a model is valid…and both of those models fail. All implied effects, including the large temperature rise, are therefore based upon a multiple scientific failure. The USNA's continued use of those models and that approach is a willful choice to disregard the most fundamental of scientific rules. (And that they did not find and eliminate such an egregious error is testimony to grave bias). For that reason alone, the USNA should be withdrawn from the public sphere until it becomes scientifically based."

Explanatory text: The basic rule of science is that hypotheses must be verified by observed data before they can be regarded as facts. Science that does not do this is "junk science", and at minimum is precisely what the FDQA is designed to bar from the policymaking process.

The two climate models used in the NACC make predictions of U.S. climate change based upon human alterations of the atmosphere. Those alterations have been going on for well over 100 years. Do the changes those models "predicted" for U.S. climate in the last century resemble what actually occurred?

This can be determined by comparison of observed U.S. annual temperature departures from the 20th century average with those generated by both of these models. It is traditional to use moving averages of the data to smooth out year-to-year changes that cannot be anticipated by any climate model. This review used 10-year running averages to minimize interannual noise.

The predicted-minus-observed values for both models versus were then compared to the result that would obtain if one simply predicted the average temperature for the 20th century from year to year. In fact, both models did worse than that base case. Statistically speaking, that means that both models perform worse for the last 100 years than a table of random numbers applied to ten-year running mean U.S. temperatures.

There was no discernible alteration of the NACC text in response to this fatal flaw. However, the NACC Synthesis Team, co-chaired by Thomas Karl, Director of the National Climatic Data Center, took the result so seriously that they commissioned an independent replication of this test, only more inclusive, using 1-year, 5-year, 10-year and 25-year running means of the U.S. annual temperature. This analysis verified that in fact both models performed no better than a table of random numbers applied to the U.S. Climate Data. Mr. Karl was kind enough to send the results to this reviewer.

"….the problem of model selection. As shown in Figure 9.3 of the Third Assessment of the United Nations Intergovernmental Panel on Climate Change, the behavior of virtually every General Circulation Climate model (GCM) is the production of a linear warming, despite assumptions of exponential increases in greenhouse forcing. In fact, only one (out of, by my count, 26) GCMs produces a substantially exponential warming-the CCC model [one of the two used in the NACC]. Others may bend up a little, though not substantially, in the policy-relevant time frame. The USNA specifically chose the outlier with regard to the mathematical form of the output. No graduate student would be allowed to submit a thesis to his or her committee with such arrogant bias, and no national committee should be allowed to submit such a report to the American people.

Even worse, the CCC and Hadley data were decadally smoothed and then (!) subject to a parabolic fit, as the caption for the USNA's Figure 6 makes clear. That makes the CCC even appear warmer because of the very high last decadal average.

One of the two models chosen for use in the USNA, the Canadian Climate Center (CCC) model, predicts the most extreme temperature and precipitation changes of all the models considered for inclusion. The CCC model forecasts the average temperature in the United States to rise 8.1˚F (4.5˚C) by the year 2100, more than twice the rise of 3.6˚F (2.0˚C) forecast by the U.K. model (the second model used in the USNA). Compare this with what has actually occurred during the past century. The CCC model predicted a warming of 2.7˚F (1.5˚C) in the United States over the course of the twentieth century, but the observations show that the increase was about 0.25˚F (0.14˚C) (Hansen, J.E., et al., 1999: GISS analysis of surface temperature change. Journal of Geophysical Research, 104, 30,997-31,022), or about 10 times less than the forecast [Hansen has since revised this to 0.5˚C, which makes the prediction three times greater than what has been observed]…. The CCC forecast of precipitation changes across the Unites States is equally extreme. Of all the models reviewed for inclusion in the USNA, the CCC model predicted more than twice the precipitation change than the second most extreme model, which interestingly, was the U.K. model [the other model used in the NACC]. The U.K. model itself forecast twice the change of the average of the remaining, unselected models. Therefore, along with the fact that GCMs in general cannot accurately forecast climate change at regional levels, the GCMs selected as the basis for the USNA conclusions do not even fairly represent the collection of available climate models.

Why deliberately select such an inappropriate model as the CCC? [Thomas Karl, co-Chair of the NACC synthesis team replied that] the reason the USNA chose the CCC model is that it provides diurnal temperatures; this is a remarkable criterion given its base

performance…."

"The USNA's high-end scenarios are driven by a model that 1) doesn't work over the United States; 2) is at functional variance with virtually every other climate model. It is simply impossible to reconcile this skewed choice with the rather esoteric desire to include diurnal temperatures…"

Explanatory text: It is clear that the NACC chose two extreme models out of a field of literally dozens that were available. This violates the FDQA requirements for "objectivity" detailed in the third paragraph of this Petition.

Second, Dr. Michaels is clearly not alone in his assessment. The following are excerpts from comments by government reviewers, received and possessed by USGCRP, or USGCRP's "peer reviewers'" failed attempts to elevate the NACC to the level of scientific product. For example, consider that styled "Improper use of climate models", by William T. Pennell of Northwest National Laboratory, submitted through DOE (John Houghton) to Melissa Taylor at USGCRP:

"Although it is mentioned in several places, greater emphasis needs to be placed on the limitations that the climate change scenarios used in this assessment have on its results. First, except for some unidentified exceptions, only two models are used. Second, nearly every impact of importance is driven by what is liable to happen to the climate on the regional to local scale, but it is well known that current global-scale models have limited ability to simulate climate effects as this degree of spatial resolution. We have to use them, but I think we need to be candid about their limitations. Let's take the West [cites example]…Every time we show maps that indicate detail beyond the resolution of the models we are misleading the reader."

USGCRP received other comments by governmental "peer reviewers" affirming these clear, significant, indeed disqualifying modeling data transgressions:

"Also, the reliance on predictions from only two climate models is dangerous". Steven J. Ghan, Staff Scientist, Atmospheric Sciences and Global Change, Pacific Northwest Laboratory.

"This report relies too much on the projections from only two climate models. Projections from other models should also be used in the assessment to more broadly sample the range of predicted responses." Steven J. Ghan Staff Scientist, Atmospheric Sciences and Global Change, Pacific Northwest Laboratory.

"Comments on National Assessment. 1. The most critical shortcomings of the assessment are the attempt to extrapolate global-scale projections down to regional and sub-regional scales and to use two models which provide divergent projections for key climatic elements." Mitchell Baer, US Department of Energy, Washington, DC.

"General comments: Bias of individual authors is evident. Climate variability not addressed…Why were the Hadley and Canadian GCMs used? Unanswered questions. Are these GCM's [sic] sufficiently accurate to make regional projections? Nope". Reviewer Stan

Wullschleger (12/17/99).

William T. Pennell, Manager, Atmospheric Sciences and Global Change, Pacific Northwest Laboratory, cites the that "only two models are used" as a "limitation" on the product.

The final NACC currently disseminated by Commerce/NOAA shows these admonitions went unheeded. Therefore, the CAR disseminated by EPA manifests these same FDQA violations by specifically relying on NACC as described herein.

Stated simply, the climate models upon which NACC relies have struck out. Strike one: they can't simulate the current climate. Strike two: they falsely predict greater and more rapid warming in the atmosphere than at the surface -- the opposite is happening (see e.g., http://wwwghcc.msfc. nasa.gov/MSU/hl_sat_accuracy.html). Strike three: they predict amplified warming at the poles, which are cooling instead (see e.g., http://www. washingtonpost.com/wp-dyn/articles/A40974-2002Jan13.html). Worse, NACC knowingly misuses the data demonstrably non-utile for their purported purpose.

2. Failure to Perform Requisite Scientific Review Violates FDQA

USGCRP's development of NACC drew congressional attention to particular shortcomings. Specifically, leaders in the United States House of Representatives repeatedly attempted to herd USGCRP and its subsidiary bodies to follow the scientific method regarding particular matters, specifically the regional and sectoral analyses. Indeed the concerns had become so acute that these leaders were compelled to promote a restriction prohibiting relevant agencies from expending appropriated monies upon the matter at issue, unless consistent with the plain requirements of the GCRA of 1990, through language in the conference report accompanying Public Law 106-74:

"None of the funds made available in this Act may be used to publish or issue an assessment required under section 106 of the Global Change Research Act of 1990 unless (1) the supporting research has been subjected to peer review and, if not otherwise publicly available, posted electronically for public comment prior to
use in the assessment; and (2) the draft assessment has been published in the
Federal Register for a 60 day public comment period."

USGCRP did not perform the conditions precedent for valid science as reaffirmed in that language. Instead USGCRP produced and now disseminates a NACC knowingly and expressly without the benefit of the supporting science which not only is substantively required but which Congress rightly insisted be performed and subject to peer review prior to releasing any such assessment. EPA thereby disseminates a CAR flawed for the very same reasons.

These attempts to rectify certain NACC shortcomings were made in advance of USGCRP producing the NACC, but were never rectified. These failures justify Petitioners' request that USGCRP cease present and future NACC dissemination unless and until its violations of FDQA are corrected. In addition to NACC violating FDQA's "objectivity" and "utility" requirements, as

"influential scientific or statistical information", NACC also fails its "reproducibility" standard, setting forth transparency regarding data and methods of analysis. Per OMB, this represents "a quality standard above and beyond some peer review quality standards."

Given USGCRP's refusal to wait for completion of the underlying science and their response to the relevant oversight chairmen, it is manifest that USGCRP ignored or rejected these lawmakers' requests, including by the relevant oversight Chairmen and produced a deeply flawed Assessment, knowingly and admittedly issuing a "final" Assessment without having complied with Congress's direction to incorporate the underlying science styled as "regional and sectoral analyses," while also admitting that the requisite scientific foundation would be completed imminently. For these same reasons dissemination presently violates FDQA.

3. NACC Not in Fact Peer Reviewed, Commenting Parties Make Clear

Finally, NACC suffers from having received no authentic peer review, in violation of FDQA's "objectivity" and "utility" requirements. As "influential scientific or statistical information", for these reasons NACC also fails the "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "a quality standard above and beyond some peer review quality standards."

Once an advisory committee was chartered pursuant to the Federal Advisory Committee Act (FACA) in 1998, Dr. John Gibbons' communication of January 8, 1998 to the first Designated Federal Officer (DFO) Dr. Robert Corell indicates a sense of urgency was communicated to the panel by political officials. Further, statements in the record and major media outlets, including but in no way limited to those from certain anonymous if purportedly well placed sources, indicate a perception among involved scientists that political pressures drove the timing and even content of this draft document. This is manifested by the lack of opportunity to comment for parties whose comment was formally requested as part of a "peer review" of NACC.

This sense of urgency is reflected in, among other places, comments the Cooler Heads Coalition obtained via the Freedom of Information Act, made by parties from the National Laboratories asked by the Department of Energy to comment on the Draft. In addition to an emphasis on speed as opposed to deliberation, the report's emphasis on "possible calamities" to the detriment of balancing comments which were widely offered, and rampant criticism of the reliance on only two significantly divergent models for the pronouncements made, these comments are exemplified by the following samples from well over a dozen such complaints accessed through FOIA, also received by and in the possession of USGCRP:

1) "This review was constrained to be performed within a day and a half. This is not an adequate amount of time to perform the quality of review that should be performed on this size document" (Ronald N. Kickert, 12/08/99);

2) "During this time, I did not have time to review the two Foundation Document Chapters" (Kickert, 12/20/99);

3) "Given the deadline I have been given for these comments, I have not been able to read

this chapter in its entirety" (William T. Pennell);

4) "UNFORTUNATELY, THIS DOCUMENT IS NOT READY FOR RELEASE WITHOUT MAJOR CHANGES" (CAPS and bold in original)(Jae Edmonds);

5) "This is not ready to go!" (William M. Putman).

These comments reflect an alarming implication of timing over substance, and of a product whose final content appears predetermined. Patrick Michaels' comments, and the absence of apparent change in response to his alarming findings, reinforces this troubling reality. Notably, the product was released and continues to be disseminated without offering an actual peer review or otherwise addressing the concerns expressed.

In conclusion, the National Assessment on Climate Change, and therefore the Climate Action Report 2002 fails to meet FDQA and/or OMB guidelines regarding Data Quality. As a consequence, EPA must immediately cease electronic and other dissemination of the "Climate Action Report 2002", which relies in part on, cites, and further disseminates (see esp. "Chapter 6"), the unacceptable data provided by the National Assessment on climate Change, as defined by OMB and described, supra.

I look forward to your timely response to this Petition.

Sincerely,

Christopher C. Horner
Counsel

June 3, 2002

USEPA
EPA Northeast Mall
Room B607
401 M Street, SW
Washington DC 20460

Ms. Margaret N. Schneider, Acting Chief Information Officer
U.S. Environmental Protection Agency
Ariel Rios Building, Room 5000 (Mail Code 2810A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Attn: Docket ID # OEI-10014

Re: Comments on EPA's Proposed Data Quality Guidelines

Introduction

The White House Office of Management and Budget's (OMB) "government-wide" Interim Final Guidelines for agency compliance with FDQA requirements (66 FR 49718), finalized by OMB's January 3, 2002 Final Guidance (67 FR 369), provide a strong foundation for improving the overall quality of information which the federal government disseminates to the public. However, as Congress acknowledged when passing the Federal Data Quality Act (FDQA)(enacted as Section 515(a) of the FY '01 Treasury and General Government Appropriations Act (P.L. 106-554; H.R. 5658)), individual agencies must promulgate their own conforming Data Quality guidelines addressing the unique characteristics and information products of their programs.

In the interim, OMB's guidelines clearly serve, as styled, as "government-wide" requirements (see FDQA Section 515(b)(1)). Still, it is imperative that each agency electing to draft its own guidelines do so in such a way ensuring they are workable, effective, and entirely consistent with OMB's government-wide standards.

The Competitive Enterprise Institute (CEI) hereby offers formal comments in response to EPA's request for comment on their proposed guidelines under FDQA. These comments address I) issues relating to all agencies promulgating Data Quality guidelines, incorporating a selection of how various proposed agency guidelines address these important topics, including a) an example of a satisfactory agency proposal on the issue, if any, and the reasoning for that conclusion, & b) numerous unsatisfactory examples of current agency proposals; and II) a direct example of

information currently disseminated by EPA violating FDQA, OMB's "government-wide" guidelines and any EPA guidelines acceptable under FDQA.

Regarding the latter, in sum, EPA currently disseminates significant data that fails the test set forth by FDQA and OMB's government-wide guidelines. Any EPA guideline that would permit the continued dissemination of such data, as exemplified by but in no way limited to the example provided, infra, cannot withstand scrutiny as acceptable under either FDQA's or OMB's requirements. The appropriate remedy for such currently disseminated data is withdrawing its dissemination immediately, consistent with OMB's Final Guidelines, applicable to EPA.

I. Cross-cutting Issues Related to Agency Data Quality Guidelines

(1) Exemptions from Applicability of the Data Quality Guidelines

OMB's interagency Data Quality guidelines exempt some types and categories of information. Many other agencies have proposed additional exemptions. As demonstrated herein, the OMB and additional agency exemptions from the Data Quality guidelines contradict clear congressional intent to the extent that they exempt any information that an agency has in fact made public. Neither OMB nor any other federal agency has authority to make such exemptions.

OMB's interagency Data Quality guidelines exempt from their coverage certain publicly disclosed federal agency information:

"Dissemination" means agency initiated or sponsored distribution of information to the public (see 5 CFR 1320.3(d) (definition of "Conduct or Sponsor")). 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. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

67 FR 8452, 8460 (Feb. 22, 2002).

This definition of "dissemination" is considerably narrower than OMB's previous definitions of this term in a PRA context. For example, in OMB Circular A-130, at page 3 OMB defined "dissemination" to mean:

... the government initiated distribution of information to the public. Not considered dissemination within the meaning of this Circular is distribution limited to government employees or agency contractors or grantees, intra-or-inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. 552) or Privacy Act.

Other agencies have included the OMB exemptions in their proposed Data Quality guidelines. Some agencies have proposed to expand the OMB exemptions, or to add new exemptions. For example:

Retroactivity Exemption (See Issue #2, infra)

Several agencies, such as NIH at page 4 of its guidelines, make statements indicating that their guidelines, and the OMB guidelines, will apply only to information that is initially disseminated initially after October 1, 2002. This proposed exemption contradicts OMB's interagency guidelines specifying their application to information created or originally disseminated prior to October 1, 2002, if an agency continues to disseminate the information after that date.

Case-by-Case Exemption (See Issue #3, infra)

Several agencies, including EPA at pages 22-23 of its proposed guidelines, propose application of the PRA's Data Quality guidelines on a case-by-case basis, rather than application of them to all information disseminated by the agency.

Rulemaking Exemption (See Issue #4)

A number of agencies, including EPA at page 22-23 and the Department of the Treasury at page 6 of their proposed guidelines, have stated that the Data Quality error correction process required by OMB's interagency Data Quality guidelines will not apply to information in proposed rulemakings, and that any alleged errors will be addressed only through the rulemaking notice and comment process. It is not clear from these proposed exemptions whether the agencies believe that any of the PRA's Data Quality standards apply to information disseminated during rulemakings.

Adjudicative Processes Exemption

EPA's proposed data quality guidelines, at page 17, substantially expand OMB's adjudicative processes exception by broadening it to include, inter alia:

Distribution of information in documents relating to any formal or informal administrative action determining the rights and liabilities of specific parties, including documents that provide the findings, determinations or basis for such actions. Examples include the processing or adjudication or applications for a permit, license, registration, waiver, exemption, or claim; actions to determine the liability of parties under applicable statutes and regulations; and determination and implementation of remedies to address such liability.

The OMB interagency and individual agency Data Quality guidelines are promulgated under and implement the Information Dissemination requirements of the Paperwork Reduction Act ("PRA"). 44 U.S.C. §§ 3504(d)(1), 3516 note. The relevant statutory text and legislative history

demonstrate clear congressional intent that these Data Quality guidelines, like the PRA's other Information Dissemination requirements, apply to any and all information that federal agencies have in fact made public.

By contrast to the PRA's separate Collection of Information requirements, there are no statutory exemptions from any of the PRA's Information Dissemination requirements.

OMB's attempt to create exemptions by restricting the definition of "dissemination" in its interagency Data Quality guidelines contradicts Congress' own pervasive and all encompassing use of this term.

OMB's "dissemination" exemptions in its interagency Data Quality guidelines are also inconsistent with OMB's prior, much broader definition of "dissemination" in implementing the PRA's Information Dissemination requirements.

The additional exemptions proposed by other federal agencies also violate clear congressional intent because OMB cannot provide any exemptions from its interagency Data Quality guidelines, and the other agencies have to comply with OMB"s interagency guidelines. 44 U.S.C. §§ 3504(d)(1); 3506(a)(1)(B); 3516 note.

2) Retroactive Application of the Data Quality Guidelines

In compliance with the statute, each agency's Data Quality guidelines must become effective on October 1, 2002. The guidelines must apply to information being disseminated on or after October 1, regardless of when the information was first disseminated. This retroactivity principle is explicitly enunciated in OMB's February 22, 2002 guidelines, at III.4. All agency guidelines are required to comply with the requirements set forth by OMB in their interagency February 22nd Final Guidelines. 44 U.S.C. §§ 3504(d)(1); 3506(a)(1)(B); 3516 note.

Specifically, see Section II, infra, for an example of information currently disseminated which fails to meet FDQA's or OMB's requirements, the remedy for which is withdrawal of such information.

Example(s) of Satisfactory Agency Proposals

Department of Justice

DOJ's draft guidelines state at page 2, "These guidelines will cover information disseminated on or after October 1, 2002, regardless of when the information was first disseminated...."

These guidelines are in full compliance with the retroactivity provision in OMB's February 22nd guidelines.

Example(s) of Unsatisfactory Agency Proposals

National Institutes of Health

The NIH guidelines state at p.4, "The OMB guidelines apply to official information (with the NIH imprimatur) that is released on or after October 1, 2002."

NIH's statement about OMB's guidelines directly contradicts the text of OMB's guidelines which clearly state that they "shall apply to information that the agency disseminates on or after October 1, 2002, regardless of when the agency first disseminated the information." [Emphasis added]

(3) Individual Agency Guidelines Must Comply with OMB's Interagency Guidelines; There Are No Case-By-Case Exemptions From Applicability of the Guidelines

OMB's interagency Data Quality guidelines implement section 3504(d)(1) of the PRA. 44 U.S.C. § 3516 note. Section 3504(d)(1) requires that "with respect to information dissemination, the [OMB] director shall develop and oversee the implementation of policies, principles, standards, and guidelines to apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated...." 44 U.S.C. § 3504(d)(1). All federal agencies subject to the PRA must comply with OMB's interagency Data Quality guidelines when they issue their own Data Quality guidelines. 44 U.S.C. §§ 3504(d)(1); 3506(a)(1)(B); 3516 note. Congress clearly intended OMB's Data Quality guidelines to apply to all information agencies subject to the PRA in fact make public.

Example(s) of Satisfactory Agency Proposals

None

All agency guidelines reviewed appear to try to reduce significantly the binding nature indicated in the OMB guidelines.

Example(s) of Unsatisfactory Agency Proposals

Multiple Agencies

None of the agency proposals reviewed make any reference to the directives of the PRA; they refer only to section 515 of the FY 2001 Consolidated Appropriations Act, the Data Quality Act itself, and ignore the fact that the Data Quality Act expressly states that the Data Quality guidelines are promulgated under and implement the PRA.

EPA's proposal states that its guidelines do not impose any "legally binding requirements or obligations.... The guidelines may not apply to a particular situation based on the circumstances, and EPA retains discretion to adopt approaches on a case-by-case basis that differ from the

guidelines, where appropriate." Sec. 1.1. "Factors such as imminent threats to public health or homeland security, statutory or court-ordered deadlines, or other time constraints, may limit or preclude applicability of these guidelines." Sec. 1.2. Information that generally would not be covered by the guidelines includes "information in press releases and similar announcements: These guidelines do not apply to press releases, fact sheets, press conferences or similar communications in any medium that announce, support the announcement or give pubic notice of information EPA has disseminated elsewhere." Sec. 1.3, Ins. 482-85.

The CDC/ATSDR proposal has lists of information products to which the guidelines do and do not apply. It also includes press releases and interviews, but does not include "similar announcements," as does EPA. The umbrella HHS guidelines state that the quality standards do not apply to press releases. Sec. D.3.

The NIH proposal also lists with considerable specificity types of information covered and not covered. Press releases are listed as not covered. There is no qualification as to whether a press release simply announces, supports an announcement, or gives public notice of information the agency has disseminated elsewhere, as in EPA's proposal. Sec. II, 2. The NIH proposal states that its information dissemination products must conform to the OMB guidelines. Sec. V, 1.

DOT's proposal states that it contains only "suggestions, recommendations, and policy views of DOT. They are not intended to be, and should not be construed as, legally binding requirements or mandates. These guidelines are intended only to improve the internal management of DOT . . . ." Sec. III, b. The DOT proposal is very specific in excluding certain types of information. Information presented to Congress is excluded if it is "not simultaneously disseminated to the public". III, j. Also excluded are "[p]ress releases and other information of an ephemeral nature, advising the public of an event or activity of a finite duration - regardless of medium". III, k.

The DOL proposal begins with a Preface that states that the document provides an "overview" of the agency's "efforts" to ensure and maximize information quality. DOL states that the guidelines are only intended to improve the internal management of the government and "are not intended to impose any binding requirements or obligations on the Department . . . A Departmental agency may vary the application of information quality guidelines in particular situations where it believes that other approaches will more appropriately carry out the purpose of these guidelines or will help an agency to meet its statutory or program obligations." DOL also specifies certain types of information to which the guidelines do not apply, including press releases, adjudicative processes, policy guidance, and statements of legal policy or interpretation. Sec. on "Scope and Applicability".

The CPSC proposal states that information is not subject to the guidelines if it states explicitly that it was not subjected to them. P.5.

Finally, all of the above agency proposals exempt material relating or adjudicatory proceedings or processes, including briefs and other information submitted to courts. See e.g., DOT at IV, g.

(4) Inclusion of Rulemaking Information in the FDQA Petition Process

Information present in rulemaking records, both completed and ongoing, comprises much of the information disseminated by federal agencies. Neither the Data Quality Act itself nor OMB's February 22nd agency-wide guidelines exclude rulemaking records from coverage.

Example(s) of Satisfactory Agency Proposals

None

Example(s) of Unsatisfactory Agency Proposals

EPA

EPA's proposed guidelines, at pages 22-23, appear to exclude most rulemaking records from the Data Quality Act petition and correction process:

... where a mechanism by which to submit comments to the Agency is already provided. For example, EPA rulemakings include a comprehensive public comment process and impose a legal obligation on EPA to respond to comments on all aspects of the action. These procedural safeguards assure a thorough response to comments on quality of information. EPA believes that the thorough consideration required by this process meets the needs for the correction of information process. A separate process for information that is already subject to such a public comment process would be duplicative, burdensome, and disruptive to the orderly conduct of the action.

If EPA cannot respond to a complaint in the response to comments for the action (for example, because the complaint is submitted too late to be considered along with other comments or because the complaint is not germane to the action), EPA will consider whether a separate response to the complaint is appropriate. EPA may consider frivolous any complaint which could have been submitted as a timely comment in the rulemaking or other action but was submitted after the comment period.

Treasury

The Treasury Department's proposed guidelines (page 5) also have an improper rulemaking exclusion.

These proposed exclusions could, as a practical matter, remove all EPA and Treasury rulemaking records from coverage under the Data Quality Act. This exclusion is contrary to the letter and intent of the Act.

Moreover, many rulemakings are very lengthy proceedings. Information in a rulemaking public docket may be publicly available for years before the agency takes any action on comments on

the information in its promulgation of final rules. Not allowing a Data Quality guidelines petition to correct this information before promulgation of final rules would violate OMB's interagency Data Quality guidelines, which require a timely correction process for correcting errors in all agency information made publicly available, including "preliminary information" used in agency rulemakings:

... agencies 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. These administrative mechanisms shall be flexible, appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices.

i. Agencies shall specify appropriate time periods for agency decisions on whether and how to correct the information, and agencies shall notify the affected persons of the corrections made.

ii. If the person who requested the correction does not agree with the agency's decision (including the corrective action, if any), the person may file for reconsideration within the agency. The agency shall establish an administrative appeal process to review the agency's initial decision, and specify appropriate time limits in which to resolve such requests for reconsideration.

67 FR 8452, 8459 (Feb. 22, 2002)(emphasis added).

OMB does not believe that an exclusion for preliminary information is necessary and appropriate. It is still important that the quality of preliminary information be ensured and that preliminary information be subject to the administrative complaint-and-correction process.

66 FR 49718, 49720 (Sept. 28, 2001).

(5) Third-Party Submissions of Data to An Agency

Much of the information disseminated by federal agencies is originally developed and submitted by states or private entities. In addition, federal agencies often disseminate research from outside parties, some of which is funded by the agency.

Congress clearly intended the Data Quality guidelines to apply to all information that agencies in fact make public. OMB's guidelines reiterate this (see "Case Study" immediately below). Consequently, all third-party information that an agency disseminates is subject to the Data Quality guidelines.

Where an agency does not use, rely on, or endorse third-party information, but instead just makes it public, the agency might claim it should not have the initial burden of ensuring that the information meets the quality, objectivity, utility and integrity standards required by the Data Quality guidelines. The information remains subject to the Data Quality requirements and correction process through administrative petitions by third parties.

Yet this claim offers a distinction without a difference because when an agency uses, relies on, or endorses third-party information, the agency itself must have the burden of ensuring that the information meets the required quality, objectivity, utility, and integrity standards.

Example(s) of Satisfactory Agency Proposals

Department of Transportation

While not entirely consistent with the PRA's Data Quality requirements, the Department of Transportation at page 8 of its proposal guidelines comes close to meeting these requirements:

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 on or disseminate this information or the Department decides to do so.

Example(s) of Unsatisfactory Agency Proposals

CPSC, EPA

The Consumer Product Safety Commission on page 3 of its proposed guidelines states "the standards and policies applied to the information generated by CPSC cannot be applied to external information sources".

EPA at pages 14-17 of its proposed guidelines exempts from the Data Quality guidelines most third-party information submitted to the agency.

(6) Use of Third-Party Proprietary Models

Federal agencies often use various models developed by third parties (often government contractors) to formulate policies based upon influential scientific information. The third-party models are sometimes asserted to be confidential and proprietary. Worse, agencies use the involvement of third-party proprietary information to justify withholding related, non-proprietary data, access to which is indispensable to assessing the quality of modeled and other data.

This issue does not involve the concerns that arise when regulated entities are required to submit confidential or proprietary data to an agency pursuant to a regulatory program. Instead, this issue is limited to situations where any agency and a contractor agree to use a model on a proprietary basis to develop influential scientific information.

OMB's interagency Data Quality guidelines require that influential scientific information be reproducible. This reproducibility standard generally requires that the models used to develop such information be publicly available. The OMB guidelines further explain that when public access to models is impossible for "privacy, trade secrets, intellectual property, and other confidentiality protections,: an agency "shall apply especially rigorous robustness checks to analytic results and documents what checks were undertaken." 67 F.R. 8452, 8457.

CASE STUDY: ABUSE OF THIRD PARTY MODEL AND "PROPRIETARY" CLAIM

Environmental Protection Agency

We are increasingly concerned about the "third party data (model)" practice that government agencies knowingly or otherwise employ in frustration of public access to important data. EPA has a duty to ensure his practice ceases. By such practice we refer to an agency, say EPA, farming out, e.g., an economic assessment, using a proprietary model then refusing to provide not the model itself but other related data (e.g., assumptions, often provided in whole or part by the agency) critical to assessing the value of such an analysis, on the basis that the information is "proprietary".

This claim is particularly vexing in cases such as EPA's development of proposals for the President's "multi-pollutant" recommendation. In that context the Administration testified to Congress that legislation must meet its criteria, established by such an analysis. There is no way to properly assess whether proposed legislation meets this test, or the validity of that test, when parties cannot view the assumptions dictating the purported benchmark against which bills will be measured.

As an example, CEI have already requested, under the Freedom of Information Act (FOIA), those assumptions employed by/on behalf of EPA in the product underlying the following statement excerpted from Assistant EPA Administrator Jeffrey Holmstead's written testimony before the Senate Environment and Public Works Committee on November 1, 2001:

"We have not modeled the specific provisions in S. 556, but useful information is provided by comparing the analyses EPA and EIA conducted to respond to a request from Senators Smith, Voinovich and Brownback with the analyses responding to a request from Senators Jeffords and Lieberman. In the Smith/ Voinovich/Brownback analysis, when we analyzed SO2 and NOx reduction levels similar to S. 556, mercury reduction levels more modest than S. 556 and no CO2 reductions, we did not find significant impacts on coal production or electricity prices."

It is CEI's understanding that EPA requested its outside contractor, ICF, assume unrealistic scenarios regarding the cost and supply of natural gas, or at minimum scenarios running strongly counter to those which ICF itself touts on its own website as likely under any carbon dioxide suppression scheme. CEI expressed our concerns to Mr. Holmstead, who orally assured us that his office would gladly provide us such information even without invoking FOIA. Notwithstanding the seriousness of this proposal and that assurance, it is several months since this assurance and this very straightforward request for information remains unsatisfied, under FOIA or otherwise. This leads us to believe that the Administration is using such a tactic, of farming out studies, to avoid scrutiny of its proposals.

Such withholding is made even more troubling by EPA refusing access to data described and/or provided by EPA to a contractor; it does not request any such contractor's "model" or other property reasonably subject to "proprietary" claims. By such practice an agency avoids releasing purported proprietary information that it is obligated to refrain from withholding. Still,

we are told by certain Administration officers, and it was alluded to by Mr. Holmstead, that the basis for such refusal is a purported "proprietary" nature of the data.

We believe this practice makes for terrible policy and is unacceptable, even without, but certainly given, FDQA's requirements. OMB's January 3 publication of "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies" (Federal Register, Vol. 2, No. 67, p. 369)(see http://frwebgate3.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=43070613463+0+ 2+0&WAISaction=retrieve) assert:

""As we state in new paragraph V.3.b.ii.B.II, 'In situations where public access to date [sic] and methods will not occur due to other compelling interests, agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken. Agency guidelines shall, however, in all cases, require a disclosure of the specific data sources that have been used and the specific quantitative methods and assumptions that have been employed.'" (emphasis added)(p. 374).

We read this to mean that the Office of Management and Budget will refuse to consider any assumptions used in, e.g., the ICF or other model(s) as proprietary. We also read this to indicate OMB recommends other agencies act similarly in promulgating their own required guidelines. That is, in the name of transparency and reproducibility Congress and OMB have preemptively addressed certain materials requiring disclosure, such that denial under FOIA, privacy agreements, or otherwise is not supportable.

Given that it appears there would not exist any reason, proprietary or otherwise, to refuse the public access to the requested assumptions, we hope OMB and EPA enforce this position at every opportunity, and immediately encourage EPA to make a prohibition against using such tools as barriers to public access to data in its FDQA guidelines. Clearly, if it appears even one agency continues to use such a tactic to shield data on a matter of such major economic significance, Congress surely would intervene and prohibit such outside contracting, period. That is a result that appears easily avoidable, and indeed proscribed by FDQA's requirements.

RECOMMENDED "THIRD PARTY" SOLUTION

General Policy

· In their Data Quality Act guidelines Federal agencies must adopt a general prohibition against use of third-party data or proprietary models.

· Use of third-party data or proprietary models conflicts with the goals and intent of the Data Quality Act.

· Public disclosure of third-party data or models must be required in all but the most unusual circumstances.

· If federal agencies believe they must use third-party data or proprietary models in order to carry out their regulatory duties and functions, then they must have the burden of demonstrating to OMB, before entering into a contract to use the model, that no other option is available and that other safeguards to ensure key information - not the model itself but, e.g., assumptions - remains available to the public.

· Federal agencies' Data Quality guidelines must explain in detail what "especially rigorous robustness checks" will be applied to third-party proprietary models that the agencies and OMB agree must be used and explain how the public will be informed of these "robustness check." The public must be allowed to review and comment on these robustness checks.

Implementation of the General Policy

Prospective Implementation:

Federal agencies must promulgate Data Quality guidelines declaring the general policy on this issue as described above. These guidelines must further state that, before the agencies agree to use a third-party, non-public, proprietary model, they will provide OMB a written justification as to why the agencies have no other option, and await OMB's views before entering into a contract that utilizes an allegedly proprietary model. The written justification to OMB should describe why the agencies cannot:

· Use an existing public model;

· Enter into a contact to develop a new public model;

· Reimburse a contractor so as to convert a proprietary model into a public model.

Agencies should provide public notice of and an opportunity to comment on the above justification.

Retroactive Implementation:

If a federal agency has already agreed to use a third-party proprietary model before it proposes Data Quality guidelines, then the agency must undertake the following actions within 45 days of the date it sends its proposed Data Quality guidelines to OMB for review.

· Provide OMB with a written identification of what third-party proprietary models are being used by the agency;

· Provide OMB with a written explanation of why the agency cannot reimburse the contractors so as to convert third-party proprietary models into public models, or enter into a contract to develop a public model.

Agencies should provide public notice of and an opportunity to comment on the above

justification.

(7) Definitions of "Affected Persons", "Person"

The definition of an "affected person" is fundamental to the operation of the Data Quality Act because it determines who is eligible to file an administrative petition for correction of agency-disseminated information.

OMB's interagency Data Quality guidelines conclude that "affected persons are people who may benefit or be harmed by the disseminated information. This includes persons who are seeking to address information about themselves as well as persons who use information." 66 FR 49718, 49721 (Sept 28, 2001). Individual agencies must use OMB's broad definition, which is consistent with the intent of these guidelines: to provide the public with a right to agency disseminated information that meets high Data Quality standards; and with a right to correct any publicly disseminated information that does not meet these standards.

Example(s) of Satisfactory Agency Proposals

OMB

OMB's definition of "affected persons" encompasses anyone who benefits or is harmed by the information including, "both: (a) persons seeking to address information about themselves or about other persons to which they are related are associated; and (b) persons who use the information." OMB's definition is further detailed by their comprehensive definition of "person" which includes individuals, organized groups, corporations, international organization, and governments and government agencies.

Example(s) of Unsatisfactory Agency Proposals

Department of Commerce

Commerce, at 67 FR 22398, 22401, (May 3, 2002), proposes to define "affected person" in an extremely narrow manner:

(1) Affected person means a person who meets each of the following three criteria:

(i) The person must have suffered an injury "harm to an identifiable legally-protected interest [sic];

(ii) There must be a causal connection between the injury and the disseminated information-the injury has to be fairly traceable to the disseminated information or decision based on such information, and not the result of independent or unrelated action; and

(iii) It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Department of Labor

The Department of Labor provides no definition of "affected persons."

(8) Deadline for Deciding a Petition

Setting an appropriate, specific timeframe for agency decisions on information correction petitions is necessary to fulfill one of the key purposes of the Data Quality Act amendments of the PRA - enabling parties to obtain correction of information. It is also required by OMB's guidelines.

Example(s) of Satisfactory Agency Proposals

Multiple Agencies

Agencies including HHS, the Social Security Administration, and the Nuclear Regulatory Commission have proposed a 45-working-day time limit for the responsible agency to respond to the petition with either: (1) a decision; or (2) an explanation of why more time is needed, along with an estimated decision date.

The HHS and similar proposals are cognizant of: (1) agency responsibility to respond in a timely and informative manner to all petitioners; and (2) that some petitions may require a longer timeframe for a response. These proposals provide agencies with flexibility without allowing open-ended delays in deciding a petition. It should be noted that these proposed guidelines do not include provisions allowing additional response extensions.

Example(s) of Unsatisfactory Agency Proposals

Department of Labor

DOL's proposed guidelines state that the agency should "try to respond to complaints and appeals within ninety (90) days of their receipt, unless they deem a response within this time period to be impracticable, in light of the nature of the complaint and the agency priorities."

DOL's proposal does not require any communication to the petitioner and allows for open-ended delays in responding to requests for correction of information.

(9) Who Decides the Initial Petition?

The selection of the party responsible for acting on information correction petitions is important because this person will have a substantial responsibility for ensuring that one of the primary intents of the PRA is realized - allowing affected persons to obtain necessary correction of federally disseminated information.

Example(s) of Satisfactory Agency Proposals

The Federal Housing Finance Board

The FHFB's proposed guidelines state that the Board's "Chief Information Officer and other personnel responsible for the information will review the underlying data and analytical process used to develop the disputed information to determine whether the information complies with OMB and agency Guidelines and whether and how to correct the information, if appropriate." P. 6.

The FHFB's short correction process statement has several important strong points including: (1) designation of an official with primary responsibility for the correction who did not originate the information; (2) examination of the data in question and the process used to produce it; and (3) determination of whether the information complies with the Data Quality requirements of both the agency and OMB.

Example(s) of Unsatisfactory Agency Proposals

National Science Foundation

NSF does not provide any indication as to the official or organization within the agency responsible for acting on information correction petitions. Other agencies, including the Department of Labor and CFTC provide little or no information on who is responsible for evaluating information correction petitions.

Without knowing who has responsibility for the information correction process, it is difficult to evaluate that process. Furthermore, by failing to indicate the official/organization responsible evaluating information correction petitions, the agencies raise questions as to the extent to which they have thought through their process.

(10) Who Decides Appeals?

The appeal is the last administrative process open to an affected person seeking correction of information. Thus, to fulfill congressional and OMB intent with regard to ensuring the quality of disseminated information, it is important that agencies have a meaningful appeals process able to catch any errors which may have made it through both the initial dissemination quality review and the initial information correction process.

Example(s) of Satisfactory Agency Proposals

Securities and Exchange Commission

The SEC's proposed appeals process (referred to as a "request for staff reconsideration") routes the appeal to an official (usually in the Office of General Counsel) who was not involved in

either producing the original data in question or in making the decision on the original request. The SEC's proposal also allows the appeal official to seek the advice of other officials.

This proposal ensures that the decision on any appeal is made by an objective official.

Example(s) of Unsatisfactory Agency Proposals

Department of Treasury

The Department of Treasury has proposed that any administrative appeal of an information correction petition be conducted "... within the Bureau (or Departmental Office), which disseminated the information." P.6.

By failing to provide for independent review of administrative appeals, Treasury's proposal: (1) reduces the likelihood of any errors being recognized on appeal because the appeal would be performed by the same organization which handled both the initial dissemination and the original complaint; and (2) creates a potential conflict of interest.

(11) Must the Agency Correct Information When It Agrees with a Petition?

The Data Quality Act amendments to the PRA explicitly give the public the right to seek and obtain correction of federally disseminated information. Thus, to comply with the law, agencies should be required to correct information disseminations covered by the guidelines.

Example(s) of Satisfactory Agency Proposals

Department of Defense

DOD's proposed guidelines state, "If the PAA [Public Affairs Activity of the relevant DOD Component] agrees with any portion or all of a complainant's request, he will notify the disseminator of the information that the correction must be made, and shall explain the substance of the requested correction. The PAA shall inform the requester, in writing, of the decision and the action taken." Sec. 3.3.5.1.

DOD's proposed guidelines recognize that when a request for an information correction is valid, the information "must" be correct. The DOD procedures would also ensure that the petitioner is informed of the action.

Example(s) of Unsatisfactory Agency Proposals

Department of Labor

DOL's proposed guidelines indicate that, when there is a valid request for information correction, the Department's response will be based on a number of loosely-defined factors including "the agency's more pressing priorities and obligations." P.7.

DOL's proposed guidelines would not implement the Act's legal requirement that affected parties be able to obtain correction of erroneous information. Although under OMB's guidelines agencies "are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved....," the OMB guidelines do not create exemptions from the correction requirements due to "more pressing issues." 67 F.R. 8452, 8458.

(12) What is the Standard for Rebutting the Presumption of Objectivity Resulting from Peer Review?

The OMB guidelines state that information will generally be presumed to be objective if data and analytic results have been subjected to formal, independent peer review; however, this presumption is rebuttable "based on a persuasive showing by a petitioner in a particular instance." 67 F.R. 8452, 8454. The OMB guidelines also specify certain standards for agency-sponsored peer reviews. The issue is what will be considered a "persuasive showing" that will overcome the presumption of objectivity under the proposed agency guidelines. For example, if the agency does not comply with majority peer review criticism, views, or recommendations, does a presumption objectivity apply?

Example(s) of Satisfactory Agency Proposals

None

The closest satisfactory example, perhaps, is the DOL proposal, which simply adopts the exact language of the OMB guidelines: "rebuttable based on a persuasive showing by the petitioner in a particular instance". App. II sec. 3, b, i.

Example(s) of Unsatisfactory Agency Proposals

Multiple Agencies

EPA's proposed does not address this issue.

The HHS proposal, the CDC/ATSDR proposal, and the NIH proposal do not address this issue.

The DOT proposal does not address this issue.

The CPSC proposal does not even mention peer review.

(13) How is "Influential Information" Defined?

The OMB guidelines define the term "influential;" however, they also provide agencies with some flexibility in adopting their own definition. The OMB guidelines state that "influential" "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." 67 F.R. 8452, 8455. The guidelines then state that "[e]ach agency is authorized to define "influential" in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible." Id. The issue is whether, and how, agencies have deviated from the OMB definition in proposing their own definition of "influential scientific, financial, or statistical information.

Example(s) of Satisfactory Agency Proposals

EPA

The closest to a satisfactory approach might be considered to be EPA's although it could be considered overly restrictive.

EPA adopts the OMB language, and then specifies several types of information that will generally be considered "influential," such as those that appear to meet the definition of a significant regulatory action, including an economically significant action, under E.O. 12866, and major scientific and technical work products undergoing peer review.

Example(s) of Unsatisfactory or Less Satisfactory Agency Proposals

Multiple Agencies

HHS simply defines "influential" in the same way as OMB, adding, like OMB, that each of its subsidiary agencies is free to define "influential" in way appropriate for it given the nature and multiplicity of issues for which the agency is responsible. Sec.s 2) I and 4) d.

The CDC/ATSDR proposal does not contain a definition of "influential," thus it is presumably incorporates OMB's definition and accepts it as appropriate for its nature and multiplicity of issues. To the extent the agency understands and agrees with this, that is consistent with FDQA and OMB's "government-wide" guidelines. Should that or any agency assert that a failure to define "influential," or other key term, is other than an incorporation and acceptance of OMB's definition for its own purposes, that is incorrect and inconsistent with FDA and OMB's "government-wide" guidelines. Similarly, CPSC does not define "influential", but simply refer to the OMB guidelines.

The NIH proposal defines "influential" in close conformity with the OMB interim final and final guidelines. Sec. VII.

The DOT proposal contains a very extensive discussion of the meaning of "influential," extending for almost two pages. In general, the discussion appears to be intended to restrict the situations in which the "influential" requirements will be applied. For example, broad impact is required, so that substantial impact on individual companies would not be included, and the economic impact benchmark is the $100 million per year from the "economically significant" regulatory action portion of E.O. 12866. Other aspects of the definition of "significant regulatory

action" from E.O. 12866 are also incorporated. Sec. XI, a.

DOL has an interesting qualification to "influential": "Whether information is influential is to be determined on an item-by-item basis rather than by aggregating multiple studies, documents, or other informational items that may influence a single policy or decision." DOL then defines "influential" using the OMB language, but also provides examples of what meets the definition and what does not. Among the examples of non-influential information products are "fact sheets", "technical information issuances", "accident prevention bulletins", and "studies". Sec. titled "Information Categories".

(14) What is "Objective" and "Unbiased" Information on Risks to Human Health, Safety and the Environment?

The Data Quality Act requires agencies to issue guidelines ensuring and maximizing the "objectivity" of all information they disseminate. The OMB guidelines implementing the legislation define "objectivity," and that definition includes a requirement that information be "unbiased" in presentation and substance. "Objectivity," along with "unbiased," is correctly considered to be, under the OMB guidelines, an "overall" standard of quality. 67 Fed. Reg. 8452, 8458. However, the OMB guidelines do not provide any explanation of how to eliminate bias from risk assessment.

For many years, risk assessments conducted by EPA and other federal environmental agencies have been criticized for being biased by the use of "conservative," policy-driven, "default assumptions", inferences, and "uncertainty factors" in order to general numerical estimates of risk when the scientific data do not support such quantitation as accurate. When such numerical assumptions are presented in any agency risk characterization, it is likely that members of the public who are unfamiliar with how the agency arrived at such numbers believe that the numbers are based on "sound science." In actuality, the risk numbers are a result of co-mingling science with policy bias in a manner such that they cannot be disentangled. The question is whether the proposed agency guidelines have attempted to address this issue and how.

Example(s) of Satisfactory Agency Proposals

None

None of the agencies have attempted to address this issue directly. The least objectionable proposal guidelines are those of agencies such as DOT and CPSC, which simply state that the information they disseminate must be "objective" and "unbiased," in accordance with the OMB guidelines.

Example(s) of Unsatisfactory Agency Proposals

A number of agencies appear to have attempted to effectively avoid this issue in order to continue the practice of employing default assumptions, inferences, and uncertainty factors to

generate speculative risk numbers that they believe are necessary to ensure protection of public health. It appears they believe it is necessary to exaggerate risks in order to protect the public, rather than accomplishing that goal through the risk management decision-making process by making explicit policy decisions that are clearly separated from the presentation of scientific data and analysis.

Three agencies' proposed guidelines are examples: EPA, DOL/OSHA, and HHS/CDC/ATSDR. The three proposals bear a strong resemblance to each other. First, in discussing the requirements for risk assessments, they do not refer to the requirement for "objectivity" and "unbiased" data and presentation. Instead, they imply that OMB's requirement to adopt or adapt the quality standards from the Safe Drinking Water Act Amendments substitutes for that requirement. Accordingly, all three agencies state that presentations of risk information must be "comprehensive, informative, and understandable," rather than "objective" and "unbiased."

EPA goes a little further, referring to the use of "assumptions" and incorporating by reference its Science Policy Council Handbook on Risk Characterization. This Handbook was published in December 2000 but is based on its 1995 internal guidance. This EPA risk characterization guidance makes clear that the agency will use policy-driven default assumptions, inferences, and uncertainty factors to generate risk characterizations (e.g., pp. 15, 18, 21, 41, and C-24 of the Handbook and pp. 2 and 3 of the Administrator's Mar. 21, 1995 Memorandum), while at the same time stating that risk characterizations should be "separate from any risk management considerations" (Mar. 1995 Policy Memorandum, p.2) and that numerical risk estimates should be "objective and balanced" (id. at p. 4). One passage from the EPA risk characterization Handbook, incorporated into its proposed Data Quality guidelines, is particularly illuminating:

3.2.9 How Do I Address Bias and Perspective?

There is an understood, inherent, EPA bias that in the light of uncertainty and default choices the Agency will decide in the direction of more public health protection than [sic] in the direction of less protection. However, it is not always clear where such bias enters into EPA risk assessments. To the extent it may make a difference in the outcome of your assessment, highlight the relevant areas so that impact will not be overlooked or misinterpreted by the risk manager.

Handbook, p. 41.

Nothing is said about such agency "bias" being overlooked or misinterpreted by the public. In addition, the statement confuses risk management ("protection") with risk "assessment," contrary to other statements of agency policy as indicated above. Inclusion of such readily acknowledged "bias" in agency risk assessments and characterizations disseminated to the public is directly contrary to both the Data Quality legislation and the OMB guidelines. The SDWA amendment quality standards do not take the place of the legislative requirements, interpreted and implemented by OMB, that risk assessments, along with all other agency information disseminated to the public, must be "objective" and "unbiased" as an "overall" quality standard.

(15) Application of the SDWA Health Risk Assessment Standards

OMB's February 22nd agency-wide guidelines stated that the science quality and risk assessment standards contained in the 1996 amendments to the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-1(b)(3)(B), should be adopted or adapted by federal agencies. Agencies should adopt both the SDWA science quality and risk assessment standards unless they conflict with the other federal statutory requirements. If such conflicts do arise, agencies should make every efforts to reconcile the SDWA standards with the conflicting statutory requirements.

There are only two valid reasons why a federal agency should not adopt these standards:

· The agency does not conduct health risk assessment; or

· The SDWA risk assessment standards conflict with the specific risk assessment standards of another federal statute governing the agency.

In the latter case, the agency should identify the conflicting specific risk assessment standards; make every effort to reconcile the conflicting standards with the SDWA standards; and request public comment on both the conflict and the attempt at reconciliation.

Example(s) of Satisfactory Agency Proposals

None

Example(s) of Unsatisfactory Agency Proposals

EPA

EPA's proposed guidelines at page 9 adopt the SDWA science quality standards but state that EPA will only adapt the SDWA risk assessment standards, without explaining how or why.

(16) Robustness Checks for CBI

OMB's February 22nd interagency Data Quality guidelines require robustness checks for data, models, or other information that the agency cannot disclose, but which are material to information that the agency does disclose. These robustness checks are critical for ensuring compliance with the Data Quality Act because the public will not be afforded any other mechanism for determining the objectivity, utility, and reproducibility of this non-disclosed information, which underlies disclosed information. OMB explained in its February 22nd agency-wide guidelines that the "general standard" for these robustness checks is "that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision." 67 FR 8452, 8457. Moreover, agencies must disclose "the specific data sources that have been used and the specific quantitative methods and assumptions that have been employed." Id.

Moreover, agency robustness checks for confidential business information (CBI) or proprietary models should be subject to the Data Quality Act petition process.

Consequently, agency guidelines should state:

· Agencies will perform robustness checks meeting OMB's general standard set forth above.

· Agencies will provide sufficient information to the general public to determine whether that standard has been met.

· The agency's compliance with these requirements is enforceable through the Data Quality Act petition process.

Example(s) of Satisfactory Agency Proposals

None

Example(s) of Unsatisfactory Agency Proposals

Multiple Agencies

Most agencies' proposed guidelines are very vague on the robustness check issue, and none specifically state that the agency's robustness checks, or lack thereof, are subject to the Data Quality Act petition process.

II. MULTIPLE AGENCY EXAMPLE OF CURRENTLY DISSEMINATED INFORMATION FAILING ANY REASONABLE INTERPRETATION OF FDQA/OMB REQUIREMENTS

For the reasons detailed throughout, supra, and as further detailed, infra, to the extent that EPA and/or any covered agency cites, refers or links to, or otherwise disseminates the following product of, inter alia, the White House Office of Science and Technology Policy, it is in violation of FDQA. Further, to the extent any EPA guidelines pursuant to OMB's FDQA guidelines permitting continued dissemination of this product, the first National Assessment on Climate Change ("National Assessment") (http://www.usgcrp.gov/usgcrp/nacc/default.htm), that guideline is unacceptable under the Federal Data Quality Act (FDQA).

The above-described and other failings of various draft FDQA guidelines that, facially, would arguably permit continued dissemination of such inappropriate data therefore must be corrected if

they are to survive challenge as violative of FDQA.

Specifically, and as detailed below, FDQA prohibits - and therefore, EPA's FDQA guidelines must prohibit -- dissemination of the National Assessment (NACC) for its failure to satisfy the data quality requirements of "objectivity" (whether the disseminated information is presented in an accurate, clear, complete and unbiased manner and is as a matter of substance accurate, reliable and unbiased), and "utility" (the usefulness of the information to the intended users (per the US Global Change Act of 1990, these are Congress and the Executive Branch). See 67 FR 370. As the statutorily designated steering document for policymaking, NACC qualifies as "influential scientific or statistical information", therefore it must meet a "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "as a quality standard above and beyond some peer review quality standards."

The reasons, as detailed, infra, include NACC's inappropriate use of computer models and data. Further, in developing the published version of NACC, the US Global Change Research Program (USGCRP) also failed to perform the necessary science underlying regional and sectoral analyses that, as Congress notified USGCRP at the time, was a condition precedent to the release of any National Assessment (even a draft). FDQA ratifies those objections, and is violated by continued dissemination of this product by any federal agency.

Additional rationale necessitating a prohibition on further NACC dissemination is provided by an extensive record obtained through the Freedom of Information Act (FOIA), that the purported internal "peer review" of the draft NACC did not in fact occur (this record also ratifies the inappropriate use of computer models, as also detailed). As the obtained documents demonstrate, commenting parties expressly informed USGCRP that they were rushed and as such were not given adequate time for substantive review or comment. USGCRP published and continues to disseminate the product nonetheless, as do all agencies such as EPA which reference, cite, link or otherwise disseminate NACC.

All of these failings ensure that dissemination of NACC violates FDQA's requirement, manifested in OMB's Guidelines and as necessarily manifested by EPA's final guidelines, that data disseminated by Federal Agencies meet standards of quality as measured by specific tests for objectivity, utility and integrity.

As you are also aware and as reaffirmed by OMB in its FDQA Final Guidance, though EPA is only now developing agency-specific guidelines and mechanisms, for complaints invoking OMB's Guidelines in the interim EPA should already have in place requisite administrative mechanisms for applying OMB's standards.

I. FDQA Coverage of USGCRP, and Therefore its Product the NACC

Be it as "third party" data or otherwise, NACC is inescapably covered by FDQA when disseminated by any other Federal Agency. First, it is notweworthy that, whatever the status of the governmental office produced NACC, as directed by the Executive Office of the President (EOP), the United States Global Change Research Program (USGCRP), producer of the National

Assessment on Climate Change (NACC or Assessment) is subject to the Federal Data Quality Act (FDQA). FDQA covers the same entities as the Paperwork Reduction Act (44 U.S.C. Sections 3501 et seq.; see esp. 44 U.S.C. 3502(1)).

By statute the President serves as Chairman of the National Science and Technology Council ("NSTC"), operating under the White House Office of Science and Technology Policy ("OSTP"), and which has under its authority the Committee on Environment and Natural Resources ("CENR") (15 U.S.C. 2932 (originally "Committee on Earth and Environmental Sciences")). All of these offices are therefore EOP entities, subject to PWRA, thus FDQA.

Per 15 U.S.C. 2934 the President, as Chairman of the Council, shall develop and implement through CENR a US Global Change Research Program. The Program shall advise the President and Congress, through the NACC, on relevant considerations for climate policy. Though the composite USGCRP is an "interagency" effort staffed in great part by seconded employees from federal agencies, it remains under the direction of the President and is therefore a "covered agency" pursuant to 44 U.S.C. 3502(1).

Collectively and pursuant to statutory authority, under the direction of these Executive offices the USGCRP directed an effort statutorily dedicated in part to studying the state of the science and its uncertainties surrounding the theory of "global warming" or "climate change," producing a National Assessment on Climate Change ("NACC"). Though originally produced prior to FDQA, the data asserted by the NACC (issued in final in December 2000; see http://www.usgcrp.gov/usgcrp/nacc/default.htm), as current or continued dissemination is subject to the requirements of the Federal Data Quality Act.

II. Development of NACC

The Assessment was produced as follows:

4. Pursuant to and/or under the auspices of the Global Change Research Act of 1990, 15 U.S.C. 2921, et seq., USGCRP is assigned the responsibility of producing a scientific assessment, particularly that which is at issue in this Petition, as follows:

"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 -

(1) integrates, evaluates, and interprets the findings of the [USGCR] Program and discusses the scientific uncertainties associated with such findings;
(2) analyzes the effects of global change on the natural environment, agriculture, energy production and use, land and water resources, transportation, human health and welfare, human social systems, and biological diversity; and
(3) analyzes current trends in global change both human-inducted (sic) and natural, and projects major trends for the subsequent 25 to 100 years." (15 U.S.C. 2934).

5. The document at issue in this Petition, the "First National Assessment on Climate Change," disseminates data rising to the requisite FDQA levels of "quality", as described herein.

6. USGCRP's surge to release a flawed, partial, and partially unauthorized, report came despite requests of lawmakers and outside interests concerned with the issues at hand, to withhold releasing a such a document lacking particular required scientific foundations, in violation of several laws and public policy.

III. The Assessment violates the requirements of the FDQA in the following ways:

1. NACC Relies Upon and Promotes Improper Use of Computer Model Data

For the following reasons, NACC violates FDQA's "objectivity" and "utility" requirements. As "influential scientific or statistical information", NACC also fails for these reasons its "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "a quality standard above and beyond some peer review quality standards."

First, on behalf of this petition, Patrick Michaels, Professor of Environmental Sciences at University of Virginia, excerpts from his review of the NACC dated and submitted to USGCRP August 11, 2000, detailing concerns noted above that place the NACC in violation of FDQA. Where appropriate, additional explanatory text is included. USGCRP made no apparent alterations of the original text in response to these comments, therefore the comments apply to NACC as disseminated.

"August 11, 2000…"

"The essential problem with the USNA [elsewhere cited in these FDQA Comments as the NACC] is that it is based largely on two climate models, neither one of which, when compared with the 10-year smoothed behavior of the lower 48 states (a very lenient comparison), reduces the residual variance below the raw variance of the data. The one that generates the most lurid warming scenarios-the Canadian Climate Centre (CCC) Model-produces much larger errors than are inherent in the natural noise of the data. That is a simple test of whether or not a model is valid…and both of those models fail. All implied effects, including the large temperature rise, are therefore based upon a multiple scientific failure. The USNA's continued use of those models and that approach is a willful choice to disregard the most fundamental of scientific rules. (And that they did not find and eliminate such an egregious error is testimony to grave bias). For that reason alone, the USNA should be withdrawn from the public sphere until it becomes scientifically based."

Explanatory text: The basic rule of science is that hypotheses must be verified by observed data before they can be regarded as facts. Science that does not do this is "junk science", and at minimum is precisely what the FDQA is designed to bar from the policymaking process.

The two climate models used in the NACC make predictions of U.S. climate change based upon human alterations of the atmosphere. Those alterations have been going on for well over 100

years. Do the changes those models "predicted" for U.S. climate in the last century resemble what actually occurred?

This can be determined by comparison of observed U.S. annual temperature departures from the 20th century average with those generated by both of these models. It is traditional to use moving averages of the data to smooth out year-to-year changes that cannot be anticipated by any climate model. This review used 10-year running averages to minimize interannual noise.

The predicted-minus-observed values for both models versus were then compared to the result that would obtain if one simply predicted the average temperature for the 20th century from year to year. In fact, both models did worse than that base case. Statistically speaking, that means that both models perform worse for the last 100 years than a table of random numbers applied to ten-year running mean U.S. temperatures.

There was no discernible alteration of the NACC text in response to this fatal flaw. However, the NACC Synthesis Team, co-chaired by Thomas Karl, Director of the National Climatic Data Center, took the result so seriously that they commissioned an independent replication of this test, only more inclusive, using 1-year, 5-year, 10-year and 25-year running means of the U.S. annual temperature. This analysis verified that in fact both models performed no better than a table of random numbers applied to the U.S. Climate Data. Mr. Karl was kind enough to send the results to this reviewer.

"….the problem of model selection. As shown in Figure 9.3 of the Third Assessment of the United Nations Intergovernmental Panel on Climate Change, the behavior of virtually every General Circulation Climate model (GCM) is the production of a linear warming, despite assumptions of exponential increases in greenhouse forcing. In fact, only one (out of, by my count, 26) GCMs produces a substantially exponential warming-the CCC model [one of the two used in the NACC]. Others may bend up a little, though not substantially, in the policy-relevant time frame. The USNA specifically chose the outlier with regard to the mathematical form of the output. No graduate student would be allowed to submit a thesis to his or her committee with such arrogant bias, and no national committee should be allowed to submit such a report to the American people.

Even worse, the CCC and Hadley data were decadally smoothed and then (!) subject to a parabolic fit, as the caption for the USNA's Figure 6 makes clear. That makes the CCC even appear warmer because of the very high last decadal average.

One of the two models chosen for use in the USNA, the Canadian Climate Center (CCC) model, predicts the most extreme temperature and precipitation changes of all the models considered for inclusion. The CCC model forecasts the average temperature in the United States to rise 8.1˚F (4.5˚C) by the year 2100, more than twice the rise of 3.6˚F (2.0˚C) forecast by the U.K. model (the second model used in the USNA). Compare this with what has actually occurred during the past century. The CCC model predicted a warming of 2.7˚F (1.5˚C) in the United States over the course of the twentieth century, but the observations show that the increase was about 0.25˚F (0.14˚C) (Hansen, J.E., et al., 1999: GISS analysis of surface temperature change.

Journal of Geophysical Research, 104, 30,997-31,022), or about 10 times less than the forecast [Hansen has since revised this to 0.5˚C, which makes the prediction three times greater than what has been observed]…. The CCC forecast of precipitation changes across the Unites States is equally extreme. Of all the models reviewed for inclusion in the USNA, the CCC model predicted more than twice the precipitation change than the second most extreme model, which interestingly, was the U.K. model [the other model used in the NACC]. The U.K. model itself forecast twice the change of the average of the remaining, unselected models. Therefore, along with the fact that GCMs in general cannot accurately forecast climate change at regional levels, the GCMs selected as the basis for the USNA conclusions do not even fairly represent the collection of available climate models.

Why deliberately select such an inappropriate model as the CCC? [Thomas Karl, co-Chair of the NACC synthesis team replied that] the reason the USNA chose the CCC model is that it provides diurnal temperatures; this is a remarkable criterion given its base performance…."

"The USNA's high-end scenarios are driven by a model that 1) doesn't work over the United States; 2) is at functional variance with virtually every other climate model. It is simply impossible to reconcile this skewed choice with the rather esoteric desire to include diurnal temperatures…"

Explanatory text: It is clear that the NACC chose two extreme models out of a field of literally dozens that were available. This violates the FDQA requirements for "objectivity" detailed in the third paragraph of this Petition.

Second, Dr. Michaels is clearly not alone in his assessment. Consider the comments of government reviewers, all received and possessed by USGCRP. For example, that styled "Improper use of climate models", by William T. Pennell of Northwest National Laboratory, submitted through DOE (John Houghton) to Melissa Taylor at USGCRP:

"Although it is mentioned in several places, greater emphasis needs to be placed on the limitations that the climate change scenarios used in this assessment have on its results. First, except for some unidentified exceptions, only two models are used. Second, nearly every impact of importance is driven by what is liable to happen to the climate on the regional to local scale, but it is well known that current global-scale models have limited ability to simulate climate effects as this degree of spatial resolution. We have to use them, but I think we need to be candid about their limitations. Let's take the West [cites example]…Every time we show maps that indicate detail beyond the resolution of the models we are misleading the reader."

USGCRP received other comments by governmental "peer reviewers" affirming these modeling data transgressions:

"Also, the reliance on predictions from only two climate models is dangerous". Steven J. Ghan, Staff Scientist, Atmospheric Sciences and Global Change, Pacific Northwest Laboratory.

"This report relies too much on the projections from only two climate models. Projections from other models should also be used in the assessment to more broadly sample the range of predicted responses." Steven J. Ghan Staff Scientist, Atmospheric Sciences and Global Change, Pacific Northwest Laboratory.

"Comments on National Assessment. 1. The most critical shortcomings of the assessment are the attempt to extrapolate global-scale projections down to regional and sub-regional scales and to use two models which provide divergent projections for key climatic elements." Mitchell Baer, US Department of Energy, Washington, DC.

"General comments: Bias of individual authors is evident. Climate variability not addressed…Why were the Hadley and Canadian GCMs used? Unanswered questions. Are these GCM's [sic] sufficiently accurate to make regional projections? Nope". Reviewer Stan Wullschleger (12/17/99).

William T. Pennell, Manager, Atmospheric Sciences and Global Change, Pacific Northwest Laboratory, cites the that "only two models are used" as a "limitation" on the product.

The final NACC currently disseminated shows these admonitions went unheeded.

Stated simply, the climate models upon which NACC relies have struck out. Strike one: they can't simulate the current climate. Strike two: they predict greater and more rapid warming in the atmosphere than at the surface. The opposite is happening (see e.g., http://wwwghcc.msfc.nasa.gov/MSU/hl_sat_accuracy.html). Strike three: they predict amplified warming at the poles, which are cooling instead (see e.g., http://www.washingtonpost.com/wp-dyn/articles/A40974-2002Jan13.html). On top of this demonstrable lack of utility for their purported purpose, NACC knowingly misuses them.

2. Failure to Perform Requisite Scientific Review Violates FDQA

USGCRP's development of NACC drew congressional attention to particular shortcomings. Specifically, leaders in the United States House of Representatives repeatedly attempted to ensure USGCRP and its subsidiary bodies follow the scientific method regarding particular matters, specifically the regional and sectoral analyses. Indeed the concerns had become so acute that these leaders successfully promoted a restriction prohibiting relevant agencies from expending appropriated monies upon the matter at issue, consistent with the plain requirements of the GCRA of 1990, through language in the conference report accompanying Public Law 106-74:

"None of the funds made available in this Act may be used to publish or issue an assessment required under section 106 of the Global Change Research Act of 1990 unless (1) the supporting research has been subjected to peer review and, if not otherwise publicly available, posted electronically for public comment prior to
use in the assessment; and (2) the draft assessment has been published in the
Federal Register for a 60 day public comment period."

USGCRP did not perform the conditions precedent for valid science as cited in that language. Instead USGCRP produced and now disseminates a NACC knowingly and expressly without the benefit of the supporting science which not only is substantively required but which Congress rightly insisted be performed and subject to peer review prior to releasing any such assessment.

These attempts to rectify certain NACC shortcomings were made in advance of USGCRP producing the NACC, but were never rectified. These failures justify Petitioners' request that USGCRP cease present and future NACC dissemination unless and until its violations of FDQA are corrected. In addition to NACC violating FDQA's "objectivity" and "utility" requirements, as "influential scientific or statistical information", NACC also fails its "reproducibility" standard, setting forth transparency regarding data and methods of analysis. Per OMB, this represents "a quality standard above and beyond some peer review quality standards."

Given USGCRP's refusal to wait for completion of the underlying science and their response to the relevant oversight chairmen, it is manifest that USGCRP ignored or rejected these lawmakers' requests, including by the relevant oversight Chairmen and produced a deeply flawed Assessment, knowingly and admittedly issuing a "final" Assessment without having complied with Congress's direction to incorporate the underlying science styled as "regional and sectoral analyses," while also admitting that the requisite scientific foundation would be completed imminently. For these same reasons dissemination presently violates FDQA.

3. NACC Not in Fact Peer Reviewed, Commenting Parties Make Clear

Finally, NACC suffers from having received no authentic peer review, in violation of FDQA's "objectivity" and "utility" requirements. As "influential scientific or statistical information", for these reasons NACC also fails the "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "a quality standard above and beyond some peer review quality standards."

Once an advisory committee was chartered pursuant to the Federal Advisory Committee Act (FACA) in 1998, Dr. John Gibbons' communication of January 8, 1998 to the first Designated Federal Officer (DFO) Dr. Robert Corell indicates a sense of urgency was communicated to the panel by political officials. Further, statements in the record and major media outlets, including but in no way limited to those from certain anonymous if purportedly well placed sources, indicate a perception among involved scientists that political pressures drove the timing and even content of this draft document. This is manifested by the lack of opportunity to comment for parties whose comment was formally requested as part of a "peer review" of NACC.

This sense of urgency is reflected in, among other places, comments the Cooler Heads Coalition obtained via the Freedom of Information Act, made by parties from the National Laboratories asked by the Department of Energy to comment on the Draft. In addition to an emphasis on speed as opposed to deliberation, the report's emphasis on "possible calamities" to the detriment of balancing comments which were widely offered, and rampant criticism of the reliance on only two significantly divergent models for the pronouncements made, these comments are

exemplified by the following samples from well over a dozen such complaints accessed through FOIA, also received by and in the possession of USGCRP:

6) "This review was constrained to be performed within a day and a half. This is not an adequate amount of time to perform the quality of review that should be performed on this size document" (Ronald N. Kickert, 12/08/99);

7) "During this time, I did not have time to review the two Foundation Document Chapters" (Kickert, 12/20/99);

8) "Given the deadline I have been given for these comments, I have not been able to read this chapter in its entirety" (William T. Pennell);

9) "UNFORTUNATELY, THIS DOCUMENT IS NOT READY FOR RELEASE WITHOUT MAJOR CHANGES" (CAPS and bold in original)(Jae Edmonds);

10) "This is not ready to go!" (William M. Putman).

These comments reflect an alarming implication of timing over substance, and of a product whose final content appears predetermined. Patrick Michaels' comments, and the absence of apparent change in response to his alarming findings, reinforces this troubling reality. Notably, the product was released and continues to be disseminated without offering an actual peer review or otherwise addressing the concerns expressed.

In conclusion, the National Assessment on Climate Change fails to meet FDQA and/or OMB guidelines regarding Data Quality. As a consequence, EPA's FDQA Guidelines must prohibit continued dissemination of the NACC, through reliance, reference, link, publication or other dissemination.

Sincerely,

Christopher C. Horner, Esq.