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COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

March 11, 2022

Hon. Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Information Quality Act Appeal and Request for Reconsideration of CEI's Request for Correction of the Greenhouse Gases Endangerment Finding

Dear Mr. Regan,

The Competitive Enterprise Institute (CEI) hereby appeals and requests reconsideration under the Information Quality Act (IQA) of the decision of Joseph Goffman, Principal Deputy Assistant Administrator denying CEI's request for correction (RFC) of EPA's 2009 Endangerment Finding. CEI filed its RFC on May 13, 2019; Mr. Goffman denied it on January 3, 2022. Goffman's decision is attached as Attachment A.

CEI's RFC was based on major procedural defects in EPA's Endangerment Finding. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66510 (2009). As shown below, Mr. Goffman's denial is incorrect on a number of grounds.

I. The Endangerment Finding's Status as a Final Agency Action Does Not Exempt It From the IQA or the RFC process.

The Goffman denial asserts that "As a final agency action, the agency decision in the 2009 Endangerment Finding falls outside the scope of the IQA and the RFC process." Goffman denial at 2. This is incorrect.

Explicit OMB rules and the EPA Information Quality Guidelines recognize that final agency actions are within the scope of the IQA and the RFC process. For instance, the EPA guidelines state that EPA "will usually address information quality issues in connection with the *final Agency action* or information product." EPA, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency 32 (October 2002) (hereinafter EPA Guidelines), https://www.epa.gov/sites/default/files/2020-02/documents/epa-info-quality-guidelines_pdf_version.pdf. The EPA Guidelines thus acknowledge that final agency actions are subject to the IQA.

The OMB rules require agencies to "Establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with these OMB guidelines." OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 FR 8451, 8458 (2002). There is no exception to this requirement for final agency actions in the OMB rules. In fact, OMB gives an example of what is within the scope of the IQA: "a risk assessment prepared by the agency to inform the agency's formulation of possible regulatory or other action." 67 FR 8454. This is exactly what the Endangerment Finding is—a risk assessment of greenhouse gases used by EPA to inform the agency's formulation of other possible regulatory actions.

The Goffman denial exempts the Endangerment Finding from the OMB rules out of thin air. EPA cannot create such exceptions on its own authority, especially when that exception is contrary to EPA's own guidelines.

II. EPA Incorrectly Denies that the Endangerment Finding and the Underlying Technical Support Document Were Scientific Assessments

The Goffman denial correctly defines "scientific assessment" as "an evaluation of a body of scientific or technical knowledge, which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information." Goffman denial at 4. That is after all the definition given by OMB. OMB, Final Information Quality Bulletin for Peer Review, 70 FR 2664, 2665 (2005). But the Goffman denial fails to properly apply that definition to these facts.

EPA states that the Technical Support Document (TSD) was not a scientific assessment because "No weighing of information, data and studies occurred in developing the TSD." Goffman denial at 4. This is incorrect. EPA staff had to weigh at least the overall quality of the reports in deciding which reports to utilize, and in choosing which parts of the reports to summarize in the TSD. Even if this is all that EPA did, it still constitutes a scientific assessment.

Moreover, even if the TSD did not present any weighing of information, that says nothing about whether the Endangerment Finding itself was a scientific assessment. As the initial response notes, "there is an important distinction between the 2009 Endangerment Finding . . . and the TSD." *Id.* at 4. In 2011, EPA apparently told OMB that the TSD was not an evaluation of the underlying reports and, on that basis, OMB stated that the TSD was not a Highly Influential Scientific Assessment (HISA). EPA Inspector General, Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes 24 (Sept. 26, 2011). But the TSD is not the Endangerment Finding itself, so that response is irrelevant.

Scientific information in the record must also have been weighed in making the final conclusions as the Endangering Finding itself asserts. The Endangerment Finding states that, under the Clean Air Act, "the Administrator is to exercise judgment by weighing risks, assessing potential harms, and making reasonable projections of future trends and possibilities." 74 FR 66505. The weighing of scientific information concerning risks is exactly what EPA described in the initial response to our request for correction as a scientific assessment. Additionally, OMB

Peer Review Guidelines explicitly list such "health, safety, or ecological risk assessments" as examples of "scientific assessments." 70 FR 2667.

The Endangerment Finding went on to note that EPA "is weighing the likelihood and severity of harms to arrive at the final finding. EPA has not applied an exaggerated or dramatically expanded precautionary principle, and instead has exercised judgment by weighing and balancing the factors that are relevant under this provision." 74 FR 66507. The exercise of professional judgement to weigh such factors is exactly how EPA described a scientific assessment in its response. In short, the very language of the Endangerment Finding describes itself as a scientific assessment.

The D.C. Circuit similarly held the Endangerment Finding was based on EPA's "'scientific judgment' about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions." The D.C. Circuit described it in these words:

> EPA simply did here what it and other decisionmakers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted. It makes no difference that much of the scientific evidence in large part consisted of "syntheses" of individual studies and research. Even individual studies and research papers often synthesize past work in an area and then build upon it. This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question.
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> Moreover, it appears from the record that EPA used the assessment reports not as substitutes for its own judgment but as evidence upon which it relied to make that judgment. EPA evaluated the processes used to develop the various assessment reports, reviewed their contents, and considered the depth of the scientific consensus the reports represented. Based on these evaluations, EPA determined the assessments represented the best source material to use in deciding whether greenhouse gas emissions may be reasonably anticipated to endanger public health or welfare.

Coalition for Responsible Regulation v. EPA, 684 F.3d 102, 120 (D.C. Cir. 2012).

The D.C. Circuit, in effect, concluded that the Endangerment Finding was a scientific assessment. It was an evaluation of the body of scientific knowledge about greenhouse gases in which EPA synthesized individual studies and research to make a "make a science-based judgment." It did not, according to the D.C. Circuit, just summarize the underlying IPCC, CCSP, USGCRP, or NAS reports without independent evaluation; instead it used those reports as evidence upon which to base its own professional judgment.

The Endangerment Finding states EPA was doing exactly what the Goffman denial says is needed to be a scientific evaluation. In its words, "EPA is giving careful consideration to all of the scientific and technical information in the record." EPA, Endangerment Finding, 74 FR 66510 (2009). The Endangerment Finding merged the findings of the underlying reports,

describing the result of the reports "[w]hen viewed in total." *Id.* Additionally, EPA in the Endangerment Finding also examined individual studies not contained in any of the underlying reports of the IPCC/CCSP/USGCRP/NAS. 74 FR 66512 ("EPA reviewed these individual studies that were not considered or reflected in these major assessments to evaluate how they inform our understanding of how greenhouse gas emissions affect climate change.").

The Goffman denial claims CEI's request for correction "appears to conflate the TSD for the 2009 Endangerment Finding and the 2009 Endangerment Finding itself." Goffman denial at 4. This is incorrect; we acknowledge that they are separate and distinct. But our position is that both the TSD for the Endangerment Finding and the Endangerment Finding itself are scientific assessments under the IQA. The fundamental difference between these documents is that the TSD was created by EPA staff to advise Administrator Jackson and the Endangerment Finding was Administrator Jackson's explanation of her evaluation and her decision. Regardless of who did the evaluating, both are scientific assessments.

At some point, either in the TSD or the final Endangerment Finding, an evaluation of how accurately the IPCC, CCSP, USGCRP, and NAS reports reflected the state of the science clearly occurred. *See, e.g.*, 74 FR 66511("the Administrator is placing primary and significant weight on these assessment reports in making her decision on endangerment."). EPA may not have gone through every study those reports relied upon, but it must have evaluated their overall scientific accuracy before relying upon them; it must have decided which reports reliably reflected the state of the science. Such an evaluation is a scientific assessment.

If an agency could claim that it avoids engaging in scientific evaluation when it relies on prior studies, then nothing would be a scientific evaluation. This is clearly contrary to OMB rules and EPA guidelines.

III. The Goffman Denial Does Not Even Dispute that the Endangerment Finding Was a Highly Influential Scientific Assessment

The Goffman denial admits that the TSD "constitutes Influential Scientific Information (ISI)." Goffman denial at 5. However, it provides no reasoned basis for its claim that the TSD is not a Highly Influential Scientific Assessment.

And even if one accepts this unsupported assertion, it says nothing about whether the Endangerment Finding itself is a Highly Influential Scientific Assessment. It does so despite acknowledging the difference between the TSD and the Endangerment Finding.

The Goffman denial quoted the factors that OMB uses to distinguish ISI from HISA—the latter involves $500 million or more in potential impacts, or it is novel, controversial, or precedent-setting, or it attracts significant interagency interest. But then the response doesn't even try to apply those factors. EPA itself has admitted that the regulations based upon the Endangerment Finding had more than $500 million of impact, and in terms of controversy it is hard to imagine a more controversial finding by EPA than its Endangerment Finding. (We incorporate by reference the claims in our initial request for correction that the Endangerment Finding has more than $500 million in impact.)

IV. The Goffman Denial Admits that EPA Did Not Have Independent Experts Perform Any Substantive Peer Review of Either the TSD or the Endangerment Finding

According to the Goffman denial, "The charge to the reviewers of the TSD was to determine whether the TSD was a fair reflection of the major assessment reports rather than to peer review a new scientific assessment." Goffman denial at 7. It was for this reason, apparently, that EPA had the peer reviewers review their own work, and this in turn supposedly made any conflict-of-interest concerns irrelevant. But if this is true, then neither the TSD nor the Endangerment Finding was ever substantively peer reviewed on the science.

This doesn't make EPA's position better; it makes it even worse. The lack of any substantive peer review performed on the TSD or the actual Endangerment Finding is completely contrary to OMB requirements that even ISI's be substantively peer reviewed. 70 FR 2675 ("To the extent permitted by law, each agency shall conduct a peer review on all influential scientific information that the agency intends to disseminate."). It would mean no independent experts ever evaluated EPA's findings to ensure they were correct.

In fact, this is a transparent attempt by EPA to make the laughable claim that it is best to have peer reviewers reviewing their own work. In the words of the Goffman denial, this is because as "authors of those underlying reports [they] were well-positioned to evaluate the charge question and ensure that EPA did not modify or misstate key findings of the major scientific assessment products." Goffman denial at 7. But a peer reviewer's job is to make sure the science claimed by EPA is correct; it is not to allow the author's own errors to be faithfully repeated.

V. EPA Does Not Dispute that the Issuance of the Endangerment Finding and TSD Was Seriously Flawed

Notwithstanding EPA's claim, in the Goffman denial, that no substantive peer review occurred, the Endangerment Finding and TSD still suffer from serious procedural issues which EPA does not dispute. This is especially true if the Endangerment Finding or its TSD is a HISA, as explained in Part II above (pages 2-4).

EPA does not dispute that the public was not considered in the selection process for the peer reviewers. Nor does EPA dispute that not allowing the public to nominate peer reviewers would violate OMB rules if the document were a HISA. EPA simply disputes that the TSD is a HISA, instead claiming it to be an ISI. Goffman denial at 6. But if, as we claim in Part II, the TSD or the Endangerment Finding itself is a HISA, then it is undisputed that this rule was violated.

The Goffman denial also does not dispute that the public was not allowed to participate in the peer review process as required by OMB's IQA rules. Goffman denial at 7. The Goffman denial argues that, instead, the public was allowed to participate in the public comment period. However, this was after the peer review process had already been completed; for this reason, no public input was shared with the peer reviewers.

The Goffman denial does not dispute that an EPA employee was on the peer review panel. Goffman denial at 7. Having an employee on the peer review panel of a HISA violates the IQA

rules. The Goffman denial claims that the TSD is not a scientific assessment. However, if, as we show in Part II, the TSD or the Endangerment Finding itself is a HISA, then it is undisputed that this rule was violated.

VI. The Goffman Denial Does Not Dispute the Absence of a Required Peer Review Report and a Required Conflict of Interest Reporting Form For ISI

Given that EPA admits the TSD is Influential Scientific Information, it has no excuse for ignoring the rules that require an ISI to be accompanied by a peer review report and to comply with conflict-of-interest requirements.

The Goffman denial does not dispute that no peer review report was made despite OMB's IQA rules for ISI. Goffman denial at 8. It says that EPA submitted a memorandum documenting changes to the TSD, but that does not substitute for a peer review report which is prepared by the peer reviewers and which includes their comments rather than EPA's changes. The public needs to see how the peer reviewers as a whole characterized EPA's work in their own words. Those comments have not been released as required by OMB rules.

The Goffman denial explicitly acknowledges that the IPCC did not explicitly contain the "conflict of interest" language required by the IQA for ISI. Goffman denial at 9. The Goffman denial claims that other checks and balances built into the IPCC procedures protect against this problem. But EPA's opinion of these other procedures is irrelevant; they do not meet OMB's requirements under the IQA.

These violations alone suffice for overturning the Goffman denial.

VII. Contrary to EPA's Claim, CEI's IQA Request for Correction Is Based on Information Available Only After the Public Comment Period

The initial response claims that the "a number of these issues were raised by CEI itself in comments submitted during the public participation process for the 2009 Endangerment Finding" and invoked the general rule that EPA will "not consider a complaint that could have been submitted as a timely comment in the rulemaking or other action but was submitted after the comment period." But CEI's comments in the NPRM phase were responding to the draft Endangerment Finding, not the final rule, and relied upon the information available at the time. CEI's request for correction is based on new information that was not available then and, as such, could not have been submitted as a part of that process.

Only one of the eight violations CEI identified in its request for correction were even mentioned in our comments—that the peer reviewers were reviewing their own work on the underlying reports. In fact, the Goffman denial not only admits this; it actually touts it, writing that because the reviewers are "the authors of those underlying reports [they] were well-positioned to evaluate the charge question and ensure that EPA did not modify or misstate key findings of the major scientific assessment products." Goffman denial at 7.

EPA doesn't dispute that this would be a problem if the Endangerment Finding were a HISA. EPA merely claims it is not a HISA. But new information acquired after the end of the public

comment period shows that the Endangerment Finding is in fact a HISA. Specifically, many of the regulations issued after the Endangerment Finding use that finding as their basis for regulatory actions that exceed $500 million in impact—the threshold for a HISA.

Furthermore, many of the problems identified in CEI's request for correction are based on information discovered by the Inspector General after the close of the comment period. As such, that information could not have been included in comments on the NPRM. One example is that EPA did not even consider including outside reviewers in the peer review process. This information was not publicly available prior to the Inspect General report, which was published after the close of the public comment period.

EPA guidelines recognize that there is an exception for a complaint which "could not have been timely submitted" because it is based on information available only after the close of the public comment period. EPA Guidelines at 39. For this reason, CEI's request for correction should be fully considered by EPA.

VIII. Administrator Regan Must Personally Decide This Request for Reconsideration

As is shown below, the only people who can be on the executive panel that would review this appeal is Acting Assistant Administrator for Research and Development Maureen Gwinn and Administrator Michael Regan. Because Administrator Regan is the highest official at EPA, he could also decide this issue entirely on his own authority.

An unappealable final decision by an agency can only be issued by a principal officer. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us."). While Administrator Regan would clearly be a principal officer, it is unclear which other officers are principal officers. But even if the agency disagrees with us on requiring a principal officer, at a minimum a lawfully appointed inferior Officer of the United States is necessary to exercise the authority of the agency. *See* Office of Legal Counsel, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Opinions of the Office of Legal Counsel https://www.justice.gov/file/451191/download. Such an officer would at least have received a commission signed by the President pursuant to Article II, section 3, clause 6 of the U.S. Constitution, and their office would have been "established by Law" in accordance with Article II, section 2, clause 2.

Under the organic law of the Environmental Protection Agency, Reorganization Plan Number 3 of 1970 (5 U.S.C. Appendix), and Public Law 98-80, the officers of the EPA are the Administrator, Deputy Administrator, and the eight Assistant Administrators. These officers include Administrator Michael Regan, Deputy Administrator Janet McCabe, Assistant Administrator for International and Tribal Affairs Jane Nishida, Assistant Administrator for Water David Patrick Ross, and Assistant Administrator for Toxic Substances Michal Ilana Freedhoff.

Additionally, assuming they have been properly appointed and commissioned for their office by the President, the Acting Assistant Administrators hold that office. This includes Acting

Assistant Administrator Office of Solid Waste Barry Breen, Acting Assistant Administrator for Research and Development Maureen Gwinn, and Acting Assistant Administrator for Enforcement and Compliance Assurance Lawrence Starfield.

Joseph Goffman and Lynnann Hitchens are Acting Principal Deputy Assistant Administrators, who are not Officers of the United States and as such cannot be delegated authority to deal with this matter. Only an Officer of the United States can make such a decision on behalf of the agency, as explained in the Office of Legal Counsel opinion cited above.

Associate Administrator of Policy Victoria Arroyo is not an Assistant Administrator. Pursuant to the Reorganization Plan Number 3 of 1970 (5 U.S.C. Appendix Section 1(d)), all Assistant Administrators are to be "appointed by the President, by and with the advice and consent of the Senate." The Associate Administrator of Policy is not appointed by the President, but rather is a noncareer appointment by the Administrator. The position of Associate Administrator of Policy has not been created by law and as such is not an Office of the United States pursuant to Article II, section 2, clause 2. That clause requires that all Offices not provided for by the Constitution "shall be established by Law." Thus, an Associate Administrator of Policy, Victoria Arroyo is not an Officer of the United States and she cannot make the final decision on this appeal.

OMB requires that "agencies should ensure that those individuals reviewing and responding to the appeals request were not involved in the review and initial response to the RFC." OMB Memo M-19-15 (April 24, 2019). OMB requires that "staff reviewing appeals should be sufficiently senior that they are effectively able to disagree with the assessment of colleagues who prepared the initial response." *Id.* at 11. In all likelihood, these requirements would be satisfied by an uninvolved officer of higher authority than the initial decisionmaker, Principal Deputy Assistant Administrator Joseph Goffman.

The EPA IQA guidelines specify that it is the Associate Administrator for Office of Research and Development (ORD), Associate Administrator for the Office of Environmental Information, and the Associate Administrator for the Office of Policy, Economics and Innovation, who should decide this appeal. EPA Quality Guidelines 35 (2002), https://www.epa.gov/sites/default/files/2020-02/documents/epa-info-quality-guidelines_pdf_version.pdf.

The position of the Assistant Administrator for the Office of Environmental Information has apparently been renamed as the Assistant Administrator for Mission Support; that position is currently vacant. Lynnann Hitchens as Acting Principal Deputy Assistant Administrator has been delegated the duties of the Assistant Administrator, but he cannot act as an Officer of the United States.

Likewise, the office of the Assistant Administrator for the Office of Policy, Economics and Innovation is currently vacant. This office should not be confused with the Associate Administrator for Policy; the first requires presidential appointment and senate confirmation while the second does not.

It is for these reasons that the only person who can potentially be directly on the executive panel to review this appeal is Acting Assistant Administrator for Research and Development Maureen Gwinn. As the other two offices are vacant, pursuant to the Federal Vacancies Reform Act of 1998, 5 U.S. Code § 3348(b)(2), "only the head of such Executive agency may perform any function or duty of such office." In this case, that is Administrator Michael Regan.

IX. Conclusion

The Goffman denial failed to consider whether the Endangerment Finding itself was a scientific assessment and it failed to apply the OMB definition of HISA to that document. If either the Endangerment Finding or the TSD was a HISA, then EPA did not follow the OMB rules for peer review. We ask that EPA acknowledge this and either do a proper peer review or withdraw the 2009 Endangerment Finding.

Sincerely,

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