

21 May 2003

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

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

To Whom it May Concern,

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

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

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

- EPA relies for its denial upon purported State Department paternity of CAR, which even were that true is not relevant under any authority regarding applicability of FDQA requirements to EPA's exclusive dissemination of CAR.
- Regardless, EPA is the sole federal government office publicly disseminating CAR.
- Further, EPA produced CAR, leading the effort as the sole office soliciting, culling, and incorporating public comment, manifested by its Federal Register publications.
- The White House acknowledges EPA produced the CAR.
- The State Department attributes CAR authorship to EPA.
- The record therefore makes clear that CAR is EPA's product.
- This notwithstanding, regarding EPA's argument, neither OMB's FDQA Guidelines – which are controlling here – nor EPA's own Guidelines support EPA's proffered argument to avoid application of FDQA to CAR, that "third party" documents include governmental product, including even that not disseminated by any other agency.

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

- The Department of State cannot be demonstrated as having a role in CAR appreciatively more substantive than transmitting this document to the United Nations pursuant to the UNFCCC or Rio Treaty, as delegated to State pursuant to statute (22 U.S.C. 2656).

- EPA offers an untenable interpretation of the FDQA, permitting agencies to collaborate in order to shield the product of the federal government from data quality requirements that were enacted for the precise purpose of exposing data produced and/or promoted by the federal government to scrutiny. FDQA, as EPA surely knows, will not be read by the courts as such a malleable shield, but instead more akin to a “sunshine” statute.

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

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

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

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

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

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

EPA is the sole federal government office publicly disseminating CAR

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

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

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

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

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

EPA Federal Register Notices Confirm EPA Production of CAR

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

EPA claims that although it may have had a hand in producing the CAR, CAR is the State Department's document. In fact, though the State Department may have had a hand in producing CAR, CAR is EPA's document. The record leaves no doubt. Further, EPA claims it can not be reasonably attributed that EPA adopted CAR or that CAR supports EPA's viewpoint, flatly unsubstantiated, and unsubstantiable, assertions belied by its FR notices, in addition of course to publishing it. Further, EPA made no effort to even abet such a claim by publishing CAR under a "Library" file, but does so under "Publications."

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

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

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

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

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

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

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

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

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

Reading further we find:

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

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

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

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

White House Asserts CAR is EPA Product

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

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

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

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

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

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

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

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

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

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

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

"REPORTS, DOCUMENTS and FACT SHEETS

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

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

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

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

OMB's Guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Exemption for Public Filings. Some agencies refined the exemption for public filings to permit agencies to “pass through” information not subject to the guidelines while properly

applying the agency and OMB guidelines to third-party information that the agency disseminates. Agencies need to qualify the public filing exemption to ensure that the agency guidelines continue to apply to third-party information that the agency disseminates, as we discuss below under II, "Coverage of 'Third-Party' Information under the Guidelines...."³

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

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

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

OMB Supplemental DQ Guidance 10 June 2002, p. 7. (emphases added)

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

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

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

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

Section III mentions an important concept that may not be immediately obvious to persons reading the OMB guidelines for the first time. As Dr. John Graham, Director [sic: Administrator] of the OMB Office of Information and Regulatory Affairs (OIRA) and others have pointed out in meetings about the information quality guidelines, **the standards for data quality that apply directly to Federal agencies also apply, at least indirectly, to outside parties who supply information to the Department.** If the Department is to rely on technical, scientific, or economic information submitted by, for example, a commenter to a proposed rule, that information would need to meet appropriate

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

standards of objectivity and utility. Numbers submitted by a commenter as the basis for a regulatory decision B which the Department would necessarily disseminate as part of a rulemaking issuance B should meet data quality standards no less than in the case of information the Department itself generates (DOT, 3).

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

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

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

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

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

EPA's Guidelines

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

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

"5.3 When do these Guidelines Apply?

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

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

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

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

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

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

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

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

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

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

Also, see:

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

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

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

Sincerely,

Christopher C. Horner

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