1310 L Street, NW, 7th Floor
Washington, DC 20005
cei.org

202 331 1010 main
202 331 0640 fax

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.
>
> 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,

Devin Watkins, Attorney
devin.watkins@cei.org
Sam Kazman, General Counsel
sam.kazman@cei.org
Competitive Enterprise Institute
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-1010

Attachment A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

January 3, 2022

OFFICE OF
AIR AND RADIATION

Mr. Devin Watkins, Attorney
Sam Kazman, General Counsel
Competitive Enterprise Institute
1310 L Street, NW, 7th floor
Washington, D.C. 20005

Dear Mr. Watkins and Mr. Kazman:

This letter is in response to the Competitive Enterprise Institute (CEI) Request for Correction (RFC), received by the U.S. Environmental Protection Agency (EPA) on May 13, 2019, which was assigned RFC# 19002 for tracking purposes. In the RFC letter, CEI asks that EPA determine that its 2009 Endangerment Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act (2009 Endangerment Finding) and supporting Technical Support Document (TSD) "do not meet the requirements of the Information Quality Act" (IQA) and are "subject to correction requests under the IQA," and that as a result, "EPA should cease distributing its Endangerment Finding and TSD until they have gone through the proper peer review process" (RFC at pp. 1-2).

Summary of the CEI Request

The CEI RFC makes its request based on the following assertions: 1) "*the 2009 GHG Endangerment Finding is a scientific assessment"* (RFC at p. 2); 2) "*the 2009 GHG Endangerment Finding has been highly influential"* (RFC at p. 2); 3) there were a "*variety of problems with the peer review process"* (specifying 8 asserted "violations" of the IQA) (RFC at pp. 3-6); and 4) *"EPA's Inspector General concluded EPA failed to follow IQA Guidelines"* (RFC at pp. 6-7).
The RFC presents various quotes from the 2009 Endangerment Finding record and from a 2011 report from EPA's Office of Inspector General ("OIG") entitled "Procedural Review of EPA's Greenhouse Gas Endangerment Finding Data Quality Processes."[1] The 7-page RFC references Office of Management and Budget (OMB) Guidelines in providing definitions of "scientific assessments" and "highly influential scientific assessments." Finally, it sets forth the relief that CEI is seeking (*i.e.*, that EPA should end its dissemination of the 2009 Endangerment Finding (and supporting TSD) and restart the peer review process). The RFC has one attachment with a single table providing the list of names of the federal experts who reviewed the draft TSD and their affiliations at the time.[2]

[1] *Office of Inspector General 2011 Report No. 11-P-0702, Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes*

[2] The CEI RFC also references several petitions seeking reconsideration of the 2009 Endangerment Finding, including three petitions from CEI and the Science and Environmental Policy Project, the Concerned Household

Summary of EPA Response

Having reviewed the RFC, EPA concludes that the information included within the 2009 Endangerment Finding and associated TSD are consistent with EPA's Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (IQGs), [3] as are the underlying scientific assessments on which these documents rely. Numerous related documents in the record, including responses to CEI's comments submitted during the 2009 Endangerment Finding process and a subsequent Petition for Reconsideration, speak to the quality of the information used by the Agency to inform the 2009 Endangerment Finding and demonstrate that, contrary to CEI's claims, no correction is warranted. To the extent that CEI's RFC seeks to change the agency decision and related determinations and judgments in the 2009 Endangerment Finding, we decline to do so as such matters are not appropriately addressed through the RFC process.[4]

Detailed EPA Response to CEI Request for Correction

The 2009 Endangerment Finding is a final agency action that was taken under section 307(d) of the Clean Air Act in 2009. *See* 74 Fed. Reg. 66,496. (Dec. 15, 2009). As a final agency action, the agency decision in the 2009 Endangerment Finding falls outside the scope of the IQA and the RFC process. The information quality concerns raised in the RFC have been previously addressed in the records for other proceedings, including in the 2009 Endangerment Finding itself; the agency's 2010 denial of petitions for reconsideration of the 2009 Endangerment Finding; the 2011 OIG Report and EPA's response thereto; and the decision of the U.S. Court of Appeals for the District of Columbia Circuit in 2012, in which the court upheld the 2009 Endangerment Finding. *See Coalition for Responsible Regulation, Inc.* v. *EPA,* 684 F.3d 102, 117, 120 (D.C. Cir. 2012). EPA finds that a number of these issues were raised by CEI itself in comments submitted during the public participation process for the 2009 Endangerment Finding[5] and in a subsequent Petition for

Electricity Consumers Council, and the Texas Public Policy Foundation, respectively. These petitions are outside the scope of this response and are being addressed separately by the agency.

[3] Environmental Protection Agency, EPA/260R-02-008, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency" ("IQGs") (October 2002). Available at https://www.epa.gov/sites/default/files/2020-02/documents/epa-info-quality-guidelines_pdf_version.pdf.

[4] *See, e.g.,* IQGs, supra n.3, at pp. 15-16 (illustrating the distinction between the information addressed by the IQGs (i.e., the "communication or representation of knowledge such as facts or data") and the regulations, guidance, or other agency decisions or positions that the distributed information is used to formulate or support and clarifying that the IQGs do not apply to items that are not considered "information"). *See also*, Office of Management and Budget M-19-15, "Improving Implementation of the Information Quality Act," Implementation Update 4.2 (April 24, 2019). Available at https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf.

[5] Comment submitted by Christopher C. Horner, Competitive Enterprise Institute (CEI), at https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0171-3316

Reconsideration[6], and EPA responded to those issues in the Response to Comments and Response to Petitions documents, respectively.[7]

Information relevant to this response can be found in the following *public documents*:
2009 Endangerment Finding
https://www.epa.gov/climate-change/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a
Response to Comments for 2009 Endangerment Finding ("RTC"), 2009
https://www.epa.gov/climate-change/appendices-and-pdf-versions-epas-response-public-comments-proposed-endangerment-and
Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 2010
https://www.epa.gov/climate-change/denial-petitions-reconsideration-endangerment-and-cause-or-contribute-findings
OIG 2011 Report No. 11-P-0702, Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes, 2011 ("OIG Report") (relevant EPA responses in Appendix G)
https://www.epa.gov/sites/production/files/2015-10/documents/20110926-11-p-0702.pdf

EPA Response to Final OIG Report Dated September 26, 2011, "Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes", Report No. 11-P-0702
https://www.epa.gov/sites/production/files/2015-10/documents/11-p-0702_agency_response.pdf

EPA Office of the Inspector General. Close-Out of OIG Report No. 11-P-0702, Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes, September 26, 2011
https://www.epa.gov/sites/production/files/2015-10/documents/11-p-0702_ig_comment_on_response.pdf

Slip Copy of U.S. Court of Appeals, District of Columbia Circuit decision in Coalition for Responsible Regulation, Inc. v. *EPA (D.C. Cir. 2012)*
https://www.epa.gov/sites/production/files/2016-08/documents/09-1322-1380690.pdf

[6] Petition for Reconsideration of the Nongovernmental International Panel on Climate Change, the Science and Environmental Policy Project, and the Competitive Enterprise Institute, at https://www.epa.gov/sites/production/files/2016-08/documents/petition_for_reconsideration_competitive_enterprise_institute.pdf

[7] EPA's IQGs explain that when the agency allows for public participation by providing an opportunity for public comment on information, it expects that the public comment process would address concerns about the information and that any information quality issues would be addressed in connection with the final agency action. Accordingly, under the IQGs EPA generally 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." IQGs, supra n.3, at pp. 32-33. Although issues in CEI's RFC could have been, and in many cases were, raised during the robust public participation process for the 2009 Endangerment Finding, for purposes of transparency and clarity, EPA has elected to both identify places in prior documents where these issues were previously raised and addressed, as well as providing additional responses to aid public understanding of the measures taken to ensure the quality of information that supported the 2009 Endangerment Finding.

EPA also notes that the RFC does not identify any information or scientific evidence within either the 2009 Endangerment Finding or the associated TSD that is said to be incorrect. Finally, we note that throughout the RFC, CEI appears to conflate the TSD for the 2009 Endangerment Finding and the 2009 Endangerment Finding itself. As discussed below, there is an important distinction between the 2009 Endangerment Finding, the scientific assessment literature that informed the Administrator's judgments in the 2009 Endangerment Finding, and the TSD that summarized relevant portions of those same scientific assessments. EPA reiterates that as explained above the agency decisions and judgments in the 2009 Endangerment Finding are outside the scope of the IQA and the RFC process.

Following are responses to each of CEI's specific assertions in the RFC.

A.) CEI asserts that "the 2009 GHG Endangerment Finding is a Scientific Assessment" Drawing on the 2005 OMB definition of the term "scientific assessment," the RFC claims that the 2009 Endangerment Finding and TSD are scientific assessments, because "EPA evaluated the current state of the science." RFC at p. 2 This action, the RFC goes on to argue, triggered a number of information quality requirements for such assessments. *Id.*

A "scientific assessment" (a prerequisite for being a Highly Influential Scientific Assessment or "HISA") is defined in OMB's Peer Review Bulletin[8] 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" (70 Fed. Reg. 2667). Neither the 2009 Endangerment Finding nor the TSD are scientific assessments. The 2009 Endangerment Finding is a final agency action presenting the EPA Administrator's determinations and the reasoning that led the Administrator to her conclusions, judgments, and ultimate decision. The Endangerment Finding was informed by scientific assessments of the International Panel on Climate Change (IPCC), the U.S. Climate Change Science Program (CCSP)/US Global Change Research Program (USGCRP), and the National Academies of Science (NAS).

The TSD summarized relevant portions of the scientific assessments that provided the scientific basis that informed the Administrator's conclusions. It did not provide an analysis or evaluation of the assessment statements summarized in the TSD. No weighing of information, data and studies occurred in developing the TSD. It was in the underlying assessments where the scientific synthesis occurred and where the state of the science was assessed. The scientific statements found in the TSD are not the result of EPA's having processed the scientific literature or assessments to synthesize multiple factual inputs, data, models, and assumptions. The TSD did not synthesize or alter the findings of the underlying assessment reports. Nor does the TSD bridge uncertainties in the available information or otherwise use "professional judgment" to resolve scientific issues. The TSD summarizes the underlying assessments of the NAS, the CCSP/USGCRP, and IPCC.

OMB, in a written response to the OIG, stated that EPA reasonably determined that the TSD itself (as opposed to the underlying peer-reviewed scientific assessments of the NRC,

[8] Office of Management and Budget, 2005. Final Information Quality Bulletin for Peer Review (70 Fed. Reg. 2664).

IPCC, and USGRCP summarized in the TSD) did not have the impacts or characteristics required to meet the OMB Peer Review Bulletin's definition of a HISA.[9]

B.) CEI asserts that "the 2009 GHG Endangerment Finding has been highly influential" CEI claims that the 2009 Endangerment Finding is a highly influential scientific assessment because "many of the regulations issued based on the 2009 Endangerment Finding had more than a $500 million potential impact" and because it was also "novel, controversial, and precedent-setting." RFC at pp. 2-3. As support, the RFC partially quotes a statement in the OMB Peer Review Bulletin, which in full states that: "A scientific assessment is considered 'highly influential' if the agency or the OIRA Administrator determines that the dissemination could have a potential impact of more than $500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest." 70 Fed. Reg. 2671. Given that neither the 2009 Endangerment Finding nor the TSD are "scientific assessments," the question of whether either document should be considered "highly influential" is irrelevant. As explained above, as a final agency action, the decision in the 2009 Endangerment Finding is outside the scope of the IQA and the RFC process, so the question of whether the 2009 Endangerment Finding is "highly influential" is irrelevant for that reason as well. The TSD (a summary of extensively peer-reviewed assessments) constitutes Influential Scientific Information (ISI), while the underlying assessments referenced in the TSD do constitute HISA-level documents. According to the OMB Peer Review Bulletin, "highly influential scientific assessments, […] are a subset of influential scientific information" and are subject to "stricter minimum requirements" for peer review. *Id.* at 2665.

In light of this distinction, the OIG report recognized that OMB's Peer Review Bulletin distinguishes between a HISA and ISI, affords agencies more discretion for the peer review of ISI, and noted that EPA's approach to the TSD was within the discretion for peer review of influential scientific information. OIG report at pp. 15-16. For example, the OIG stated that guidelines for ISI provide agencies broad discretion in determining what type of peer review is appropriate and what procedures should be employed to select appropriate reviewers. In an OMB memo to the EPA Inspector General, OMB confirmed this discretion, noting the statement in the OIG's draft report that "EPA had the TSD reviewed by a panel of climate change scientists, and that the methodology employed for this review was an appropriate exercise of the discretion afforded the agency for peer reviews of 'influential scientific information,' as defined in OMB's Final Information Quality Bulletin for Peer Review." OIG report, Appendix H, at p. 87. Provided that the ISI has not substantially changed after the original peer review, agencies do not have to subject ISI to additional peer review if the information has already been subjected to adequate peer review for the intended purpose (Section 3.3.2, EPA Peer Review Handbook[10] and Implementation Update 1-3, OMB M-19-15[11]): EPA considers the peer review processes of the NAS, USGCRP, and IPCC adequate for the purposes of the TSD. Further, while the

[9] See Appendix H (pp. 87-91) from Office of Inspector General ("OIG") 2011 Report; Close-Out of OIG Report No. 11-P-0702, Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes, 2011. https://www.epa.gov/sites/production/files/2015-10/documents/20110926-11-p-0702.pdf

[10] EPA, 2015. Peer Review Handbook, 4th Edition. Science and Technology Policy Council, EPA/100/B-15/001.

[11] OMB, 2019. M-19-15, available at https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf

final Close-Out of the OIG Report memorandum provided several recommendations to the Agency to clarify methods of documenting certain data quality processes, each of the Agency's subsequent responses to those recommendations were accepted by the OIG.[12]

C.) CEI asserts that there were "a variety of problems with the peer review process" CEI provided a list of 8 asserted "violations" of IQA regarding peer review that it claims arose from EPA's failure to apply OMB's Information Quality Standards:

1.) "EPA did not consider allowing the public, including scientific and professional societies, to nominate potential reviewers."

Because EPA did not approach the 2009 Endangerment Finding nor the TSD as a scientific assessment, the HISA peer review requirement of allowing the public to nominate potential reviewers was not applicable. Nevertheless, both documents did undergo extensive review. As an Agency action providing the EPA Administrator's determination, the 2009 Endangerment Finding was subject to the complete set of requirements outlined by the EPA Regulatory Development Process, and the Agency followed the requirements of section 307(d) of the Clean Air Act in taking this action. Accordingly, the process for the 2009 Endangerment Finding included a determination that it was a Tier 1 action (this ensures agency and interagency participation); development of an EPA workgroup (this ensures agency office participation, review, and clearance); public review and comment; interagency review and clearance; consideration of petitions for reconsideration; and judicial review.

The agency also developed a TSD as part of the action. As a summary of extensively peer reviewed scientific assessments, the agency properly treated the TSD as ISI rather than as a HISA, and it underwent peer review by federal experts, workgroup review, public review, and interagency review and clearance. The charge for the peer review of the TSD was to ensure that the TSD was "a fair and accurate reflection of the current state of climate change science as embodied in the major assessment reports such as IPCC, USGCRP/CCSP and NRC." OIG report at p. 83. All the science summarized in the TSD was derived from scientific assessments which met the requirements for a HISA, including solicitation of potential reviewers from the public. Therefore, EPA's decision to draw from federal experts for the review of the TSD was appropriate and consistent with both the OMB peer review guidelines and with EPA's IQGs. See Responses 1-10 and 1-70 from Volume 1 of the RTC document. Volume 1 of the RTC also provides extensive discussion of the development, review and transparency processes of these major scientific assessments that provided the scientific basis that informed the 2009 Endangerment Finding.

2.) "The peer review panel had a substantial conflict of interest because it was largely reviewing its own work."

[12] Memorandum from EPA Inspector General Arthur A. Elkins, Jr. (dated February 7, 2012) to Assistant Administrators for the Offices of Research and Development, Policy, and Air and Radiation Re: "Close-Out of OIG Report No. 11-P-0702, *Procedural Review of Greenhouse Gases Endangerment Finding Data Quality Processes*, September 26, 2011".

See the response to #1 above. 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. OIG report at p. 83. For that reason, the authors of those underlying reports 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. See Responses 1-10 and 1-70 from the RTC, which also note that the federal experts were not involved with developing the TSD nor the 2009 Endangerment Finding other than in their review role, thereby avoiding any conflict of interest.

3.) "The peer review panel was not sufficiently independent as it contained an EPA employee."

As previously stated, because EPA did not consider the TSD to be a scientific assessment, the requirement of the 2005 OMB memorandum cited in the RFC, which bars scientists employed by the agency from participating in the peer review is not applicable. The EPA employee was chosen because her expertise in the human health impacts of climate change helped fill the balance of expertise needed. This employee participated in the peer review in the same independent role as the other reviewers. As such, the employee was not involved in the drafting of the TSD, was not involved in the process to address comments from all 12 reviewers and was independent from the TSD development process. The EPA employee also did not influence the reviews of the 11 non-EPA reviewers, as reviewers provided individual sets of written comments to EPA only and did not meet among themselves.

4.) "The public was not allowed to participate in the peer review process."

As previously stated, because EPA did not consider the TSD to be a scientific assessment, the requirements imposed by the 2005 OMB memorandum and cited by the RFC regarding *simultaneous* peer review and public review, "[w]henever feasible and appropriate", are not applicable. RFC at p. 4 (quoting 70 Fed. Reg. 2676). In any event, the 2009 Endangerment Finding and associated documents (including the TSD) were in fact provided to the public for comment, including public hearings, before they were finalized. As stated in the TSD, the "proposed findings and TSD were subject to a 60-day public comment period as well as two public hearings. An earlier version of the TSD was released July 11, 2008, to accompany the Advance Notice of Proposed Rulemaking on the Regulation of Greenhouse Gases under the Clean Air Act (73 FR 44353, EPA-HQ-OAR-2008-0318), which was subject to a 120-day public comment period." TSD at p. 2. Comments received during the public participation process were responded to in 11 RTC volumes.

5.) "No Peer Review Report was prepared."

EPA submitted a memorandum to the record (see EPA-HQ-OAR-2009-0171-11639) documenting all changes to the TSD in response to all levels of comments, both from the expert reviewers and from the public. Expert reviewers were disclosed, and EPA has maintained documentation of all comments received and before-and-after versions of the TSD.

6.) "EPA failed to certify how it was complying with the IQA."

EPA notes that Section III.A. of the Findings, "The Science on Which the Decisions Are Based," and portions of the RTC document, especially Section 1.5 of the RTC document "Information Quality Act Requirements for Independent Assessment," clearly explain how the agency complied with the OMB IQA requirements. EPA described how the information in the TSD was developed, referring to EPA's IQGs. And the public did provide comments on this process, to which EPA replied in the RTC document (see Responses 1-10, 1-25, and 1-60 through 1-75).

7.) "EPA did not state how the underlying information supporting the Endangerment Finding met the requirements of the OMB Information Quality Bulletin for Peer Review."

Specifically, the requestor argues that "EPA failed to explain why the use of the data and models of the IPCC, NRC, and USGCRP meet the requirements of the OMB Information Quality Bulletin." RFC at p. 5.

EPA explained how it evaluated and considered the use of data and modeling output of the IPCC, NRC, and USGCRP, and therefore did in fact adhere to the IQGs, as further explained in the 2009 Endangerment Finding and the RTC document (see Responses 1-25, 1-64, 1-67, 1-68, 1-72). Also see Section III.A. of the 2009 Endangerment Finding, "The Science on Which the Decisions Are Based," and Section 1.1 of Volume 1 of the RTC document, for a detailed description of EPA's evaluation of the procedures used by IPCC, USGCRP, CCSP, and NRC in developing the assessment reports. For example, processes undertaken by the USGCRP included, but were not limited to:

- public and expert review of the draft prospectus for the assessment, with public posting of comments and responses to comments
- solicitation of additional input through hearings and workshops
- expert peer review of the first draft (often by the National Academies, but with public notice and exclusion of agency experts if otherwise) including public posting of all comments
- public review of the second draft, with posting of all comments
- interagency review of the third draft.

Relatedly, the United States Court of Appeals for the District of Columbia Circuit addressed whether EPA improperly relied upon the IPCC, USGCRP and NRC assessments. The court rejected that argument. *Coalition for Responsible Regulation, Inc.* v. *EPA,* 684 F.3d 102, 120 (D.C. Cir. 2012).

8.) "IPCC peer review is not adequate to satisfy OMB guidelines on conflict of interest requirements to be used."

EPA addressed the IPCC peer review process and CEI's objections to the reliance on the IPCC in Responses 1-14 and 1-68 from the RTC document. In addition, Sections 2.2.2 and 2.2.3 in Volume 2 of the Response to Petitions Document addressed petitioner concerns about conflict of interest procedures in IPCC assessments. Section III.A of the 2009 Endangerment Finding also describes how "these assessment reports undergo a rigorous and exacting standard of peer review by the expert community, as well as rigorous levels of U.S. government review and acceptance."74 Fed. Reg. 66551.

EPA documented how IPCC review procedures are designed to avoid conflict of interest among authors and peer reviewers in detail in Section 1 and Appendix A of Volume 1 of the RTC document for the 2009 Endangerment Finding, and in Section 2.2 of the Response to Petitions document. EPA explained in the RTC document that while IPCC procedures did not explicitly contain "conflict of interest" language, there are sufficient checks and balances built into the IPCC procedures such that there has been no evidence that the quality of IPCC reports suffer from potential conflict of interest issues.

For example, Response 1-14 of the RTC document quotes IPCC's report development procedures, which state that the review should entail, "a wide circulation process, ensuring representation of independent experts (*i.e.*, experts not involved in the preparation of that particular chapter) from developing and developed countries and countries with economies in transition should aim to involve as many experts as possible in the IPCC process. … [T]he review process should be objective, open and transparent… To help ensure that Reports provide a balanced and complete assessment of current information, each Working Group/Task Force Bureau should normally select two Review Editors per chapter… Review Editors should not be involved in the preparation or review of material for which they are an editor."

D) CEI asserts that "EPA's Inspector General Concluded EPA Failed to Follow IQA Guidelines."

The IG concluded that "EPA met statutory requirements for rulemaking and generally followed requirements and guidance related to ensuring the quality of the supporting technical information." OIG report at p. 3. The IG did provide recommendations for clarifying several EPA internal processes in the future such as to revise a flowchart in EPA's Peer Review Handbook for clarification and provide clarification to ensure that language is included in the preamble of proposed and final rules that specifically states that an action was supported by either influential scientific information or highly influential scientific assessment along with appropriate peer review certification statements. The IG

closeout memo stated that in "accordance with EPA Manual 2750, your response included a proposed corrective action plan addressing each of the open recommendations. The proposed corrective actions and proposed timelines for completion meet the intent of our recommendations." The OIG report also noted that "EPA Employed Procedures to Ensure Data Quality and Fulfilled the Basic Requirements for Federal Rulemaking and Other Statutory and Executive Order Requirements." OIG report at p. 15. Further, as noted above, the OIG report stated that the method used for the peer review of the TSD was "within the discretion afforded by OMB guidance for peer reviews of influential scientific information." *Id.* While the OIG report did find that EPA's review of the TSD "did not meet all of OMB's peer review requirements for highly influential scientific assessments," *id.*, it recognized the implication of this statement depends on whether the TSD is a HISA. As explained above, it is not. Further, as reflected in the OIG report, OMB clarified that it "believes that EPA reasonably determined that the Endangerment TSD itself …did not have the impacts or characteristics required to meet the OMB Bulletin's definition of a highly influential scientific assessment." OIG report at p. 18. The IG closed out their report and action plan in 2012 and did not make any recommendation regarding the 2009 Endangerment Finding.

Third-Party Correspondence

EPA received three items of third-party correspondence: two in opposition to this RFC from the Environmental Defense Fund ("EDF") and from 15 State Attorneys General, DC, and the California Air Resource Board (together "States"), and one in support of the RFC from Murray Energy Corporation. Third-party correspondence related to this RFC can be found at https://www.epa.gov/quality/epa-information-quality-guidelines-requests-correction-and-requests-reconsideration#19002.

Conclusion

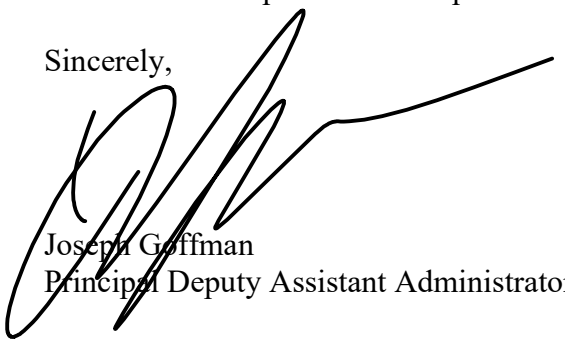
As a final agency action, the decision in the 2009 Endangerment Finding is outside the scope of the IQA and the RFC process. Moreover, the information contained in the 2009 Endangerment Finding and associated TSD are consistent with EPA's IQGs, as are the underlying scientific assessments on which these documents rely. The various related documents in the record, including responses to comments CEI previously submitted, address in greater detail the quality of the information used by the Agency to inform the 2009 Endangerment Finding.

Your Right to Appeal

If you are dissatisfied with this response, you may submit a Request for Reconsideration (RFR). EPA requests that any such RFR be submitted within 90 days of the date of EPA's response. If you choose to submit a RFR, please send a written request to the EPA IQGs Processing Staff via mail (Enterprise Quality Management Division, Mail Code 2821T, USEPA, 1200 Pennsylvania Avenue, NW, Washington, DC 20460); or electronic mail (quality@epa.gov). If you submit an RFR, please reference the IQG identifier assigned to this original RFC # 19002. Additional information about how to submit an RFR is listed on the EPA IQGs website at http://epa.gov/quality/informationguidelines/index.html.

I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,



Joseph Goffman
Principal Deputy Assistant Administrator