

Center for Regulatory Effectiveness

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March 14, 2014

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
1650 Pennsylvania Ave., NW – Rm. 246
Washington, DC 20503

Dear Dr. Shelanski:

Re: OIRA legal responsibility to enforce IQA peer review requirements applicable to EPA's rulemaking proposal on New Source Performance Standards for greenhouse gas emissions from electric utility generating units (79 Fed. Reg. 1430, Jan. 8, 2014)

We are very concerned that OIRA is not fulfilling its statutory and regulatory responsibilities with regard to enforcing the peer review requirements for the technology assessment contained in the subject rulemaking. We are also concerned that OIRA is not advising EPA to follow recommendations of its Inspector General on compliance with the OIRA peer review requirements.

On February 3, 2014, we wrote to EPA Administrator McCarthy to express CRE's concern that EPA was proceeding with a rulemaking containing a "highly influential scientific assessment" ("HISA") in the form of a technology assessment of carbon capture and storage technology without compliance with the legally binding requirements of the OIRA peer review Bulletin. You, as well as the Director of OSTP, should have received a copy of that letter. Another copy is attached to this letter.

We have not received any response from EPA, nor are we aware of any action by OIRA to require EPA to carry out its peer review obligations.

In 2005, OIRA issued its peer review Bulletin pursuant to the legal authority of the Information Quality Act ("IQA"). The IQA, enacted as a supplement to the information dissemination provisions of the Paperwork Reduction Act of 1995 ("PRA"), expressly incorporates section 3504(d)(1) of the PRA, which states:

With respect to information dissemination, the Director [of OMB] shall develop and oversee the implementation of policies, principles, standards, and guidelines to ... apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated....

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This statutory responsibility has been delegated to OIRA,¹ and it is reflected in section X of the peer review Bulletin (“*Responsibilities of OIRA and OSTP*”), which states that “OIRA, in consultation with OSTP, shall be responsible for overseeing implementation of this Bulletin.” 70 Fed. Reg. at 2677.

There can be no legitimate doubt that the peer review Bulletin is a “legislative rule” containing legally binding peer review regulatory requirements, as detailed in our letter to EPA, and that the assessment of partial carbon capture and storage technology as “adequately demonstrated” is a HISA under the definition in the OMB Bulletin. The Bulletin requires an independent external peer review of a HISA, with public participation in the planning and conduct of the peer review, in order to allow for informed public comment on a proposed rulemaking. The Bulletin emphasizes the importance of conducting peer review of any HISA or ISI that is a critical component of a rulemaking before the agency issues a proposed rulemaking. 70 Fed. Reg. at 2668. Yet OIRA approved the release of the proposed rulemaking without any compliance with the Bulletin’s peer review requirements.

The EPA Inspector General recently recommended to EPA, after review of the peer review procedures employed with regard to its GHG endangerment finding, that it “revise its *Peer Review Handbook* to accurately reflect OMB requirements for peer review of highly influential scientific assessments....”² At present the EPA Handbook does not reflect that the OMB Bulletin contains “requirements,” as discussed in our letter to EPA. EPA has not provided any explanation of why it is not following the Inspector General recommendations.

The Inspector General Report consistently recognizes that the OMB Bulletin contains “requirements” that must be met.³ Neither EPA nor OMB disputed with the IG that the OMB requirements are mandatory.⁴ Instead, EPA and OMB relied on an OMB opinion that it was reasonable for EPA to characterize the endangerment TSD (“Technical Support Document”) as not a HISA. That cannot be the case here. The EPA technology assessment for partial carbon capture and storage is plainly a HISA.

Of particular importance with regard to OIRA responsibilities for reviewing proposed and final regulations, the OIRA peer review Bulletin requires that agencies publish a “certification” in the administrative record for a final rule that relies on scientific information or assessment subject to the Bulletin, explaining “how the agency has complied with the requirements of this Bulletin” 70 Fed. Reg. at 2677. If EPA does not meet this requirement – which it obviously cannot at this time, since EPA has not complied with any of the OIRA requirements for a HISA (or even ISI) – OIRA cannot legally approve a final rule.

¹ The PRA authorizes and directs the Director of OMB to delegate responsibility for implementation of the Act to OIRA, but it does not relieve the Director of responsibility. 44 U.S.C. § 3503.

² PROCEDURAL REVIEW OF EPA’S GREENHOUSE GASES ENDANGERMENT FINDING DATA QUALITY PROCESSES. EPA Office of Inspector General, Report No. 11-P-0702, Sept. 26, 2011. <http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf>. (Emphasis added)

³ OIG report summary (unnumbered page at the beginning), and pages 13, 15, 18, 19, 22, 23, 28, 55, 56, 60, 66, 68, 69, 72, 73, 74, 84, 89, 91.

⁴ EPA references to OMB Bulletin “requirements” at pages 55, 62, 67, 73; OMB references to its Bulletin “requirements” at pages 50, 91.

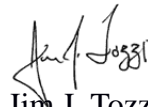
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Finally, we note that the importance of independent peer review of the technology and science basis for agency policy decisions was emphasized in President Obama's March 9, 2009 Memorandum and directive on "Scientific Integrity," and in OSTP Director Holdren's related December 17, 2010 Memorandum and directive on the same subject. EPA has taken action to implement those policy directives by appointing a Scientific Integrity Official and deputy officials, but there is no indication of their involvement in the subject rulemaking.

OIRA must carry out its legal and policy responsibilities with regard to this matter by notifying EPA that it must conduct an independent external peer review on the technology assessment contained in the subject rulemaking, and comply with other related OIRA peer review guidance requirements.

We would appreciate a response from your office on whether you will carry out these peer review oversight responsibilities and explaining how you will proceed.

Respectfully,



Jim J. Tozzi

Member, CRE Advisory Board

Attachment (Feb. 3, 2014, letter from CRE to EPA Administrator McCarthy)

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February 3, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Administrator McCarthy:

We are writing to advise you of a clear failure by EPA to comply with legally binding OMB data quality peer review rules in proceeding with publication of its notice of proposed rulemaking concerning new source performance standards for carbon dioxide emissions from fossil fuel-fired electric utility generating units. The NPRM signed by you was published in the *Federal Register* on January 8.¹ Issuance of a final rule without compliance with the OMB peer review guidance would be a violation of law because it would violate a number of OMB peer review mandates.

This letter is not being submitted at this time as a formal comment on the NPRM. CRE will be submitting formal and more extensive comments that will encompass this issue. We are writing this separate letter at this time because we believe that this matter is especially urgent since it involves highly important national energy and scientific integrity issues. Moreover, the non-compliance detailed herein is compromising the ability and rights of the public and CRE to comment on a rulemaking proposal on carbon capture and storage technology which contains analysis addressing its commercial availability that has been peer reviewed in accordance with the legally binding requirements of the Data Quality Act.

Executive Summary

The proposed new source performance standards are based on a scientific assessment of the technical feasibility, cost, and energy impacts of implementing partial carbon capture and storage (“CCS”) at new fossil fuel-fired electric utility plants. EPA’s

¹ 79 Fed Reg. 1430 (Jan. 8, 2014).

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proposed technology assessment is a “highly influential scientific assessment” (“HISA”) under the definition of a HISA in the 2005 OMB information quality peer review guidance.²

The OMB guidance contains “requirements” for the conduct of impartial outside peer reviews of such assessments. The U.S. Court of Appeals for the D.C. Circuit determined in *Prime Time Int’l, Inc. v. Vilsack*³ in 2010 that OMB guidance issued pursuant to the Information Quality Act is legally binding. Other legal precedents from the U.S. Supreme Court and the D.C. Circuit confirm that the peer review guidance is a legally binding and enforceable “legislative rule.” Yet the NPRM does not contain any reference to the OMB guidance or discussion of the agency’s compliance with it.

At this time, EPA has already failed to comply with multiple requirements of the OMB guidance, both for HISAs and for other influential scientific information. Those deficiencies must be corrected and the NPRM’s technology assessment subjected to independent external peer review, with public participation in the peer review planning and conduct, before the rulemaking can go forward, and certainly before it could be sent to OMB for review as a final rule.⁴

I. The NPRM Contains and Relies on a Technology Assessment of Partial CCS that is a HISA under the OMB Peer Review Guidance.

The subject rulemaking is being conducted pursuant to the new source performance standards (“NSPS”) provisions of the Clean Air Act. (Sec. 111, 42 U.S.C. § 7411.) Those provisions require that the standards be based on a determination of the best system for emission reduction (“BSER”). Determination of a BSER requires conduct of a technology assessment that takes into account multiple factors. The BSER

² 70 Fed. Reg. 2664-77 (Jan. 14, 2005).

³ 599 F.3d 678, 685 (D.C. Cir. 2010).

⁴ EPA’s non-compliance with procedural legal requirements is the only issue being analyzed in this letter. However, deep doubt regarding the availability of CCS technology for commercial power plants has been expressed by both industry and environmentalists. For example, Greenpeace’s Norway affiliate recently stated that “It was never true that effective CCS technology was readily available, no more in 2006 than today.” (“The Norwegian carbon capture and storage nightmare,” January 24, 2014, *TheForeigner*.) A May 2008 report by Greenpeace International, ([False Hope: Why carbon capture and storage won’t save the climate](#)) stated, “The Intergovernmental Panel on Climate Change (IPCC) does not expect CCS to become commercially viable until at least the second half of this century.”

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must have been “adequately demonstrated,” “taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.” 42 U.S.C. § 7411(a)(1). As the NPRM acknowledges, this NSPS determination process requires inter-related determinations of technical feasibility, reasonableness of cost, achievability of certain emission reductions, and energy impacts on both national and local levels. Fed. Reg. at 1462. EPA has some discretion in weighing these various factors, but the exercise of that discretion must be underpinned by sound scientific/technical assessment (including costs).

The OMB peer review guidance sets out requirements for peer review of all “influential scientific information” (“ISI”) and for “highly influential scientific assessments” (“HISA”s). The provisions for ISI allow for exercise of considerable discretion, while the provisions for HISAs, which are layered on top of the requirements for ISI, are more numerous and mainly mandatory.

The OMB guidance is careful to distinguish between ISI and HISAs. A key term in the HISA definition concerns the meaning of the term “assessments.” The OMB guidance also exhibits a careful distinction between what is discretionary and what is mandatory, based on use of the terms “requirements,” “shall,” and “must,” as opposed to arguably non-mandatory terms such as “should,” “may,” and “encouraged.”

The term “scientific assessment” is defined in the OMB guidance as requiring a synthesis of various inputs. The OMB guidance definition states that it means “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.” The definition expressly includes “technology assessments.” 70 Fed. Reg. at 2675.

The subject NPRM clearly incorporates a technology assessment of partial CCS as the best technology for reduction of carbon dioxide emissions from fossil fuel-fired power plants. The NPRM proposes to conclude that partial CCS is BSER and the basis for the proposed NSPS because it is technically feasible and available and can be implemented at a reasonable cost and without undue negative impacts on energy supplies. The proposed technology assessment in the NPRM relies on numerous data sources and evaluations. Those sources include multiple reports on technical feasibility, including costs, from DOE’s National Energy Technology Laboratory, a federal inter-agency task force, the Pacific Northwest National Laboratory, the Joint Global Change Research

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Institute, the University of California, Davis, the Intergovernmental Panel on Climate Change, individual authors, the U.S. Geological Survey, the International Energy Administration, and government consultants. EPA states in the NPRM that its proposed assessment of the technical feasibility of partial CCS is supported by an extensive literature record and commercial experience:

*The EPA proposes to find that partial CCS is feasible because **each step** in the process [capture, transportation, storage] has been demonstrated to be possible through an **extensive literature record** [and experience at commercial operations].*

79 Fed. Reg. at 1471 (emphasis added). The “extensive literature record” supporting the various “steps” in the EPA technology assessment, including costs, is detailed in numerous footnoted citations and textual descriptions. See 79 Fed. Reg. at 1471-84.

It is hard to imagine how it could be any clearer that the EPA proposal incorporates a technology “assessment,” as it is “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.”

The OMB guidance definition of a HISA states that a “scientific assessment” is “highly influential” if it “(i) Could have a potential impact of more than \$500 million in any year, or (ii) Is novel, controversial, or precedent-setting or has significant interagency interest.” 70 Fed. Reg. at 2675. The NPRM does not contain any specific cost estimates for implementing CCS, but it is highly likely that the cost would exceed \$500 million in a given year. The technology assessment as a whole is almost certain to be controversial, and it is clearly “precedent-setting.” It is also obviously of “significant interagency interest,” as evidenced by the NPRM’s significant reliance on numerous DOE studies and the report of an interagency task force.⁵

⁵ The interagency task force report is cited numerous times in the technology assessment portion of the NPRM. It was convened pursuant to directives in a Presidential Memorandum dated Feb. 3, 2010, and was delivered to the President on August 12, 2010. The Task Force was co-chaired by DOE and EPA and included more than 100 representatives from 14 federal departments and agencies: State, Treasury, Justice, Interior, Agriculture, Commerce, Labor, Transportation, Energy, OMB, EPA, FERC, OSTP, and CEQ. The report relied on extensive literature and input from outside experts and stakeholders.

II. The OMB Peer Review Guidance is Legally Binding.

That OMB guidance issued under the Information Quality Act (“IQA”) is legally binding, having the “force of law,” has already been determined by *Prime Time Int’l, Inc. v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010). In *Prime Time*, the D.C. Circuit stated that a provision in OMB guidance issued under the IQA was “binding,” and referenced a statement from the Supreme Court’s opinion in *United States v. Mead Corp.*, 533 U.S. 218, 226-27, in which the Court held that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” (Emphasis added) Subsequent to the issuance of the decision, the Department of Justice was very concerned that CRE opined that the *Prime Time* decision concluded that the IQA is judicially reviewable. This concern on the part of the Department of Justice led them to request that the court make clear that IQA is not judicially reviewable; the court refused to honor that request.⁶

The IQA (also known as the “Data Quality Act”), 44 U.S.C. § 3516 note, was enacted as a supplement to the requirements of the Paperwork Reduction Act (“PRA”) provisions authorizing and directing OMB to issue “Rules and regulations” to ensure and maximize the quality of information disseminated by federal agencies. 44 U.S.C. §§ 3516 and 3504(d)(1). The IQA expressly incorporated those PRA provisions and others. The OMB peer review guidance states that it is promulgated under the legal authority of the IQA and other OMB authorities. 70 Fed. Reg. at 2666, 2667.

The *Prime Time* holding is in line with U.S. Supreme Court precedent and other D.C. Circuit case law. In *Chrysler Corp. v. Brown*, the Supreme Court held that regulations have the “force and effect of law” when they are issued pursuant to legislative authority to implement a statute and are promulgated pursuant to any procedural requirements imposed by Congress, such as the notice-and-comment requirements of the APA. 441 U.S. 281, 302-03 (1979). The D.C. Circuit has elaborated on those basic principles by holding that a regulation has the force and effect of law if it appears on its

⁶ The Dept. of Justice motion is available at http://thecre.com/pdf/20100603_Government_DQA_Appeal_to_Court.abrev.pdf. In denying the motion, the court did not issue an opinion.

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face to be binding, as indicated by its use of mandatory language. *Cement Kiln Recycling Coalition v. U.S. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007); *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Security*, 653 F.3d 1, 7 (D.C. Cir. 2011). The OMB peer review guidance was issued following extensive formal notice and comment⁷ and uses mandatory language for those provisions it describes as “requirements.”

Although the OMB guidance contains a disclaimer regarding judicial reviewability (70 Fed. Reg. at 2677), such a disclaimer cannot transform the guidance from a binding legislative rule into a non-binding advisory. A similar disclaimer in EPA “guidance” was expressly given no effect by the D.C. Circuit in *Appalachian Power Co. v. U.S. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 1015). The court characterized such a disclaimer as “boilerplate,” and held that the guidance imposed binding obligations subject to judicial review because it required, ordered, and dictated what must be done. Likewise, the disclaimer in the OMB peer review guidance does not have any effect because the guidance contains numerous mandatory “requirements” for what must be done. An agency cannot, by fiat, immunize itself or other agencies from judicial review of non-compliance with legislative rules.

The OMB peer review guidance has been recognized as mandatory by the EPA Inspector General. On September 26, 2011, the Inspector General transmitted to you (as AA OAR) a report focusing on whether EPA had complied with OMB’s and its own peer review requirements in issuing its greenhouse gas endangerment finding.⁸ The Inspector General concluded that EPA had not complied with OMB’s peer review “requirements” for HISAs in certain respects. He also recommended that EPA revise its internal PEER REVIEW HANDBOOK “to accurately reflect OMB requirements...”⁹

⁷ OMB issued an initial draft in the *Federal Register* for public comment, then a revised draft for public comment. The National Academies commented extensively. When the revised draft was issued, the three Presidents of the National Academies (National Academy of Sciences, National Academy of Engineering, and National Institute of Medicine) praised the revised guidance as “point[ing] to a new and constructive era of scientific engagement in public policy-making.”
<http://www8.nationalacademies.org/onpinews/newsitem.aspx?recordid=s04152004>.

⁸ PROCEDURAL REVIEW OF EPA’S GREENHOUSE GASES ENDANGERMENT FINDING DATA QUALITY PROCESSES. EPA Office of Inspector General, Report No. 11-P-0702, Sept. 26, 2011. See, e.g., the “At a Glance” section at the beginning of the report, and Ch. 2, p. 13 *et seq.* (titled “EPA’s TSD Peer Review Methodology Did Not Meet OMB Requirements for Highly Influential Scientific Assessments”). See also the Press Statement by Inspector General Elkins on Sept. 28, 2011, available at http://www.epa.gov/oig/reports/2011/IG_Statement_Greenhouse_Gases_Endangerment_Report.pdf.

⁹ EPA, with OMB concurrence, disagreed with the Inspector General as to whether the endangerment finding was a HISA that triggered certain OMB peer review requirements.

EPA had revised its PEER REVIEW HANDBOOK in 2006 to reflect much of the OMB guidance. However, at the same time, it used non-mandatory language (such as “may,” “can,” or “should”) in place of OMB’s mandatory language. It also inserted a new and extensive legal disclaimer stating that the HANDBOOK was not a rule or regulation, was not enforceable, and that its use of terms such as “should” did not connote a legal requirement. In many places, the HANDBOOK states merely that the OMB guidance “calls for” certain peer review procedures.¹⁰ The HANDBOOK has not been further revised pursuant to the Inspector General’s recommendations to “reflect OMB requirements.”

As noted below in section III, in a number of instances the current NSPS/CCS rulemaking and technology assessment violate not only OMB mandates, but also policy guidance in EPA’s PEER REVIEW HANDBOOK.

III. EPA Is Violating the Requirements of the OMB Guidance for HISAs.

1. Peer Review Agenda and Plans

EPA is required to post notice of an upcoming peer review on its peer review agenda, and to set out a peer review plan containing ten specific items of information. The agency must establish a mechanism for allowing the public to comment on the adequacy of the peer review plan, and it must consider any such public comments. 70 Fed. Reg. at 2675-76.

The EPA PEER REVIEW HANDBOOK reflects this requirement at 19-21. The HANDBOOK also states that if peer review of a work product is not planned, an explanation should be included in the agency’s Science Inventory.

EPA’s peer review agenda and plans are part of its Science Inventory, but in this case the Science Inventory contains no agenda item or plan for peer review of the highly influential technology assessment contained in the NPRM, nor any explanation of why a

¹⁰ The 2006 revision of the HANDBOOK was the 3d edition. The legal disclaimer was put at the beginning on p. iii. The previous version of the HANDBOOK, the 2d edition, issued in 2000, contained a much briefer legal disclaimer at p. 49.

peer review is not needed or appropriate. The Science Inventory home page¹¹ and the peer review Agenda home page¹² describe peer review agendas and plans as “required” by the OMB guidance.

2. Requirement for Independent Peer Review by Diverse Experts

All HISA’s must be peer reviewed. The only exception is official reports of the National Academy of Sciences [sic – should probably be National Academies].¹³ The group of peer reviewers must be “sufficiently broad and diverse to fairly represent the relevant scientific and technical perspectives and fields of knowledge.” Agencies shall consider nominations from the public and professional societies. 70 Fed. Reg. 2675-76. The peer reviewers must be independent of the sponsoring agency. *Id.* Public comment on a rulemaking proposal is not a substitute for peer review. *Id.* at 2665.

EPA has not announced a peer review or selected a panel, perhaps because it considers that the studies it relies on have been previously peer reviewed in some fashion – although it does not discuss prior peer review in the NPRM. However, assuming this is a HISA that is a synthesis of a number of studies and disciplines (*e.g.*, engineering and economics), the only exception to a new, independent peer review of the technology assessment for NSPS/CCS is that made for official NAS reports, and there is no such report. The EPA HANDBOOK does not reflect this limited exception.

3. Public Participation

“Whenever feasible and appropriate,” the agency “shall” sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested parties, and “whenever practical” the agency “shall” “provide the peer reviewers with access to public comments that address significant scientific or technical issues.” 70 Fed. Reg. at 2676. The EPA PEER REVIEW HANDBOOK reflects this requirement, stating that it is a “responsibility” of the agency decisionmaker (at 23), but it also uses “should” instead of “shall” (at 49).

¹¹ <http://cfpub.epa.gov/si/>.

¹² http://cfpub.epa.gov/si/si_public_pr_agenda.cfm.

¹³ 70 Fed. Reg. at 2671.

There is no indication at this time that EPA intends to sponsor the kind of peer review required for HISAs, much less that it will sponsor a public meeting with the peer reviewers and provide them with significant public comments.

4. Peer Reviewers' Report and Agency Response

The agency must instruct the peer reviewers to prepare a peer review report that will be made public. 70 Fed. Reg. at 2675, 2676. In the case of HISAs, the agency must prepare a written response to the report. The EPA HANDBOOK reflects this requirement as a “responsibility” of agency personnel at 25-26. EPA has not indicated that it will sponsor an independent peer review of the technology assessment contained in the NPRM.

5. Certification of Compliance

If an agency relies on either ISI or a HISA to support regulatory action, it “shall include in the administrative record for that action a certification explaining how the agency has complied with the requirements of this Bulletin and the applicable information quality guidelines.” 70 Fed. Reg. at 2677. Absent such a certification, it is clear that OMB could not, as a matter of law, approve a final rule incorporating ISI or a HISA.

The EPA HANDBOOK contains a flowchart (at 4) that refers only to a “certification in the preamble” of a final rule and refers to three additional sections of the HANDBOOK, and one of those sections in turn refers to a “template” in Appendix C. All of the referenced sections of the HANDBOOK avoid reference to a certification of “compliance” with OMB “requirements.” Instead, they instruct staff to “discuss,” in the final rule’s preamble, the peer review and “how EPA implemented the provisions of the OMB Bulletin.” The template language referred to provides language for a final rule using ISI or a HISA that similarly avoids reference to “certification” of “compliance” with OMB “requirements.” The sample language states: “This regulatory action was supported by **[influential scientific information or a highly influential scientific assessment]**.” Therefore, EPA conducted a peer review in accordance with OMB’s Final Information Quality Bulletin for Peer Review. ...” At C-4.

IV. In Particular, Prior Outside Peer Review of Materials Referenced and Discussed in the NPRM Does not Satisfy the Requirements of the OMB Guidance for a HISA Unless the HISA is Relying on an Official NAS report.

After the NPRM was originally signed by you on September 20, 2013, a Science Advisory Board work group recommended that it undergo additional peer review. The agency responded in a teleconference during which it argued that the CCS technology was already demonstrated as feasible and that a study by DOE that the agency was relying on had previously been peer-reviewed by DOE. The agency argued that the existing projects and DOE peer review were sufficient under the agency's peer review policy. It also stated that there was no new science involved. There is no indication that the agency ever mentioned the requirements of the OMB peer review guidance. In addition, it is clear that the NPRM assessment of CCS as BSER is based on multiple studies and publications. Nevertheless, the SAB Work Group reversed its recommendation for additional peer review based on the representations made by EPA staff.¹⁴

The OMB guidance requires independent group peer review of highly influential technology assessments. The technology assessment of CCS as BSER contained in the NPRM clearly meets the definition of a "highly influential scientific assessment." There is nothing in the peer review agenda section of the agency's Science Inventory to explain why this is not so.

For HISAs, the only exception to a new independent peer review of the technology assessment in the NPRM, as stated in the OMB guidance, would be an official report of the National Academy of Sciences. 70 Fed. Reg. 2675-76. OMB explanation in the preamble to its guidance makes this even clearer, stating:

Section III(2) clarifies that the principal findings, conclusions and recommendations in official reports of the National Academy of Sciences that fall under this section [on requirements for HISAs] are generally

¹⁴ Memorandum dated Nov. 12, 2013 from James R. Mihelcic, Chair of SAB Work Group to Chartered SAB and SAB Liaisons, recommending additional peer review (available at [http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/\\$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf)); memorandum dated Jan. 7, 2014, from James R. Mihelcic, reversing the previous recommendation (available at [http://yosemite.epa.gov/sab/sabproduct.nsf/F43D89070E89893485257C5A007AF573/\\$File/SAB+work+grp+memo+w+attach+20140107.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/F43D89070E89893485257C5A007AF573/$File/SAB+work+grp+memo+w+attach+20140107.pdf)).

presumed not to require additional peer review. All other highly influential scientific assessments require a review that meets the requirements of Section III of this Bulletin.

70 Fed. Reg. at 2671 (emphasis added). Since there is no such NAS report being relied on, any prior peer review, whether by EPA or sponsored by DOE, is not sufficient to comply with the OMB requirements. Moreover, there is no explanation in the peer review agenda portion of the Science Inventory explaining why the agency has concluded that the type of independent peer review required by the OMB guidance is not necessary. Such an explanation, as noted above, is required as a matter of policy by the EPA PEER REVIEW HANDBOOK (at 43).

V. Compliance with the Peer Review Requirements Should Be Achieved at the Earliest Possible Time, and Certainly before any Draft Final Rule is Sent to OMB for Review.

Although timing of a HISA peer review is not expressly addressed in the substantive portion of the OMB guidance, the discussion in the preamble strongly recommends that peer review be completed prior to issuance of an NPRM. The OMB guidance preamble states:

When an information product is a critical component of rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a particular approach or the positions of interest groups have hardened. If review occurs too late, it is unlikely to contribute to the course of a rulemaking. Furthermore, investing in a more rigorous peer review early in the process “may provide net benefits by reducing the prospect of challenges to a regulation that later may trigger time consuming and resource-draining litigation. [Footnote omitted]

70 Fed. Reg. at 2668. The EPA Peer Review HANDBOOK contains a policy statement that “[i]n general, peer review should be completed prior to issuance of the proposed regulation.” At 15.

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Since EPA has not sponsored the necessary independent HISA peer review prior to issuance of the NPRM, it appears that it might be necessary for peer review to focus on the NPRM itself as the draft information work product.

VI. EPA Actions Necessary to Achieve Compliance

EPA must do the following at a minimum in order to comply with the OMB peer review requirements before it can issue any final rule, and before OMB's Office of Information and Regulatory Affairs ("OIRA") can consider approving any final rule pursuant to E.O. 12866:

1. EPA must post a peer review plan in the peer review Agenda on its Science Inventory and establish a mechanism whereby the public can comment on the plan. It should also consider inviting public and/or professional society nominations for the independent peer review group. Further, although apparently not strictly required, EPA should post a draft charge to the peer reviewers and request comment on the draft charge.
2. EPA must select a group of peer reviewers. The selected peer reviewers must be independent from the agency, be impartial experts, and be sufficient in number to fairly and impartially represent expertise in the technical, economic, environmental science, geology, and energy areas addressed in all aspects of the NPRM's evaluation of CCS technology. The peer reviewers must be free of any conflict of interest. Selection should be in conformance with National Academy procedures, as indicated in the OMB guidance.
3. EPA must develop a charge for the peer reviewers that instructs them to address all the technology assessment issues (including costs) reflected in the NPRM, while avoiding allowing any policy considerations that would bias their deliberations and conclusions to intrude. The charge must also include instruction on the information quality standards in OMB's 2002 general IQA government-wide guidance. The agency (either in the charge or otherwise) must instruct the peer reviewers to prepare a written report stating their conclusions in response to the charge, and advise them that the report will be made public.
4. EPA must give the peer reviewers access to all materials relevant to their review.

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5. EPA must sponsor at least one public meeting of the peer review group at which interested members of the public can make oral comments. It must also provide an opportunity for written public comments. EPA must ensure that the peer reviewers have access to all significant public comments on the scientific/technology evaluation issues.
6. Upon completion of the peer review, EPA must make available to the public the peer reviewers' report, the charge, and the reviewers' names, affiliations, and areas of expertise.
7. EPA must provide a written response to the peer review report in which it discusses whether and why it agrees or disagrees with its conclusions.
8. EPA must include in the administrative record for any final rule that relies on ISI or a HISA a "certification" explaining how the agency has complied with the OMB peer review guidance and the applicable (2002) general information quality guidelines.

VII. OMB's Role

The OMB guidance recognizes that OMB is responsible for overseeing compliance with its rules regarding the quality of disseminated information, which include the peer review guidance. This is a statutory responsibility under 44 U.S.C. § 3504(d)(1), which is incorporated by reference into the IQA. The OMB peer review guidance states that "OIRA [of OMB], in consultation with OSTP, shall be responsible for overseeing implementation of this Bulletin." 70 Fed. Reg. 2667. OIRA could not approve a final NSPS rule based on CCS without ensuring that its peer review guidance had been complied with. At this time, it would be impossible for OIRA to do so.

VIII. Questions for EPA

1. Will EPA post a peer review agenda and plan on its Scientific Inventory website and seek public comment on the plan?
2. Does EPA agree that the technology assessment (involving technical feasibility, costs, and energy impacts) of partial CCS as BSER for an NSPS for fossil fuel-fired electricity generating plants is a HISA? If not, why not? Has EPA done cost

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estimates for implementation of a NSPS based on partial CCS? If so, where can they be found by the public?

3. In that EPA failed to perform a peer review prior to the issuance of its NPRM as required by both EPA and OMB guidelines will EPA sponsor an independent peer review of the CCS technology assessment contained in the NPRM with an opportunity for public comment in writing and orally at a public meeting of the peer reviewers and in compliance with all other OMB requirements? Will EPA keep the public comment period open during this period?
4. Does EPA agree that it cannot send a final rule to OMB for final review until it fulfills the requirements set forth in (1), (2) and (3) above, and that the determination of “fulfillment” will be made in consultation with OIRA and OSTP?

IX. Requested Timeframe for EPA Response to this Letter

We request that EPA respond to the above questions not later than the end of the public comment period on March 10. Upon doing so, EPA should provide the opportunity for the public to comment on its answers. If EPA prefers not to provide answers to the aforementioned questions by March 10, then it should extend the public comment period to allow the public sufficient time to comment on its answers to those questions.

We are asking for a prompt response to the above questions so that we can ensure that the public will not be deprived of sufficient opportunity to comment formally on the agency’s assessment. Subsequent to the close of the public comment period we will be providing the public with an opportunity to comment and learn of new developments through a dedicated Interactive Public Docket (an “IPD”) on the CRE website at <http://www.thecre.com/forum10/>.

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Thank you for your careful consideration of this matter.

Respectfully,



[Jim J. Tozzi](#)

Member, CRE Advisory Board

cc: EPA Assistant Administrator for Air and Radiation
Administrator, OIRA
Director, OSTP
Secretary of Energy
EPA Deputy Administrator
EPA Peer Review Coordinator for OAR
EPA Assistant Administrator for ORD
Chair, EPA Science Advisory Board
EPA Science Advisor
Chair, EPA Science Policy Council
EPA Inspector General
Chair, EPA Office of Science and Technology Policy Peer Review Advisory
Group
Chair and Ranking Minority Member of the Senate Committee on Environment
and Public Works
Chair and Ranking Minority Member of the House Committee on Energy and
Resources