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To the Committee on Regulation
The Administrative Conference of the United States

Dear Members:

I am sorry to be so late in writing you about Professor Wagner's study and the science project. I think it would be ironic and unfortunate for the Conference to proceed on the basis that has been proposed.

Consider the following paragraph from Reeve Bull's recent email to us:

> For the Science project, please note that the attached draft recommendation has been prepared by ACUS staff and differs in numerous respects from the recommendations contained in Professor Wagner's revised report (which will be circulated early next week when completed). The changes include, among other things, edits from ACUS staff, Conference members, and outside experts as well as several completely new recommendations based upon input received from the October 23, 2012 GWU workshop on Enhancing Science and Policy for Chemical Risk Assessments and the December 14, 2012 SBA Science Roundtable workshop, which are not endorsed by the consultant. Some of the differences between the attached draft recommendation and the recommendations set forth in Professor Wagner's revised report include: (a) the attached draft recommendation does not include recommendations related to the review of science-based recommendations by the Executive Office of the President or deliberative process matters that appear in the revised report; (b) the attached draft recommendation includes a new recommendation on external peer review panels (which is based primarily upon the recent Keystone Center report (available at https://www.keystone.org/images/keystone-center/spp-documents/Health/Research%20Integrity%20Rountable%20Report.pdf) and input received at the workshops held at GWU and SBA) that does not appear in the revised report; and (c) in all but a few instances, the attached draft recommendation rewords the recommendations in the revised report

> based upon input from ACUS staff, outside experts, and ACUS members. The consultant report, which Gretchen will circulate early next week, contains the consultant's revised recommendations as well as discussions of OMB review and other topics not addressed in the attached draft recommendation, which are not endorsed by Conference staff.

The minutes of our last meeting, September 24, reflect suggestions to Professor Wagner that she might find ideas in the Keystone Center Report how to approach certain issues, and her report reflects that. However, as the above paragraph states, the draft recommendation goes well beyond that suggestion to include new recommendations based primarily on that report, that are outside the scope of her report. In my recollection ACUS has always acted on the basis of reports made by its consultants, a line that appears to have been crossed here. We do not have the Keystone report before us in the same way as we have her report. It may be a fine report, but making it a basis for ACUS recommendations without intermediation by our consultant is outside our practice. For some recent work, concerning the controversial Pebble Mine development in Bristol Bay, Alaska, Keystone was hired by the corporate interests involved to develop science analyses independent of the government studies being made. Here, as there, we would want to have the assurance about the objectivity of the report that personal engagement with its author(s) can help to provide.

Even more striking to me is the reference to "several completely new recommendations based upon input received from the October 23, 2012 GWU workshop on Enhancing Science and Policy for Chemical Risk Assessments and the December 14, 2012 SBA Science Roundtable workshop, which are not endorsed by the consultant." Although the October 23 workshop was co-sponsored by ACUS, the minutes of our September 24 meeting do not reflect and I do not recall any reference being made to it. I know I did not receive an invitation to either of these workshops, and wonder if ACUS apprised Professor Wagner of them. Unlike the earlier National Academy of Science workshop, about which we all knew and which I and others of us attended, there is no public record I can find of its proceedings or such input as may have been received from it. These are, in my judgment, not proper bases for ACUS recommendations. We have consultants for a reason, and ought to act only on the basis of their work, which is subject to our and the Assembly's interactive review.

Our Committee had asked Professor Wagner to undertake specific further work, for example in connection with the National Academy of Science, and she did both, as her draft richly reflects. She carefully documents her work, identifying both "best practices" that can now be securely identified, and areas not yet ripe in her judgment for such guidance, but where further work is warranted. The ACUS staff has concluded that "best practices" can be recommended where she thought such practices could not yet be identified, and that too I find disturbing.

Finally, I know the ACUS staff has opposed considering the OIRA transparency issues she richly documents and recommended addressing. Those detailed draft recommendations concerning agency transparency about changes in scientific analyses resulting from the E.O. 12,866 process have been eliminated in what the Committee is being asked to consider.

This is consistent with ACUS's past unwillingness to address White House-agency relations, but in my judgment it leaves on the floor what may be the most important issues about assuring the integrity of government science, in fact and in the public eye.

Professor Wagner remarks at pp. 89-90 of her report, that

> "in most if not all cases of politicization of science, the process governing the integration of science into regulation tends to involve: 1) a regulatory decision that involves high stakes; 2) high-level interventions or related pressures occurring at a point in the decision process where there is limited to no transparency regarding the changes, and 3) the absence of rigorous scientific oversight or peer review of the changes, including changes to the characterization or use of the relevant science.
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> "Experience thus reveals significant risks associated with decision-making processes that allow last-minute, high level changes to an agency's characterization of scientific or technical evidence, especially where these changes are not recorded, justified, or subjected to scientific or technical review."

These are, indeed, the most important questions for us to address, as the experience of past years richly illustrates. I regret the staff's decision to turn the Committee away from them and wish I did not have the sense that its treatment of her work has been a case in point.

She will be joining you Monday, as I cannot, and I hope the Committee will pay careful attention to the differences between her report and its recommendations, and what ACUS staff is now asking it to approve.

Respectfully submitted,