



## Selected docket entries for case 10–1036

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Filed	Document Description	Page	Docket Text
04/15/2010	 Motion Filed	2	MODIFIED PARTY FILER-- JOINT MOTION filed [1240064] by Commonwealth of Virginia in 10–1036 and State of Alabama in 10–1039 to remand case (Response to Motion served by mail due on 04/29/2010) [Service Date: 04/15/2010 by US mail] Pages: 16–20. [10–1036, 09–1322, 10–1045, 10–1024, 10–1025, 10–1026, 10–1044, 10–1042, 10–1035, 10–1030, 10–1037, 10–1038, 10–1039, 10–1040, 10–1041, 10–1046, 10–1049]--[Edited 04/15/2010 by JMC]
04/15/2010	 Motion to Hold Case in Abeyance	42	MOTION filed [1240145] by EPA in 09–1322, 10–1045, 10–1024, 10–1025, 10–1026, EPA and Lisa Perez Jackson in 10–1044, 10–1042, 10–1035, 10–1030, 10–1036, 10–1037, 10–1038, 10–1039, 10–1040, 10–1041, 10–1046, 10–1049 to hold case in abeyance (Response to Motion served by mail due on 04/29/2010) [Service Date: 04/15/2010 by email] Pages: 11–15. [09–1322, 10–1045, 10–1024, 10–1025, 10–1026, 10–1044, 10–1042, 10–1035, 10–1030, 10–1036, 10–1037, 10–1038, 10–1039, 10–1040, 10–1041, 10–1046, 10–1049]

**UNITED STATES  
COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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<b>COMMONWEALTH OF VIRGINIA,</b>	)	
<b>ex rel. KENNETH T. CUCCINELLI, II</b>	)	
<b>in his official capacity as</b>	)	Docket No. 10-1036
<b>Attorney General of Virginia</b>	)	(consolidated with Case Nos.
	)	10-1024, 10-1025, 10-1026,
<b>Petitioner,</b>	)	10-1030, 10-1035, 10-1036,
	)	10-1037, 10-1038, 10-1039,
<b>v.</b>	)	10-1040, 10-1041, 10-1042,
	)	10-1044, 10-1045, 10-1046,
	)	10-1049)
<b>UNITED STATES ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
<b>Respondent.</b>	)	
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**JOINT MOTION  
OF THE STATE OF ALABAMA  
AND THE COMMONWEALTH OF VIRGINIA  
TO REMAND TO ADDUCE ADDITIONAL EVIDENCE**

Petitioners the State of Alabama and the Commonwealth of Virginia move pursuant to 42 U.S.C. § 7607(c) to remand the “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule” (74 F.R. 66496) to the Environmental Protection Agency for further proceedings to adduce additional evidence.

### **INTRODUCTION**

Congress has provided the remedy of remand where it is apparent that the record is incomplete. It is now a matter of common knowledge that the “climate-gate” revelations which have thrown the scientific basis for the Endangerment Finding into grave doubt occurred after the closing of the record. Despite the explosive revelations of climate-gate, EPA insouciantly issued its Finding on December 15, 2009 without providing any mechanism for the consideration of this new information. Despite the pendency of motions for reconsideration, the agency has announced its intent to begin rule-making in reliance on the un-re-examined Finding. It would be a waste of judicial resources to prosecute appeals based upon a stale record when it is apparent that at some point remand will be ordered to consider these new developments.

On December 15, 2009, EPA issued its first pronouncement on the dangers posed by greenhouse gases (in the form of its final Endangerment Finding) without considering newly-discovered pertinent, post-comment information that

undermines EPA's entire announced bases for relying upon the climate science of others to reach its endangerment conclusion. EPA chose to publish its Endangerment Finding on December 15, 2009 despite the explosive revelations that began in November 2009 and continued thereafter consisting of emails and other materials from the Climate Research Unit ("CRU") at the University of East Anglia in England. The CRU is the climate research arm of the United Nations Intergovernmental Panel on Climate Change ("IPCC"), the international organization on whose climate change pronouncements and conclusions EPA principally relied to reach its Endangerment Finding. The emails and associated materials suggest that prominent CRU scientists suppressed academic dissent, manipulated the peer-review process, and withheld, lost or discarded source data from academic and public inspection. These practices not only violate clear EPA standards of conduct for scientific research, they also wholly undermine EPA's bases for relying upon IPCC science instead of conducting its own research. The existence of these charges and the basis for them is subject to judicial notice. In the alternative, Petitioners tender these facts as an offer of proof. The actual significance of this information must be evaluated in light of agency expertise following public hearing and comment.

EPA acknowledges that it is responsible for assessing and verifying adherence to accepted Agency standards of scientific information on which it

intends to rely. However, here EPA simply accepted IPCC's undemonstrated assertions that IPCC actually acts in accordance with its aspirational statements. While EPA concluded that IPCC had adequate procedures to justify agency reliance on its reports and assessments, the newly revealed emails indicate that IPCC did not follow or adhere to its own or EPA's procedures in developing fundamental elements of its conclusions.

Despite these revelations, the Agency went forward – causing the final Endangerment Finding to be published in the Federal Register without reference to climate-gate, just three days before President Obama arrived in Copenhagen for the U.N. Climate Change Conference 2009. The Endangerment Finding was not tethered to any substantive rule and EPA had no deadline for its release – other than a political one. It is unprecedented for EPA to issue an endangerment finding in this fractured way. EPA could have easily re-opened the record for further public comment about concerns over politicized science and undertaken a pre-release investigation of the impact of the CRU disclosures as required by EPA's own guidelines and internal rules. These steps would have served to quell a widespread controversy, so as to permit complete appellate review of EPA's assessment of IPCC's work. But EPA forged ahead as it continues to do.

After EPA issued the Endangerment Finding on December 15, 2009, a number of parties moved for EPA's reconsideration of the Finding before the

February 16, 2010 deadline established by 42 U.S.C. § 7607(d)(7)(B). Those Parties asked EPA to address on the record climate-gate and other procedural science irregularities, all of which contradicted published EPA standards of scientific review and invalidated EPA's ultimate conclusions as a matter of administrative law and procedure. EPA accepted and docketed the petitions, but denied them *de facto* on April 1, 2010, when, along with the Department of Transportation, it announced its intention to publish the "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule" ("Light Duty Motor Vehicle rule," or "LDMV rule").

Although EPA is seeking an order holding these consolidated appeals in abeyance pending its anticipated July 30, 2010 ruling on the reconsideration motions, there can be no realistic expectation that EPA will actually grant reconsideration because recent public statements of the Administrator and the announced intention to issue the LDMV rule demonstrate a fixed commitment to the present Agency course. Instead, an ultimate denial sets up the likelihood of protracted consolidated appeals in which the likely outcome is a remand. This Court does not have to permit this unfair and inefficient mode of proceeding. Virginia has availed itself of all procedural remedies before the Agency to redress these methodological failures, and Petitioners now call upon a special provision Congress created at 42 U.S.C. § 7607(c) for remedying the rare procedural

situation in which important but after-discovered evidence has evaded primary review by an agency. This provision permits this Court to remand a judicial review proceeding to EPA when a party can identify “additional evidence” that is “material” to the record now subject to “review,” but which could not have been “adduce[d] . . . in the proceeding” below. The irregularities surrounding the Endangerment Finding represent just such a rare circumstance, and Petitioners move this Court to cut through the procedural knot by remanding the Endangerment Finding to EPA for complete fact-finding subject to the Court’s subsequent appellate review.

## **ARGUMENT**

### **I. This Court Should Remand These Judicial Review Proceedings of the Endangerment Finding to EPA in Light of Additional Evidence.**

42 U.S.C. § 7607(c) provides:

In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if

any, for the modification or setting aside of his original determination, with the return of such additional evidence.

That “material” evidence within the meaning of 42 U.S.C. § 7607(c) has come to light since the statutorily mandated public hearings and the closing of the record is beyond serious dispute. The release of CRU emails call in to question the objectivity and methodology of IPCC contributors who seem to have been embarked upon a scheme of advocacy far in excess of the degree of certainty justified by the underlying evidence. The new information unveils concerns about transparency and replicability that are simply not consistent with American standards or law. Whatever the motivations of IPCC contributors, and whatever the impact the new revelations might have on the reliability of the underlying science, these new facts clearly show that it is unreasonable for EPA to continue to rely on IPCC’s work as the primary scientific backing for its endangerment conclusions when the processes thought to be in place at IPCC to assure the generation of “good science” were not followed.

Congress provided for a remand mechanism in the Clean Air Act in recognition of the reality that an agency’s scientific conclusions are always subject to revision in the face of new information. The U.S. Senate added the remand provision in the 1970 amendments to the Clean Air Act. The Senate’s Committee on Public Works emphasized the importance of a vehicle for remand because “it would not be in the public interest to measure for all time the adequacy of a



promulgation . . . by the information available at the time.” S. Rep. No. 91-1196, at 41 (1970). Common sense prescribes that the development of new information “may dictate a revision or modification” of an EPA determination, and the Senate believed any person should be able to “challenge any promulgated standard [or] regulation . . . whenever it is alleged that significant new information has become available.” *Id.* at 41-42 (emphasis added).

Congress included similar mechanisms for administrative remand in other environmental protection statutes besides the Clean Air Act. In both the Resource Conservation and Recovery Act of 1976 (“RCRA”) and the Clean Water Act (“CWA”), a party challenging an EPA regulation in court may seek remand on the basis of “additional evidence” that is “material” and could not have been presented to the agency in the rulemaking proceeding. RCRA § 7006(a)(2) (42 U.S.C. § 6976(a)(2)), *cited by Amer. Portland Cement Alliance v. EPA*, 101 F.3d 772, 774-75 (D.C. Cir. 1996); CWA § 509(c) (42 U.S.C. § 1369(c)), *cited by Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977). *See also* 28 U.S.C. § 2347(c).

In the interest of judicial economy, this Court has previously recognized the value in remanding a proceeding to EPA due to new and additional evidence previously unconsidered by the Agency. In *Ethyl Corp. v. Browner*, 989 F.2d 522 (D.C. Cir. 1993), Ethyl appealed to this Court for review of EPA’s denial of its application for a waiver for a fuel additive, MMT, under 42 U.S.C. § 7545(f)(4).

Pending judicial review, evidence appeared that tended to “undermine[]” the Agency’s basis for denial. *Id.* at 523. This Court observed that motions for remand should be granted when appropriate in order that the agency may “consider new evidence and make a new decision.” *Id.* at 524.

As in *Ethyl*, it is indisputable that new facts and evidence “undermine” the foundation of the Agency’s final decision on the Endangerment Finding. *See id.* at 523. A number of parties, including Virginia, have utilized all avenues to bring these new facts to EPA’s attention—most recently, in the form of petitions for reconsideration. Yet EPA has chosen to postpone a rigorous examination and formal response to these new facts and has announced its intention to issue a LDMV rule despite the undermining of the Endangerment Finding’s conclusions. There is no reason why EPA should be permitted to slow walk its inadequate record through the appellate process. Instead, a remand will allow EPA to “cure [its] own mistakes rather than wasting the courts’ and the parties’ resources” leading to a review of the Endangerment Finding on a complete record. *Id.* at 524. *See also SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (“A remand is generally required if the intervening event may affect the validity of the agency action.”).

## **II. The New Evidence is Highly Material.**

- A. EPA relied on the IPCC’s work to conclude that global warming was attributable to human-caused emissions of greenhouse gases.**

Section 202(a) of the Clean Air Act requires that the Administrator make a “judgment” as to whether the emission of certain air pollutants poses a danger to public health and welfare. Throughout the Endangerment Finding, however, the Administrator admitted that the Agency *did not itself* conduct a comprehensive review of climate change science in making its “judgment” that anthropogenic GHG emissions endanger the public. Instead, EPA relied primarily on what it termed the “assessment literature” in reaching its scientific conclusions. While the “assessment literature” on which the Administrator relied generally consisted of the work of both the IPCC and the U.S. Climate Change Science Program (“CCSP”), the Administrator relied primarily on the work of the IPCC on the critical issue of whether anthropogenic GHGs are causing climate change.

Most of the EPA’s Technical Supporting Document (“TSD”), which the Agency authored to support the Endangerment Finding, examined observed and projected climate changes and their effect on public health and welfare. Only eight pages of the TSD, however, were devoted to the critical “attribution” issue: that is, whether changes to the climate system that EPA says are occurring and will accelerate can be “attributed” to anthropogenic GHG emissions and not natural forces. TSD at 47–54. The “attribution” section of the TSD particularly relied on the work of the IPCC, as opposed to other “assessment literature,” or any additional or independent studies. Forty-seven (47) of the sixty-seven (67)

citations in this section are to the IPCC's work, and all the graphics in this section were taken from the IPCC as was the introduction as well.

**B. EPA uncritically accepted that IPCC had adhered to its own protocols for transparency and peer-review instead of conducting its own independent review in accordance with the Agency's standards.**

EPA recognized in the Endangerment Finding that it is responsible for verifying that scientific information on which the Agency relies meets standards for quality, integrity and transparency that are set forth in U.S. law, including the Clean Air Act and the Information Quality Act ("IQA"). TSD at 4. In 2002, EPA was required by the IQA to issue a set of guidelines for evaluating scientific conclusions that influence the Agency's decision-making. These standards are embodied in EPA's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA."<sup>1</sup> EPA acknowledges in these Guidelines that, in decision-making, it uses some data collected by others, but insists that it "maintain[s] a robust quality system." *Id.* at 7. Importantly, EPA's standards specify that "influential information"<sup>2</sup> must have a "higher degree of transparency regarding (1) the source of the data used, (2) the

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[http://www.epa.gov/QUALITY/informationguidelines/documents/EPA\\_InfoQualityGuidelines.pdf](http://www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf)

<sup>2</sup> "Influential information" is "[i]nformation disseminated in support of top Agency actions (*i.e.* rules, substantive notices, policy documents, studies, guidance) that demand the ongoing involvement of the Administrator's office." *Id.* at 20.

various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures employed.” *Id.* at 21. As a matter of course, “[f]or those work products that are intended to support the most important decisions or that have special importance in their own right, external peer review is the procedure of choice.” *Id.* at 11. The guidelines further require that, where full transparency and access to another organization’s data and methods is not possible because of “privacy” or “other confidentiality protections,” EPA must perform its own “especially rigorous robustness checks” of that information to ensure the information’s reliability and objectivity and “carefully document all [such] checks that were undertaken.” *Id.* at 21.

EPA claimed that it ensured compliance with its Guidelines in issuing the Endangerment Finding because it reviewed the IPCC’s written procedures for preparation of that body’s science assessment reports.<sup>3</sup> Based on that review, EPA determined that the IPCC had methods in place to ensure “a basic standard of quality, including objectivity, utility and integrity,”<sup>4</sup> and presumed that IPCC was actually following these procedures. Accordingly, EPA concluded that it had “no reason to believe” that the “assessment reports do not represent the best source material to determine the state of the science and the ‘consensus’ view of the

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<sup>3</sup> EPA Response to Public Comments, Vol. 1 at 9–23.

<sup>4</sup> *Id.* at 57.

world's scientific experts on the issues central to making an endangerment decision with respect to greenhouse gases.”<sup>5</sup>

**C. EPA Neither Delayed Issuing the Endangerment Finding In Spite of New Developments Nor Revisited the Endangerment Finding Afterwards.**

In November 2009, disclosures of emails from the University of East Anglia's CRU began climate-gate. In the United Kingdom alone, a number of investigations subsequently commenced. Nevertheless, on December 15, 2009, EPA issued the Endangerment Finding and utilized IPCC as its principal authority for the Agency's central conclusion that anthropogenic GHG emissions are causing deleterious climate change. EPA faced no deadline to issue the final Endangerment Finding, which has the force of an agency rule. The first major rulemaking the Endangerment Finding was to support was the LDMV rule. Pursuant to a settlement among the U.S. government, several states and the auto industry, the LDMVR was not due until April 1, 2010. EPA could have promulgated the Finding anytime it believed it had satisfactorily responded to all comments and issues, and resolved all concerns already apparent by resorting to its Guidelines.

Having promulgated a faulty finding, EPA has continued to rely on the IPCC assessments despite growing evidence of the unreasonableness of that course of

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<sup>5</sup> Endangerment Finding, 74 Fed. Reg. at 66,511.

action. On February 11, 2010, the University of East Anglia ordered an academic misconduct review of its own CRU scientists, headed by Sir Muir Russell.<sup>6</sup> On March 22, 2010, the University asked Lord Ron Oxburgh, former chair of the House of Lords Science and Technology Select Committee, to head a second independent inquiry into the viability of all the scientific results produced by the CRU studies.<sup>7</sup> On March 31, 2010, the U.K. Parliament's Science and Technology Select Committee completed its investigation in a facially inadequate one day pre-dissolution hearing but nonetheless criticized the University for a lack of transparency and failing to take head-on a "culture of withholding information" among the CRU scientists.<sup>8</sup> The U.N. itself eventually announced an investigation on March 10, 2010, soliciting the help of the InterAgency Council, a collaboration between international science academies, to review every aspect of how the IPCC's reports are prepared, including the use of non-peer reviewed literature, the

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<sup>6</sup> David Adam, "Hacked climate emails inquiry will not 'audit scientific conclusions,'" Guardian, Feb. 11, 2010, available at <http://www.guardian.co.uk/environment/2010/feb/11/hacked-emails/inquiry>.

<sup>7</sup> David Adam, "Lord Oxburgh to head new UEA inquiry," Guardian, Mar. 22, 2010, available at <http://www.guardian.co.uk/environment/2010/mar/22/lord-oxburgh-uea-inquiry>.

<sup>8</sup> James Randerson, "Climate researchers 'secrecy' criticized," Guardian, Mar. 31, 2010, available at <http://www.guardian.co.uk/environment/2010/mar/31/climate-mails-inquiry-jones-cleared>.

reflection of diverse viewpoints, and how the report's conclusions are communicated.<sup>9</sup>

In addition, following the damaging email disclosures, serious errors in the IPCC's work came to light. In November 2009, an internationally recognized expert on Himalayan glaciers, V.K. Raina, produced a study that contradicted IPCC reports on Himalayan glacier melts. Although Dr. Raina's report was initially dismissed by the IPCC chairman as "voodoo science," the IPCC was later forced to admit in January 2010 that the Report had misstated the possible melt of the Himalayan glaciers.<sup>10</sup> Because of this error, India announced on February 5, 2010, that it would establish its own National Institute of Himalayan Glaciology to monitor climate change in the region, independent of the IPCC's ongoing research.<sup>11</sup>

On December 15, 2009—the very day that EPA announced the Endangerment Finding—the Russian Institute of Economic Analysis ("IEA")

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<sup>9</sup> Dan Vergano, "Science academies to review climate report production," USA Today, Mar. 10, 2010, available at <http://content.usatoday.com/communities/sciencefair/post/2010/03/science-academies-to-review-climate-report-production/1>.

<sup>10</sup> *Glacier Scientist: I knew data hadn't been verified*, David Rose, Jan. 24, 2010, Daily Mail, available at <http://www.dailymail.co.uk/news/article-1245636/Glacier-scientist-says-knew-data-verified.html>; *IPCC statement on the melting of Himalayan glaciers*, Jan. 20, 2010, available at <http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf>.

<sup>11</sup> "India abandons IPCC, sets up own panel," International Business Times, Feb. 5, 2010, available at <http://www.ibtimes.com/articles/20100205/india-ipcc-un-climate-change-global-warming.htm>.



reported that CRU probably tampered with Russian climate data and that the Russian meteorological station data do not support human-caused global warming. It was well established that CRU had dropped many Russian stations in the colder regions of the country supposedly because these stations were no longer maintained. The IEA stated that, on the contrary, the stations still report temperatures but that CRU ignores the results. Only 25% of the temperature reporting stations in Russia are used in the Report, and they are in population centers that are influenced by the urban heat island effect. Rural areas were largely ignored by CRU, giving the data a pro-warming bias. Given that Russia accounts for 12.5% of the world's land mass, the CRU dataset has been highly compromised, reporting global surface temperature trends that are unreliable and biased towards achieving a politically driven predetermined outcome.<sup>12</sup>

In late January 2010, it was revealed that IPCC claims of warming's adverse effects in the Amazon rainforests and on coral reefs came from publications of environmental groups such as the World Wildlife Fund and Greenpeace. Further, claims of glacier melts in the Andes and the Alps came from anecdotal comments

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<sup>12</sup> *What the Russian Papers Say*, Dec. 16, 2009, Rianovosti, available at <http://en.rian.ru/papers/20091216/157260660.html>.

in a magazine article and a master's thesis. Thus, any Agency conclusion that the findings in IPCC's report are based on peer-reviewed science was misplaced.<sup>13</sup>

On February 7, 2010, the Sunday Times (London) reported on the extent to which false claims that warming will destroy rain-based agriculture in Africa permeate IPCC findings. The IPCC had claimed that global warming would reduce yields from rain-fed agriculture by up to 50% in many African countries.<sup>14</sup> IPCC's claim is not based on peer-reviewed science but instead on a 2003 policy paper from a Canadian think-tank.<sup>15</sup> Yet EPA cites this assertion in its Technical Support Document as support for its Endangerment Finding. TSD Table 16.1.

As a final measure of the carelessness of IPCC's work, on February 3, 2010, the Netherland's environment minister, Jacqueline Cramer, demanded a thorough

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<sup>13</sup> Christopher Booker, "Amazongate: new evidence of the IPCC's failures," Telegraph, Jan. 30, 2010, available at <http://www.telegraph.co.uk/comment/columnists/christopherbooker/7113582/Amazongate-new-evidence-of-the-IPCCs-failures.html>; Editorial, "Climate debate needs facts, not anecdotes," NZ Herald, Feb. 3, 2010, available at [http://www.nzherald.co.nz/opinion/news/article.cfm?c\\_id=466&objectid=10623715](http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10623715); Lawrence Solomon, Op-Ed., "Beyond the Himalayas," Nat'l Post, Feb. 6, 2010, available at <http://network.nationalpost.com/np/blogs/fpcomment/archive/2010/02/05/lawrence-solomon-beyond-the-himalayas.aspx>; David Adam and Suzanne Goldenberg, "UN Climate Scientists Blame IPCC Colleagues for 'Sloppy' Glacier Error," Guardian (London), Feb. 9, 2010.

<sup>14</sup> *Climate Change 2007: Synthesis Report – Summary for Policymakers*, IPCC, available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf).

<sup>15</sup> *Africagate: top British Scientist says UN panel is losing credibility*, Jonathan Leake, Feb. 7, 2010, Times Online, available at <http://www.timesonline.co.uk/tol/news/environment/article7017907.ece>.

investigation into IPCC's research after it was revealed that its Report incorrectly stated that 55 percent of the Netherlands lies below sea level, when the correct figure is actually 26 percent.<sup>16</sup>

For its part, in response to the controversy, EPA has done nothing to date. It announced no review. It commissioned no inquiry that it ever announced to the public. While a congressional committee issued a minority report attacking what the press had dubbed by this time climate-gate and glacier-gate, EPA officials expressed categorical confidence in the IPCC through public speeches and statements. In the LDMV rule announcement, EPA ratified without review—for a second time—the IPCC conclusions on which the Endangerment Finding was based. In the absence of an analysis and statement of why EPA can or should continue to conclude that the IPCC information is reliable, appropriate appellate review of EPA's Endangerment Finding cannot efficiently proceed.

EPA's standards of conduct, established in 2002 by the Agency's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA," are clear and beyond dispute. They require "rigorous robustness checks" anytime data transparency, quality, or peer review issues emerge regarding "influential information," defined to include

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<sup>16</sup> "New mistake found in UN climate report," NRC Handelsblad, Feb. 4, 2010, available at <http://www.nrc.nl/international/article2476086.ece>.

information supporting a rule making. These “rigorous robustness checks” must be documented contemporaneously with the Agency’s review, and before issuance of a final rule.

Numerous commentators have objected to EPA’s non-transparent handling of climate-gate. By February 16, 2010, ten petitions for reconsideration were filed, asking the Agency to reconsider its Endangerment Finding. EPA has displayed no indication of imminent action. Instead, it proposes to rule on whether to permit further public comment by July 30, 2010 while holding this appeal in abeyance. This is a formula for inefficiency and needless delay.

### **III. The Additional Evidence Shows that EPA Did Not Follow Its Own Standards of Conduct When It Finalized the Endangerment Finding.**

#### **A. EPA’s Own Standards Require Transparency and Objectivity in the Scientific Research It Relies Upon.**

In the Endangerment Finding, EPA made the affirmative claim that IPCC’s climate change assessments conform to the Agency’s Guidelines “for data and scientific integrity and transparency.”<sup>17</sup> The TSD accompanying the Endangerment Finding also declares that IPCC’s information is “objective, technically sound and vetted, and of high integrity” as required by EPA standards. TSD at 5. Yet IPCC’s work does not meet the “higher degree of transparency” that is a prerequisite for EPA’s reliance according to its own guidelines as IPCC

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<sup>17</sup> 74 F.R. 66511, n.14.

members lack much of the raw temperature data that supports the group's claims of anthropogenic climate change.<sup>18</sup>

**B. This Court Requires Agencies to Adhere to Their Established Standards of Conduct in Their Rulemakings.**

In issuing the final Endangerment Finding, EPA failed to follow its own standards of conduct for scientific research by relying primarily on the tainted and politically influenced conclusions of the IPCC. Although this Court typically defers to an agency's conclusions drawn from scientific data, *see, e.g., Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), this presumption disappears when an agency has failed to follow its own established standards of conduct in the course of evaluating that scientific data. *See Edison Electric Inst. v. EPA*, 391 F.3d 1267, 1269 (D.C. Cir. 2004) (EPA cannot "ignore or contradict" its "own criteria"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (an agency cannot "casually ignore[]" its policies and standards).

**CONCLUSION**

Additional evidence directly implicating the EPA's Endangerment Finding has arisen after final promulgation of the rule, necessitating a remand to the Agency for its official review and comment. The newly available information is clearly material to the Endangerment Finding because it goes to the core requirements of § 202(a) and § 307(d)(3). This additional evidence is

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<sup>18</sup> <http://www.timesonline.co.uk/tol/news/environment/article7004936.ece>.

unquestionably so serious that there is a substantial likelihood that the Endangerment Finding would not have issued when it did if EPA had taken the time to examine and comment upon it. *See, e.g., NRDC v. Herrington*, 768 F.2d 1355, 1421 (D.C. Cir. 1985) (holding that agencies are obliged to produce substantial evidence for major assumptions in rulemaking).

This Court, in ordering remand, may “order such additional evidence . . . to be taken before the Administrator, in such manner and upon such terms and conditions as [to] the court may deem proper.” 42 U.S.C. § 7607(c). Petitioners respectfully submit that a reopening of the period for public comment will permit the Agency to receive all of the additional evidence pertaining to the Endangerment Finding that has surfaced since December 15, 2009 calling IPCC’s conclusions into question. EPA will then have an opportunity to conduct its own rigorous robustness check of all of IPCC’s methodologies and conclusions in light of the additional evidence contained in the public’s remarks. After the close of the court-ordered remand period, EPA can then revisit the merits of the Endangerment Finding as required by the Act which obligates the Administrator to “modify [her] findings as to the facts, or make new findings, by reason of the additional evidence so taken and [to] file such modified or new findings, and [her] recommendation, if any, for the modification or setting aside of [her] original determination, with the return of such additional evidence.” *Id.*

**COMMONWEALTH OF VIRGINIA**

BY: /s/ E. Duncan Getchell, Jr.

Kenneth T. Cuccinelli, II  
Attorney General of Virginia

E. Duncan Getchell, Jr. (14156)  
State Solicitor General  
[dgetchell@oag.state.va.us](mailto:dgetchell@oag.state.va.us)

Stephen R. McCullough (41699)  
Senior Appellate Counsel  
[smccullough@oag.state.va.us](mailto:smccullough@oag.state.va.us)

Charles E. James, Jr.  
Chief Deputy Attorney General

Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
Telephone: (804) 786-2436  
Facsimile: (804) 786-1991

*Counsel for the Commonwealth*

**STATE OF ALABAMA**

Troy King, Attorney General

BY: /s/ Robert D. Tambling  
Assistant Attorney General  
500 Dexter Avenue  
Montgomery, Alabama 36110  
(334) 242-7300

Virginia v. EPA, No. 10-1036

**CERTIFICATE OF SERVICE**

<p>John Alan Bryson Holland &amp; Hart, LLP 975 F Street NW, Suite 900 Washington, DC 20004 (202) 654-6920 Fax: (202) 747-6568 <a href="mailto:jbryson@hollandhart.com">jbryson@hollandhart.com</a></p> <p>Paul David Phillips Holland &amp; Hart, LLP 555 Seventeenth Street, Suite 3200 Denver, CO 80202 (303) 295-8131 Fax: (303) 295-8261 <a href="mailto:pPhillips@hollandhart.com">pPhillips@hollandhart.com</a></p> <p>Eric A. Groten Vinson &amp; Elkins LLP 2801 Via Fortuna, Suite 100 Austin, TX 78746 (512) 542-8709 Fax: (512) 236-3272 <a href="mailto:egroten@velaw.com">egroten@velaw.com</a></p>	<p>Counsel for Petitioners</p> <p>Coalition for Responsible Regulation, Inc. Industrial Minerals Association - North America National Cattlemen's Beef Association Great Northern Project Development, L.P. Rosebud Mining Company Massey Energy Company Alpha Natural Resources, Inc.</p>
<p>Peter S. Glaser Troutman Sanders LLP 401 9<sup>th</sup> Street NW, Suite 1000 Washington, DC 20004 (202) 274-2950 Fax: (202) 654-5611 <a href="mailto:peter.glaser@troutmansanders.com">peter.glaser@troutmansanders.com</a></p>	<p>Counsel for Petitioners</p> <p>National Mining Association Peabody Energy Company American Farm Bureau Federation</p>



<p>Robin S. Conrad  Amar D. Sarwal  National Chamber Litigation Center  1615 H Street NW, Suite 230  Washington, DC 20062  (202) 463-5337  Fax: (202) 463-5346  <a href="mailto:rconrad@uschamber.com">rconrad@uschamber.com</a>  <a href="mailto:asarwal@uschamber.com">asarwal@uschamber.com</a></p> <p>William Henry Burgess, IV  Kirkland &amp; Ellis LLP  655 15<sup>th</sup> Street NW, Suite 1200  Washington, DC 20005  (202) 879-5000  Fax: (202) 879-5200  <a href="mailto:william.burgess@kirkland.com">william.burgess@kirkland.com</a></p>	<p>Counsel for Petitioner</p> <p>Chamber of Commerce of the United States of America</p>
<p>Shannon Lee Goessling  Southeastern Legal Foundation  6100 Lake Forrest Drive NW, Suite 520  Atlanta, GA 30328  <a href="mailto:Shannon@southeasternlegal.org">Shannon@southeasternlegal.org</a></p> <p>Edward Allen Kazmarek  Kazmarek Geiger &amp; Laseter LLP  3490 Piedmont Road NE, Suite 201  Atlanta, GA 30305  <a href="mailto:skazmarek@kglaw.com">skazmarek@kglaw.com</a></p> <p>Harry Woodward MacDougald  Caldwell &amp; Watson, LLP  Building Two, Suite 200  5825 Glenridge Drive NE  Atlanta, GA 30328  (404) 843-1956  <a href="mailto:hmacdougald@cwlaw.org">hmacdougald@cwlaw.org</a></p>	<p>Counsel for Petitioners</p> <p>Southeastern Legal Foundation, Inc.  The Langdale Company  Langdale Forest Products Company  Langdale Farms, LLC  Langdale Fuel Company  Langdale Chevrolet-Pontiac, Inc.  Langdale Ford Company  Langboard, Inc. – MDF  Langboard, Inc. – OSB  Georgia Motor Trucking Association, Inc.  Collins Industries, Inc.  Collins Trucking Company, Inc.  Kennesaw Transportation, Inc.  J&amp;M Tank Lines, Inc.  Southeast Trailer Mart, Inc.  Georgia Agribusiness Council, Inc.  U.S. Representative John Linder (GA-7th),  <i>et al.</i></p>

<p>E. Duncan Getchell, Jr.          Attorney General's Office, Commonwealth of Virginia          900 East Main Street          Richmond, VA 23219          (804) 786-2071          Fax: (804) 371-0200  <a href="mailto:dgetchell@oag.state.va.us">dgetchell@oag.state.va.us</a></p>	<p>Counsel for Petitioner           Commonwealth of Virginia, <i>ex rel.</i>          Kenneth T. Cuccinelli, II in his official capacity as Attorney General of Virginia</p>
<p>Chet Maraffa Thompson          Crowell &amp; Moring LLP          1001 Pennsylvania Avenue NW          Washington, DC 20004          (202) 624-2500          Fax: (202) 628-5116  <a href="mailto:cthompson@crowell.com">cthompson@crowell.com</a></p>	<p>Counsel for Petitioners           Gerdau Ameristeel Corp.          American Iron and Steel Institute</p>
<p>Robert Douglas Tambling          Attorney General's Office, State of Alabama          11 South Union Street          Montgomery, AL 36130          (334) 242-7300          Fax: (334) 242-4890  <a href="mailto:rtambling@ago.state.al.us">rtambling@ago.state.al.us</a></p>	<p>Counsel for Petitioner           State of Alabama</p>
<p>Scott Oostdyk          McGuireWoods LLP          One James Center          901 East Cary Street          Richmond, VA 23219          (804) 775-1000          Fax: (804) 698-2133  <a href="mailto:soostdyk@mcguirewoods.com">soostdyk@mcguirewoods.com</a></p> <p>Neal John Cabral          McGuireWoods LLP          1050 Connecticut Avenue, N.W.,          Suite 1200          Washington, DC 20036-5317          (202) 857-1700          Fax: (202) 828-2968  <a href="mailto:ncabral@mcguirewoods.com">ncabral@mcguirewoods.com</a></p>	<p>Counsel for Petitioner           The Ohio Coal Association</p>

<p>Greg Abbott Office of the Attorney General of Texas P.O. Box 12548 Austin, TX 78711-2548 (512) 463-2080</p>	<p>Counsel for Petitioner(s) State of Texas Greg Abbott, Attorney General of Texas Texas Commission on Environmental Quality Texas Agriculture Commission Barry Smitherman, Chairman of Texas Public Utility Commission Rick Perry, Governor of Texas</p>
<p>F. William Brownell Norman William Fichthorn Allison D. Wood Hunton &amp; Williams LLP 1900 K Street NW, Suite 1200 Washington, DC 20006-1109 (202) 955-1500 Fax: (202) 778-2201 <a href="mailto:bbrownell@hunton.com">bbrownell@hunton.com</a> <a href="mailto:nfichthorn@hunton.com">nfichthorn@hunton.com</a> <a href="mailto:awood@hunton.com">awood@hunton.com</a></p>	<p>Counsel for Petitioner  The Utility Air Regulatory Group</p>

<p>Jeffrey Alan Lamken Molo Lamken LLP The Watergate 600 New Hampshire Avenue NW Washington, DC 20037 (202) 556-2000 Fax: (202) 556-2001 <a href="mailto:jlamken@mololamken.com">jlamken@mololamken.com</a></p> <p>Matthew Goodwin Paulson Baker Botts LLP 98 San Jacinto Boulevard, Suite 1500 Austin, TX 78701-4039 (512) 322-2582 Fax: (512) 322-8329 <a href="mailto:matthew.paulson@bakerbotts.com">matthew.paulson@bakerbotts.com</a></p> <p>Timothy Kenly Webster Sidley Austin, LLP 1501 K Street NW Washington, DC 20005 (202) 736-8000 Fax: (202) 736-8711 <a href="mailto:twebster@sidley.com">twebster@sidley.com</a></p> <p>Adam Jeffrey White Alexandra Margaret Walsh Baker Botts LLP The Warner, Suite 1300 West 1299 Pennsylvania Avenue, N.W. Washington, DC 20004 (202) 639-7700 Fax: (202) 585-4097 <a href="mailto:adam.white@bakerbotts.com">adam.white@bakerbotts.com</a> <a href="mailto:alex.walsh@bakerbotts.com">alex.walsh@bakerbotts.com</a></p> <p>Michael Robert Barr Pillsbury Winthrop Shaw Pittman, LLP 50 Fremont Street San Francisco, CA 94105 (415) 983-1000 Fax: (415) 983-1200 <a href="mailto:michael.barr@pillsburylaw.com">michael.barr@pillsburylaw.com</a></p>	<p>Counsel for Petitioners</p> <p>National Association of Manufacturers American Petroleum Institute Brick Industry Association Corn Refiners Association, Inc. National Association of Home Builders National Oilseed Processors Association National Petrochemical &amp; Refiners Association Western States Petroleum Association</p>
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<p>Quentin Riegel National Association of Manufacturers North Tower, Suite 1500 1331 Pennsylvania Avenue NW Washington, DC 20004 (202) 637-3000</p>	<p>Counsel for Petitioner  National Association of Manufacturers</p>
<p>Harry Moy Nq Michele Marie Schoeppe American Petroleum Institute 1220 L Street, N.W. Washington, DC 20005 (202) 682-8251 <a href="mailto:schoeppem@api.org">schoeppem@api.org</a></p>	<p>Counsel for Petitioner  American Petroleum Institute</p>
<p>Hans Frank Bader Sam Kazman Competitive Enterprise Institute 1899 L Street NW, 12<sup>th</sup> Floor Washington, DC 20036 (202) 331-1010 Fax: (202) 331-0640 <a href="mailto:hbader@cei.org">hbader@cei.org</a> <a href="mailto:skazman@cei.org">skazman@cei.org</a></p>	<p>Counsel for Petitioners  Competitive Enterprise Institute Freedom Works Foundation Science and Environmental Policy Project</p>
<p>Paul D. Clement Ashley Charles Parrish King &amp; Spalding LLP 1700 Pennsylvania Avenue NW, Suite 200 Washington, DC 20006 (202) 737-0500 Fax: (202) 626-3737 <a href="mailto:pclement@kslaw.com">pclement@kslaw.com</a> <a href="mailto:aparrish@kslaw.com">aparrish@kslaw.com</a></p>	<p>Counsel for Petitioner Portland Cement Association</p>
<p>William Orr c/o Dr. Bonner Cohen 1600 North Oak Street, #617 Arlington, VA 22209 (703) 528-3751</p>	<p>Counsel for Petitioners  Alliance for Natural Climate Change Science William Orr</p>

<p>Jon M. Lipshultz U.S. Department of Justice Environment &amp; Natural Resources Division PO Box 23986, L'Enfant Plaza Station Washington, DC 20026 (202) 514-2191 Fax: (202) 514-8865 <a href="mailto:jon.lipshultz@usdoj.gov">jon.lipshultz@usdoj.gov</a></p> <p>Angeline Purdy U. S. Department of Justice Environmental Defense Section 601 D Street, N.W. Washington, DC 22204 <a href="mailto:angeline.purdy@usdoj.gov">angeline.purdy@usdoj.gov</a></p>	<p>Counsel for Respondents</p> <p>Environmental Protection Agency; Lisa Perez Jackson, Administrator, EPA</p>
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<p>Steven E. Mulder  Assistant Attorney General  State of Alaska  Department of Law, Room 310  1031 West 4th Avenue, Suite 200  Anchorage, AK 99501  (907) 269-6011  Fax: (907) 278-7022  steve.mulder@alaska.gov</p>	<p>Movant-Intervenor for Petitioners   State of Alaska</p>
<p>Bill McCollum  Attorney General of Florida  The Capital, PL-01  Tallahassee, FL 32399  (850) 414-3300  Fax: (850) 410-2672</p>	<p>Movant-Intervenor for Petitioners   State of Florida</p>
<p>Mark J. Bennett  Attorney General of Hawaii  425 Queen Street  Honolulu, HI 96813  (808) 586-1282  Fax: (808) 586-1239</p>	<p>Movant-Intervenor for Petitioners   State of Hawaii</p>
<p>Gregory F. Zoeller  Attorney General of Indiana  302 W. Washington St.  IGC-South, Fifth Floor  Indianapolis, IN 46204  (317) 233-8292  Fax: (317) 232-7979</p>	<p>Movant-Intervenor for Petitioners   State of Indiana</p>
<p>Jack Conway  Attorney General of Kentucky  Capital Suite 118  700 Capital Ave.  Frankfort, KY 40601  (502) 696-5300  Fax: (502) 564-2894</p>	<p>Movant-Intervenor for Petitioners   Commonwealth of Kentucky</p>

James D. "Buddy" Caldwell Attorney General of Louisiana Department of Justice 1885 North Third St. Baton Rouge, LA 70802 (225) 326-6705 Fax: (225) 326-6793	Movant-Intervenor for Petitioners  State of Louisiana
Governor Haley Barbour State of Mississippi P.O. Box 139 Jackson, MS 39205 (601) 359 – 3150 Fax: (601) 359-3741	Movant-Intervenor for Petitioners  State of Mississippi
Katherine Jean Spohn Attorney General's Office, State of Nebraska 2115 State Capitol Building P.O. Box 98920 Lincoln, NE 68509 (402) 471-2834 Fax: (402)471-2957 katie.spohn@nebraska.gov	Movant-Intervenor for Petitioners  State of Nebraska
Wayne Stenehjem Attorney General of North Dakota 600 East Boulevard Avenue Department 125 Bismarck, ND 58505 (701) 328-2210 Fax: (710)328-2226 ndag@state.nd.us	Movant-Intervenor for Petitioners  State of North Dakota
W.A. Drew Edmondson Attorney General of Oklahoma 313 NE 21st St. Oklahoma City, OK 73105 (405) 521-3921 Fax: (405) 522-0669	Movant-Intervenor for Petitioners  State of Oklahoma



<p>Henry D. McMaster          Attorney General of South Carolina          P.O. Box 11549          Columbia, SC 29211          (803) 734-3680          Fax: (803) 734-3677</p>	<p>Movant-Intervenor for Petitioners           State of South Carolina</p>
<p>Roxanne Giedd          Attorney General's Office, South Dakota          1302 East Highway 14, Suite 1          Pierre, SD 57501          (605) 773-3215          Fax: (605) 773-4106          roxanne.giedd@state.sd.us</p>	<p>Movant-Intervenor for Petitioners           State of South Dakota</p>
<p>Mark L. Shurtleff          Attorney General of Utah          P.O. Box 142320          Salt Lake City, UT 84114          (801) 538-9600          Fax: (801) 538-1121</p>	<p>Movant-Intervenor for Petitioners           State of Utah</p>

<p>Matthew Goodwin Paulson                  Baker Botts LLP                  98 San Jacinto Boulevard                  Suite 1500                  Austin, TX 78701                  (512) 322-2582                  Fax: (512) 322-8329                  matthew.paulson@bakerbotts.com</p>	<p>Movant-Intervenor for Petitioners</p> <p>Glass Packaging Institute                  Independent Petroleum Association of America                  Louisiana Oil and Gas Association                  North American Die Casting Association                  Steel Manufacturers Association                  National Electrical Manufacturers Association                  Michigan Manufacturers Association                  Indiana Cast Metals Association                  Virginia Manufacturers Association                  Colorado Association of Commerce &amp; Industry                  Tennessee Chamber of Commerce and Industry                  West Virginia Manufacturers Association                  The Kansas Chamber of Commerce and Industry                  Idaho Association of Commerce and Industry                  Pennsylvania Manufacturers Association                  The Ohio Manufacturers Association                  Wisconsin Manufacturers and Commerce                  Nebraska Chamber of Commerce and Industry                  Arkansas State Chamber of Commerce                  Associated Industries of Arkansas                  Mississippi Manufacturers Association</p>
<p>Joseph P. Mikitish                  Attorney General's Office, State of Arizona                  1275 West Washington Street                  Phoenix, AZ 85007                  (602) 542-8553</p>	<p>Movant-Intervenor for Respondent</p> <p>State of Arizona</p>

<p>Marc Nathaniel Melnick  Attorney General's Office, State of California  1515 Clay Street, 20th Floor  P.O. Box 70550  Oakland, CA 94612  (510) 622-2133  Fax: (510) 622-2270  marc.melnick@doj.ca.gov</p>	<p>Movant-Intervenor for Respondent   State of California</p>
<p>Kimberly P. Massicotte  Attorney General's Office, State of Connecticut  55 Elm Street  P.O. Box 120  Hartford, CT 06141  (860) 808-5318</p>	<p>Movant-Intervenor for Respondent   State of Connecticut</p>
<p>Valerie Melissa Satterfield  Attorney General's Office, State of Delaware  102 West Water Street, Third Floor  Dover, DE 19904  (302) 739-4636  Fax: (302) 739-4624  vcsizmadia@state.de.us</p>	<p>Movant-Intervenor for Respondent   State of Delaware</p>
<p>Susan Jane Hedman  Attorney General's Office, State of Illinois  100 West Randolph Street  Chicago, IL 60601  (312) 814-3000  Fax: (312) 814-3212  shedman@atg.state.il.us</p>	<p>Movant-Intervenor for Respondent   State of Illinois</p>
<p>David Robert Sheridan  Attorney General's Office, State of Iowa  Lucas State Office Building  321 E. 12th Street  Des Moines, IA 50319  (515) 281-6714  Fax: (515) 242-6072  dsheid@ag.state.ia.us</p>	<p>Movant-Intervenor for Respondent   State of Iowa</p>

<p>Gerald D. Reid  Attorney General's Office, State of Maine  6 State House Station  Augusta, ME 04333  (207) 626-8800</p>	<p>Movant-Intervenor for Respondent   State of Maine</p>
<p>Mary Raivel  Attorney General's Office, State of  Maryland  1800 Washington Boulevard, Suite 6048  Baltimore, MD 21230  (410) 537-3035  Fax: 410-537-3943  mraivel@mde.state.md.us</p>	<p>Movant-Intervenor for Respondent   State of Maryland</p>
<p>Carol A. Iancu  Attorney General's Office, Commonwealth  of Massachusetts  One Ashburton Place, 18th Floor  Boston, MA 02108  (617) 963-2428  carol.iancu@state.ma.us</p>	<p>Movant-Intervenor for Respondent   Commonwealth of Massachusetts</p>
<p>Neil D. Gordon  Attorney General's Office, State of  Michigan  P.O. Box 30755  Lansing, MI 48909  (517) 373-7540  Fax: (517) 373-1610  gordonn1@michigan.gov</p>	<p>Movant-Intervenor for Respondent   State of Michigan</p>
<p>Steven M. Gunn  Jocelyn F. Olson  Attorney General's Office, State of  Minnesota  445 Minnesota Street, Suite 900  St. Paul, Minnesota 55101  (651) 757-1244  steven.gunn@state.mn.us  jocelyn.olson@state.mn.us</p>	<p>Movant-Intervenor for Respondent   State of Minnesota</p>

<p>Kelvin Allen Brooks  Attorney General's Office, State of New Hampshire  33 Capitol Street  Concord, NH 03301-6397  (603) 271-3679  Fax: (603) 223-6266</p>	<p>Movant-Intervenor for Respondent   State of New Hampshire</p>
<p>Stephen Robert Farris  Attorney General's Office, State of New Mexico  P.O. Drawer 1508  Santa Fe, NM 87504  (505) 827-6939  Fax: (505) 827-4440  sfarris@ago.state.nm.us</p>	<p>Movant-Intervenor for Respondent   State of New Mexico</p>
<p>Michael J. Myers  Attorney General's Office, State of New York  The Capitol  New York State Department of Law  Albany, NY 12224  (518) 402-2594  Fax: (518) 473-2534  michael.myers@oag.state.ny.us</p>	<p>Movant-Intervenor for Respondent   State of New York</p>
<p>Robert A. Reiley  Kristen Campfield Furlan  Pennsylvania Department of Environmental Protection  Rachael Carson State Office Building  400 Market Street, 9th Floor  Harrisburg, PA 17101  (717) 787-7060  Fax: (717) 783-7911  rreiley@state.pa.us  kfurlan@state.pa.us</p>	<p>Movant-Intervenor for Respondent   Commonwealth of Pennsylvania  Department of Environmental Protection</p>

<p>Gregory Stage Schultz  Attorney General's Office, State of Rhode  Island  150 South Main Street  Providence, RI 02903  (401) 274-4400  Fax: (401) 222-3016  gschultz@riag.ri.gov</p>	<p>Movant-Intervenor for Respondent   State of Rhode Island</p>
<p>Paul Sandberg Logan  Oregon Department of Justice  1515 SW Fifth Avenue  Suite 410  Portland, OR 97201  (971) 673-1943  paul.s.logan@doj.state.or.us</p>	<p>Movant-Intervenor for Respondent   State of Oregon</p>
<p>Thea J. Schwartz  Attorney General's Office, State of  Vermont  109 State Street  Montpelier, VT 05609  (802) 828-2359  tschwartz@atg.state.vt.us</p>	<p>Movant-Intervenor for Respondent   State of Vermont</p>
<p>Leslie Riley Seffern  Attorney General's Office, State of  Washington  2425 Bristol Court SW, 2nd Floor  P.O. Box 40117  Olympia, WA 98504  (360) 586-6770  Fax: (360) 586-6760  ECYOLYEF@ATG.WA.GOV</p>	<p>Movant-Intervenor for Respondent   State of Washington</p>
<p>Christopher Gene King  New York City Law Department  6-143  100 Church Street  New York, NY 10007  (212) 788-1235  Fax: (212) 788-1619  cking@law.nyc.gov</p>	<p>Movant-Intervenor for Respondent   City of New York</p>

<p>David G. Bookbinder Sierra Club 408 C Street NE Washington, DC 20002-0000 (202) 548-4598 Fax: (202) 547-6009 david.bookbinder@sierraclub.org</p>	<p>Movant-Intervenor for Respondent  Sierra Club</p>
<p>David S. Baron Earthjustice Legal Defense Fund 1625 Massachusetts Avenue, NW Suite 702 Washington, DC 20036-2212 (202) 667-4500 dbaron@earthjustice.org</p> <p>Sean H. Donahue Law Office of Sean H. Donahue 2000 L Street, NW Suite 808 Washington, DC 20036-0000 (202) 277-7085 Fax: (202) 315-3582 sean@donahuegoldberg.com</p> <p>Vickie Lynn Patton Environmental Defense Fund 2334 North Broadway Boulder, CO 80304-0000 (303) 447-7215 Fax: (303) 440-8052 vpatton@edf.org</p>	<p>Movant-Intervenor for Respondent  Environmental Defense Fund</p>
<p>Joseph Mendelson, III National Wildlife Federation 901 E Street NW, Suite 400 Washington, DC 20004 (202) 797-6898 Fax: (202) 797-6646 mendelsonj@nwf.org</p>	<p>Movant-Intervenor for Respondent  National Wildlife Federation</p>

<p>David D. Doniger                  Benjamin Hoyt Longstreth                  Colin Casey O'Brien                  John DuVal Walke                  Natural Resources Defense Council                  1200 New York Avenue NW, Suite 400                  Washington, DC 20005                  (202) 289-6868                  Fax: (202) 789-0859                  ddoniger@nrdc.org                  blongstreth@nrdc.org                  cobrien@nrdc.org                  jwalke@nrdc.org</p>	<p>Movant-Intervenor for Respondent                   Natural Resources Defense Council</p>
<p>Ann Brewster Weeks                  Conservation Law Foundation                  Clean Air Task Force                  18 Tremont Street, Suite 530                  Boston, MA 02108                  (617) 624-0234                  Fax: (617) 624-0230                  aweeks@catf.us</p>	<p>Movant-Intervenor for Respondent                   Conservation Law Foundation</p>
<p>Deborah M. Murray                  Wetlands Watch                  Southern Environmental Law Center                  201 West Main Street, Suite 14                  Charlottesville, VA 22902-5065                  (434) 977-4090                  Fax: (434) 977-1483                  dmurray@selcva.org</p>	<p>Movant-Intervenor for Respondent                   Wetlands Watch</p>



<p>Elizabeth Gallaway                  Mountain States Legal Foundation                  2596 South Lewis Way                  Lakewood, CO 80227                  (303) 292-2021                  Fax: (303) 292-1980                  egallaway@mountainstateslegal.com</p>	<p>Counsel for <i>Amicus Curiae</i> for Petitioners                   Mountain States Legal Foundation</p>
<p>Karen R. Harned                  National Federation of Independent                  Business                  1201 F Street, N.W., Suite 200                  Washington, DC 20004                  (202) 314-2061  <a href="mailto:karen.harned@nfib.org">karen.harned@nfib.org</a></p>	<p>Counsel for <i>Amicus Curiae</i> for Petitioners                   National Federation of Independent                  Business Small Business Legal Center</p>
<p>Richard P. Hutchison                  Landmark Legal Foundation                  3100 Broadway                  Suite 515                  Kansas City, MO 64111                  (816) 931-1175                  Fax: 816-931-1115                  rpetehutch@aol.com</p>	<p>Counsel for <i>Amicus Curiae</i> for Petitioners                   Landmark Legal Foundation</p>
<p>Susan Jill Kraham                  Environmental Law Clinic                  Columbia Law School                  435 West 116<sup>th</sup> Street, Room 843                  New York, NY 10027                  (212) 854-4291                  Fax: (212) 854-3554  <a href="mailto:susan.kraham@law.columbia.edu">susan.kraham@law.columbia.edu</a></p>	<p>Counsel for <i>Amicus Curiae</i> for Respondent                   Union of Concerned Scientists</p>

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION,	)	
et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 09-1322 (and
	)	consolidated
	)	cases)
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

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**RESPONDENT’S MOTION TO HOLD CASE IN ABEYANCE  
PENDING COMPLETION OF ADMINISTRATIVE PROCEEDINGS  
ON PETITIONS FOR RECONSIDERATION**

Respondent United States Environmental Protection Agency (“EPA”) hereby moves the Court for an Order holding this case in abeyance pending a decision by EPA on numerous administrative petitions for reconsideration of the agency action that is the subject of these consolidated petitions for review, without prejudice to any party’s right to move the Court to lift the abeyance for the purpose of filing a stay motion pursuant to Fed. R. App. P. 18 or to seek other procedural relief, and any other party’s, including EPA’s, right to oppose the relief sought in any such motion. EPA expects to issue a decision (or decisions) on the reconsideration petitions on or about July 30, 2010. Accordingly, by this motion,

EPA specifically asks the Court to hold this case in abeyance until 14 days after an EPA decision or decisions on the reconsideration petitions, or August 16, 2010, whichever comes first, with motions to govern further proceedings due upon expiration of the abeyance period. EPA suggests that the motions to govern further proceedings be filed jointly if possible, but separately if agreement cannot be reached. EPA has advised the other parties (and proposed parties) to these consolidated cases of its intent to file this motion and, as enumerated in numbered Paragraph 14 below, some of these parties do not oppose this motion, some parties have not responded, some parties have stated that they oppose this motion, and some parties have stated that they reserve their right to file a response to this motion. In further support of this Motion EPA states:

1. The first Petition for Review in this matter was filed on December 23, 2009, and was assigned docket number 09-1322. Subsequently, sixteen additional petitions for review were filed.<sup>1/</sup> All seventeen petitions have now been consolidated by the Court and all challenge an EPA action under the Clean Air Act (“CAA”) published in the Federal Register on December 15, 2009. See “Endangerment and Cause or Contribute Findings For Greenhouse Gases Under

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<sup>1/</sup> Docket numbers: 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1049.

Section 202(a) of the Clean Air Act,” 74 Fed. Reg. 66,496 (Dec. 15, 2009) (“Endangerment Finding”). On March 12, 2010, EPA filed an unopposed motion to extend the deadlines for initial filings in this matter to April 15, 2010 for procedural motions (and related filings) and April 29, 2010 for dispositive motions (and related filings). The Court granted this motion by Order dated March 15, 2010.

2. Ten administrative petitions for reconsideration of the Endangerment Finding were filed with EPA.<sup>2</sup> Two groups of petitioners filing such petitions also requested an administrative stay of the Endangerment Finding. In addition, the various petitioning parties have to date filed a total of seven supplements to the pending petitions for reconsideration.

3. EPA currently is considering the issues raised in the various administrative petitions for reconsideration and stay and has not yet made any decisions on these petitions. EPA expects to issue its decision(s) on the administrative petitions for reconsideration on or about July 30, 2010. If EPA denies the reconsideration petitions, in whole or in part, this denial (or denials) would be final action subject to judicial review in this Court pursuant to sections

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<sup>2</sup> These petitions (and supplemental petitions) are publicly posted on EPA’s Internet website and may be accessed at:  
<http://www.epa.gov/climatechange/endangerment/petitions.html>.

307(b) and 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. §§ 7607(b), (d)(7)(B). If EPA grants the reconsideration petitions, in whole or in part, further procedures would ensue pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B).

4. Given the foregoing, EPA believes that the interests of judicial economy will best be served by holding this case in abeyance until 14 days after an EPA decision or decisions on the reconsideration petitions, or August 16, 2010, whichever comes first, with motions to govern further proceedings due upon expiration of the abeyance period. EPA suggests that the motions to govern further proceedings be filed jointly if possible, but separately if agreement cannot be reached.

5. If EPA denies the petitions for reconsideration (in whole or in part), and parties file petitions for review of this denial (or denials) with this Court, EPA would work with those parties, as well as the parties to the original consolidated proceeding, to develop a briefing proposal for both the original petitions for review and the petitions for review of the reconsideration decision(s) that is as expeditious and consolidated as is reasonable and practical for all parties under the circumstances. If EPA grants the reconsideration petitions (in whole or in part), then EPA would work with the other parties to propose a reasonable schedule to govern further proceedings in this case, taking account of the nature and timing of

any further procedures to be undertaken pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B).

6. Some Petitioners have requested that the abeyance of proceedings requested in this motion be without prejudice to the filing of any motions to lift the abeyance for purposes of filing a motion for a stay pending review pursuant to Fed. R. App. P. 18, or for other procedural relief a party may deem appropriate during the abeyance period. EPA agrees to this request provided that any other party's rights (including EPA's rights) to file an opposition to the requested relief is preserved.<sup>3/</sup>

7. The relief requested in the instant Motion is quite reasonable and should not prejudice any party.

8. To begin with, the only reason an abeyance is necessary at all is because many Petitioners have themselves asked EPA to review detailed reconsideration petitions. Specifically, between December 2009 and March 2010, EPA received ten petitions to reconsider the Endangerment Finding. In addition to

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<sup>3/</sup> EPA notes that on April 14, 2010, Petitioner Ohio Coal Association filed a "Motion to Remand To Adduce Additional Evidence" and on April 15, 2010, Petitioners Virginia and Alabama filed a "Joint Motion of the State of Alabama and the Commonwealth of Virginia to Remand to Adduce Additional Evidence" and the Petitioners in No. 10-1035 filed a "Motion for Remand To Adduce Additional Evidence." EPA will be filing oppositions to those motions.

the original submissions, EPA has received seven supplements to the original petitions, the most recent of which was dated March 25, 2010. Counting all of the original and supplemental petitions, EPA currently has received more than 500 pages of petitions for reconsideration, as well as attachments consisting of hundreds of pages that contain information including dozens of studies, more than 300 pages of computer code, and more than 1000 emails. EPA believes a target decision date of July 30, 2010, is quite reasonable and expeditious under the circumstances.

9. The process suggested by EPA in this motion provides for the most efficient and thorough consideration of the largely technical, data-oriented issues raised in the petitions for reconsideration. EPA is thoroughly evaluating Petitioners' arguments and the schedule identified by EPA provides a reasonable amount of time for the Agency to do so. Further, preparation of a complete administrative record and decision document will be critical to this Court's subsequent review (if necessary) of these largely technical and scientific issues. Moreover, if the original case is not held in abeyance and EPA then denies the reconsideration petitions, the likely result would be inefficient, piecemeal and somewhat duplicative briefing on the original petitions for review of the Endangerment Finding and later petitions for review of the denial(s) of

reconsideration. Similarly, if the existing challenges to the Endangerment Finding are not held in abeyance, but instead are set for briefing (and potential argument) prior to a decision or decisions on the reconsideration petitions, some or all of this effort could be rendered moot (in whole or in part) by a decision to grant reconsideration.

10. No party will suffer any prejudice from the relatively modest abeyance of proceedings requested here.

11. First, as detailed above, during the abeyance period as proposed by EPA, any party retains its right to file a motion for stay or other procedural relief that it deems appropriate, so parties have an avenue to raise for the Court's consideration any tangible concerns of this sort that may arise during the abeyance period.

12. Second, as also noted above, following EPA's decision or decisions on the reconsideration petitions, the Agency has committed itself to working in good faith to develop motions to govern further proceedings that propose a schedule that is as reasonable, consolidated and expeditious for all parties as is practical under the circumstances.

13. Finally, there is no reason to believe that any Petitioner will suffer any harm from the modest delay in proceedings that will result from the requested



abeyance. The Endangerment Finding was issued pursuant to section 202(a) of the Act, 42 U.S.C. § 7521(a), which pertains specifically to regulation of emissions from new motor vehicles and new motor vehicle engines. None of the named Petitioners in this case manufactures new motor vehicles or new motor vehicle engines. Although none of the Petitioners has yet spelled out in any detail the arguments and evidence which it believes establishes standing in this case, the primary concern of the Industry, State, and interest group Petitioners appears to be the indirect effects that they perceive the Endangerment Finding will have on regulation of greenhouse gas emissions from stationary (as opposed to mobile) sources.<sup>4/</sup> However, it is clear from separate regulatory action taken by EPA that no regulation of greenhouse gas emissions from stationary sources will occur before January 2, 2011, at the earliest. See 75 Fed. Reg. 17,004 (April 2, 2010). This is five full months after July 30, 2010, the approximate date by which EPA intends to decide the reconsideration petitions.

14. As noted above, undersigned counsel for EPA has contacted all

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<sup>4/</sup> For this reason, there is at least a question regarding the standing of any of the Petitioners in this case to challenge the Endangerment Finding, and EPA certainly does not regard the standing of any Petitioner to be self-evident. EPA reserves its right to contest the standing of any Petitioners as appropriate in light of further supporting materials to be filed by the Petitioners to demonstrate their standing.

counsel for all Petitioners and proposed Intervenors in all consolidated petitions seeking their position on the relief sought in this motion. Due to the number of parties and proposed Intervenors these communications have been somewhat complicated. However, the position of the other parties on this motion, as best as the undersigned counsel for EPA has been able to determine, is as follows: All proposed Intervenor-Respondents have represented that they do not oppose the relief sought in this motion. EPA has not been informed of any Petitioner or proposed Intervenor-Petitioner that consents to this motion, and it appears that the majority of Petitioners and proposed Intervenor-Petitioners oppose this motion, although as noted below some have reserved taking a position at this time. Petitioner States Texas and Virginia have specifically stated that they oppose this motion. EPA has also been specifically informed that proposed Intervenor-Petitioner State of Alaska opposes this motion and that proposed Intervenor-Petitioner Twenty One Industry Associations, et al., does not take a position at this time and reserves its right to file a response. EPA has had some communications with the Petitioner State of Alabama on this motion but is not aware of Alabama's formal position on the motion. Petitioners Portland Cement Association and Ohio Coal Association have specifically stated that they oppose this motion. Petitioners in the following case numbers have not taken a position at this time and reserve

their rights to file a response: 10-1024 to 10-1026, 10-1042, and 10-1044. EPA has not received a response from Petitioners in No. 10-1049.

WHEREFORE, EPA requests that the Court issue an Order holding this case in abeyance until 14 days after an EPA decision or decisions on the pending reconsideration petitions, or August 16, 2010, whichever comes first, with motions to govern further proceedings due upon expiration of the abeyance period. EPA suggests that the motions to govern further proceedings be filed jointly if possible, but separately if agreement cannot be reached. EPA further suggests that the abeyance be without prejudice to any party's right to move the Court to lift the abeyance for the purpose of filing a stay motion pursuant to Fed. R. App. 18 or to seek other procedural relief, and any other party's, including EPA's, right to oppose the relief sought in any such motion.

Respectfully submitted,

IGNACIA S. MORENO  
Assistant Attorney General

/s/ Jon M. Lipshultz

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JON M. LIPSHULTZ  
U.S. Department of Justice  
Environment & Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-2191 (o)  
(202) 514-8865 (fax)  
E mail: [jon.lipshultz@usdoj.gov](mailto:jon.lipshultz@usdoj.gov)

DATED: April 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONDENT'S MOTION TO HOLD CASE IN ABEYANCE PENDING COMPLETION OF ADMINISTRATIVE PROCEEDINGS ON PETITIONS FOR RECONSIDERATION was today served electronically through the court's CM/ECF system on all registered counsel. An additional copy was served via first class mail on the following Petitioner in No. 10-1049:

William Orr  
c/o: Dr. Bonner Cohen  
1600 N. Oak St #617  
Arlington, VA 22209

/s/ Jon M. Lipshultz

DATED: April 15, 2010