ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1322

Coalition for Responsible Regulation, Inc., et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al., Intervenors

Consolidated with 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, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

OPENING BRIEF FOR STATE PETITIONERS TEXAS AND VIRGINIA ON DENIAL OF RECONSIDERATION OF THE ENDANGERMENT FINDING AND OF STATE PETITIONERS AND SUPPORTING STATE INTERVENORS ON ENDANGERMENT FINDING DELEGATION ISSUES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the State Petitioners and State Petitioner-Intervenors state as follows:

(A) Parties and *Amici*

PETITIONERS:

Petitions for Review Challenging the Endangerment Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009):

Case No. 09-1322: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Massey Energy Co.; Alpha Natural Resources, Inc.

Case No. 10-1024: National Mining Association

Case No. 10-1025: Peabody Energy Company

Case No. 10-1026: American Farm Bureau Federation

Case No. 10-1030: Chamber of Commerce of the United States of America

Case No. 10-1035: Southeastern Legal Foundation, Inc.; U.S. Representative John Linder (GA-7th); U.S. Representative Dana Rohrabacher (CA-46th); U.S. Representative John Shimkus (IL-19th); U.S. Representative Phil Gingrey (GA-11th); U.S. Representative Lynn Westmoreland (GA-3rd); U.S. Representative Tom Price (GA-6th); U.S. Representative Paul Broun (GA-10th); U.S. Representative Steve King (IA-5th); U.S. Representative Nathan Deal (GA-5th); U.S. Representative Jack Kingston (GA-1st); U.S. Representative Michele Bachmann (MN-6th); U.S. Representative Kevin Brady (TX-8th);

Langdale Co.; Langdale Forest Products Co.; Langdale Farms, LLC; Langdale Fuel Co.; Langdale Chevrolet-Pontiac, Inc.; Langdale Ford Co.; Langboard, Inc.–MDF; Langboard, Inc.–OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc.; Southeastern Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.

Case No. 10-1036: The Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II in his official capacity as Attorney General of Virginia

Case No. 10-1037: Gerdau Ameristeel Corp.

Case No. 10-1038: American Iron and Steel Institute

Case No. 10-1039: The State of Alabama

Case No. 10-1040: The Ohio Coal Association

Case No. 10-1041: The State of Texas; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Barry Smitherman, Chairman of the Texas Public Utility Commission

Case No. 10-1042: Utility Air Regulatory Group

Case No. 10-1044: National Association of Manufacturers; American Petroleum Institute; Brick Industry Association; Corn Refiners Association; National Association of Home Builders; National Oilseed Processors Association; National Petrochemical and Refiners Association; Western States Petroleum Association

Case No. 10-1045: Competitive Enterprise Institute; FreedomWorks Foundation; the Science and Environmental Policy Project

Case No. 10-1046: Portland Cement Association

Petitions for Review Challenging EPA's Denial of Reconsideration of the Endangerment Rule, 75 Fed. Reg. 49,556 (Aug. 13, 2010):

Case No. 10-1234: Coalition for Responsible Regulation, Inc.; Industrial Minerals Association – North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; Alpha Natural Resources, Inc.

Case No. 10-1235: Chamber of Commerce of the United States of America

Case No. 10-1239: Southeastern Legal Foundation; John Linder (U.S. Representative) (GA-7th); Dana Rohrabacher (U.S. Representative) (CA-46th); John Shimkus (U.S. Representative) (IL-19th); Phil Gingrey (U.S. Representative) (GA-11th); Lynn Westmoreland (U.S. Representative) (GA-3rd); Tom Price (U.S. Representative) (GA-6th); Paul Broun (U.S. Representative) (GA-10th); Steve King (U.S. Representative) (IA-5th); Jack Kingston (U.S. Representative) (GA-1st); Michele Bachmann (U.S. Representative) (MN-6th); Kevin Brady (U.S. Representative) (TX-8th); John Shadegg (U.S. Representative) (AZ-3rd); Marsha Blackburn (U.S. Representative) (TN-7th); Dan Burton (U.S. Representative) (IN-5th); 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&M Tank Lines, Inc.; Southeast Trailer Mart, Inc.; Georgia Agribusiness Council, Inc.

Case No. 10-1245: Peabody Energy Company

Case No. 10-1281: The State of Texas; Rick Perry, Governor of Texas; Greg Abbott, Attorney General of Texas; Texas Commission on Environmental Quality; Texas Agriculture Commission; Barry Smitherman, Chairman of the Texas Public Utility Commission

Case No. 10-1310: Pacific Legal Foundation

Case No. 10-1318: Competitive Enterprise Institute; FreedomWorks; Science and Environmental Policy Project

Case No. 10-1319: The Commonwealth of Virginia, *ex rel.* Kenneth T. Cuccinelli, II in his official capacity as Attorney General of Virginia

Case No. 10-1320: Utility Air Regulatory Group

Case No. 10-1321: Ohio Coal Association

RESPONDENTS: United States Environmental Protection Agency (Respondent in all consolidated cases) and Lisa P. Jackson, Administrator, United States Environmental Protection Agency (Respondent in Nos. 10-1030, 10-1044, 10-1049, and 10-1235).

PETITIONERS' INTERVENORS: Commonwealth of Kentucky, States of Alaska,[1] Florida, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Utah, Governor of Mississippi Haley Barbour, Portland Cement Association, 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 & 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, Ohio Manufacturers Association, Wisconsin Manufacturers and Commerce, Nebraska Chamber of Commerce and Industry, Arkansas State Chamber of Commerce, Associated Industries of Arkansas, and Mississippi Manufacturers Association

[1] The State of Alaska is incorrectly listed on the PACER docket as an "Intervenor for Respondent." Alaska moved for leave to intervene on behalf of petitioners on March 15, 2010 (Doc. No. 1235051), and the Court granted that motion on May 5, 2010 (Doc. No. 1243328).

RESPONDENTS' INTERVENORS: Commonwealth of Massachusetts, the States of California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the City of New York, Pennsylvania Department of Environmental Protection, Natural Resources Defense Council, Environmental Defense Fund, Sierra Club, National Wildlife Federation, Conservation Law Foundation, and Wetlands Watch

PETITIONERS' *AMICI CURIAE*: Mountain States Legal Foundation; National Federation of Independent Business Small Business Legal Center; Landmark Legal Foundation; and Atlantic Legal Foundation

RESPONDENTS' *AMICI CURIAE*: Union of Concerned Scientists and Great Waters Coalition have been granted leave to participate as *amici curiae* in support of respondents. On February 11, 2011, ClientEarth filed a motion for leave to participate as *amicus curiae*. That motion has not been resolved.

(B) Rulings Under Review

These petitions challenge **(1)** EPA's final rule entitled *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Rule"); and **(2)** EPA's denial of reconsideration of the Endangerment Rule: *EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 75 Fed. Reg. 49,556 (Aug. 13, 2010) ("Reconsideration Denial") as appealed by Texas and Virginia.

(C) Related Cases

There are numerous cases related to these consolidated cases. The Court has grouped these related cases into three separate groupings, as follows:

(1) Forty-two petitions for review consolidated under lead case **No. 10-1073**: seventeen petitions challenging EPA's "Triggering Rule," 75 Fed. Reg. 17,004 (April 2, 2010), and twenty-five petitions challenging EPA's "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010).

(2) Seventeen petitions for review consolidated under lead case **No. 10-1092**, challenging EPA's and NHTSA's "Auto Rule," 75 Fed. Reg. 25,324 (May 7, 2010).

(3) Twelve petitions for review consolidated under lead case **No. 10-1167**: three petitions challenging each of the following four EPA Rules: (a) *Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 43 Fed. Reg. 26,380 (June 19, 1978); (b) *Part 52 – Approval and Promulgation of State Implementation Plans: 1977 Clean Air Act Amendments to Prevent Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978); (c) *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52,676 (Aug. 7, 1980); and (d) *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Baseline Emissions Determination; Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects*, 67 Fed. Reg. 80,186 (Dec. 31, 2002).

Pursuant to Rule 28(a)(1)(C) of the Rules of this Court, Petitioners and Petitioner-Intervenors state that Case No. 10-1049, *Orr v. EPA*, challenges EPA's Endangerment Rule, 74 Fed. Reg. 66,496. The Court severed that case and dismissed it for lack of prosecution on September 9, 2010, reopened it on January 12, 2011, and that case continues to proceed separately from these consolidated cases. On March 14, 2011, the Court ordered the petitioner in that case to show cause why his petition should not be dismissed. Petitioner's response to that show-cause order is due on July 13, 2011.

(D) Prior Procedural Rulings

On November 16, 2010, this Court ordered that these consolidated cases be designated as complex. *See* Order, *Coalition for Responsible Regulation v. EPA*, No. 09-1322, Doc. No. 1277636 (Nov. 16, 2010). Through Orders issued December 10, 2010 [Doc. No. 1282558] and March 18, 2011 [Doc. No. 1299003], this Court ordered that these consolidated cases, as well as the three groupings of related cases listed above, be scheduled for oral argument before the same panel. On September 15, 2010, the State of Texas [Doc. # 1266089] and another group of petitioners [Doc. No. 1266084] filed motions asking this Court

to stay the Endangerment Rule and other related rules. The Court denied those motions on December 10, 2010 [Doc. No. 1282558].

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GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
CCSP	Climate Change Science Program
Coalition PR	Petition for Reconsideration of Coalition for Responsible Regulation, Inc., et al.
CRU	Climate Research Unit at the University of East Anglia
GHG's	Green House Gases
IPCC	Intergovernmental Panel on Climate Change
Linder PR	Petition for Reconsideration of United States Representative John Linder, et al.
NGIPR	Petition for Reconsideration of the Nongovernmental Panel on Climate Change, et al.
NRC	National Research Council
OCPR	Petition for Reconsideration of the Ohio Coal Association
Peabody PR	Petition for Reconsideration by Peabody Energy Company
PLFRP	Pacific Legal Foundation's Petition for Reconsideration
RTP	Response to Petitions
TPR	Texas Petition for Reconsideration

TSD	EPA Technical Support Document for Endangerment Finding
UEA	University of East Anglia
USGCRP	U.S. Global Change Research Program
VPR	Virginia Petition for Reconsideration

JURISDICTIONAL STATEMENT

The Supreme Court found in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the EPA had both the jurisdiction and the obligation to decide "whether sufficient information exists to make an endangerment finding" with respect to CO_2. 549 U.S. at 534. The EPA published its Endangerment Finding on December 15, 2009. Endangerment and Cause or Contribute Findings, 74 Fed. Reg. at 66,496. Petitions for Review of that finding were permitted "within sixty days from the date notice" was published in the Federal Register. 42 U.S.C. § 7607(b)(1).[2] In addition to direct Petitions for Review, if a person raising an objection to agency action can demonstrate that "the grounds for . . . objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). The comment period of the Endangerment Finding closed on June 23, 2009. EPA's

[2] All cited statutes appear in the Appendix bound with this brief.

Denial of the Petitions to Reconsider, 75 Fed. Reg. at 49,556, 49,560 (Aug. 13, 2010). On November 17, 2009 internal emails and documents from the Climate Research Unit (CRU) at the University of East Anglia (UEA) became available to the public. These documents were sufficiently damaging to the data upon which the EPA relied in making its Endangerment Finding that the release is now most commonly known as "climategate." Ten petitions for reconsideration were timely filed within the period for appeal of the Endangerment Finding, including those of Texas and Virginia (Petitions for Reconsideration). The EPA considered and then denied them. 75 Fed. Reg. at 49,957 (Aug. 13, 2010). Ten timely petitions for review were filed, including those of Texas (Doc. 1265314) and Virginia (Doc. 1271500). Therefore this Court has jurisdiction under 42 U.S.C. § 7607(b)(1).

Section 307 of the Clean Air Act grants this Court exclusive jurisdiction over petitions for review that challenge final actions of the EPA Administrator, *see* 42 U.S.C. § 7607(b)(1) (explaining that a "petition for review of . . . final action taken[ ] by the Administrator under [the CAA] may be filed only in the United States Court of Appeals for the District of Columbia"), and the EPA's endangerment

finding qualifies as a final agency action. Virginia filed its petition for review on February 8, 2010 and Texas filed its petition for review on February 16, 2010, within the 60-day deadline for challenging the Endangerment Finding. *See* 74 Fed. Reg. at 66,496 (appearing in the Federal Register on December 15, 2009).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Did Texas, Virginia and other Petitioners demonstrate that there was evidence of central relevance to the outcome of the rule not available during the comment period such that the Administrator was obligated to convene a proceeding for reconsideration with procedural rights of notice and comment?
2) Did the EPA correctly apply the standard for demonstrating central relevance?
3) Did the EPA err when it found the objections material enough to require resort to extensive new evidence outside of the record while denying the rights of notice and comment?
4) Did the EPA err initially and on Petition for Reconsideration by delegating its Statutory Authority to outside entities?

STATEMENT OF THE CASE

In addition to the proceedings described above in the Jurisdictional Statement, when the EPA denied rehearing it did so in partial reliance on "a 3-volume, roughly 360-page Response to Petitions (RTP) document" replete with information not otherwise in the record and not subject to notice or comment. 75 Fed. Reg. at 49,956; RTP. The EPA also relied upon investigations conducted by third parties:

> Inquiries from the UK House of Commons, Science and Technology Committee, the University of East Anglia, Oxburgh Panel, the Pennsylvania State University, and the University of East Anglia, Russell Panel, all entirely independent from EPA, have examined the issues and many of the same allegations brought forward by the petitioners as a result of the disclosure of the private CRU e-mails. These inquiries are now complete. Their conclusions are in line with EPA's review and analysis of these same CRU e-mails.

75 Fed. Reg. at 49,957. Rather than reinforcing the EPA's position, these studies emphasize the danger of agency action uniformed by notice and comment procedures. Not one of these reports even dealt with the central subject of the reconsideration petitions: does climategate undercut the reliability of the science upon which the EPA relied?

For example, the House of Commons Science and Technology Committee published a report entitled "The disclosure of climate data from the Climatic Research Unit at the University of East Anglia" on March 31, 2010, but the committee specifically declined to review the scientific validity of climate science. HC Report at 4, 46.

A nine-page "Report of the International Panel set up by the University of East Anglia to examine the research of the Climatic Research Unit" was issued on April 12, 2010. However, this report only evaluated eleven articles, selected in part by Phil Jones, who was a target of the investigation, and found merely that there was no scientific impropriety demonstrated with respect to *those* articles. The report also stated, "We cannot help remarking that it is very surprising that research in an area that depends so heavily on statistical methods has not been carried out in close collaboration with professional statisticians." UEA Report at 5.

On June 4, 2010, a report was issued by the Pennsylvania State University entitled "RA-10 Final Investigation Report involving Dr. Michael E. Mann." The committee employed tortured logic in concluding "that Dr. Michael E. Mann did not engage in, nor did he

participate in, directly or indirectly, any actions that seriously deviated from accepted practices within the academic community for proposing, conducting, or reporting research, or other scholarly activities." This conclusion was based on the assertion that Mann must have acted properly because he received many grants and published numerous articles. Penn. State Report at 17-19. The Atlantic magazine has described this pseudo-syllogism as being "difficult to parody."[3]

A UEA committee chaired by Sir Muir Russell issued a report entitled "The Independent Climate Change E-mails Review, July 2010." It should be noticed that this report suggests that climategate has produced a recognition at UEA that the interaction between science and the IPCC has the potential to corrupt science while misleading both the public and their leaders through the systemic suppression of the extent of uncertainty in the science. The committee also found "a consistent pattern of failing to display the proper degree of openness, both on the part of the CRU scientists and on the part of the UEA," Russell Report at 11; "that e-mails might have been deleted in order to make them

[3] Clive Crook, *Climategate and the Big Green Lie*, The Atlantic, http://www.theatlantic.com/politics/archive/2010/07/climategate-and-the-big-green-lie/59709/.

unavailable should a subsequent request be made for them," *Id.* at 14; and that peer review "should not be overrated as a guarantee of the validity of individual pieces of research." *Id.* at 15. *See also id.* at 64 ("Peer review is not a 'gold standard' that ensures validity, as some claim."). With respect to the communication of scientific uncertainty, the committee wrote:

> Climate Science is an area that exemplifies the importance of ensuring that policy makers . . . understand the limits on what scientists can say and with what degree of confidence. Statistical and other techniques for explaining uncertainty have developed greatly in recent years, and it is essential that they are properly deployed. But equally important is the need for alternative viewpoints to be recognized in policy presentations, with a robust assessment of their validity, and for the challenges to be rooted in science rather than rhetoric.

Id. at 14-15. The committee ended its Executive Summary by "welcom[ing] the IPCC's decision to review its processes, . . . stress[ing] the importance of capturing the range of viewpoints and reflecting appropriately the statistical uncertainties surrounding the data it assesses." *Id.* at 16. No review of the CRU science as a whole was undertaken by the committee and no view on that subject was expressed. *Id.* at 23, 36. However, the references in the report to uncertainty and to rhetoric have been misunderstood by the EPA

because the agency improperly proceeded without the benefit of notice and comment.

In proceeding in that fashion, the EPA failed to appreciate the probability that the Russell report in its discussion of uncertainty and rhetoric was obliquely recognizing that at least some climate scientists understand that the resources at their disposal are too uncertain to demonstrate climate change employing the methods of normal science. As a result, some climate scientists accept the methods of "post-normal" science.

Mike Hulme of the University of East Anglia has written a paper with Martin Mahony raising the question whether "the IPCC is an example of how the philosophy of post-normal science is reflected in practice." Mike Hulme & Martin Mahony, *Climate Change: what do we know about the IPCC?*, for *Progress in Physical Geography*, Apr. 12, 2010, at 9 (citing Funtowicz & Ravetz, 1993), *available at* http://mikehulme.org/wp-content/uploads/2010/01/Hulme-Mahony-PiPG.pdf. Funtowicz and Ravetz, the inventors of Post Normal Science, have described it in this fashion:

> In the sorts of issue-driven science relating to the protection of health and the environment, typically facts are uncertain,

> values in dispute, stakes high, and decisions urgent. The traditional distinction between 'hard', objective scientific facts and 'soft', subjective value-judgments is now inverted. All too often, we must make hard policy decisions where our only scientific inputs are irremediably soft. The requirement for the "sound science" that is frequently invoked as necessary for rational policy decisions may affectively conceal value-loadings that determine research conclusions and policy recommendations. In these new circumstances, invoking 'truth' as the goal of science is a distraction, or even a diversion from real tasks. A more relevant and robust guiding principle is quality, understood as a contextual property of scientific information.[4]

Scientific quality under this theory is supposedly achieved through consensus in a peer community. *Id.* at 7, 9-11. Mike Hulme, who was a lead author for the IPCC Third Assessment Report, personally believes that Climate Science is and should be post-normal.[5] Without notice and comment proceeding as required by law an agency risks going badly astray when it picks and chooses among new evidence and takes it at face value.

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[4] S. Funtowicz & J. Ravetz, *Post Normal Science*, Feb. 2003, at 1-2, *available at* http://www.ecoeco.org/pdf/pstnormsc.pdf.

[5] http://www.guardian.co.uk/society/2007/mar/14/scienceofclimatechange.climatechange.

STATEMENT OF FACTS

The Clean Air Act sets forth two requirements for reconsideration. These requirements speak to timing and relevance. Section 307(d)(7)(B) of the Act provides *inter alia*:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

42 U.S.C. § 7607(d)(7)(B). Here, the EPA denied reconsideration even though petitioners objected on grounds that arose after the public comment period had closed and that were of "central relevance" to the outcome of the Endangerment Finding.

Petitioners cited copious amounts of new information that became public after the endangerment finding's publication.[6] The climategate emails support arguments that the IPCC data upon which EPA relied

[6] *See* Petitions for Reconsideration.

were manipulated,[7] critical IPCC records were lost or destroyed,[8] the peer review process was corrupted and dissent suppressed,[9] IPCC personnel had conflicts of interest,[10] and the EPA's reliance on IPCC data ensured that the process underlying the Endangerment Finding lacked transparency.[11] The Rehearing Petitions also identified mistakes that bring the reliability of the underlying data into question. For example, EPA relied on an IPCC report that purported to "distill [IPCC's] most important science into a form accessible to politicians and

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[7] Texas Pet. for Recons. ("TPR") at 15-17; Pacific Legal Foundation's Pet. For Recons. ("PLFPR") at 18, A 4-7, A 10-21; Pet. For Recons. of Peabody Energy Company ("Peabody PR") at IV 18-35; Pet. For Recons. of the Nongovernmental International Panel on Climate Change, et al. ("NGIPPR") at 2-5; Pet. For Recons. of Coalition For Responsible Regulation, Inc., et al. ("Coalition PR") at 7-9, 14-15; Pet. For Recons. of The Ohio Coal Association ("OCPR") at 4-5; Pet. For Recons. of U.S. Representative John Linder, et al. ("Linder PR") at 1-2, 5-18; Third Amendment to Linder PR at 2-14; Fifth Amendment to Linder PR at 8-9; Virginia Pet. For Recons. VPR at 2; Pet. For Recons. of Arthur G. Randol, III, Ph.D.

[8] TPR at 17; PLFPR at 19, A 10-12; Peabody PR at V 8-13, VI 22-31; NGIPPR at 5-6; Coalition PR at 10-11.

[9] TPR at 23-26; PLFPR at 17, A 1-4; Peabody PR at III 7-10, VII 1-12, VIII 1-16; NGIPPR at 6; Coalition PR at 23-26; Supplement to OCPR at 7-8; Linder PR 18-24; Third A.

[10] TPR at 26; Third Amendment to Linder PR at 30-31.

[11] TPR at 28-36; PLFPR at 18-19, A. 7-10; Peabody PR at VI 1-41.

policy makers." In it, IPCC claimed that anthropogenic GHGs could cut many African countries' yields from rain-fed agriculture in half. The source of this alarmist conclusion was a 2003 policy paper from a Canadian think tank.[12] Climategate revealed other significant errors and misstatements that EPA failed to detect and which the public could not comment on before the finding's publication. Errors identified in the timely petitions for reconsideration included the percentage of the Netherlands lying below sea level, errors in the projection of glacier melt in the Himalayas, projected Amazon rainforest die-off, and projections of more violent storms.[13]

In adopting the Endangerment Finding, the Administrator viewed the IPCC, the NRC, and the USGCRP as representing independent,

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[12] Peabody PR at VII-16-18; NGIPPR at 8-9.

[13] *See* Peabody PR at VII-13-16 (Himalayan glaciers), VII-18-19 (Amazonian rainforests); VII-21 (Netherlands below sea level); NGIPPR at 9-10 (severe storms); Supplement to NGIPPR at 3 (severe storms); OCRP at 6 (Himalayan glaciers); Supplemental Petition to OCRP at 7 (same); Third Amendment to Linder PR at 14-22 (extreme events) (Himalayan glaciers) 22-28 (African Crop Yields) (Amazon rainforests); Fifth Amendment to Linder PR at 9-10 (severe storms). See also EPA Response to Petitions ["RTP"] Vol. 2 at 8-9 (regarding erroneous data related to the percentage of the Netherlands below sea level); *id.* at 9-12 (regarding serious errors in projections for the melting of Himalayan glaciers); *id.* at 21-23 (validity of Amazonian rainforest dieback projections).

mutually reinforcing data. As the petitions argue, the other data sets are heavily dependent on the IPCC and the work of that body is derived from a small number of collaborative "climate scientists."[14]

Ever since 1980, EPA has consistently and correctly interpreted the rehearing standard of CAA § 307(d)(7)(B), codified at 42 U.S.C. § 7607(d)(7)(B), as a heightened relevancy standard. Specifically, EPA grants reconsideration when new evidence would "provide substantial support *for the argument* that the regulation should be revised." *See* Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 Fed. Reg. at 81,653 n.3 (Dec. 11, 1980). *See* Denial of Petition for Reconsideration of National Ambient Air Quality Standards for Particulate Matter, 53 Fed. Reg. at 52,698 (Dec. 29, 1988); Prevention of Significant Deterioration and Non-Attainment New Source Review, Denial of Petition to Reconsider, 68 Fed. Reg. at 63,021 (Nov. 7, 2003) (codified at 40 CFR pts. 51, 52) (emphasis added). Consistent with its past practice, EPA announced that it would apply its usual standard to

[14] TPR at 12-15; PLFPR at 3-4, 25-29; Peabody PR at III 7-14, VII 1-12; VPR at 2.

the petitions for reconsideration of the endangerment finding. 75 Fed. Reg. at 49,561.

In fact, however, EPA applied a very different outcome-determinative standard in denying the petitions. Throughout its argumentative, 360-page RTP, EPA did not evaluate whether the matters at issue "provide[d] substantial support" for revision of the Endangerment Finding. Instead, EPA expressly rejected the objections on the merits without notice and comment, stating that petitioners' arguments did not change EPA's own conclusions. 75 Fed. Reg. at 49,569. This was tantamount to an informal reconsideration without public participation. And because the basis for the Endangerment Finding has been supplemented, there has been a *de facto* revision.

Because the reconsideration petitioners were required to demonstrate only "substantial support for an argument" giving rise to a likelihood of revision, it is beside the point whether EPA agrees or disagrees with that argument on the merits. Nonetheless, merits-based

evaluations of new evidence appear throughout the three volumes of the RTP.[15]

In addition, the entire point of the CAA's reconsideration provision is to require EPA to determine the relevance of new information submitted by **petitioners** which **petitioners** believe is inconsistent with EPA's basis for rulemaking. Here, EPA violated the Act by relying on new material: (1) never commented upon by the public, (2) added to the docket by EPA for the first time after the comment period, and (3) created, in some instances, after the Endangerment Finding was finalized.

Section 307(d)(4)(B) requires that "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." 42 U.S.C. § 7607(d)(4)(B). Once this process is complete, section 307(d)(6)(C) states that the "**promulgated rule may not be based (in**

[15] 75 Fed. Reg. at 49,556, 49,566, 49,570, 49,575, 49,577, 49,580, 49,582; RTP Preface at 2, 3, Vol. 1 at 13, 21, 23, 29-30, 35-37, 39, 45-47, 50, 67-69, 76, 91-103, 108-09, 111-12, 114, 118-19, 122-25, 127-29, 136, 147-48, 150, Vol. 2 at 6-10, 14-16, 19-25, 27, 29, 34-35, 39, 42, 52-53, 58-60, Vol. 3 at 18, 26, 31-33, 38-39, 50, 52, 54, 59, 61, 67, 76-83, 87, 89-95, 99, 101-02, 107, 110-11.

part or in whole) on any information or data which has not been placed in the docket as of the date of such promulgation" 42 U.S.C. § 7607(d)(6)(C) (emphasis added). This requirement is inconsistent with a merits rejection of the new information added to the docket by EPA post promulgation without notice or comment. Although the EPA concluded that the "[t]he petitioners do not provide any substantial support for the argument that the Endangerment Finding should be revised," 75 Fed. Reg. at 49,558, EPA in fact revised the basis of the Endangerment Finding when it published its denial of reconsideration. Had the required notice and comment been provided, the EPA would have inevitably further revised the basis for the Endangerment Finding when it addressed the comments.

EPA added more than four hundred documents to the record after the close of the comment period, and cited more than fifty of these documents in its RTP. In fact, EPA not only added significant amounts of material to the docket late, it heavily relied on many of these materials in denying reconsideration. *See* n.11 supra.

In addition to the various merits-type discussions of Petitioners' submissions, the EPA heavily relied on a National Research Council

("NRC") study entitled "Advancing The Science of Climate Change" to reinforce the now questioned IPCC study. EPA justified its reliance on the wholly new NRC study due, in part, to the fact that it was "not aware of any published criticisms" of the study. RTP Vol. 1 at 50. Of course, there were no published criticisms of the NRC study specifically because it is new, and there has not been time to allow for review and criticism of the study. EPA's decision to deny reconsideration simply insulates from criticism both that report and all other new information added to the docket without the opportunity for public comment.

While EPA claims that it has internally reviewed the climategate documents, this review has not been subject to public comment either. The whole purpose of the Act's requirement that reconsideration proceed under "the same procedural rights as would have been afforded had the information been available at the time the rule was proposed . . . ." is to avoid just such a situation. In fact, procedurally and institutionally, an agency is incapable of knowing and deciding scientific matters in the absence of notice and comment. *See Kennecott Corp.*, 684 F.2d 1007, 1018-19 (D.C. Cir. 1982).

As a result of EPA's denial of reconsideration, the record currently before this Court is incomplete. The public has had no opportunity to evaluate EPA's analysis of the climategate and other new materials or to test its conclusions. More importantly, this Court does not have the benefit of EPA's response to public comments to guide its assessment of the merits of EPA's decision-making.[16]

In the endangerment finding, EPA justified its use of third-party synthesis and assessment reports as "allow[ing] EPA to rely on the best science." 74 Fed. Reg. at 66,511. Now, however, EPA argues that it was entitled to deny reconsideration in part because other institutions found "no evidence of scientific misconduct or intentional data manipulation" by the climate researchers on whom EPA so extensively relied. 75 Fed. Reg. at 49,558. Informal reconsideration without notice

[16] For example, if EPA had granted reconsideration and the record had been reopened, the agency could have considered a paper recently produced by Dr. Ross McKitrick of the University of Guelph. *See* Petition for Data Correction of Peabody Energy Company at 3 (July 30, 2010) and attached article, "An Overview of Surface Temperature Data Products," (July 26, 2010), *available at* http://www.epa.gov/quality/informationguidelines /documents/10008.pdf. This paper concludes that all the temperature record datasets upon which the Endangerment Finding is based share the same core data, whose deficiencies, when "spliced together," produce "a margin of error larger than the trend line on which EPA relies."

or comment on a "found not to be based on scientific misconduct or intentional data manipulation" standard is nowhere authorized by the Clean Air Act.

With respect to delegation issues in the Endangerment Finding appeal, the Secretary improperly delegated her obligations to Foreign entities who did not adhere to American scientific and legal standards. This conclusion is amply demonstrated in the reconsideration appeal.

SUMMARY OF ARGUMENT

The answer to the epistemological question – how something is known – has been clearly answered in the courts for federal regulatory agencies. Those agencies are deemed to have substantive expertise. Procedurally, that expertise is engaged through back and forth comment with commentors and objectors. Once the EPA found the objections of Petitioners material enough to require a 360 page response in three volumes heavily relying on new data not previously in the record, it should have found the central relevance standard satisfied and convened a notice and comment rehearing. Its failure to do so was reversible error.

With respect to delegation issues in the Endangerment Finding appeal, the Administrator's decision to delegate her obligations to other entities is arbitrary and capricious and contrary to law.

STANDING

Pursuant to D.C. Cir. Rule 28(a)(7), Texas and Virginia state that standing exists in the reconsideration appeal because they have been procedurally injured by being deprived of participation during reconsideration and of the right to comment upon the new evidence that EPA relied upon in denying their motions for reconsideration. The violation of a procedural right provided by Congress relaxes the redressability prong of standing, excusing the States from having to demonstrate that reconsideration will succeed. *Summers v. Earth Island Institute*, 555 U.S. 483, 129 S. Ct. 1142, 1151 (2009). The concrete interest associated with denial of those procedural rights is the desire of those States not to regulate stationary sources that EPA contends that they must regulate under the PSD Interpreting Memo (Johnson Memo). Although Texas, Virginia and other States have separately appealed this requirement, it could not stand without the Endangerment Finding. Texas and Virginia also have standing as

emitters that will inevitably be regulated even under the Tailoring Rule if the Endangerment Finding stands. Finally, Texas and Virginia purchase motor vehicles whose cost will be increased by regulation under the Tailpipe Rule if that rule stands; which it cannot absent the Endangerment Finding. *See* Tex. Gov't Code Ann. § 2171.101 *et seq*., § 2158.001 *et seq*.; Tex. Transp. Code § 721.001 *et seq*; Va. Code Ann. § 2.2-120; § 2.2-1176.

With respect to standing on the Endangerment Finding appeal, Petitioner States and their supporting Intervenors have the same substantive injuries as identified for standing with respect to reconsideration. *See also* Opening Brief of State Petitioners at 13-16.

ARGUMENT

Standard of Review

Reconsideration

Although it is a question of first impression, 42 U.S.C. § 7607(d)(8) seemingly applies here because denial of reconsideration is governed by 42 U.S.C. § 7607(b)(1) as provided by 42 U.S.C. § 7607(d)(7)(B). Because the Endangerment Finding was docketed as a rulemaking under 42 U.S.C. § 7607(d)(1)(K), it should be deemed a rule for purposes

of 42 U.S.C. § 7607(d)(8). That provision authorizes this Court to invalidate a rule based upon procedural errors where the errors are "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been substantially changed if such errors had not been made." But "there is less to § 307(d)'s requirement for procedural reversal than meets the eye." *Small Refiner Lead Phase-Down Task Force v. USEPA*, 705 F.2d 506, 521 (D.C. Cir. 1983). "At a minimum, failure to observe the basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well." *Id.* at 523. And reliance on data for which an objector has had no opportunity for comment violates "both the structure and spirit of section 307." *Id.* at 540 (citing *Sierra Club v. Costle*, 657 P.2d 298, 396-400 (D.C. Cir. 1980); *Kennecott Corp.*, 684 F.2d at 1019)). If the Endangerment Finding is not deemed a rule for purposes of § 7607(d), then it was adopted in a rulemaking for purposes of APA § 551(4), rendering any prejudicial procedural error reversible. APA § 706. A procedural error is prejudicial for purposes of APA § 706(D) where there is "a *possibility* that the error would result in *some*

change in the final rule." *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 521.

Endangerment Appeal Delegation Issues

The duties of the EPA are statutory and generally may not be delegated to outside parties. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). Doing so here omitted necessary data from the record contrary to statute and led to a finding that fails the overarching arbitrary and capricious standard of review. See 42 U.S.C. § 7607(d)(9). *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

A. The Administrator was obligated to grant reconsideration because Petitioners demonstrated that their timely objections were based on evidence of central relevance to the outcome of the endangerment finding.

For over thirty years, the EPA has consistently held that a timely motion for reconsideration is due to be granted where new evidence would "provide substantial support for the argument that the regulation should be revised." *See* 45 Fed. Reg. at 81,653; 53 Fed. Reg. at 52,698; 68 Fed. Reg. at 63,021. It is difficult to maintain that this standard has not been met when objections lead the agency to produce a 360 page

three volume supplement to the Endangerment Finding. Nor can the agency plausibly say that the new information is unlikely to cause it to revise its action. *See West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004). Because the EPA, for foreign diplomatic reasons, issued the Endangerment Finding as a free standing document unassociated with any implementing rule, any objection cogent enough to require a response relying on extensive new extra-record evidence is not merely likely to lead to a revision, it is itself a *de facto* revision. An Endangerment Finding whose supporting bases have to be supplemented and restated to adequately respond to objections triggers reconsideration under notice and comment standards. This is the plain meaning of 42 U.S.C. § 7607(d)(7)(B).

B. The Administrator erroneously applied the central relevance standard.

The EPA departed from its clear and consistent use of its heightened relevance standard without adequate explanation when it denied reconsideration based upon its conclusion that the data supplied by Petitioners did not change its mind on the promulgation of an Endangerment Finding. The Endangerment Finding was promulgated as the first step in rulemaking under Section 202(a) of the Clean Air

Act, codified at 42 U.S.C. § 7521. *See* 74 Fed. Reg. at 66,496. As a consequence, it was required to be accompanied by "a statement of basis and purpose," as well as "a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." 42 U.S.C. § 7607(d)(6). In no event could the Endangerment Finding "be based (in part or whole) on any information or data which ha[d] not been placed in the docket as of the date of such promulgation." 42 U.S.C § 7607(d)(6). After promulgation on December 15, 2009, any revision to the statement of basis and purpose or to the response to comments was a revision requiring the same process as that required in the initial promulgation. 42 U.S.C. § 7607(d)(1)(K). *See Donner Hanna Coke Corp. v. Costle*, 464 F. Supp. 1295 (W.D.N.Y. 1979) (EPA enforcement officials cannot circumvent rulemaking requirements of 42 U.S.C. § 7607 by making substantial changes in testing methods without notice and hearing).

Clearly, the EPA misapplied the central relevance and likelihood of revision test because, in purporting to deny reconsideration, the EPA did, in fact, revise the statement of basis and purpose and response to comments. This is not only an arbitrary and capricious violation of the

EPA's own standard, but is also a facial violation of the Clean Air Act, or of the APA if the Endangerment Finding is not considered a rule for purposes of 42 U.S.C. § 7607(b)(8).

C. The Administrator erred by making determinations without notice or comment.

42 U.S.C. § 7607(d)(3) forbids the revision of any rule without notice and comment and limits the basis for such revision to data, information, and documents contained in the docket when the revision is published. 42 U.S.C. § 7607(d)(7)(B) requires any reconsideration to be conducted with rights of notice and comment. 42 U.S.C. § 7607(h) declares, with exceptions not here relevant, a congressional intent, "consistent with the policy of the Administrative Procedures Act [5 U.S.C. §§ 551 *et seq*.]," that the Administrator "ensure a reasonable period for public participation of at least 30 days." 42 U.S.C. § 7607(d)(6)(A) provides that any promulgated rule "shall be accompanied by (i) a statement of basis and purpose." A revision of the statement of basis and purpose is therefore a revision requiring notice and comment. The Endangerment Finding itself is nothing more than an overarching statement of basis and purpose intended to support all subsequent rulemaking on the subject.

> To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the plausible alternatives to the rule it has adopted.

1 Richard J. Pierce, Jr., *Administrative Law Treatise* 593 (Wolters Kluwer, 5th ed. 2010). "Failure to fulfill one of these judicially prescribed requirements of a 'concise general statement of basis and purpose' has become the most frequent basis for judicial reversal of agency rules." *Id.* Supplementing the statement of basis and purpose with a 360 page response to objections is a revision that violates this scheme when conducted without rights of notice and comment.

D. EPA impermissibly delegated its statutory authority to outside entities.

EPA also violated the CAA when it delegated its judgment to outside groups. Congress empowered EPA to decide whether, *in its judgment*, pollutants emitted from motor vehicles endanger public health and welfare. 42 U.S.C. § 7521(a)(1). But rather than

independently assessing the data as required by the CAA, EPA impermissibly delegated its judgment to outside organizations.

By its own admission EPA placed "primary and significant weight on the[] assessment reports" of the IPCC the NRC and the USGCRP in making the endangerment finding. Endangerment Finding, 74 Fed. Reg. at 66,511. And rather than assessing the actual scientific data, these reports served as EPA's "primary scientific and technical basis" for its endangerment decision. *Id.* at 66,510; *see also* EPA Technical Support Document for Endangerment Finding (TSD) (Dec. 7, 2009), (explaining that the document's data and conclusions "are primarily drawn from the assessment reports of the Intergovernmental Panel on Climate Change (IPCC), the U.S. Climate Change Science Program (CCSP), the U.S. Global Change Research Program (USGCRP), and the National Research Council (NRC)"). However, to avoid an arbitrary decision, "*the agency* must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v.*

United States, 371 U.S. 156, 168 (1962)) (emphasis added). EPA failed to do so here.

Federal administrative agencies generally may not delegate their authority to outside parties. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). An agency may look to outside groups for advice and policy recommendations, as EPA does in proposed rulemakings, *e.g.* Advanced Notice of Proposed Rulemaking for Endangerment Finding, 73 Fed. Reg. at 44,354 (July 30, 2008), but delegation is improper because "lines of accountability may blur, undermining an important democratic check on government decision-making." *U.S. Telecom* Ass'n, 359 F.3d at 565-66, 568. Because outside sources do not necessarily "share the agency's 'national vision and perspective,'" the goals of the outside parties may be "inconsistent with those of the agency and the underlying statutory scheme." *Id.* at 566.

EPA's wrongful delegation in this case powerfully illustrates those dangers. EPA relied on the judgment of a number of outside groups, but the IPCC's Fourth Assessment Report: Climate Change 2007 was accorded special weight. Not only did EPA cite it more often than the others, but the USGCRP—another of EPA's major sources—also relied

heavily on the IPCC Report for its "own" findings. *See* Endangerment Finding, 74 Fed. Reg. at 66,511 (noting that the "USGCRP incorporates a number of key findings from the [IPCC Report]" including "the attribution of observed climate change to human emissions of greenhouse gases, and the future projected scenarios of climate change for the global and regional scales"). Despite the serious deficiencies of the IPCC process demonstrated in the reconsideration petitions and the fact that scientific data underlying the assessments is not in the administrative record, in violation of the CAA, s*ee* 42 U.S.C. § 7607(d)(3) ("All data, information, and documents . . . on which the proposed rule relies shall be included" in the rulemaking docket.), the EPA used the same assessments again to unilaterally reject reconsideration without notice or comment. 75 Fed. Reg. at 49,565-49,566. *See National Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976) (explaining that "judicial review is meaningless where the administrative record is insufficient to determine whether the action is arbitrary and capricious"). In sum, EPA's delegation was unreasonable and illegal.

E. EPA's reasons for relying on the IPCC were undermined by the Climategate data provided in the reconsideration petitions which data compel the conclusion that the Endangerment Finding fails to meet essential Information Quality Standards such that reconsideration is required.

The Administrator rationalized her reliance on the "assessment literature" by claiming that EPA carefully reviewed the processes by which this literature was prepared and confirmed that these processes met the standards to which EPA is subject in preparing scientific reports. 74 Fed. Reg. at 66,511-13, TSD at 4-5, EPA Response to Public Comments ("RTC") at 1-2 (based on its review of IPCC procedures, "EPA has determined that the approach taken provided the high level of transparency and consistency outlined by EPA's" information quality requirements). Based on this review, the Administrator concluded that her reliance on this literature "is entirely reasonable and allows EPA to rely on the best available science." 74 Fed. Reg. at 66,511. (footnote omitted).

As discussed in the previous section, even if IPCC's scientific procedures were of sterling quality, the Administrator still would be required to exercise her own judgment on climate science, and this she

did not do. But Climategate revealed the quality of IPCC's science was anything but sterling, and there is a yawning gap between the way IPCC operated in reality compared with the way EPA says it did based on its review of IPCC's written procedures. Indeed, by relying so heavily on the IPCC, EPA failed to observe basic information quality standards to which it is subject.

1. Failure to Ensure that the Information Is "Accurate, Reliable and Unbiased"

EPA is subject to rigorous data quality obligations under the Information Quality Act ("IQA"), Pub. L. No. 106-554, 114 Stat. 2763 (2000) and EPA's IQA Guidelines, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (Oct. 2002).[17] Because the Endangerment Finding meets EPA's definition of "influential information" (information having "a clear and substantial impact (i.e., potential change or effect) on important public policies or private sector decisions," *id.* at 19), the Endangerment Finding is "subject to a higher degree of quality (for example, transparency about

[17] The Guidelines are available at http://epa.gov/quality/informationguidelines/documents/ EPA_InfoQualityGuidelines.pdf.

data and methods) than [other] information…." *Id.* at 20. The substance of the information underlying the Endangerment Finding must be "accurate, reliable and unbiased," requiring use of "the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data)." *Id.* at 22.

As demonstrated in detail in the petitions for reconsideration, however, the IPCC reports frequently relied on unscientific "studies" that were prepared by advocacy groups such as the World Wildlife Fund ("WWF"), Greenpeace, and other similar groups. This led, among other numerous examples, to the IPPC having to retract its embarrassing assertion, which was relied on in the Endangerment Finding, that Himalyan glaciers would melt by 2035, which turned out to be based on faulty information from an unpublished, unpeered review study by an advocacy organization. The IPCC had been aware of the data problems in the study but decided to rely on it anyway for public relations

impact.[18] The coordinating Lead Author of that section of the IPCC report stated:

> "It related to several countries in this region and their water sources. *We thought that if we can highlight it, it will impact policy-makers and politicians and encourage them to take some concrete action.* It had importance for the region, so we thought we should put it in."[19]

2. Reliance on IPCC Undermined Public Comment

EPA's reliance on the "assessment literature" rendered the public's right to comment meaningless. Indeed, in light of the Administrator's reliance on those reports, the Agency did not think much of a public comment period was necessary at all. While recognizing the enormous complexity of climate science ("very wide range of risks and harms that need to be considered)," 74 Fed. Reg. at 66,509, EPA limited the comment period to a mere 60 days based in part on the Agency's (mistaken and irrelevant) view that the public had had an opportunity to comment on these reports to their authors when the reports were being prepared. *Id.* at 66,503.

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[18] *See* Peabody PR at VII 13-16.

[19] *See id.* at ES-1.

But the defect with the comment period was even more fundamental. EPA time and again responded to public comments on a particular scientific point by saying that the "assessment literature" had reached a different conclusion. The fundamental purpose of the comment process, however, is to ensure that a "genuine interchange" is carried on between the agency and the public, where the agency makes available all the underlying studies and data and the public is able to provide "meaningful commentary." *Connecticut Light & Power v. NRC,* 673 F.2d 525, 530-31 (D.C. Cir. 1982). No such interchange occurs when the Administrator dismisses public comments on the ground that a third party disagrees with them.[20] And by undermining the public's right to comments, EPA's reflexive citation to the "assessment literature" undermined the substantive credibility of the Agency's findings. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("[b]y requiring the 'most critical factual material' used by the agency to be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment").

[20] Approximately 160 separate EPA responses to comments cited the documents comprising the "assessment literature."

3. Lack of Transparency

Under EPA's IQA Guidelines § 6.3, the Endangerment Finding, as "Influential Information," was required to have "a higher degree of transparency regarding (1) the source of the data used, (2) the various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures employed." Climategate revealed the hollowness of EPA's claim that IPCC met this same level of transparency, as key IPCC authors routinely relied on their own studies while simultaneously refusing to disclose to other scientists the data underlying those studies. The United Kingdom House of Commons Science and Technology report cited by EPA in denying reconsideration found an "unacceptable" "culture of withholding information—from those perceived by CRU to be hostile to global warming…."[21] Another review panel report cited by EPA found "a consistent pattern of failing to display the proper degree of openness."[22]

But as stated by Ralph J. Cicerone, President of the National Academy of Sciences, Science, February 5, 2010, in commenting on Climategate, "'[f]ailure to make research data and related information

[21] HC Report at 34.

[22] Muir Russell Report at 11.

accessible not only impedes science, it also breeds conflicts.'"[23] It is also completely at odds with the "high" level of transparency demanded by EPA's IQA Guidelines in order to ensure the high quality of EPA science.

CONCLUSION

Wherefore the Endangerment Finding should be reversed and remanded for further proceeding in accordance with law including rehearing with rights of notice and comment.

[23] Peabody PR at ES-1.

Respectfully submitted,

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APPENDIX A – STATUTORY ADDENDUM

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APPENDIX A – STATUTORY ADDENDUM

42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines

(a) Authority of Administrator to prescribe by regulation. Except as otherwise provided in subsec. (b)--

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

42 U.S.C. § 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses. In connection with any determination under section 110(f) [42 USCS § 7410(f)], or for purposes of obtaining information under section 202(b)(4) or 211(c)(3) [42 USCS § 7521(b)(4) or 7545(c)(3)], any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [this] Act (including but not limited to section 113, section 114, section 120, section 129, section 167, section 205, section 206, section 208, section 303, or section 306 [42 USCS § 7413, 7414, 7420, 7429, 7477, 7524, 7525, 7542, 7603, or 7606][,], the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes

of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 202(c) [42 USCS § 7521(c)], or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 USCS § 7412], any standard of performance or requirement under section 111 [42 USCS § 7411][,], any standard under section 202 [42 USCS § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 USCS § 7521(b)(1)]), any determination under section 202(b)(5) [42 USCS § 7521(b)(5)], any control or prohibition under section 211 [42 USCS § 7545], any standard under section 231 [42 USCS § 7571] any rule issued under section 113, 119, or under section 120 [42 USCS § 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 USCS § 7410 or 7411(d)], any order under section 111(j) [42 USCS § 7411(j)], under section 112 [42 USCS § 7412],[,] under

section 119 [42 USCS § 7419], or under section 120 [42 USCS § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I [42 USCS §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review

under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence. 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 [to] 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.

(d) Rulemaking.

(1) This subsection applies to--

(A) the promulgation or revision of any national ambient air quality standard under section 109 [42 USCS § 7409],

(B) the promulgation or revision of an implementation plan by the Administrator under section 110(c) [42 USCS § 7410(c)],

(C) the promulgation or revision of any standard of performance under section 111 [42 USCS § 7411], or emission standard or limitation under section 112(d) [42 USCS § 7412(d)], any standard under section 112(f) [42 USCS § 7412(f)], or any regulation under section 112(g)(1)(D) and (F) [42 USCS § 7412(g)(1)(D),(F)], or any regulation under section 112(m) or (n) [42 USCS § 7412(m) or (n)],

(D) the promulgation of any requirement for solid waste combustion under section 129 [42 USCS § 7429],

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 211 [42 USCS § 7545],

(F) the promulgation or revision of any aircraft emission standard under section 231 [42 USCS § 7571],

(G) the promulgation or revision of any regulation under title IV (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 119 [42 USCS § 7419] (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under title VI [42 USCS §§ 7671 et seq.] (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under subtitle C of title I [42 USCS §§ 7470 et seq.] (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 202 [42 USCS § 7521] and test procedures for new motor vehicles or engines under section 206 [42 USCS § 7525], and the revision of a standard under section 202(a)(3) [42 USCS § 7521(a)(3)],

(L) promulgation or revision of regulations for noncompliance penalties under section 120 [42 USCS § 7420],

(M) promulgation or revision of any regulations promulgated under section 207 [42 USCS § 7541] (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 126 [42 USCS § 7426] (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 183(e) [42 USCS § 7511b(e)],

(P) the promulgation or revision of any regulation pertaining to field citations under section 113(d)(3) [42 USCS § 7413(d)(3)],

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of title II [42 USCS §§ 7581 et seq.],

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 213 [42 USCS § 7547],

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 217 [42 USCS § 7552],

(T) the promulgation or revision of any regulation under title IV [42 USCS §§ 7641 et seq.] (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 183(f) [42 USCS § 7511b(f)] pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5 of the United States Code.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, United States Code, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of--

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations

underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 109(d) [42 USCS § 7409(d)] and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4) (A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B) (i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be

placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the

date of such promulgation.

(7) (A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may

be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after the date of enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977].

(e) Other methods of judicial review not authorized. Nothing in this Act shall be construed to authorize judicial review of regulations or orders

of the Administrator under this Act, except as provided in this section.

(f) Costs. In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties. In any action respecting the promulgation of regulations under section 120 [42 USCS § 7420] or the administration or enforcement of section 120 [42 USCS § 7420] no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public Participation. It is the intent of Congress that, consistent with the policy of the Administrative Procedures Act [5 USCS §§ 551 et seq.], the Administrator in promulgating any regulation under this Act, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [sections] 107(d), 172(a), 181(a) and (b),

and 186(a) and (b) [42 USCS § 7407(d), 7502(a), 7511(a) and (b), 7512(a) and (b)].

History:

(July 14, 1955, ch 360, Title III, § 307, as added Dec. 31, 1970, P.L. 91-604, § 12(a), 84 Stat. 1707; Nov. 18, 1971, P.L. 92-157, Title III, § 302(a), 85 Stat. 464; June 22, 1974, P.L. 93-319, § 6(c), 88 Stat. 259; Aug. 7, 1977, P.L. 95-95, Title III, §§ 303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, P.L. 95-190, § 14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, P.L. 101-549, Title I, §§ 108(p), 110(5), Title III, § 302(g), (h), Title VII, §§ 702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574, 2681, 2682-2684.)

II. APA § 551. Definitions (5 usc § 551)

For the purpose of this subchapter—

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

APA § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably

delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History:

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 393.)

1. (Public Law 106-554)

Sec. 515. (a) In General.--The Director of the Office of Management and Budget shall, by not later than September 30,2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) Content of Guidelines.--The guidelines under subsection (a) shall--

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) require that each Federal agency to which the guidelines apply--

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

(C) report periodically to the Director--
(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
(ii) how such complaints were handled by the agency.

Tex. Gov't Code § 2171.101 (2010)

§ 2171.101. Vehicle Reporting System

(a) The office of vehicle fleet management shall establish a vehicle reporting system to assist each state agency in the management of its vehicle fleet. A state agency shall be required to submit the reports on a quarterly basis, not earlier than the 45th day or later than the 60th day after the date on which the quarter ends.

(b) The office shall:

(1) develop automated information retrieval systems to implement the reporting system; and

(2) maintain a complete inventory of agency vehicles by class of vehicle.

(c) The office shall determine the average cost of operation for each class of vehicle.

(d) The office shall file an annual report with the legislature containing:

(1) vehicle information submitted by state agencies; and

(2) the names of state agencies that fail to report complete vehicle information.

(e) The office shall review the operation of each state agency's vehicle fleet and report to the legislature not later than January 1 of each odd-numbered year the status of the agency's vehicle fleet and the office's recommendations to improve operations of the agency's vehicle fleet.

History:

Enacted by Acts 1995, 74th Leg., ch. 41 (S.B. 958), § 1, effective September 1, 1995; am. Acts 1997, 75th Leg., ch. 165 (S.B. 898), § 17.10(b), effective September 1, 1997; am. Acts 1999, 76th Leg., ch. 1050 (H.B. 3125), § 1, effective September 1, 1999; am. Acts 2003, 78th Leg., ch. 309 (H.B. 3042), § 7.01, effective June 18, 2003; am. Acts 2005, 79th Leg., ch. 658 (H.B. 3227), § 1, effective June 17, 2005.

Tex. Gov't Code § 2158.001 (2010)

§ 2158.001. Definitions

In this subchapter:

(1) "Conventional gasoline" means any gasoline that does not meet specifications set by a certification under Section 211(k) of the federal Clean Air Act (42 U.S.C. Section 7545(k)).

(2) "Golf cart" has the meaning assigned by Section 502.001, Transportation Code.

(3) "Light-duty motor vehicle" has the meaning assigned by Section 386.151, Health and Safety Code.

(4) "Motor vehicle" has the meaning assigned by Section 386.151, Health and Safety Code.

(5) "Neighborhood electric vehicle" means a motor vehicle that:

(A) is originally manufactured to meet, and does meet, the equipment requirements and safety standards established for "low-speed vehicles" in Federal Motor Vehicle Safety Standard 500 (49 C.F.R. Section 571.500);

(B) is a slow-moving vehicle, as defined by Section 547.001, Transportation Code, that is able to attain a speed of more than 20 miles per hour but not more than 25 miles per hour in one mile on a paved, level surface;

(C) is a four-wheeled motor vehicle;

(D) is powered by electricity or alternative power sources;

(E) has a gross vehicle weight rating of less than 3,000 pounds; and

(F) is not a golf cart.

(6) "Plug-in hybrid motor vehicle" means a vehicle that:

(A) draws motive power from a battery with a capacity of at least four kilowatt-hours;

(B) can be recharged from an external source of electricity for motive power; and

(C) is a light-duty motor vehicle capable of operating at highway speeds, excluding golf carts and neighborhood electric vehicles.

History:

Enacted by Acts 2005, 79th Leg., ch. 864 (S.B. 1032), § 3, effective September 1, 2005; am. Acts 2009, 81st Leg., ch. 900 (H.B. 432), § 1, effective September 1, 2009.

Tex. Transp. Code § 721.001 (2010)

§ 721.001. Definition

In this chapter, "state agency" means a department, bureau, board, commission, or office of state government.

History:

Enacted by Acts 1995, 74th Leg., ch. 165 (S.B. 971), § 1, effective September 1, 1995.

Va. Code Ann. § 2.2-1176 (2011)

§ 2.2-1176. Approval of purchase, lease, or contract rental of motor vehicle

No motor vehicle shall be purchased, leased, or subject to a contract rental with public funds by the Commonwealth or by any officer or employee on behalf of the Commonwealth without the prior written approval of the Director. No lease or contract rental shall be approved by the Director except upon demonstration that the cost of such lease or contract rental plus operating costs of the vehicle shall be less than comparable costs for a vehicle owned by the Commonwealth.

Notwithstanding the foregoing provisions of this section, the Virginia Department of Transportation shall be exempted from the approval of purchase, lease, or contract rental of motor vehicles used directly in carrying out its maintenance, operations, and construction programs.

HISTORY: 1989, c. 479, § 33.1-403; 1997, c. 48; 1998, c. 329; 2001, cc. 815, 842, § 2.1-548.04.

Va. Code Ann. § 2.2-120 (2011)

§ 2.2-120. Powers with respect to state-owned motor vehicles

A. The Governor may prescribe, by general or special executive orders, regulations for the purchase, use, storage, maintenance and repair of all motor vehicles owned by the Commonwealth, and in the possession of any state department, institution or agency where his supervision is not forbidden by the Constitution.

B. The Governor may use any building or land owned by the Commonwealth, and not required to be used for other purposes, for storing and garaging state-owned motor vehicles. He may employ watchmen or guards, mechanics and other labor to repair and service such vehicles, and provide for the purchase of gasoline, oil and other supplies for such vehicles, and allocate among the various departments and agencies using such vehicles their proportionate part of the cost of repairs, servicing, gasoline, oil, and other supplies.

C. The Governor may create in the State Treasurer's office a special fund to be reflected on the books of the Comptroller, out of which all costs and expenses incurred pursuant to this section shall be paid. All allocations of costs and charges for repairing and servicing motor vehicles made against any institution, agency, or department shall, when approved by the department head, be paid into the special fund by interdepartmental transfers on the Comptroller's books. All funds so paid or transferred into the special fund are appropriated for the purposes of this section and shall be paid out on warrants of the Comptroller issued upon vouchers signed by the state officer or employee designated by the Governor.

D. The Governor may, by executive order or regulation, impose upon the Director of the Department of Planning and Budget, or any other

agency of the executive branch of the state government, any or all administrative duties pertaining to the administration of this section.

E. If any state officer, agent or employee fails to comply with any rule, regulation or order of the Governor made pursuant to this section, the Comptroller shall, upon order of the Governor, refuse to issue any warrant on account of expenses incurred, or to be incurred in the purchase, operation, maintenance, or repair of any motor vehicle now or to be in the possession or under the control of such officer, agent or employee, or the Governor may order some state officer or agent to take possession of the vehicle and transfer it to some other department, institution, agency, officer, agent or employee, or to make such other disposition as the Governor may direct.

HISTORY: Code 1950, § 2-42; 1966, c. 677, § 2.1-47; 2001, c. 844.

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I HEREBY CERTIFY THAT the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) and this Court's Order of March 22, 2011. *See* Order, *Coalition for Responsible Regulation v. EPA*, No. 09-1322, (Doc. 1299368) (March 22, 2011) (authorizing two state briefs totaling 15,000 words). As determined by the Microsoft Word 2007 software, Century Schoolbook, 14 point, used to produce this brief, it contains 7,798 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ E. Duncan Getchell, Jr.
Counsel

May 20, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONERS was filed electronically with the Court by using the CM/ECF system on this 20th day of May 2011. All participants in the case are thought to be registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ E. Duncan Getchell, Jr.
Counsel