BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In re:	)	
	)	EPA Docket No.
Endangerment and Cause or Contribute	)	
Findings for Greenhouse Gases Under	)	EPA-HQ-OAR-2009-0171
Section 202(a) of the Clean Air Act	)	
	)	

SUPPLEMENTAL PETITION FOR RECONSIDERATION AND WITHDRAWAL OF EPA'S ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT

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I. INTRODUCTION

Pursuant to Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), the Ohio Coal Association ("the Association") hereby *supplements* its original Petition for Reconsideration of the "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule" published by the Agency on December 15, 2009 (74 F.R. 66496, Dec. 15, 2009) ("the Endangerment Finding").[1]

The Association's supplemental petition describes in further detail the deference by EPA to the U.N. Intergovernmental Panel on Climate Change ("IPCC") for fundamental research and scientific findings in support of EPA's core conclusions in its Endangerment Finding, the release of emails from the University of East Anglia ("UEA") Climatic Research Unit ("CRU") in November of last year calling in to question the objectivity and methodology of IPCC members, and the correlation between the challenged IPCC methodology and the EPA's Endangerment Finding. The supplemental petition also details the world-wide criticisms of IPCC's conclusions regarding climate change, and the perception that the United States of America, through EPA's conclusions in the Endangerment Finding, has embraced as a government scientific conclusions predicated on questionable or invalid premises. Because EPA elected to outsource to IPCC the "scientific and technical basis" of the Endangerment Finding,[2] the Agency predicated the reliability of its own work on the integrity of IPCC. The CRU admissions, as well as the true nature and source of IPCC's data, damage the integrity of the IPCC

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1 The Ohio Coal Association's initial petition was filed with Administrator Jackson on February 12, 2010.

2 74 F.R. 66510.

study and conclusions, and should alarm the Agency, inspiring the withdrawal and re-review of the Endangerment Finding.

In addition, the Association's supplemental petition highlights comments by both state environmental permitting agencies and industry shareholders with respect to the "Greenhouse Gas Tailoring Rule" (74 F.R. 55292, Oct. 27, 2009) ("the Tailoring Rule"), which EPA interjected after the expiration of the comment period for the Endangerment Finding. The state agencies and private interests offered timely comment to EPA regarding the Tailoring Rule, pointing out the onerous and prohibitive permitting requirements that would be precipitated by the Endangerment Finding and associated regulation of Greenhouse Gases ("GHGs"), despite the supposed relief afforded by the Tailoring Rule.

The Association respectfully submits that EPA must reexamine the plausibility of the Endangerment Finding. Considering the way the world is looking askance at the EPA's use of science right now and how the government officials ultimately to be charged with implementing the EPA's Tailoring Rule are doubting the basic legitimacy of that rule, to refuse to do so would be non-rational, arbitrary, and capricious.

II. EPA HAS FAILED TO NEGATE POINTED CRITICISMS OF IPPC'S REPORT THAT INVALIDATE THE ENDANGERMENT FINDING.

EPA must withdraw its Endangerment Finding based on new revelations and criticisms about the IPCC's AR4 Working Group II Report ("the Report"), upon which EPA relied so heavily in its Endangerment Finding. The flaws that have unleashed an international firestorm were not uncovered during the comment period, and thus EPA has not yet received comment on how IPCC's alleged missteps have impacted EPA's conclusions on climate change reached in its Endangerment Finding.

A. EPA Has Relied on IPCC's Report Without Criticism.

The EPA issued the Endangerment Finding based in large measure upon climate information aggregated by IPCC and generated by CRU. By the time EPA's Administrator signed the Endangerment Finding on December 7, 2009, serious gaffes had already been unearthed in the methodology and conclusions of IPCC's Report. Rather than slow down its rush to climactic conclusion, though, EPA has instead plowed ahead with compromised data, undermining its core conclusions in the process. Following is a summary of EPA's flawed development of the Endangerment Finding.

In *Massachusetts v. EPA,* 549 U.S. 497 (2007), the Supreme Court of the United States decided that the Clean Air Act required the EPA to determine whether or not it should issue an endangerment finding regarding the potential impact of climate change on human health. Prior to that high court decision, EPA had taken the position that it had no institutional power to issue such a finding under the Clean Air Act because anthropomorphic global warming, if a reality, would of necessity be a worldwide, multi-jurisdictional phenomenon, and thus beyond the ability of the EPA to address within constrained Clean Air Act parameters. *Id.* at 512.

The Supreme Court set no time table for the EPA to determine whether global warming trends impact human health, nor did the U.S. Court of Appeals for the District of Columbia Circuit—the court from which *Massachusetts v. EPA* originated. On March 27, 2008, the EPA Administrator wrote Congress to supply an update.[3] The Administrator reported that EPA staff had been instructed to draft an Advance Notice of Proposed Rulemaking ("ANPR"), to be "issued later this spring." After the required

[3] Letter from Stephen L. Johnson to Congressman Edward Markey, March 27, 2008, available at http://globalwarming.house.gov/tools/assets/files/0451.pdf.

public comment period, the Administrator expected that"[t]he Agency will *then* consider how to best respond to the Supreme Court decision and its implications under the Clean Air Act."[4]

On July 30, 2008, the EPA published the ANPR.[5] It contains a summary of the scientific research conducted or supported by EPA to that date. Noting that the "implications of a decision to regulate GHG's under the [Clean Air] Act are so far-reaching,"[6] EPA included comments from other federal agencies in the body of the ANPR.[7] It also solicited public comment on whether air pollution may reasonably be anticipated to endanger public health and welfare.[8] According to the EPA's disclosure in this July 30, 2008 notice, the Agency had not yet concluded that there existed a scientific correlation between human activity and impactful global warming. At this point, EPA and Executive Branch decision-makers had declined to act upon lower-level EPA recommendations. EPA also gave no indication at this juncture that it had commissioned, engaged, or relied to any significant degree on the work of IPCC, or any other climate organization, in formulating Agency opinion on this over-arching point. EPA was, at the time of the ANPR, uncertain about its climate conclusion. In fact, the Agency was using the ANPR to "seek comment on the best available science for purposes of the

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4 Letter from Stephen L. Johnson to Congressman Edward Markey, March 27, 2008, available at http://globalwarming.house.gov/tools/assets/files/0451.pdf (emphasis added).

5 73 F.R. 44354.

6 73 F.R. 44354.

7 73 F.R. 44356-44389.

8 73 F.R. 443555.

endangerment discussion, and in particular on the use of the more recent findings of the U. S. Climate Change Science Program."[9]

The ANPR comment period closed on November 28, 2008.[10] The EPA began methodically parsing, digesting and sifting an outpouring of interest in this far-reaching issue. This period of planning, interconnection and dialogue did not last long.

In a February 17, 2009 article, the Associated Press reported the new Obama Administration to be under pressure from the December 2009 Copenhagen climate summit fast-approaching. A burden befell the White House to exert on the world stage an American will to control greenhouse gases. That same press piece quoted the new EPA Administrator, Lisa Jackson, as follows:

> We are going to be making a fairly significant finding about what these gases mean for public health and the welfare of our country. . . . If EPA is going to talk and speak in this game, the first thing it should speak about is whether carbon dioxide and other greenhouse gases endanger human health and welfare. It is a very fundamental question.[11]

On April 29, 2009, EPA did in fact release its proposed Endangerment Finding.[12] This proposal was predicated not on the EPA staff science conclusions (upon which the previous EPA Administrator had also declined to act in 2008), or upon any independent work specially-commissioned by EPA. Rather, EPA predicated the Endangerment Finding on the published reports of IPCC. EPA chose to rely on the "major

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9 73 F.R. 44425.

10 73 F.R. 44425.

11 AP Interview: *EPA Near Ruling on Greenhouse Gasses*, Dina Cappiello, Associated Press, available at http://abcnews.go.com/Politics/wireStory?id=6899971.

12 74 F.R. 18886.

assessment[s]" of IPCC as proof of the science behind climate change, characterizing its work as a "robust and valuable reference" that essentially "serv[es] as a benchmark."[13]

Public comment of the EPA/IPCC effort ensued. Responses poured in, with upwards of 380,000 comments.[14] EPA timely terminated the process, rejecting on June 17, 2009 requests to extend the period of inquiry[15]—likely so it could keep on pace for Copenhagen. With comment closed, EPA sifted responses, and set a course toward the release of its final rule. The process, like the IPCC peer-review research, was even and controlled, until problems arose in England.

British law mandates strict disclosure of research data so scholars could have ample basis for peer review. In August of 2009, CRU tried fending off impatient researchers seeking its climate data by announcing that it no longer held the original raw support for its climate change datasets. CRU claimed that it only retained modified sets which CRU termed "value-added."[16] Critics called this data dumping. CRU had received repeated requests to disclose data underlying its climate studies.[17] Protests to British authorities began. An exposé by the Sunday Times (London) confirmed the abuses at CRU. The paper documented the repeated requests for this divested data

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13 74 F.R. 18894.

14 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under the Clean Air Act, http://www.epa.gov/climatechange/endangerment.html.

15 *EPA Comment Period on 'Endangerment' Proposal Closes Tomorrow*, Robin Bravender, E&E News (June 22, 2009).

16 *CRU Data Availability*, Climate Research Unit, available at http://www.cru.uea.ac.uk/cru/data/availability.

17 *Climate Change Data Dumped*, Jonathan Leake, Nov. 29, 2009, Times Online, available at http://www.timesonline.co.uk/tol/news/environment/article6936328.ece.

pursuant to the powerful British Freedom of Information Act. The British Information Commissioner's Office stepped in and ultimately found CRU in violation.[18]

Soon thereafter, other reports of falsification surfaced. In November 2009, an internationally recognized expert on Himalayan glaciers, V.K. Raina, produced a comprehensive study that totally contradicted IPCC reports on Himalaya glacier melts, showing those reports to be flimsily-documented exaggerations. Although Dr. Raina's report was initially dismissed by the IPCC chairman as "voodoo science," the author of the IPCC Report's chapter on Asia admitted in January 2010 that the Report had deliberately exaggerated the possible melt of the Himalayan glaciers.[19]

The misdeeds and bias harboring within the halls of East Anglia spilled out in a large way when whistleblowers began unmasking CRU practices, captured in CRU's own words. On November 19, 2009, CRU's internal email began leaking to the public, evidencing the clear pro-warming bias of IPCC members. Among those emails is a message from Dr. Keith Briffa, CRU Deputy Director and an IPCC lead author: "I tried hard to balance the needs of the science and the IPCC, which were not always the same . . . ."[20] Other leaked discourse revealed cover-ups, plots, and plans coordinated in both Britain and the U.S. to suppress independent studies contrary to IPCC's conclusion of

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[18] *New Twist in UEA Climate Change Row*, David Bale, Jan. 28, 2010, Norwich Evening 24, available at http://www.eveningnews24.co.uk/content/eveningnews24/norwich-news/story.aspx?brand=ENOnline&category=News&tBrand=ENOnline&tCategory=xNews&itemid=NOED28%20Jan%202010%2010%3A05%3A43%3A370.

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

[20] Briffa, Keith. Email. April 24, 2007, available at http://www.eastangliaemails.com/emails.php?eid=794&filename=1177890796.txt (emphasis added).

human-caused global warming. One such email from Dr. Phil Jones, CRU Director, declares that a "troublesome editor" at a peer-reviewed journal should be gotten "rid of" because of an anti-climate change paper that editor approved to be published.[21] These emails and others reveal that scientists authoring key chapters of the IPCC climate assessments crossed the line from a science rooted in neutrality to an advocacy promoting a results-basis.

Phil Jones himself issued general denials of wrongdoing when the scrutiny first started, blaming criminal hackers, selective use of stolen internal emails, and a "concerted attempt to put a question mark over the science [undergirding] the Copenhagen talks."[22] Despite the flap, Professor Jones retained his post at CRU, but only for a short while. On December 1, 2009, East Anglia announced Professor Jones would step down pending the review.[23] Sir Muir Russell was appointed to head the investigation. The University disclosed it had asked for the results by "Spring 2010," and promised public disclosure of the report and East Anglia's rebuttal.[24]

Even though the East Anglia revelations and action proceeded her release of an Endangerment Finding by several weeks, the EPA Administrator nonetheless issued the Finding on December 7, 2009. The Administrator said the finding allowed the President

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21 Jones, Phil. Email. March 11, 2003, available at http://www.eastangliaemails.com/emails.php?eid=295&filename=1047388489.txt.

22 *CRU update 2*, Nov. 24, 2009, available at https://www.uea.ac.uk/mac/comm/media/press/2009/CRUupdate.

23 *CRU update 3*, Dec. 1, 2009, available at http://www.uea.ac.uk/mac/comm./media/press/2009/dec/CRUphiljones.

24 *Sir Muir Russell to head the Independent Review into the allegations against the Climate Research Unit (CRU)*, Dec. 3, 2009, available at http://www.uea.ac.uk/mac/comm./media/press/2009/dec/CRUreview.

"to arrive at the climate talks in Copenhagen with a clear demonstration of [the United States'] commitment to face this global challenge."[25] The Administrator did not mention the discredited IPCC report.

Instead, in the preamble to the Endangerment Finding, EPA proudly announced that it relied upon the "major assessments" of IPCC for the "scientific and technical basis" of its Finding, and for support that the science of climate change is "sufficiently certain" to warrant broad-based regulatory action.[26] Throughout the document, EPA characterized IPCC's "scientific assessments" as one of "the best reference materials for determining the general state of knowledge on the scientific and technical issues before the agency in making an endangerment decision." The EPA lauded IPCC's methods, rigor, and integrity, calling the research "comprehensive," "in-depth," and—most damning—demonstrating "a high and exacting standard of peer review."[27]

The Technical Support Document accompanying EPA's finding quotes IPCC's Report for corroboration that "[w]arming of the climate system is unequivocal."[28] The TSD goes on to list in detail the warming trends in global temperatures identified by IPCC.[29] EPA also cited computer models run by IPCC to assert that there is "*no reason to expect* that . . . atmospheric levels of greenhouse gases will not continue to climb, and

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25 *Copenhagen and the EPA's Unlikely Endangerment Finding Coincidence*, Chris Morrison, Dec. 7, 2009, available at http://industry.bnet.com/energy/10002618/copenhaven-and-the-epas-unlikely-endanger.

26 74 F.R. 66500, 66510.

27 74 F.R. 66511.

28 74 F.R. 66517.

29 74 F.R. 66517.

thus lead to ever greater rates of climate change."[30] Finally, EPA relied upon IPCC's assessment reports to substantiate the existence of grave endangerment to the public welfare as a result of climate change, such as impacts to food production and agriculture,[31] the increase of forest fires,[32] alterations in the water cycle and sea levels,[33] adverse effects on water quality,[34] and consequences for biodiversity.[35]

Yet even since the Endangering Finding was issued, East Anglia widened the scope of its self-examining inquiry yet again, bowing to international outcry about the handling of peer review, and the criticism that has made the "findings of [its] researchers . . . the subject of significant debate in recent months." On February 11, 2010, the University announced a *second* independent inquiry, this one into the overall quality of the climate scholarship that has originated at East Anglia. This review will not inquire into "Climategate" per se, but rather into something far more serious: "an assessment *considering the science itself*."[36] Guided by an as-yet-unannounced overseer, this inquiry will evaluate East Anglia's "key publications" for academic integrity, research discipline,

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30 74 F.R. 66518 (emphasis added).

31 74 F.R. 66531-32.

32 74 F.R. 66532.

33 74 F.R. 66532-33.

34 74 F.R. 66533-34.

35 74 F.R. 66534.

36 *New scientific assessment of climate research publications announced*, Feb. 11, 2010, available at https://www.uea.ac.uk/mac/comm/media/press/CRUstatements/New+scientific+assessment+of+climate+research+publications+announced (emphasis added).

and efficacy of their scientific conclusions. This merits review "will be completed at the earliest date the assessors can manage." The findings will be made public.[37]

Professor Jones, for his part, has become less predictive of the outcome of the investigations. Interviewed by the BBC on February 13, 2010, he responded as follows to key inquiries:

> Q: Where do you draw the line on the handling of data? What is at odds with acceptable scientific practice? Do you accept that you crossed the line?
>
> Prof. Jones: *This is a matter for the independent review.*
>
> Q: Now, on to the fallout from "Climategate," as it has become known. You had a leading role in a part of the IPCC, Working Group I. Do you accept that credibility in the IPCC has been damaged - partly as a result of your actions? Does the IPCC need reform to gain public trust?
>
> Prof. Jones: Some have said that the credibility in the IPCC has been damaged, partly due to the misleading and selective release of particular e-mails. I wish people would spend as much time reading my scientific papers as they do reading my e-mails. *The IPCC does need to reassure people about the quality of its assessments.*[38]

B. EPA Cannot Continue to Rationally Rely on IPCC's Report.

Professor Jones' hopes notwithstanding, IPCC's work cannot be rehabilitated, nor can the EPA's Endangerment Finding. IPCC has been unmasked as an overt scientific organization with a covert political agenda of making the science conform to the desired result. Its report is anything but the "peer-reviewed" and "in-depth" scientific analysis

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[37] *New scientific assessment of climate research publications announced*, Feb. 11, 2010, available at https://www.uea.ac.uk/mac/comm/media/press/CRUstatements/New+scientific+assessment+of+climate+research+publications+announced.

[38] *Q&A: Professor Phil Jones*, Feb. 13, 2010, available at http://news.bbc.co.uk/2/hi/science/nature/8511670.stm (emphasis added).

that the Administrator deemed it to be. Case in point is the admission of Anton Imeson, a former IPCC lead author. In public comments on February 8, 2010, Imeson intoned that "government employees will use [the IPCC's report] to negotiate changes and [fashion] a redistribution of resources." Imeson went on to say that the report was "not a scientific analysis of climate change." Imeson suggested the IPCC admit this. He set out the following strategy for the organization:

> IPCC should change its name and become a part of something else. The IPCC should have never allowed itself to be branded as a scientific organization. It provides a review of published scientific papers but none of this is much controlled by independent scientists.[39]

It is patently unreasonable for EPA to continue to insist that IPCC is a scientific organization when its own members concede that it is not.

IPCC has done nothing to amend its errant ways since "Climategate." On December 15, 2009—the very day that EPA announced the Endangerment Finding—the Russian Institute of Economic Analysis ("IEA") reported that CRU probably tampered with Russian climate data and that the Russian meteorological station data do not support human-caused global warming. It was well established that CRU had dropped many Russian stations in the colder regions of the country presumably because these stations were no longer maintained. The IEA stated that, on the contrary, the stations still report temperatures but that CRU ignores the results. Only 25% of the temperature reporting stations in Russia are used in the Report, and they are in population centers that are influenced by the urban heat island effect. Rural areas were also ignored by CRU, giving the data a pro-warming bias. Given that Russia accounts for 12.5% of the world's land

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[39] *How to reform the IPCC*, David Adam and Suzanne Goldenberg, Feb. 10, 2010, Guardian, available at http://www.guardian.co.uk/environment/2010/feb/10/ipcc-reform.

mass, the CRU dataset has been highly compromised, reporting global surface temperature trends that are unreliable and biased towards achieving a politically driven predetermined outcome.[40]

In late January 2010, additional information revealed that IPCC claims of warming's adverse effects in the Amazon rainforests and on coral reefs came from publications of environmental groups such as the World Wildlife Fund and Greenpeace. Further, claims of glacier melts in the Andes and the Alps came from anecdotal comments in a magazine article and a master thesis. Thus, any presumption that the findings in IPCC's report are based on peer-reviewed science became quickly misplaced.[41]

On February 7, 2010, the Sunday Times (London) reported on the extent to which false claims that warming will destroy rain-based agriculture in Africa permeate IPCC findings. The IPCC's Synthesis Report, which purports to "distill[ed] [IPCC's] most important science into a form accessible to politicians and policy makers," claims that yields from rain-fed agriculture could be reduced by up to 50% in many African countries.[42] IPCC's claim is not based on peer-reviewed science but instead a 2003

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[40] *What the Russian Papers Say*, Dec. 16, 2009, Rianovosti, available at http://en.rian.ru/papers/20091216/157260660.html.

[41] *Amazongate: new evidence of the IPCC's failures*, Christopher Booker, Jan. 30, 2010, Telegraph, available at http.//www.telegraph.co.uk/comment/columnists/christopherbooker/7113582/Amazongate-new-evidence-of-the-IPCCs-failures.html; *Greenpeace and the Nobel-Winning Climate Report*, Donna Laframboise, Jan. 28, 2010, Nofrakkingconsensus, available at http://nofrakkingconsensus.blogspot.com/2010/01/greenpeace-and-nobel-winning-climate_28.html; Editorial: *Climate debate needs facts, not anecdotes*, Feb. 3, 2010, NZ Herald, available at http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10623715.

[42] *Climate Change 2007: Synthesis Report – Summary for Policymakers*, IPCC, available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

policy paper from a Canadian think-tank.[43] Yet EPA cites this assertion in its Technical Support Document as support for its Endangerment Finding.[44]

EPA cannot possibly continue to rely on a body of work that is under investigation by multiple entities around the world, has been discredited by standards organizations, and is admitted to be of questionable scientific import. EPA's own standards of conduct preclude this practice. In its manifesto on the "Role of Science at EPA," the Agency declares that "it is vital that the conduct of [Agency] research itself be *independent* and *of the highest quality*," with an emphasis on "open, transparent, and peer-reviewed research planning."[45] The Association submits that the Agency cannot afford to rely on research and conclusions of another politically-motivated organization, when that organization's efforts would not meet the high standards established by the Agency for its own work product.

Courts that extend deference to agency judgment draw the line at unreasonable agency action. *See Am. Lung Assn. v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998). Agencies must act on "reasonable extrapolations" from "reliable evidence." *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990). The Administrator was instructed by the Supreme Court to exercise "judgment" within the statutory parameters of § 202(a) of the Clean Air Act, regardless of "policy" considerations. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Because EPA did not conduct an independent analysis

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

[44] TSD Table 16.1, p. 162, available at http://www.epa.gov/climatechange/endangerment/downloads/Endangerment_TSD.pdf.

[45] "Role of Science at EPA," available at http://www.epa.gov/epahome/science.htm (emphasis added).

to substantiate its Endangerment Finding but rather put IPCC "policy" in that place, EPA must reconsider and withdraw its Endangerment Finding.

III. IMPLEMENTING THE GHG REGULATIONS IS INFEASIBLE BASED ON THE ENDANGERMENT FINDING.

A. EPA Identified Significant Negative Permitting Impacts in the Endangerment Finding but Erroneously Assumed It Could Remedy Them.

EPA received numerous requests to consider the full range of possible ramifications—economic, public welfare, and efficiency—that would flow from the regulation of GHGs before issuing the final Endangerment Finding.[46] In response, EPA described the "panoply of adverse consequences" that were predicted by commentators to occur as a result of such regulation.[47] However, EPA ultimately declared in the final Endangerment Finding that the Administrator "must base her decision about endangerment on the science, and not on policy considerations about the repercussions or impact of such a finding."[48] While EPA professed to be limited by § 202 of the Clean Air Act and the Supreme Court's direction in *Massachusetts v. EPA* to considering only the "science" in making the Endangerment Finding, EPA did in fact honestly give credence and expression to one key negative impact—the implementation of GHG permitting.[49]

In its forthright assessment of the permitting impact, EPA declared in the Finding that it "has the ability to fashion a reasonable and common-sense approach" to address

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46 74 F.R. 66515.

47 74 F.R. 66516.

48 74 F.R. 66515.

49 74 F.R. 66516, n.17.

GHG issues.[50] EPA explicitly cited, in particular, its proposed Tailoring Rule as an example of EPA's ability to limit GHG permit impacts by proposing new higher temporary permitting thresholds for GHG emissions that define when Prevention of Significant Deterioration ("PSD") and federal operating (Title V) permits are required for new or existing facilities.[51]

In the Tailoring Rule proposal referenced in the Endangerment Finding, EPA detailed the negative impacts that would inexorably flow from the Endangerment Finding—that is, the triggering of PSD and Title V permitting requirements at the low applicability levels provided under the Clean Air Act. EPA stated that because millions of new and modified sources of GHGs would require permits before construction could begin, unless the PSD and Title V permitting thresholds were changed, "[s]tate permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate."[52]

EPA recognized the burden that would be placed on many sources of GHGs by the costs of individualized PSD control technology requirements and permit applications.[53] EPA knew the impossibility of administering the permitting programs and the overwhelming time and cost that would be associated with doing so. In fact, it declared that "the additional annual permitting burden for [state] permitting authorities, on a national basis, is estimated to be 3.3 million hours at a cost of $257 million to

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50 74 F.R. 66516.

51 74 F.R. 66516, n. 17.

52 74 F.R. 55292, 55304.

53 74 F.R. 55294.

include all GHG emitters above the 250-tpy [tons per year] threshold."[54] In an amazing concession, EPA estimated that the average processing time for a GHG permit would swell to almost ten years.[55] Since PSD permits are pre-construction permits, this means each and every new project—industrial, utility, or otherwise—that could emit even nominal amounts of GHGs would not proceed for at least a decade, effectively ending economic growth.

Under the existing Clean Air Act permitting thresholds for PSD and Title V, state permitting agencies would buckle under the load of permits necessitated by EPA's Endangerment Finding to regulate GHGs. The economy would grind to a halt. In commenting on the Tailoring Rule, the regulated community has predicted EPA's approach will result in unbearable uncertainty for applicants and permitting authorities alike. It will overwhelm the permitting system, and will effectively bring PSD and Title V permitting procedures to a stop.[56]

To avoid the economic train wreck the Agency itself predicts, EPA issued the proposed Tailoring Rule on October 27, 2009, to "remedy" the situation. Relying on the statutory interpretation doctrines of "absurd results" and "administrative necessity" to alleviate the ridiculous administrative, financial, and time burdens that would otherwise arise from permitting requirements following GHG regulation based on the Endangerment Finding, EPA proposed to establish new emissions thresholds for the treatment of GHGs as a "pollutant." In the draft rule, EPA would set PSD and Title V

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[54] 74 F.R. 55295, 55301.

[55] 74 F.R. 55303.

[56] Letter of Public Comment, Docket No. OAR-2009-0472, National Mining Association, November 27, 2009.

major source thresholds of 25,000 TPY of carbon dioxide equivalent ("CO_2e"), and a major modification threshold (and significance level) between 10,000 and 25,000 TPY of CO_2e. These thresholds will be used to determine whether a facility's GHG emissions trigger applicability of the PSD and Title V programs. Absent the Tailoring Rule, the Clean Air Act would require PSD standards to apply to all stationary sources emitting more than 250 tons per year of CO_2, and Title V would apply to all stationary sources emitting more than 100 tons per year of CO_2.

EPA did in fact consider the widespread and economically crippling permitting impacts that would result from the Endangerment Finding, but naively assumed that this chaos could be averted by devising an administrative remedy. In comments filed after EPA issued its final Endangerment Finding, the state permitting agencies **actually responsible** for issuing PSD and Title V permits flatly declared EPA's proposed tailoring rule to be dead-on-arrival, and insufficient to address the negative economic impacts of the Endangerment Finding. These state authorities have astutely pointed out that the Tailoring Rule will not work because EPA does not have the ability to change **state law**, which is a necessary component to provide relief from the dire impacts set in motion by EPA.

B. The Tailoring Rule Fails to Prevent a Widespread Negative Economic Impact.

State environmental agencies, under their respective State Implementation Plans ("SIPs"), are charged with processing and issuing Title V and PSD permits. However, EPA's "tailoring" proposal provides an absurdly truncated time for a state agency that operates pursuant to a SIP to increase its statutory and regulatory emissions thresholds—which have the force of law within that state's borders. If states are not provided

adequate time to modify their regulations, then the lower thresholds of 100 or 250 TPY would apply in those local programs, and the "administrative impossibility and absurd results" that EPA seeks to avoid would in fact occur regardless. This contention was made by the state officials themselves during the comment period for the Tailoring Rule. They uniformly argue that EPA's proposed rule will not in actuality achieve its objective of avoiding "absurd" results.[57]

State environmental agencies, under their respective State Implementation Plans ("SIPs"), will be charged with enforcing these regulatory requirements. EPA's "tailoring" proposal provides way too little time for state agencies that operate pursuant to SIPs to increase their statutory and regulatory emissions thresholds—which have the force of law within state borders—so as to be able to reduce the administrative burden on the state level. If states are provided inadequate time to modify their regulations, then the lower thresholds of 100 or 250 TPY will apply in those programs, and the "administrative impossibility and absurd results" that EPA seeks to avoid in its rule are likely to occur in those states. This contention was made by the state officials themselves during the comment period for the Tailoring Rule who, as the actual GHG permitting authorities, argue that EPA's proposed rule will not in actuality achieve its objective.[58]

The National Association of Clean Air Agencies ("NACAA") specifically commented that in "each SIP-approved state, the thresholds will remain at 100/250 tpy

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[57] *See, e.g.*, Letter of Public Comment, Docket No. OAR-2009-0517, State of Ohio Environmental Protection Agency, December 22, 2009; Letter of Public Comment, Docket No. OAR-2009-0517, Northeast States for Coordinated Air Use Management, December 22, 2009.

[58] *See, e.g.*, Letter of Public Comment, Docket No. OAR-2009-0517, State of Ohio Environmental Protection Agency, December 22, 2009; Letter of Public Comment, Docket No. OAR-2009-0517, Northeast States for Coordinated Air Use Management, December 22, 2009.

until and unless state law and/or regulations are modified."[59] NACAA further opined that few if any states would be able to modify their state laws or regulations to adjust the thresholds in the near-term, and suggested states would need about fifteen months or more to resolve the situation. NACAA concluded that "under EPA's proposal and based on EPA's estimates, tens of thousands of PSD permits will need to be issued, and millions of Title V permit applications will need to be submitted by June 2011, to allow business to function normally."[60]

Others have echoed these concerns. One group of state permitting agencies declared that state rulemaking processes require at least twelve, and in some cases many more, months to complete.[61] The State of Ohio Environmental Protection Agency was equally emphatic, declaring:

> What U.S. EPA lacks is an appreciation of the issues that will arise on the state level if U.S. EPA goes forward with this approach without providing adequate time for the transition to permitting GHGs. There must be a recognition by the federal government that having a rule immediately effective will place states in the position of having either to advise entities to violate state rules or the state agencies will be inundated with paperwork that serves no useful purpose. . . . The day that U.S. EPA makes the rule effective means that sources will need to comply with the lower state threshold even if U.S. EPA has modified the federal rules. The federal government should not put states in that position. U.S. EPA must grant states adequate time to modify state requirements. . . . The same issues that U.S. EPA raise on a federal level about absurd results apply on

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59 Letter of Public Comment, Docket No. OAR-2009-0517, National Association of Clean Air Agencies, December 28, 2009, at 3.

60 *Id.*

61 Letter of Public Comment, Docket No. OAR-2009-0517, Northeast States for Coordinated Air Use Management, December 22, 2009.

> the state level and U.S. EPA needs to provide states with adequate time to change laws and rules.[62]

Even if EPA's Tailoring Rule could be implemented quickly on a state-by-state basis, the economic impacts of the Endangerment Finding would still be harsh, both for public and private concerns. Thousands of stationary sources will still be subject to new federal regulatory requirements, and even if states could conform their own laws to the Tailoring Rule, most anticipate that the number of permit actions that would remain under EPA's proposed thresholds for GHGs will be far greater than estimated by EPA. States, such as Ohio, which are now feeling the heaviest impact of the latest economic recession are faced with the impossible task of drumming up sufficient administrative resources to handle the inevitable increase in workload. EPA has the responsibility of ensuring that state and local permitting authorities have adequate resources in place to address the additional permitting workload that flows from an Endangerment Finding before making a sweeping determination in such a hurried and unwise fashion.

Furthermore, the "tailored" thresholds proposed by EPA are still very low for most industrial sources, especially for coal producers such as the Association's membership.[63] As EPA knows, the U.S economy is powered by hydrocarbon fuels such as coal.[64] Coal is fundamental to how this nation produces electricity, with

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62 Letter of Public Comment, Docket No. OAR-2009-0517, State of Ohio Environmental Protection Agency, , December 22, 2009 at p. 2.

63 Letter of Public Comment, Docket No. OAR-2009-0517, North American Coal Corporation, December 28, 2009.

64 Letter of Public Comment, Docket No. OAR-2009-0517, Ohio Coal Association, December 28, 2009.

approximately 50 percent of the country's electricity derived from combusting coal.[65] In the state of Ohio, coal-based generation supplies more than 87% of Ohio's energy needs. The Association's membership sells coal to customers throughout the United States, providing some of the highest paying jobs in areas of severe unemployment. The trickle-down effect of Ohio's and the country's coal-industry is beneficial to all Americans' broader economy and welfare.

EPA has already predicted the impacts of GHGs as regulated pollutants under the Clean Air Act as "overwhelming" and "paralyzing" to state permitting agencies, producing "multi-year permitting backlogs."[66] The most viable and sensible option would be for EPA to withdraw its Endangerment Finding so that the GHG permitting impacts that have been raised by the states be closely, carefully, and responsibly assessed.

IV. CONCLUSION

For all of the foregoing reasons contained in this Supplemental Petition, EPA should convene a proceeding to reconsider, stay, and/or withdraw the Endangerment Finding.

Respectfully submitted this 16th day of February, 2010.

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65 "Materials Characterization Paper in Support of the Advanced Notice of Proposed Rulemaking – Identification of Nonhazardous Materials that are Solid Waste Coal Combustion Products – Coal Fly Ash, Bottom Ash, and Boiler Slag," EPA, Dec. 17, 2008, available at http://www.epa.gov/waste/nonhaz/pdfs/ccpash.pdf.

66 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 F.R. 55294–95 (Oct. 27, 2009).

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