

ORAL ARGUMENT NOT YET SCHEDULED

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

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COALITION FOR RESPONSIBLE)	
REGULATION, et al.,)	No. 10-1035
)	(Consolidated under
Petitioners,)	09-1322 with:
)	10-1024, 10-1025,
v.)	10-1026, 10-1030,
)	10-1036, 10-1037,
UNITED STATES ENVIRONMENTAL)	10-1038, 10-1039,
PROTECTION AGENCY,)	10-1040, 10-1041,
)	10-1042, 10-1044,
Respondent.)	10-1045, 10-1046,
<hr/>)	10-1049)

**MOTION FOR REMAND TO ADDUCE
ADDITIONAL EVIDENCE**

Petitioners in Case No. 10-1035¹ (which has been consolidated with the above-mentioned case), pursuant to Clean Air Act (“CAA”) § 307(c) (42 U.S.C. §7607(c)), submit the following motion to remand the “Endangerment and Cause

¹ The Petitioners in Case No. 10-1035 are U.S. Rep. John Linder (GA-7th); U.S. Rep. Dana Rohrabacher (CA-46th); U.S. Rep. John Shimkus (IL-19th); U.S. Rep. Phil Gingrey (GA-11th); U.S. Rep. Lynn Westmoreland (GA-3rd); U.S. Rep. Tom Price (GA-6th); U.S. Rep. Paul Broun (GA-10th); U.S. Rep. Steve King (IA-5th); U.S. Rep. Nathan Deal (GA-9th); U.S. Rep. Jack Kingston (GA-1st); U.S. Rep. Michele Bachmann (MN-6th); U.S. Rep. Kevin Brady (TX-8^h); Southeastern Legal Foundation, Inc.; The Langdale Company; Langdale Forest Products Company; Langdale Farms, LLC; Langdale Fuel Company; Langdale Chevrolet – Pontiac, Inc.; Langdale Ford Company; Langboard, Inc. – MDF; Langboard, Inc. - OSB; Georgia Motor Trucking Association, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc; Southeast Trailer Mart, Inc.; and Georgia Agribusiness Council, Inc

or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule” (74 F.R. 66496) (“the Endangerment Finding,” or “the Finding”) to the Environmental Protection Agency (“EPA,” or “the Agency”) for further proceedings to adduce additional evidence.

I. ARGUMENT AND CITATION OF AUTHORITY

A. REMAND PURSUANT TO CLEAN AIR ACT SECTION 307(C) IS AN AVAILABLE REMEDY IN THIS PROCEEDING.

These Petitioners hereby adopt the legal arguments presented by the Ohio Coal Association, the Petitioner in Case No. 10-1040 (which has been consolidated herewith), in Section I of the Argument in support of their Motion to Remand as to the availability in this proceeding of the remedy of remand for development of additional evidence under CAA §307(c) (42 U.S.C. §7607(c)).

B. REMAND IS APPROPRIATE UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

The Endangerment Finding issued by Environmental Protection Agency (“EPA”) relies explicitly and pervasively on reporting by the United Nations Intergovernmental Panel on Climate Change (“IPCC”). 74 F.R. 66511.

The historic disclosure in November 2009, of e-mails, computer code and other documents from the Climatic Research Unit (“CRU”) at the University of East Anglia, in England, an episode now known as “Climategate,” has shaken the world of climate science to its foundations. Climategate and multiple other

revelations of scientific misconduct on the part of the IPCC (discussed below) have impeached the validity and reliability of the IPCC's conclusions that human emissions of greenhouse gases ("GHG") pose a threat of catastrophic global warming. In view of the depth and breadth of EPA's reliance on the IPCC, these revelations also necessarily undermine the Finding at issue in this appeal.

On the explicit premise of the Endangerment Finding, EPA is promulgating and issuing a series of follow-on rules² that will subject vast swathes of economic activity to regulation. The validity of the Endangerment Finding is thus the foundation of the government's campaign to regulate emissions of CO₂ and other GHGs under the Clean Air Act.

But that foundation has cracks. Climategate and the other scientific scandals surrounding the IPCC and the resulting public outcry are such that many institutions and governments with a role or stake in the matter have undertaken formal inquiries or reconsiderations. These include the organizational parents of

² The EPA's overall policy for regulating greenhouse gases under the Clean Air Act has four primary components: (1) the Endangerment Finding, (2) the "Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule," issued by EPA on April 2, 2010 (published in the Federal Register at 75 Fed. Reg. 17,004 *et seq.*, (3) the "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," issued by EPA and awaiting publication in the Federal Register, and (4) EPA's proposed rule, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule," 74 Fed. Reg. 55292 (October 27, 2009).

the IPCC itself³, the UK House of Commons Science and Technology Select Committee⁴, the UK Met Office (the UK's national weather service)⁵, the University of East Anglia⁶, Pennsylvania State University⁷, and the governments of India⁸ and the Netherlands.⁹

Additionally, Three British scientific societies have denounced the practices

³ IPCC Press Release, "Scientific Academy to Conduct Independent Review of the Intergovernmental Panel on Climate Change's Processes and Procedures at Request of United Nations and IPCC," available at http://www.ipcc.ch/pdf/press/press_release_1003210-UNhq.pdf, last visited March 10, 2010

⁴ "The disclosure of climate data from the Climatic Research Unit at the University of East Anglia," http://www.parliament.uk/parliamentary_committees/science_technology/s_t_cru_inquiry.cfm, last visited April 14, 2010

⁵ "Proposal for a new International Analysis of Land Surface Air Temperature Data," submitted by the UK Met Office, available at ftp://ftp.wmo.int/Documents/SESSIONS/CCI-XV/English/DOCs/pdf/inf15_en.pdf, last visited March 4, 2010.

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

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

⁷ "Inquiry into climate scientist moves to next phase," Penn State University, February 3, 2010, available at <http://live.psu.edu/story/44327>, last visited April 14, 2010.

⁸ "India abandons IPCC, sets up own panel," International Business Times, Feb. 5, 2010, available at <http://www.ibtimes.com/articles/20100205/india-ipcc-un-climate-change-global-warming.htm>.

⁹ "New mistake found in UN climate report," NRC Handelsblad, Feb. 4, 2010, available at <http://www.nrc.nl/international/article2476086.ece>.

of the CRU.¹⁰ Leading U.S. scientists have described the episode as one of the greatest scientific frauds in history.¹¹

These developments were not adduced during the comment period for the

¹⁰ “Memorandum submitted by the Institute of Physics,” available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/memo/climatedata/uc3902.htm>, last visited March 3, 2010; “Memorandum submitted by the Royal Society of Chemistry,” available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/memo/climatedata/uc4202.htm>, last visited March 3, 2010; “Memorandum submitted by the Royal Statistical Society,” available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/memo/climatedata/uc4702.htm>, last visited March 3, 2010.

¹¹ It is worth noting some of the reactions of prominent scientists to the Climategate scandal:

- Princeton University's Robert Austin: “I view it as science fraud, pure and simple.” Quoted in: McCullagh, Declan. “Physicists Stick to Warming Claim Post-Climategate,” CBS News (Dec, 8, 2009). Found at: <http://www.cbsnews.com/blogs/2009/12/08/taking-liberties/entry5933353.shtml> (last visited Dec. 23, 2009).
- Robert Austin (Princeton), Will Happer (Princeton) and Hal Lewis (UC Santa Barbara) “ClimateGate, which was and is an international scientific fraud, the worst any of us have seen.” *Ibid.*
- Don Easterbrook: “Legitimate scientists do not doctor data, delete data they don't like, hide data they don't want seen, hijack the peer review process, personally attack other scientists whose views differ from theirs, send fraudulent data to the IPCC that is used to perpetuate the greatest hoax in the history of science, provide false data to further legislation on climate change that will result in huge profits for corrupt lobbyists and politicians, and tell outright lies about scientific data.” Found at: <http://www.climatedepot.com/a/4140/Geologist-appalled-at-NYTs-Krugman-Legitimate-scientists-do-not-doctor-datahijack-peerreviewsend-fraudulent-data-to-UN-that-is-used-to-perpetuate-greatest-hoax-in-the-history-of-science> (Nov. 29, 2009) (last visited Dec. 23, 2009).
- Ian Plimer “If you have to argue your science by using fraud, your science is not valid.” Quoted in “Climate Change Fraud.” Daily Express (Dec. 2, 2009). Found at: <http://www.express.co.uk/posts/view/143573/Climate-change-rocked-> (last visited Dec. 23, 2009)

Endangerment Finding because it closed on June 23, 2009, while the Climategate scandal first surfaced in late November 2009.¹²

Petitioners have called these developments and their momentous implications to the attention of the EPA in a Petition for Reconsideration and two substantive supplements filed with the Agency. Other parties have also filed weighty petitions for reconsideration and supplements explaining in comprehensive detail the stark implications of Climategate and other recent developments.¹³ Yet the EPA has not budged. Instead its Administrator has made public statements insisting there is no reason for doubt and that the science remains “settled.”¹⁴ The EPA thus reposes more confidence in the IPCC than the IPCC does in itself, and appears to disagree with the IPCC only on the question of whether the IPCC’s reporting should be reconsidered.

EPA has not yet formally acted on the petitions for reconsideration. Instead, EPA is pressing forward to regulate emissions of GHG under the Clean Air Act as if nothing of any significance has occurred. The Reconsideration of the Johnson

¹² “Hackers target leading climate research unit.” BBC News, 20 November 2009, found at: (<http://news.bbc.co.uk/2/hi/8370282.stm> (last visited 20 December 2009)).

¹³ See especially the Petition for Reconsideration of Peabody Energy Company, available at Regulations.gov docket no. EPA-HQ-OAR-2009-0171-11696, available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480aa657b>

¹⁴ “EPA Chief Goes Toe-To-Toe With Senate GOP Over Climate Science,” The New York Times, February 24, 2010, available at <http://www.nytimes.com/gwire/2010/02/23/23greenwire-epa-chief-goes-toe-to-toe-with-senate-gop-over-72892.html>, last visited April 14, 2010.

Memo, the Light Duty Vehicle (“LDV”) Rule, the forthcoming issuance of the Tailoring Rule, and the Administrator’s public statements all reflect an implicit denial of reconsideration. Yet the EPA insists in the LDV Rule that issuance of regulations premised on the Endangerment Finding is without prejudice to the petitions to reconsideration, which remain under review.¹⁵

Whatever EPA’s actual intentions towards the petitions for reconsideration may be, the fact remains that EPA is pressing ahead with an extraordinary expansion of federal regulatory authority without pausing to determine whether, as it appears, Climategate and the other scientific scandals fatally undermine the entire enterprise. Petitioners contend that EPA should look before it leaps, and carefully evaluate the full implications of Climategate and the other scientific scandals surrounding the IPCC before finalizing the Endangerment Finding and the follow-on emissions regulations. Since the Agency will not take heed, Petitioners are asking this Court to send the Endangerment Finding back to the Agency for a thorough and searching examination of the new evidence that has emerged before it commits the country to ruinous and ill-considered follow-on regulations.

¹⁵ See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, p. 161, available at <http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf>

C. THE TEMPERATURE RECONSTRUCTIONS ON WHICH THE IPCC AND EPA RELY HAVE BEEN IMPEACHED.

At a high level of generality, the conclusion that human emissions of GHG, principally CO₂, are causing anthropogenic global warming (“AGW”) is based on trends derived from surface temperature records and on the projections of climate models. Surface temperature records fall into two broad categories, those recorded contemporaneously from thermometers commencing at the earliest in 1850, called the instrumental record, and those for prior periods derived from alleged proxies for temperature, such as tree rings, sediments on lake and sea floors, ice cores, etc., called proxy temperature reconstructions.

Naturally occurring episodes of warming and cooling in climate history present a problem of proof for the promoters of catastrophic AGW, namely how to explain that modern warming is caused by man when prior episodes of equal or greater warming self-evidently were not. Part of their solution has been to airbrush out of climate history cyclical climate changes that impeach their claims. Thus, in Mann, Briffa and Hughes (1998) strenuous efforts were undertaken to erase the Medieval Warm Period and the Little Ice Age by means of proxy reconstructions. Their reconstruction, which became known as the “Hockey Stick,” was featured by the IPCC in their Third Assessment Report (“TAR”) and slightly modified by the Fourth Assessment Report (“AR4”). Between the TAR and the AR4 a significant

scientific controversy raged over the validity of the “Hockey Stick.”¹⁶

Climategate added a new and important dimension to this controversy by revealing extensive e-mail correspondence between and among leading authors of the IPCC reports and the creators of the Hockey Stick that are strongly probative of intentional scientific fraud, manipulation of computer code and temperature records to suppress natural variability and convey a false impressions of validity and of anthropogenic warming, manipulation of peer review processes at scientific journals and at the IPCC, blackballing of dissenting scientists and their papers, and of journals that published their papers, deletion of relevant data to prevent scientific scrutiny, and deletion of e-mails and data to obstruct Freedom of Information Act requests.

The most famous such e-mail is from former CRU director Phil Jones::

¹⁶ See McKittrick & Michaels, *Corrections To The Mann Et. Al. (1998) Proxy Data Base And Northern Hemispheric Average Temperature Series*, Energy & Environment Vol. 14, No. 6, p. 751 (2003); McKittrick & Michaels, *Hockey Sticks, principal components, and spurious significance*, Geophysical Research Letters, Vol. 32 L03710 (2005); McKittrick & Michaels, *The M&M Critique Of The Mbh98 Northern Hemisphere Climate Index: Update And Implications*, Energy & Environment Vol. 16 No. 1, p. 69 (2005); McKittrick & Michaels, *Reply to comment by von Storch and Zorita on ‘‘Hockey sticks, principal components, and spurious significance,’’* Geophysical Research Letters, Vol. 32, L20714 (2005); McKittrick & Michaels, *Reply to comment by Huybers on ‘‘Hockey sticks, principal components, and spurious significance,’’* Geophysical Research Letters, Vol. 32 L20713 (2005); Ad Hoc Committee Report on the “hockey Stick” Global Climate Reconstruction” a/k/a the “Wegman Report” available at http://republicans.energycommerce.house.gov/108/home/07142006_Wegman_Report.pdf. (last visited Feb. 10, 2010)

Dear Ray, Mike and Malcolm, Once Tim's got a diagram here we'll send that either later today or first thing tomorrow. I've just completed Mike's Nature trick of adding in the real temps to each series for the last 20 years (i.e. from 1981 onwards) and (sic) from 1961 for Keith's to hide the decline...¹⁷

The decline that Jones was hiding was the decline in proxy temperatures commencing in 1981 in some series and from 1961 in Keith Briffa's series. The post-1960 decline in the proxy reconstruction temperatures while instrumental records showed an increase fatally impeached the validity and reliability of proxy reconstructions over all time periods.¹⁸ This was extremely significant because the proxy reconstructions were the method by which natural climate variability was suppressed in the Hockey Stick graph, a linchpin to the claim that recent warming was anthropogenic. If the reconstructions were invalid, then so was the suppression of natural climate variability, and so was the claim that the current warming was unprecedented. By "hiding the decline" the CRU scientists made their proxy reconstruction seem "more skilful than it really is."¹⁹

¹⁷ E-mail from P. Jones to R. Bradley, "Diagram for WMO Statement" (Nov 16, 1999). Found at:
<http://www.eastangliaemails.com/emails.php?eid=154&filename=942777075.txt>
(last visited: Dec 23, 2009)

¹⁸ Sheppard, Marc. "Understanding Climategate's Hidden Decline." American Thinker (Dec. 6, 2009). Found at:
http://www.americanthinker.com/2009/12/understanding_climategates_hid.html
(last visited Dec. 23, 2009)

¹⁹ This manipulation was embedded in the computer code used to process the proxy reconstructions. The programmer's comments repeatedly and frankly state that the decline is "artificially removed" "which will incorrectly imply the

D. THE INSTRUMENTAL SURFACE TEMPERATURE RECORDS ON WHICH THE IPCC AND THE EPA RELY HAVE BEEN IMPEACHED.

IPCC and the EPA rely upon surface temperature record datasets to demonstrate that the recent warming is unprecedented. Accordingly, if these records are invalid or unreliable, the conclusions drawn by the IPCC and the EPA are gravely undermined.

Joseph D'Aleo²⁰ and Anthony Watts²¹ have published and twice updated their paper, *Surface Temperature Records: Policy Driven Deception?*²² (hereinafter "D'Aleo & Watts"). They amass compelling evidence that the surface temperature records are in fact invalid and unreliable for three principal reasons, all of which introduce a warm bias:

1. Station drop out, which introduces a significant sampling bias toward warmer temperatures, and invalid use of interpolation from warmer grid cells to fill thusly vacant grid cells without actual data;

reconstruction is more skilful than it actually is. See Osborn et al. (2004).” See “Here’s Harry!” available at <http://a-sceptical-mind.com/heres-harry>, last visited April 14, 2010, or Climategate: Hide the Decline - codified, available at <http://wattsupwiththat.com/2009/11/25/climategate-hide-the-decline-codified/>, last visited April 14, 2010.

²⁰ Joseph D'Aleo is a meteorologist of 35 years experience. He co-founded the Weather Channel and is currently the Executive Director of the International Climate and Environmental Change Assessment Project.

²¹ Anthony Watts has 25 years experience in broadcast meteorology. He founded SurfaceStations.org, a web site devoted to assessing the quality of weather stations across the U.S. He is also the founder of <http://wattsupwiththat.com/>, a top-rated science blog.

²² Available at <http://scienceandpublicpolicy.org/originals/policy-driven-deception.html> (last visited April 14, 2010).

2. Improper adjustments to data; and
3. Improper siting of temperature stations.

Station Drop-Out. There has been a huge decline in the number of temperature stations included in the temperature datasets. D'Aleo & Watts, p. 16-21. The remaining stations are biased towards lower latitudes, lower elevations, and urban locations. *Id.* The greatest station drop-out has occurred in Siberia and Canada, where these global temperature datasets purport to show the greatest warming has occurred. This sampling bias imparts a warm bias to the record. *Id.*

For example, the selective use of only 25% of the available Russian stations in the HadCRUT²³ dataset imparted a warming bias of .64 C ° greater than the trend calculated using all available data. *Id.* p. 24-26. Russia represents 11.5% of the Earth's land mass, so this is a significant issue. In Canada, the number of reporting stations dropped from 600 to less than 50, the percentage below 300 feet in elevation tripled, while those above 3000 feet were reduced by half. *Id.* at 27-28. GHCN²⁴ data, corrupted by this sampling bias and by inappropriately warm-biased infilling, shows warming in Canada, but a simple average of available station data shows cooling. *Id.*

The station drop-out results in sampling errors that introduce a warming bias

²³ The HADCRUT dataset is published by the CRU and the Hadley Research Center.

²⁴ The GHCN is the Global Historical Climate Network surface temperature dataset.

to the surface temperature record. Infilling from warmer temperature stations to colder grid cells for which no actual data is collected also imparts a spurious warming signal.

Improper Adjustments or Failures to Adjust. Phil Jones himself recently admitted in a BBC interview that the rates of warming in the periods from 1860-1880, 1910-1940 and 1975-1998 were “similar and not statistically different from each other,” with the caveat that the 1860 period was less certain because of its shorter length and sparser data. Jones’ admission is significant because such prior episodes of warming and cooling in the instrumental temperature record pose the same dilemma for promoters of AGW as the Medieval Warm Period and the Little Ice Age – they undercut the assertion that recent warming is outside the range of natural variability, and that it has been caused by human emissions of GHG.

D’Aleo & Watts present persuasive evidence that the warming of the 1910-1940 period has been minimized by subsequent negative adjustments, and that the recent warming has been exaggerated by positive adjustments (or by failure to properly adjust for urban heat islands), thereby imparting to the 20th century a warming trend that the raw data and rural stations do not show. D’Aleo & Watts at pp. 44-79.

In one particular recent analysis of adjustments to U.S. surface temperature

records, Edward R. Long, PhD,²⁵ showed that for rural stations, the raw data linear trend was 0.13° C per century, while for urban stations the raw data linear trend was 0.79° C per century. *Id.* at p. 8-9. Yet NCDC²⁶'s *adjusted* rural linear trend was 0.64° C per century. The adjusted urban trend was 0.77° C per century. *Id.* “Thus, the adjustments to the data have increased the rural rate of increase by a factor of 5 and slightly decreased the urban rate, from that of the raw data.” *Id.* This has the effect of hiding urban heating, and permitting the warming present in the adjusted data to be attributed not to urban warming, but to climactic warming. As Long concludes, “The consequence, intended or not, is to report a false rate of temperature increase for the Contiguous U.S.” *Id.* at 13.

Station Siting. With respect to temperature station siting, Anthony Watts formed a project, SurfaceStations.org, that has surveyed 1067 of 1221 (87.4%) surface stations in the USHCN network and evaluated them for compliance with the government's siting criteria. D'Aleo & Watts, pp. at 38-43.²⁷ The Surface-

²⁵ Dr. Long is a physicist who retired from NASA after leading their Advanced Materials Program, among other contributions. His paper, published February 10, 2010, is Long, E.R., “Contiguous U.S. Temperature Trends Using NCDC Raw and Adjusted Data for One-Per-State Rural and Urban Station Sets,” available at http://scienceandpublicpolicy.org/originals/temperature_trends.htm, last visited March 2, 2010.

²⁶ National Climate Data Center, keeper of the Global Historical Climate Network and the U.S. Historical Climate Network (“USHCN”).

²⁷ *See also* Climate Reference Network Site Information Handbook (Dec. 2002) available at [Climate Reference Network Site Information Handbook](#) (last visited Feb. 10, 2010).

Stations.org survey determined that 90% of surveyed stations were poorly sited in ways that result in errors exceeding 1° C according to the handbook's error scale.

Overall D'Aleo & Watts conclude in their Summary for Policymakers that

1. Instrumental temperature data for the pre-satellite era (1850-1980) have been so widely, systematically, and unidirectionally tampered with that it cannot be credibly asserted there has been any significant "global warming" in the 20th century.
2. All terrestrial surface-temperature databases exhibit very serious problems that render them useless for determining accurate long-term temperature trends.
3. All of the problems have skewed the data so greatly as to overstate observed warming both regionally and globally.

Id. at 10.

E. THE CLIMATE MODELS' ON WHICH THE IPCC AND THE EPA RELY TO PREDICT CATASTROPHIC GLOBAL WARMING HAVE BEEN IMPEACHED.

In the here and now there is no present climate catastrophe. All catastrophic effects of AGW exist only in the projections of computer models. The significance of these models to the Endangerment Finding is therefore obvious. As set forth below, the Climategate emails reveal startling admissions by a leading IPCC scientist that the climate models are deeply flawed and unreliable. The preface to these admissions is that there has been no statistically significant global warming over the last 15 years, despite steadily increasing atmospheric CO₂.²⁸ Against this

²⁸ In an interview with the BBC, Phil Jones acknowledged what the data show, that there has been no statistically significant warming since 1995. *See* BBC News –

background Kevin Trenberth wrote:

The fact is that we can't account for the lack of warming at the moment and it is a travesty that we can't.²⁹

Tom Wigley disagreed, which drew this reply from Trenberth:

How come you do not agree with a statement that says we are no where close to knowing where energy is going or whether clouds are changing to make the planet brighter. We are not close to balancing the energy budget. The fact that we can not account for what is happening in the climate system makes any consideration of geoengineering quite hopeless as we will never be able to tell if it is successful or not! It is a travesty!

Id. Michael Mann countered that it could be “explained” by natural variability, but Trenberth demurred: “Saying it is natural variability is not an explanation. What are the physical processes? □ Where did the heat go?” *Id.*

These confessions from the sanctum sanctorum of the IPCC drive a stake through the heart of the EPA's position that the climate models are sufficiently valid and reliable to serve as the basis for enacting a radical program of federal regulation of CO2 emissions.

F. THE ASSERTION THAT ANTHROPOGENIC GLOBAL WARMING ENDANGERS HUMAN HEALTH AND WELFARE HAS BEEN IMPEACHED.

Since Climategate, several other scandals have emerged in the IPCC's

Q&A: Professor Phil Jones, Feb. 13, 2010, *available at* <http://news.bbc.co.uk/2/hi/science/nature/8511670.stm> last visited Feb. 14, 2010.

²⁹ CRU email 1255523796.txt. CRU e-mails are available at <http://www.eastangliaemails.com/index.php>

reporting on the effects of AGW. Multiple IPCC assertions have been shown to be knowingly fraudulent or improperly based on non-peer reviewed sources, including claims of the disappearance of Himalayan glaciers,³⁰ the disappearance of mountain ice,³¹ the collapse of African crop yields,³² the threat that large swathes of the Amazonian rain forest would turn into savannah grasslands,³³ the increasing frequency and severity of extreme weather,³⁴ and the claim that 50% of

³⁰ This claim was knowingly fraudulent and intended to induce a response from policymakers. *See* UK Daily Mail, “Glacier scientist: I knew data hadn’t been verified” January 24, 2010, *available at* <http://www.dailymail.co.uk/news/article-1245636/Glacier-scientists-says-knew-data-verified.html> (last visited Feb. 10, 2010).

³¹ Telegraph.co.uk, “UN climate change panel based claims on student dissertation and magazine article,” January 30, 2010, *available at* <http://www.telegraph.co.uk/earth/environment/climatechange/7111525/UN-climate-change-panel-based-claims-on-student-dissertation-and-magazine-article.html> (last visited Feb. 10, 2010).

³² Richard North, “And Now for Africagate,” February 7, 2010, *available at* <http://eureferendum.blogspot.com/2010/02/and-now-for-africagate.html> (last visited Feb. 10, 2010)

³³ *See* Richard North, “The corruption of science,” January 26, 2010, *available at* <http://eureferendum.blogspot.com/2010/01/corruption-of-science.html>, (last visited Feb. 2010)

³⁴ Roger Pielke, Jr., “Systematic Misrepresentation of the Science of Disasters and Climate Change,” *available at* <http://rogerpielkejr.blogspot.com/2009/06/systematic-misrepresentation-of-science.html>, (last visited Feb. 10, 2010); Roger Pielke, Jr., “A Primer on Egregious Errors in IPCC WG2 on Disasters,” *available at* <http://rogerpielkejr.blogspot.com/2010/01/primer-on-egregious-eroors-in-ipcc-wg2.html> (last visited Feb. 10, 2010); Roger Pielke, Jr., “What Does Pielke Think About This?” *available at* <http://rogerpielkejr.blogspot.com/2010/01/what-does-pielke-think-about-this.html> (last visited Feb. 10, 2010); *See* “UN wrongly linked global warming to natural disaster,” TimesOnline, January 24, 2010 *available at*

the Netherlands was at risk of inundation.³⁵

Space constraints preclude more than a passing identification of these scandals. Collectively they show that the IPCC's processes were grossly inadequate, which the IPCC admits but the EPA denies. EPA's finding that AGW endangers human health and welfare has been undermined and the Agency should be directed on remand to take evidence on these issues.

G. THE EPA'S GREENHOUSE GAS POLICY AS A WHOLE IS CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION.

The proposed Tailoring Rule demonstrates that EPA's attempt to regulate GHG's under the CAA is:

- administratively impossible without rewriting the statute;³⁶
- necessarily contrary to the Clean Air Act since it cannot be administered under the Act as actually written;
- an unconstitutional attempt to fix the impossibility problem by rewriting the statute by means of a regulation³⁷; and

<http://www.timesonline.co.uk/tol/news/environment/article7000063.ece?token=nul&offset=0&page=1> (last visited Feb. 10, 2010).

³⁵ "New mistake found in UN climate report," NRC Handelsblad, Feb. 4, 2010, available at <http://www.nrc.nl/international/article2476086.ece>

³⁶ This point is acknowledged by the EPA in the Tailoring Rule. *See* 74 Fed. Reg. 55292 (October 27, 2009). ("[A] literal application would render it impossible for permitting authorities to meet the requirement in CAA section 165(c) to process permit applications within 12 months." Tailoring Rule Proposal, p. 65; "The extraordinary number of permit applications would render it impossible for permitting authorities to meet the requirements of section 503(c) to process title V permit applications within 18 months." *Id.*, p. 68.

- climatically pointless because it will have no detectable effect on either global CO₂ levels or AGW³⁸.

There is also compelling evidence that the policy is economically destructive, EPA's claims to the contrary notwithstanding.³⁹

Since EPA is rushing forward with this policy, it is urgently necessary that this Court remand the Endangerment Finding to the EPA with explicit direction that it take additional evidence on the full implications of Climategate and the subsequently unfolding scandals for the validity and reliability of the IPCC's reporting and of EPA's own Endangerment Finding, as well as the related follow-

³⁷ The Tailoring Rule purports to unilaterally amend the Clean Air Act by raising the statutory major permitting threshold from 250 tons per year to 25,000 tons per year for six years. *See* 74 Fed. Reg. 55292 (October 27, 2009); CAA § 169 (42 U.S.C. § 7479(1)); CAA § 302 (42 U.S.C. § 7602(j)). While this may be convenient for the government or and even appreciated by those who momentarily escape regulation, it is also patently unconstitutional. *Clinton v. New York*, 524 U.S. 417, 438 (1998); *INS v. Chadha*, 462 U.S. 919, 954 (1983 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I.") To be valid an amendment of a statute must satisfy the bicameralism and presentment clauses of Article I, Section 7. *Terran v. Secretary of HHS*, 195 F.3d 1302, 1312 (D.C. Cir. 2000)..

³⁸ EPA Administrator Lisa Jackson admitted in response to questions from Sen. James Inhofe that the Lieberman-Warner Climate Security Act would have no effect on global CO₂ levels. *See* Press release, "Jackson Confirms EPA Chart Showing No Effect on Climate Without China, India," U.S. Senate Committee on Environment and Public Works, July 7, 2009 at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=564ed42f-802a-23ad-4570-3399477b1393 (last visited March 16, 2010).

³⁹ *See, e.g.* Comment submitted by the National Association of Home Builders, EPA-HQ-OAR-2009-141-11690.1; Comment submitted by Portland Cement Association, EPA-HQ-OAR-2009-0517-16411.1; Comment submitted by U.S. Chamber of Commerce, EPA-HQ-OAR-2009-0517-5110.1.

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This 15th day of April, 2010.

Respectfully submitted,

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I, the undersigned, hereby certify that on April 15, 2010, I electronically filed the foregoing “Motion for Remand to Adduce Additional Evidence” using the Court’s ECF system, and thereby caused it to be served by electronic transmission to counsel of record that are registered to use the Court’s CM/ECF system. All counsel not registered with the Court’s CM/ECF system were served via first-class postage paid mail.

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