

ORAL ARGUMENT NOT YET SCHEDULED

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

**U.S. REPRESENTATIVE JOHN
LINDER, et al., and**

v.

**UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,**

Respondent

No. 10-1035

**(consolidated with
09-1322 and
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, 10-1046, and
10-1049)**

REPLY IN SUPPORT OF MOTION FOR REMAND

The undersigned Petitioners, U.S. Representative John Linder, et al. in Case 10-1035, consolidated with cases under Case 09-1322, submit this reply in support of their “Motion for Remand to Adduce Additional Evidence.”

**I. NOTICE AND COMMENT RULEMAKING UNDER THE CLEAN AIR
ACT IS SUBJECT TO REMAND UNDER § 307(C)**

EPA and other proposed intervenors argue that § 307(c) does not apply to the Endangerment Finding because it is an “informal rulemaking.” *See e.g.*, Doc. 1242455, p. 4 (only applies if determination required to be “on the record”); Doc. 1242335, pp.3-4 (“applies only in agency determinations made through formal

rulemaking”); Doc. 1242502, p. 2 (language in 307(c) denotes “formal, ‘trial-type’ evidentiary hearings”). However, by these arguments, Respondent and the like-minded intervenors admit that § 307(c) applies to formal rulemaking procedures; they dispute only whether notice and comment rulemaking under the Clean Air Act (“CAA”) is sufficiently formal for § 307(c) to apply. EPA overlooks that both Congress and this Court have determined that 307(d) rulemaking is not “informal,” but in fact requires an elevated, hybrid level of formality. Accordingly, 307(c) should apply.

EPA first argues that § 307(d) did not require the Endangerment Finding be determined “on the record,” and therefore § 307(c) cannot apply. This argument ignores the plain Congressional intent of the 1977 amendments to the CAA to establish a clear, defined and formal record for judicial review. *See Pedersen, Formal Records and Informal Rulemaking*, 85 Yale L.J. 38 (1975); *American Petroleum Institute v. Costle*, 609 F.2d 20, 23 (1979) (Pedersen article “authoritative guide to congressional intent in enacting the record provisions of Section 307(d)”); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298, 392-400 (D.C. Cir. 1981). Pedersen’s proposed reforms were largely adopted in the 1977 amendments to the CAA, and were “designed ‘to move rulemaking records as far as possible toward the “procedural” end of the spectrum without reimposing the adjudicatory

hearing requirements that have done so much damage in the past.” *Sierra Club, supra*, 657 F.2d at 305, *citing* Pedersen, *supra*, 85 Yale L.J. at 79.

In addition, when Congress adopted Pedersen’s recommendations and formalized the notice and record in rulemaking under the CAA, it left § 307(c) both intact and unchanged, with no express statement that it did not apply to § 307(d) rulemakings. The 1977 amendments had the same purpose as § 307(c) – to make sure that the EPA’s decisions were supported by a proper record and proper analytical rigor. It would be anomalous to read § 307(c) as not being complementary to the purposes of the 1977 amendments. By clear implication therefore, Congress intended that § 307(c) apply to rules adopted using the hybrid procedure required by § 307(d).

The alternative, apparently suggested by EPA and proposed intervenors, is that § 307(c) applies only to the “formal” sorts of rulemaking described in the APA. EPA does not explain, nor can one imagine, why Congress would move away from the formal-versus-informal structure of the APA, only to keep provisions in the CAA supposedly designed to maintain the distinction. There’s simply no credible argument that § 307(c)’s language “required to be made on the record after notice and opportunity for hearing” was intended to refer back to a requirement of the APA that Congress overtly eschewed in drafting the Clean Air Act.

EPA then argues that this Court should allow EPA “to complete the applicable Section 307(d) administrative process without interference.” (EPA Response at p.3) It goes without saying that it is hardly “interference” for this Court to apply law to EPA’s actions, especially where such would actually be the imposition of accountability. *See* Pedersen, *supra* at 59-60 (extolling the beneficial effects of detailed judicial review). As Petitioners have argued from the beginning, this case is unique in two respects. First EPA’s GHG policy is being issued in separate components in an apparent attempt to protect the overall policy from meaningful judicial review. Second, the Administrator refuses to acknowledge that Climategate and its sequela gravely undermine the validity of the Endangerment Finding.

Opponents of the motions for remand also argue that even if § 307(c) applies, remand is discretionary with the Court. *See* Doc. 1242502, p. 5. This is certainly true, but carries little weight since neither EPA nor any of the proposed respondent-intervenor have questioned Petitioners’ factual submissions. At this point, the record is uncontroverted that numerous, serious, and substantial questions exist about the scientific basis on which EPA issued the Endangerment Finding, all of which are of “central relevance” to the outcome of the rule. To say, under such circumstances, that remand is discretionary is to miss the point.

Finally, Petitioners cannot help but note that while the State of New York argues that § 307(c) does not apply to 307(d) rulemaking, New York itself has previously argued the exact opposite. In *State of New York v. EPA*, 716 F.2d 440 (7th Cir. 1983), New York filed a petition for reconsideration with the EPA and also filed a petition for review of EPA's final rulemaking in the Seventh Circuit. In the appeal New York moved for remand under § 307(c) to adduce additional evidence, arguing that new scientific reports addressing the pollutants had become available after the notice and comment period. *See* 46 Fed. Reg. 52139. New York contended the matter was therefore appropriate for remand under 307(c) – the same argument they now oppose. Evidently, New York was for remand before it was against it.

II. EPA HAS ALREADY REJECTED RECONSIDERATION.

EPA also argues that remand is inappropriate in light of its motion for abeyance. The Agency suggests that during the period of abeyance it will fairly consider the petitions for reconsideration. EPA makes this argument despite repeated Congressional testimony by its Administrator that EPA has already determined that Climategate and the other scientific scandals surrounding the IPCC do not undermine the scientific basis of the Endangerment Finding.¹ On April 28,

¹ Petitioners argued in their motion to remand and in response to EPA's motion for abeyance that EPA had already decided to deny reconsideration but had not issued the formal decision for tactical reasons.

2010, in Congressional testimony, EPA Administrator Lisa Jackson testified that the Agency had analyzed Climate-gate and Himalaya-gate and Amazon-gate and found that they did not change any of the conclusions on which the endangerment findings were based.² The Administrator was then asked “What analysis has EPA done that caused you to reach that conclusion in light of these scandals that have erupted over falsified scientific data?” She answered:

A. EPA reviewed the allegations as they were made, and they dribbled out over a period of time. And, in each case, my direction to staff was clear: to review whatever allegations were being made to determine whether they change the foundation for the endangerment finding. Certainly, that is our obligation to do.

And, as I said in response to one of the earlier questions, *we have made a determination*, and it turns out that others now agree with that.

Q. When did you conduct that analysis?

A. I am sorry?

Q. When did you conduct that analysis?

A. As a part of the endangerment finding and as the information became available, because some of this has dribbled out since.³ (Emphasis added).

Ms. Jackson also agreed that the Climategate e-mails “do not in any way undermine the scientific basis of global climate change.” *Id.* at 108.

It thus is impossible for EPA to deny having already “made a determination.” The premise of its motion for abeyance has been invalidated by the

² See Preliminary transcript of Hearing before the Energy and Environment subcommittee of the House Energy and Commerce Committee, http://energycommerce.house.gov/Press_111/20100428/transcript.04.28.2010.ee.pdf, p. 78.

³ See note 2, *supra*, pp. 115-116.

Administrator. EPA thus appears to be seeking abeyance for some other reason, such as sheltering its overall GHG policy from coherent review for as long as possible while it presses forward with emissions regulations.

Even though EPA denies that Climategate has changed anything, there has in fact been a significant change in how EPA is attempting to justify the Endangerment Finding. Before Climategate the IPCC reports were the openly proclaimed centerpiece of the Endangerment Finding. The term “IPCC” appears 1,635 times in the full suite of Endangerment documents⁴, and 397 times in the Technical Support Document alone. But after Climategate, Administrator Jackson’s opening statement describing the scientific consensus on which the Endangerment Finding supposedly rests *makes no mention whatsoever of the IPCC*.⁵ The IPCC’s outright frauds and errors are now said to have nothing whatever to do with the Endangerment Finding.

EPA’s predicament is that Climategate and its sequela show a lack of transparency and peer review that preclude EPA’s reliance on the IPCC as a matter of law. This is why EPA is now pretending that it did not rely on the IPCC after all, or at least not on the bad parts. The spectacle of the Administrator tying herself in knots to disavow the IPCC is reason enough to order a remand.

⁴ Consisting of the Final Rule, the Technical Support Document, and the 12 volumes of Responses To Comments.

⁵ See note 2, *supra*, pp. 62-65.

The Administrator's testimony that Climategate and the subsequent scandals do not implicate the Endangerment Finding is without merit because, as outlined in the motions for remand and the petitions for reconsideration, these documents show top IPCC scientists *in their own words* gravely impeaching the validity and reliability of the foundation of the Endangerment Finding: (1) the physical understanding of climate, (2) the reconstructed and instrumental temperature records, and (3) the climate models. On the critical question of attributing climate change to human causes, the Endangerment Finding relies almost entirely on the IPCC. *See* TSD, pp. 47-54. In this section 47 of 67 citations are to the IPCC, and all graphs in this section are from the IPCC. The Climategate revelations go to the very heart of these three pillars of attribution, and may not be dismissed with an offhand wave of the regulatory hand.

The proposed environmental intervenors also object that the petitions for remand cite to online newspapers and blogs that do not formally qualify as "evidence," presumably under the Federal Rules of Evidence. First, no authority is cited for this argument. Second, the Federal Rules of Evidence do not apply to Notice and Comment rulemaking under the Clean Air Act and therefore cannot be superimposed upon a motion for remand in a CAA appeal. The citations are in the nature of a proffer and would certainly be proper as comments on the rule at the agency level. Fourth, if the Federal Rules of Evidence are to apply, then the

Endangerment Finding and the IPCC reports on which it is based would be inadmissible as junk science under *Daubert*⁶, based, *inter alia*, on the scientific misconduct shown by Climategate and its sequela.

The Court should order a remand to require the Agency to do what it adamantly refuses to do on its own – carefully consider the full implications of Climategate and the subsequently revealed scientific scandals for the validity and reliability of the Endangerment Finding and its GHG policy as whole.

Respectfully submitted, this 10th day of May, 2010.

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⁶ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

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I, the undersigned, hereby certify that on May 10, 2010, I electronically filed the foregoing “Reply in Support of Motion for Remand” 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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