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	)	
	)	

PETITION FOR STAY

Filed by:

United States Representative John Linder (GA–7th District), U.S. Representative Dana Rohrabacher (CA-46th District), U.S. Representative John Shimkus (IL–19th District), U.S. Representative Phil Gingrey (GA–11th District), U.S. Representative Lynn Westmoreland (GA–3rd District), U.S. Representative Tom Price (GA–6th District), U.S. Representative Paul Broun (GA–10th District), U.S. Representative Steve King (IA–5th District), U.S. Representative Nathan Deal (GA–9th District), Representative Jack Kingston (GA – 1st District), U.S. Representative Michele Bachmann (MN-6th District); U.S. Representative Kevin Brady (TX-8th District); U.S. Representative Joe Barton (TX-6th District); U.S. Representative John Shadegg (AZ-3rd District); U.S. Representative Marsha Blackburn (TN-7th District); 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., and Southeastern Legal Foundation Inc.

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), the above-named Petitioners ("Petitioners") hereby request that the Environmental Protection Agency ("EPA" or "the Agency") issue a stay of the "Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act" issued by the Agency on December 15, 2009. This Petition for Stay is a supplement to and made in conjunction with Petitioners' Petition for Reconsideration, as amended, previously filed in the above-captioned docket.

I. Background

The above-named Petitioners filed a Petition for Reconsideration on December 23, 2009. The grounds for the Petition for Reconsideration were that newly revealed information, in what is being referred to as "Climategate ," indicates that the purportedly "scientific" information on which the Agency relied was the subject of a number of systematic manipulations, including collusion to withhold scientific information, deletion of e-mails and raw data to prevent discovery of key facts, manipulation of data and computer code to create false impressions, and concerted efforts to boycott key journals and exclude disagreement. For the reasons stated therein, Petitioners asserted that EPA is required to convene a proceeding for reconsideration because: (1) the information arose after the period for public comment on the Endangerment Finding and (2) the objection is of "central relevance to the outcome of the rule."

Similar petitions urging EPA to reconsider its Endangerment Finding in light of the goings-on of the Climategate cabal have been filed, including the comprehensive and well-reasoned filing on behalf of Peabody Coal Company.

On February 17, 2010, after several filings to add to and clarify the parties, Petitioners filed a Third Amendment to Petition for Reconsideration ("the Third Amendment"). As was shown in the Third Amendment, a series of revelations following on the heels of Climategate further called into question the scientific data that EPA had relied upon in issuing the Endangerment Finding. Specifically, post-Climategate information indicated that: (1) surface temperature records were unreliable; (2) various projections and assessments (such as projections of extreme weather events, crop failures, and glacier melts) were false and misleading; (3) at least one of the principle scientists involved admitted that the climate projections were potentially erroneous; (4) there were potential conflicts of interests that called into question the

motivation of climate study leadership; and (5) recent empirical data undermined the assumptions that various greenhouse gases were "well-mixed."

Significantly, these post-Climategate revelations undermine not only the IPCC conclusions, but the analyses performed by the U.S. Global Change Research Program, including all thirteen federal departments that have relied on the underlying data, including the National Science Foundation, the Department of Health and Human Services, and the Departments of Commerce, Agriculture, Defense, Energy, and Interior. As with the information cited in Petitioner's original Petition, (1) the information arose after the period for public comment on the Endangerment Finding and (2) the objection is of "central relevance to the outcome of the rule."

The amazing string of developments that have undermined the scientific basis for the Endangerment Finding continues day-to-day. Petitioners have tried to avoid filing the "Amended Petition de Jour," and have instead asked EPA to withdraw the Endangerment Finding and let the ongoing developments run their course before reevaluating the science. (See Part V, Third Petition.) Nonetheless, as EPA is well aware, the developments are indeed occurring nearly every day. Within the past few days, for example, Dr. Edward Long[1] reported that

> Comparison of the adjusted data for the rural set to that of the raw data shows a systematic treatment that causes the rural adjusted set's temperature rate of increase to be 5-fold more than that of the raw data. The adjusted urban data set's and raw urban data set's rates of temperature increase are the same. This suggests the consequence of the

[1] Edward R. Long is a physicist who retired from NASA where he led NASA's Advanced Materials Program, was a team member for the development of several upper atmospheric research satellites, and was responsible for the non-manned portion of a study for the replacement of Shuttle. He currently provides consultant support to both government and the private sector concerning radiation in the space flight environment. He also provides technical consultant support to members of the Commonwealth of Virginia's legislative bodies.

NCDC's protocol for adjusting the data is to cause historical data to take on the time-line characteristics of urban data. The consequence intended or not, is to report a false rate of temperature increase for the Contiguous U. S.[2]

EPA has acknowledged that a number of inevitable legal consequences[3] necessarily follow promulgation of the Endangerment Finding. Specifically, EPA intends to issue a greenhouse gas standard for light-duty vehicles and will begin issuing permits and phasing in other regulatory measures for stationary sources.[4] These actions will have substantial consequences. Under the LDV rule, the number of vehicles affected will be in excess of 14 million units. Even assuming the lawfulness of EPA's "tailoring rule," and even ignoring the six-year time limit on the duration of EPA's categorical exclusions, the number of stationary sources subject to Title V permitting would be, by EPA's own estimate, around 14,000, with 3000 of these newly regulated. The attendant cost of these regulations would easily range into the billions of dollars.

On top of these costs, there are even more substantial indirect and ancillary costs associated with regulation of carbon emissions as such would be necessitated by issuance of the

[2] "CONTIGUOUS U. S. TEMPERATURE TRENDS USING NCDC RAW AND ADJUSTED DATA FOR ONE-PER-STATE RURAL AND URBAN STATION SETS," p. 13, found at: http://scienceandpublicpolicy.org/originals/temperature_trends.html (last visited 26 February 2010).

[3] It appears that EPA jumped the gun on a number of the "inevitable legal consequences" resulting from the Endangerment Finding, by launching many of them before the Endangerment Finding was even finalized. As one example, EPA apparently entered into a "historic" agreement with automakers and other stakeholders relevant to emissions from LDVs, which requires an effective Endangerment Finding, before the public comment period even closed. See "President Obama Announces National Fuel Efficiency Policy," http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/ (last visited Feb. 26, 2010). The EPA has already rejected the assertion that the entire process was pre-determined. See 74 FR at 66502-03. Petitioners believe that EPA's position is belied by its current and past conduct, but that point will be addressed in another forum.

[4] EPA has not included within its identified consequences such possibilities as a similar endangerment finding under Section 108 of the Clean Air Act, which would trigger development of a NAAQS for CO2 and, as a result, a staggering economic cost to achieve NAAQS in 5 or 10 years.

Endangerment Finding. For example, the Heritage Foundation's Center for Data Analysis has found that, in just 20 years, the proposed carbon dioxide rules alone would lower gross domestic product by $7 trillion, with single-year GDP losses exceeding $600 billion. Job losses would exceed 800,000 annually for several years. The already-struggling manufacturing sector would be hit especially hard.[5]

In short, EPA's Endangerment Finding inevitably triggers potentially devastating costs to the American economy and is based on increasingly shaky technical assumptions, even though the credibility of the "science" on which it was based continues to be undermined by a flood of damaging revelations and analyses.

II. Basis for Stay

Section 307 of the Clean Air Act provides EPA with express authority to stay the effectiveness of a rule for up to three months while the rule is reconsidered. 42 U.S.C. § 7607(d)(7)(B). Indeed, EPA has often issued a stay of its own rules when it is apparent that the technical basis for the rule may be in error. *See, e.g.*, Standards for Performance of Petroleum Refineries, 73 Fed. Reg. 55751 (Sep. 26, 2008) (granting stay of rule in part because in reconsidering the published requirements both the affected universe and the substantive requirements could change); Organic Air Emission Standards for Tanks, Surface Impoundments and Containers, 60 Fed Reg. 50426 (Sept. 29, 1995) (stay issued in response to petition demonstrating that application of standards to units managing particular wastes could create safety hazards); Boilers and Industrial Furnaces Rule, 58 Fed. Reg. 59598 (Nov. 9, 1993) (stay issued in response to petition demonstrating that standards were based on mistaken risk

[5] Heritage Foundation, "EPA's Greenhouse Gas Finding Endangers U.S. Economy" (April 17, 2009) (found at: http://www.heritage.org/Press/NewsReleases/nr041709a.cfm, last visited February 25, 2010).

assumptions); Identification and Listing of Hazardous Waste, 54 Fed. Reg. 4021 (Jan. 27, 1989) (stay of portions of rule based on a finding of "unanticipated short-term difficulties" with application of rule); NESHAP for Halogenated Solvent Cleaning, 63 Fed. Reg. 24649 (May 5, 1998) (3-month stay issued for particular type of cleaning machine based on finding that application of final rule to these sources was impractical).

In this instance, the very foundation for the Finding has been jeopardized by recently developed evidence. Accordingly, the Agency should, as it has in other instances, acknowledge the possibility of mistaken conclusions in the Finding and stay the effectiveness of the Finding while the underlying science is reexamined.

III. Legal Requirement for Stay

As should be self-evident, EPA is not legally authorized to issue a rule based on faulty science. Section 202 of the Clean Air Act requires "the Administrator" to exercise "judgment" in determining whether any pollutant causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7607(d)(7)(B). EPA cannot variously rely on conclusions and analyses of others, especially not the dictates of politically-minded agencies, such as IPCC. Moreover, respectable "judgment," of course, requires that the judgment be exercised on data and studies suitable for reliance. Petitioners respectfully suggest, therefore, that the Administrator cannot possibly exercise the form of "judgment" required by the Clean Air Act based on data or procedures from other agencies that are potentially faulty, manipulated, contrived, or otherwise subject to the kinds of irregularities that have been alleged with respect to current climate information.

This principle is also reflected in various legal principles. For example, data quality guidelines issued pursuant to the Information Quality Act (Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001) establish a standard for EPA to ensure and maximize the quality, objectivity, utility, and integrity of information that it disseminates. 67 Fed. Reg. 8452, 8452/1 (Feb. 22, 2002). Accuracy, transparency and reproducibility are key components of ensuring the quality of the information under these guidelines, *id*. at 8459/2-3, 8460/3, and a deviation from these guidelines would be arbitrary and capricious. In addition, EPA must supply a reasoned basis for its regulatory choices." *Leather Indus. of Am., Inc. v. EPA*, 40 F.3d 392, 405 (D.C. Cir. 1994). In responding to petitions for reconsideration and the multiple serious substantive and procedural deficiencies they identify, EPA must offer rational, reasonable justifications for its conclusions. See *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188-89 (D.C. Cir. 1990) (finding agency's conclusory statement insufficient to address challenges raised to particular studies). As Judge Posner said in *Niam v. Ashcroft*, 354 F.3d 652 (7th Cir. 2004), after noting that *Daubert*[6] does not apply in administrative proceedings, "[b]ut the spirit of *Daubert* … does apply to administrative proceedings. … 'Junk science' has no more place in administrative proceedings than in judicial ones." *Id*. at 660.

As noted above, the wide range of deficiencies have all arisen since the close of the comment period are of central relevance to the Endangerment Finding. Under such circumstances, CAA § 307(d)(7)(B) requires EPA to convene a proceeding for reconsideration "and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d

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

1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirement is to provide for meaningful public participation in the rulemaking process."); *Wash. Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981) (public comment can effectuate Congress's goals only if the public is able to make intelligent, informed, meaningful comments").

Finally, there is no harm in issuing a three-month stay. EPA has already implemented a slow-down of the most drastic consequences of the Finding.[7] Moreover, without acknowledging any agreement with EPA's conclusions on long-term temperature trends, there's no evidence of any statistically significant warming since 1995.[8] Under the circumstances, it is apparent that there is no need to rush headlong into a potentially irrational and arbitrary decision.

IV. Summary and Conclusion.

As is apparent from the foregoing, there are three factors that combine to compel a stay of the Endangerment Finding: (1) by almost daily revelations, the data on which the Endangerment Finding is based are subject to serious question; (2) the inevitable legal consequences of the Endangerment Finding will create potentially devastating economic consequences; and (3) the Endangerment Finding cannot withstand legal challenge unless and until EPA reconsiders its conclusion, provides a meaningful opportunity for public comment, and then determines whether the Finding is still valid. On all grounds, blazing ahead without staying the Endangerment Finding would be obdurate, arbitrary, capricious, and a manifest abuse of discretion.

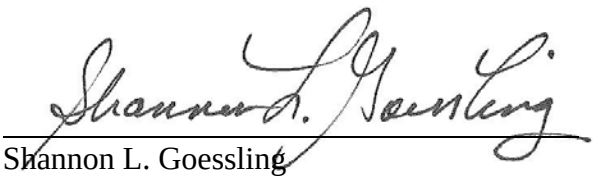
[7] See Letter to the Honorable Jay D. Rockefeller IV from Lisa P. Jackson, Administrator, EPA (February 22, 2010), in which the Agency describes the "modifications" it intends to make from its previous proposals.

[8] Interview with Phil Jones, BBC News – Q&AQ: Professor Phil Jones, Feb. 13, 2010, *available at* http://news.bbc.co.uk/2/hi/science/nature/8511670.stm last visited Feb. 14, 2010

Therefore, based on all of the above facts and arguments, Petitioners respectfully request the Agency pursuant to 42 U.S.C. § 7607(d)(7)(B) issue a Stay of the Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act.

Respectfully submitted this 4th day of March 2010.

Attorneys for Petitioners



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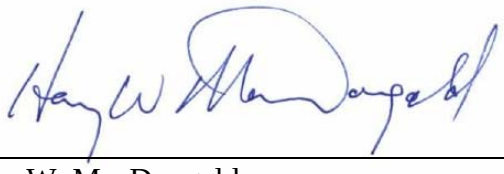

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