

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN RE:

Endangerment and Cause or Contribute
Findings for Greenhouse Gases Under Section
202(a) of the Clean Air Act

EPA Docket Number

EPA-HQ-OAR-2009-0171

**FIFTH AMENDMENT TO PETITION FOR
RECONSIDERATION**

FILED BY

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I. INTRODUCTION

The purpose of this Fifth Amendment to the Petition for Reconsideration of the above-referenced parties is to further support the Petition with a series of new developments that further impeach the reporting of the Intergovernmental Panel on Climate Change (“IPCC”) and hence the EPA’s Endangerment Finding as well. It is also to point out that when the Endangerment Finding and the Tailoring Rule are considered together, it is evident that the EPA’s greenhouse gas policy is illegal, administratively impossible and climatically pointless. These matters have come to light since the close of the comment period, have central relevance to the Endangerment Finding, and support the Petition for Reconsideration.

II. THREE PROMINENT BRITISH SCIENTIFIC ORGANIZATIONS HAVE CONDEMNED THE PRACTICES OF TOP IPCC CLIMATE SCIENTISTS AS REVEALED BY THE CLIMATEGATE DOCUMENTS

An inquiry into Climategate¹ by the UK House of Commons Science and Technology Committee is currently underway. In connection with this inquiry, the Institute of Physics, the Royal Society of Chemistry, and the Royal Statistical Society have submitted statements to the investigating committee, offering their comments on the poor scientific practices of the IPCC scientists exposed by the Climategate documents.

The Institute of Physics is a scientific charity with a membership of over 36,000 that is a leading communicator of physics related science. On the question of “what are the implications of the [Climategate] disclosures for the integrity of scientific research?” the Institute of Physics said the following:

¹ “Climategate” refers to the scandal in climate science that ensued from the release to the public on the internet of e-mails and documents from the Climatic Research Unit at the University of East Anglia, in Britain in November 2009.

2. The CRU² e-mails as published on the internet provide prima facie evidence of determined and co-ordinated refusals to comply with honourable scientific traditions and freedom of information law. The principle that scientists should be willing to expose their ideas and results to independent testing and replication by others, which requires the open exchange of data, procedures and materials, is vital. The lack of compliance has been confirmed by the findings of the Information Commissioner. This extends well beyond the CRU itself - most of the e-mails were exchanged with researchers in a number of other international institutions who are also involved in the formulation of the IPCC's conclusions on climate change.

3. It is important to recognise that there are two completely different categories of data set that are involved in the CRU e-mail exchanges:

- those compiled from direct instrumental measurements of land and ocean surface temperatures such as the CRU, GISS and NOAA data sets; and
- historic temperature reconstructions from measurements of 'proxies', for example, tree-rings.

4. The second category relating to proxy reconstructions are the basis for the conclusion that 20th century warming is unprecedented. Published reconstructions may represent only a part of the raw data available and may be sensitive to the choices made and the statistical techniques used. Different choices, omissions or statistical processes may lead to different conclusions. This possibility was evidently the reason behind some of the (rejected) requests for further information.

5. The e-mails reveal doubts as to the reliability of some of the reconstructions and raise questions as to the way in which they have been represented; for example, the apparent suppression, in graphics widely used by the IPCC, of proxy results for recent decades that do not agree with contemporary instrumental temperature measurements.

6. There is also reason for concern at the intolerance to challenge displayed in the e-mails. This impedes the process of scientific 'self correction', which is vital to the integrity of the scientific process as a whole, and not just to the research itself. In that context, those CRU e-mails relating to the peer-review process suggest a need for a review of its adequacy and objectivity as practised in this field and its potential vulnerability to bias or manipulation.

7. Fundamentally, we consider it should be inappropriate for the verification of the integrity of the scientific process to depend on appeals to Freedom of Information legislation. Nevertheless, the right to such appeals has been

² The "CRU" is the Climatic Research Unit at the University of East Anglia, in Britain.

shown to be necessary. The e-mails illustrate the possibility of networks of like-minded researchers effectively excluding newcomers. Requiring data to be electronically accessible to all, at the time of publication, would remove this possibility.³

The Royal Society of Chemistry (“RSC”) has also opined on Climategate. The RSC is the UK professional body for chemical scientists and an international learned society for advancing the chemical sciences. It has more than 46,000 members worldwide. Like the Institute of Physics, the RSC concluded that the refusal of the CRU researchers to disclose their data and methods was contrary to the scientific method and cast doubt on the integrity of their research:

4. The apparent resistance of researchers from the Climatic Research Unit (CRU) at the University of East Anglia (UEA) to disclose research data has been widely portrayed as an indication of a lack of integrity in scientific research. The true nature of science dictates that research is transparent and robust enough to survive scrutiny. A lack of willingness to disseminate scientific information may infer that the scientific results or methods used are not robust enough to face scrutiny, even if this conjecture is not well-founded. This has far-reaching consequences for the reputation of science as a whole, with the ability to undermine the public's confidence in science.

5. It is essential that the public and all non-specialists remain truly confident in the scientific method to provide a sound scientific evidence-base on which strong decisions can be made. . . .

6. The dissemination of scientific information is central to progressing scientific developments, as it is based on a sound knowledge of preceding research. Access to reliable, up-to-date information is vital to advancing research and enabling the discovery or development of solutions to global issues. Sharing information is especially important in multi-disciplinary research, where progress is very much dependent on willing and effective communication between different speciality areas.

7. It is also imperative that scientific information is made available to the wider community for scrutiny: the validity and essence of research relies upon its ability to stand up to review. In fact, advances in science frequently occur when the prevailing view is challenged by informed scepticism, this is

³ “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.

fundamental to the scientific method and should be encouraged, even if controversial. The RSC firmly believes that the benefits of scientific data being made available and thus open to scrutiny outweigh the perceived risks. To this end, scientific information should be made available on request as outlined in the Freedom of Information Act. Furthermore, research needs to be presented in an accurate and reliable manner in the correct context in order to optimise this process. It may also be necessary to incorporate an independent auditing system into peer review with the ability to demand access to raw data sets to ensure best practices are being adhered to.⁴

The RSC also recommended the investigation be expanded to determine whether data have been manipulated or suppressed:

13. As has been set out in the review, *it is necessary to investigate the email exchanges which were discovered along with other relevant CRU information to establish whether data have been manipulated or suppressed.* This is, not only needed in order to identify any unacceptable behaviour, but also to verify the results which have been published. This is vital in clarifying the severity of the acts carried out by those scientists at the CRU involved, i.e. whether it was a misguided protection of their work or a malicious misrepresentation of data.

(Emphasis added).

A third British scientific society, the Royal Statistical Society (“RSS”) also submitted a memorandum to the House of Commons Science and Technology Committee.⁵ The RSS was founded in 1834 and is one of the most influential and prestigious statistical societies in the world. Its conclusions carry considerable weight because of the pivotal importance of proper statistical analysis to climate science, as proven to devastating effect in the Hockey Stick affair.

The RSS joined the Institute of Physics and the Royal Society of Chemistry in calling for the data and methods of climate research to be made freely available as

⁴ “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.

⁵ “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.

required by the canons of the scientific method. Their memorandum gives a pointed explanation of why this is necessary:

9. More widely, the basic case for publication of data includes that science progresses as an ongoing debate and not by a series of authoritative and oracular pronouncements and that the quality of that debate is best served by ensuring that all parties have access to the facts. It is well understood, for example, that peer review cannot guarantee that what is published is 'correct'. The best guarantor of scientific quality is that others are able to examine in detail the arguments that have been used and not just their published conclusions. It is important that experiments and calculations can be repeated to verify their conclusions. If data, or the methods used, are withheld, it is impossible to do this.

10. The RSS believes that a crucial step in improving the quality of the debate on global warming will be to place the data, the analysis methods and the models in the public domain.

Three prominent British scientific societies have now gone on record with the UK Parliament saying that Climategate has grave implications for the integrity of the science upon which the IPCC's reporting is based. These implications necessarily apply as well to the Endangerment Finding because the EPA has irretrievably bound itself to the IPCC by relying so heavily on its findings. The EPA cannot dismiss the conclusions of institutions having the prestige and reputation of the Institute of Physics, the Royal Society of Chemistry, and the Royal Statistical Society. The EPA is obligated instead to take heed of their critiques and reconsider the Endangerment Finding in its entirety.

III. THE UNITED NATIONS ENVIRONMENTAL PROGRAM HAS ORDERED AN INDEPENDENT REVIEW OF IPCC PROCEDURES

On March 10, 2010, the IPCC announced that the InterAcademy Council would conduct an independent review of the IPCC by.⁶ The UN Secretary General, the Chair of

⁶ IPCC Press Release, "Scientific Academy to Conduct Independent Review of the Intergovernmental Panel on Climate Change's Processes and Procedures at Request of United

the IPCC, and the Executive Heads of the UN Environmental Program (“UNEP”) and the World Meteorological Organization (“WMO”) all agreed that the review was necessary. The Terms of Reference for the review provide that it is completely independent and that it will examine, among other things, the following:

1. Review IPCC procedures for preparing reports including:
 - Data quality assurance and data quality control;
 - Guidelines for the types of literature appropriate for inclusion in IPCC assessments, with special attention to the use of non peer-reviewed literature;
 - Procedures for expert and governmental review of IPCC material;
 - Handling of the full range of scientific views; and
 - Procedures for correcting errors identified after approval, adoption and acceptance of a report.
2. Analyze the overall IPCC process, including the management and administrative functions within the IPCC, and the role of UNEP and WMO, the United Nations system and other relevant stakeholders, with a view to strengthen and improve the efficiency of the assessment work and effectively ensure the consistent application of the IPCC Procedures.⁷

In plain terms, the IPCC itself is reconsidering its own work. Given the irrevocable depth and breadth of the EPA’s reliance on the IPCC, it is simply not tenable for the EPA to now disagree with the IPCC on the sole point of whether reconsideration is necessary.

Nations and IPCC,” available at http://www.ipcc.ch/pdf/press/press_release_1003210-UNhq.pdf, last visited March 10, 2010.

⁷ “Independent Review of the IPCC Assessment Process Terms of Reference,” available at <http://www.ipcc.ch/pdf/press/tor-independent-review-10032010.pdf>, last visited Mar 10, 2010.

IV. THE UK MET OFFICE HAS ASKED FOR A “DO-OVER” ON THE SURFACE TEMPERATURE RECORD

On or about February 19, 2010, the UK Met Office⁸ proposed the creation of a new international analysis of land surface air temperature data.⁹ While the Met Office claims it does not anticipate any substantial changes in any trends detected in the data, the obvious purpose of the reconstruction is to cure some of the gross deficiencies and departures from the scientific method that have been exposed in the existing global surface temperature datasets. Thus, they propose that the new dataset would provide:

1. verifiable datasets starting from a common databank of unrestricted data;
2. methods that are fully documented in the peer reviewed literature and open to scrutiny;
3. a set of independent assessments of surface temperature produced by independent groups using independent methods;
4. comprehensive audit trails to deliver confidence in the results;
5. robust assessment of uncertainties associated with observational error, temporal and geographical in homogeneities.

Id. at p. 2. The existing surface temperature datasets have virtually none of these qualities, which are clearly necessary for valid or reliable analysis of trends in global temperature. That the UK Met Office feels it necessary to start over and create a new valid and reliable surface temperature dataset necessarily implies a lack of confidence in the existing records. Indeed, the proposal was made for the very purpose of bringing the datasets “up to modern standards and made fit for addressing 21st century needs.” *Id.* This

⁸ The UK’s national weather service.

⁹ “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.

is an admission that the datasets are *not* fit for *present* needs. This lack of confidence clearly results from the disorder and manipulation evident in the Climategate documents and in the surface temperature record as shown by the D'Aleo and Watts report discussed in Petitioners' Third Amendment to the Petition for Reconsideration (hereinafter the "Third Amendment"). This proposal by the UK Met Office is an additional reason why the EPA should reconsider its reliance on the IPCC and the surface temperature datasets and reconsider its Endangerment Finding.

V. FURTHER EVIDENCE OF IMPROPER ADJUSTMENTS TO THE SURFACE TEMPERATURE RECORD

On February 25, 2010, Edward R. Long, Ph.D.¹⁰ published a paper through the Science and Public Policy Institute analyzing the effect of adjustments to the temperature record for the continental United States that are made in the NCDC temperature record for rural and urban stations.¹¹ For the rural stations in the study, the raw data showed a linear trend of 0.13° C per century, while for urban stations the raw data showed a trend of 0.79° C per century. *Id.* at p. 8-9. The long term trends were very similar until about 1965, when the trend in the urban raw data increases faster than in the rural data. *Id.* at 9-10.

NCDC's *adjusted* data for rural stations show a trend of 0.64 ° C per century, compared to 0.13 ° C per century for the raw data. In other words, the NCDC adjustment increased the rural trend by nearly five times. *Id.* at 11. The adjusted data for urban stations show a trend of 0.77° C per century, compared to a raw urban trend of 0.79° C

¹⁰ Dr. Long is a physicist who retired from NASA after leading their Advanced Materials Program, among other contributions.

¹¹ 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.

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. The EPA should not base economically devastating regulations, or any regulations, on false reports, and should reconsider the Endangerment Finding to make sure that it has not done so here.

VI. THERE IS NO ANTHROPOGENIC SIGNAL IN GLOBAL TROPICAL CYCLONE FREQUENCY

Since the Third Amendment, claims by the IPCC and the EPA that Anthropogenic Global Warming (“AGW”) has caused and will in the future cause increasing severity and frequency of extreme weather events has suffered further disintegration. A team of researchers under the auspices of the World Meteorological Organization (“WMO”), an organizational parent of the IPCC, announced in an article published March 1, 2010, that

In terms of global tropical cyclone frequency, it was concluded that there was no significant change in global tropical storm or hurricane numbers from 1970 to 2004, nor any significant change in hurricane numbers for any individual basin over that period, except for the Atlantic (discussed above). Landfall in various regions of East Asia during the past 60 years, and those in the Philippines during the past century, also do not show significant trends.¹²

Regarding storm intensity, the authors also concluded that the increase in storm intensity predicted by climate models could not be reliably separated from natural variability:

Uncertain relationships between tropical cyclones and internal climate variability, including factors related to the SST distribution, such as vertical wind shear, also reduce our ability to confidently attribute observed intensity

¹² Knutson, et al., “Tropical Cyclones and Climate Change,” *Nature Geoscience* 3, 157–163 (1 March 2010)

changes to greenhouse warming. The most significant cyclone intensity increases are found for the Atlantic Ocean basin, but the relative contributions to this increase from multidecadal variability (whether internal or aerosol forced) versus greenhouse-forced warming cannot yet be confidently determined.

Id. In conclusion, the authors stated that “we cannot at this time conclusively identify anthropogenic signals in past tropical cyclone data.”

While the EPA acknowledged in the TSD that there was no trend in tropical cyclone frequency, it stated that the observed increase in intensity was anthropogenic. *See* TSD § 4(l), pp. 45, 53. EPA further relies upon model projections of increased tropical cyclone frequency and intensity. TSD, pp. 74-75; Endangerment Finding, pp. 11, 168, 171.

The EPA relies heavily on projections of frequent and intense storms, including tropical cyclones, to support its Endangerment Finding. Yet the best evidence is that no positive trend in frequency can be detected and that any increase in intensity cannot be attributed to human influence. The validity and reliability of these projections is necessarily called into question by their divergence from reality. Accordingly, the EPA should reconsider its conclusions that GHGs endanger human health and welfare by causing more frequent and intense tropical cyclones.

VII. THE IPCC UNDERESTIMATED THE INCREASE IN ANTARCTIC SEA ICE BY 50%

In the AR4 the IPCC said that while Arctic sea ice extent was decreasing at a statistically significant rate, there was a statistically *insignificant* increase in Antarctic sea ice extent: “There is a significant decreasing trend in arctic sea ice extent of $-33 \pm 7.4 \times 10^3$ km² yr⁻¹ (equivalent to $-2.7 \pm 0.6\%$ per decade), whereas the Antarctic results show a small positive trend of $5.6 \pm 9.2 \times 10^3$ km² yr⁻¹ ($0.47 \pm 0.8\%$ per decade), which is not

statistically significant.”¹³ In the Summary for Policymakers the same point was made: “Antarctic sea ice extent continues to show interannual variability and localised changes but no statistically significant average trends, consistent with the lack of warming reflected in atmospheric temperatures averaged across the region.”¹⁴

At the time of AR4, there was an existing scientific debate over how to measure the trend in Antarctic sea ice and whether it was statistically significant.¹⁵ The AR4 relied on a non-peer-reviewed chapter of a book by one of its contributing authors, Josefino Comiso, that showed the lowest rate of increase and made no mention of peer-reviewed literature that showed a higher trend.¹⁶

Comiso himself subsequently published a paper in 2008 in which he corrected his algorithm and found a statistically significant increase in Antarctic sea ice.¹⁷ Thus, IPCC’s source changed his analysis, but the IPCC did not. A chart comparing the IPCC trend (red) with Comiso’s revised trend (cyan) and with the “NASA Team” of Markus and Cavalieri (blue) is below and shows the IPCC trend is substantially lower:

¹³ IPCC AR4 WGI, Chapter 4, “Observations: Changes in Snow, Ice, and Frozen Ground” (p. 351).

¹⁴ IPCC AR4 Summary for Policymakers, § 3.2, 4.4.

¹⁵ That debate is reviewed in “Yet Another Incorrect IPCC Assessment: Antarctic Sea Ice Increase,” available at <http://www.masterresource.org/2010/03/yet-another-incorrect-ipcc-assessment-antarctic-sea-ice-increase>, by Knappenberger, last visited March 10, 2010..

¹⁶ *Id.*

¹⁷ Comiso, J. C., and F. Nishio, 2008. Trends in the sea ice cover using enhanced and compatible AMSR-E, SSM/I, and SMMR data. *Journal of Geophysical Research*, 113, C02S07, doi:10.1029/2007JC004257

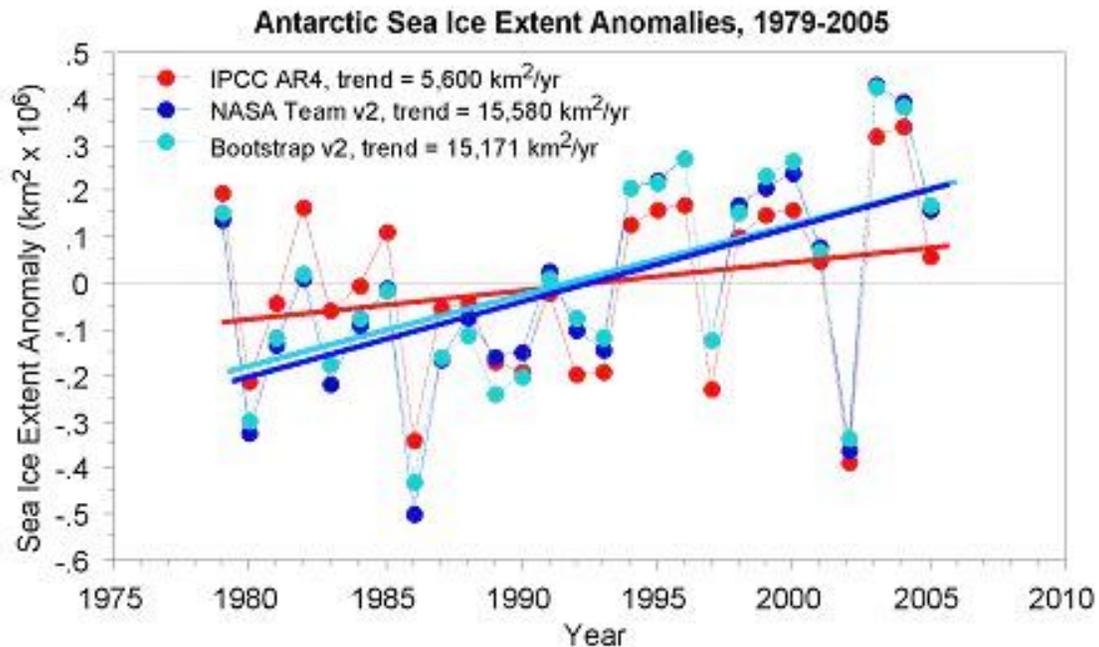


Figure 3. Annual Antarctic sea ice anomalies from three datasets: the one used by the IPCC (Comiso, 2003; red); another extant at the time of the IPCC production (Markus and Cavalieri, 2000; blue); and the update to the IPCC analysis (Comiso and Nishio, 2008; cyan). The trend in the latter two datasets are more than 2.5 times larger than the IPCC trend and both are statistically significant (the IPCC trend is not).¹⁸

Comiso published another paper in 2009 that concluded that “based on a new analysis of passive microwave satellite data, we demonstrate that the annual mean extent of Antarctic sea ice has increased at a *statistically significant* rate of 0.97% dec-1 since the late 1970s.”¹⁹ (Emphasis added). The IPCC analysis of Antarctic sea ice trends is an outlier that is inconsistent with the peer reviewed literature.

In response to comment 2-111 EPA revised the final TSD to read that “[f]or the period 1979- 2008, Antarctic sea ice underwent a *not statistically significant* increase of

¹⁸ *Supra*, at n. 15 **Error! Bookmark not defined.**

¹⁹ Turner, J., J. C. Comiso, G. J. Marshall, T. A. Lachlan-Cope, T. Bracegirdle, T. Maksym, M. P. Meredith, Z. Wang, and A. Orr, 2009. Non-annular atmospheric circulation change induced by stratospheric ozone depletion and its role in the recent increase of Antarctic sea ice extent. *Geophysical Research Letters*, 36, L08502, doi:10.1029/2009GL037524

0.9% (about 100,000 km²; 42,000 mi²) per decade (NSIDC, 2009).” TSD p. 39; RTC 2-111 (emphasis added).

While the EPA acknowledges the upward trend, it errs to say this is not statistically significant, as Comiso clearly stated in his 2009 paper. If the increase is statistically significant, then it is yet another empirical refutation of the IPCC models, which predict a loss of sea ice in the Antarctic. This was pointed out to EPA, which responded in RTC 4-11 that the observed increase is statistically insignificant.

EPA has contradicted the literature and mischaracterized the statistical significance of the trend in Antarctic sea ice extent increase. It appears that this mischaracterization permits EPA to claim that the model projections have not been refuted and remain “robust” even though any fair analysis shows they have been at best undermined and at worst falsified.

VIII. EMPIRICAL OBSERVATIONS CONTRADICT MODEL PROJECTIONS OF NORTH AMERICAN SNOW EXTENT

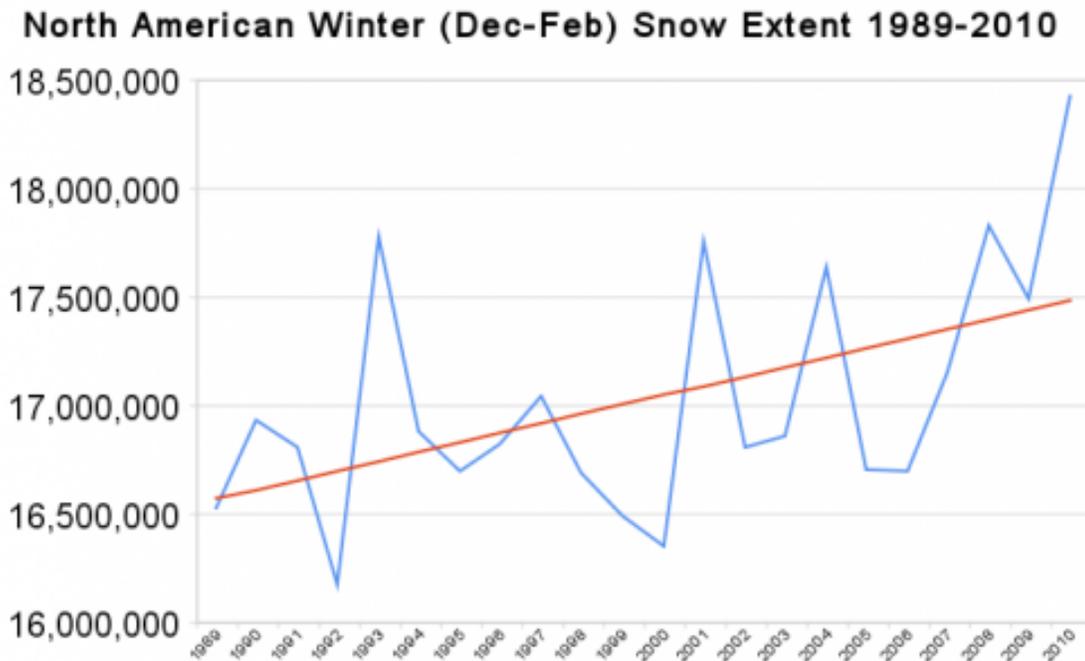
The Endangerment Finding takes the position that AGW is causing and will cause less snow generally, and in the United States in particular, with adverse consequences for human health and welfare. For example, the TSD states that

In North America, from 1915 to 2004, snow-covered area increased in November, December, and January due to increases in precipitation. However, snow cover decreased during the latter half of the 20th century, especially during the spring over western North America (Lemke et al., 2007). Eight-day shifts towards earlier melt since the mid-1960s were also observed in northern Alaska (Lemke et al., 2007). Consistent with these findings, Lettenmaier et al. (2008) note a trend toward reduced mountain snowpack, and earlier spring snowmelt runoff peaks across much of the western United States.

TSD p. 42. “Reduced snowpack, earlier spring snowmelt, and increased likelihood of seasonal summer droughts are projected in the Northeast, Northwest, and Alaska.” ES-6.

“In the Midwest in particular, heating oil demand and snow-related traffic accidents are expected to decrease.” TSD p. ES-9. “Snow season length and snow depth are very likely to decrease in most of North America as illustrated in Figure 6.10, except in the northernmost part of Canada where maximum snow depth is likely to increase (Christensen et al., 2007).” TSD § 6(d) p. 72.

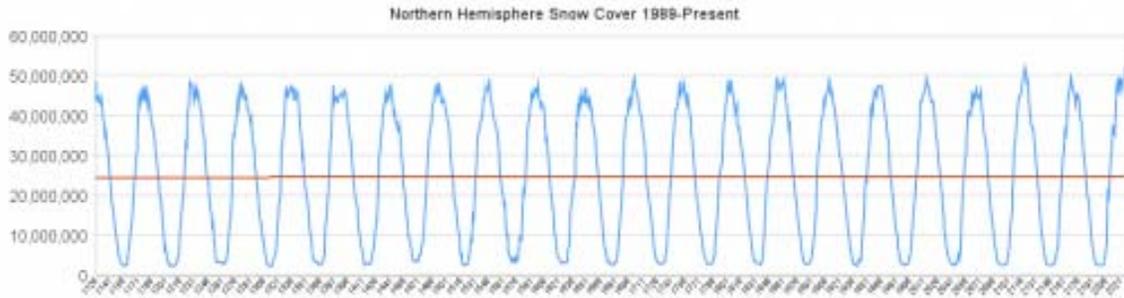
In fact, data from the Rutgers University Global Snow Lab show that winter snow extent in North America has been increasing in the 21 years since 1989²⁰:



In the Northern Hemisphere the annual snow cover, there is virtually no trend since 1989.²¹

²⁰ “North American snow models miss the mark – observed trend opposite of the predictions,” by Steven Goddard, available at <http://wattsupwiththat.com/2010/02/19/north-america-snow-models-miss-the-mark/>, last visited March 3, 2010.

²¹ “Why is Winter Snow Extent Interesting,” by Steven Goddard, available at <http://wattsupwiththat.com/2010/02/18/why-is-winter-snow-extent-interesting/>, last visited March 3, 2010.



While there are a number of ways to interpret these data, the essential point is that the IPCC and the EPA predicted reduced snow fall and reduced snow cover due to AGW, but the data show the winter snow extent trend is increasing over the last 21 years in North America. This is yet another instance of the failure of model predictions. The EPA should reconsider its reliance on models of such proven unreliability and invalidity.

IX. THE ENDANGERMENT FINDING IS CONTRARY TO THE CLEAN AIR ACT

Although the Endangerment Finding directly implicates only tailpipe emissions from light duty vehicles, regulating these emissions will as a matter of definition cause GHGs to be “subject to regulation” under the Clean Air Act (“CAA”), and therefore required to be regulated under the Act’s Prevention of Significant Deterioration (“PSD”) and Title V permitting programs. Recognizing this, after the close of the public comment period on the Endangerment Finding, EPA proposed its so-called “tailoring rule,” which would “phase in” permitting requirements under the CAA, raising the permitting threshold from 250 tons per year to 25,000 tons per year for six years. *See* 74 Fed. Reg. 55292 (October 27, 2009). For the reasons stated below, the “Tailoring Rule” is of central relevance to the Endangerment Finding and therefore Petitioners submit that EPA must re-open the Endangerment Finding docket to allow the public to comment on the implications of the Tailoring Rule” to the form and content of the Endangerment Finding.

EPA's reasons for "tailoring" the applicable thresholds under the CAA are that *not* doing so would lead to "absurd results." Therefore, "tailoring" the Act to fit EPA's determination to issue an Endangerment Finding was required due to "administrative necessity."

This "tailoring" of the requirements of the CAA is plainly contrary to the unambiguous terms of the CAA. CAA § 169 specifies thresholds of 100 or 250 tpy for "major emitting facilities." 42 U.S.C. § 7479(1). CAA § 302 specifies a threshold of 100 tpy for Title V permitting. 42 U.S.C. § 7602(j). Consequently, there is nothing for EPA to "tailor" in implementing these statutory emission thresholds. EPA simply proposes to ignore them, at least for the present. It is undisputable that EPA cannot exercise its discretion in a manner that is inconsistent with the plain terms of the authorizing statute. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1988); *United States v. James*, 478 U.S. 597 (1986); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioners refer EPA to the many well-reasoned submissions made in the "tailoring rule" docket on this point, such as that made by the Competitive Enterprise Institute, among others.²² (December 28, 2009).

Furthermore, the Tailoring Rule is a patently unconstitutional attempt by the Executive Branch to unilaterally amend a statute. *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).

²² See EPA-HQ-OAR-2009-0517-5129.1

Accordingly, Petitioners submit that EPA missed the obvious conclusion of its attempted regulatory machinations: if EPA could not regulate GHGs under the CAA without ignoring the permitting requirements of the CAA, then by the irresistible force of logic, EPA cannot regulate GHGs in a manner consistent with the CAA. Given the utter incompatibility of GHG regulation with the rest of the CAA, EPA should have concluded that GHGs cannot possibly be made “subject to regulation” under the CAA. Therefore, whatever Congress may have intended in terms of making findings under the CAA regarding “endangerment” of human health and welfare, it could not possibly have intended for EPA to make endangerment findings for substances that are administratively impossible to regulate under the CAA the way it is actually written.

In short, by making the Endangerment Finding, EPA embarked on a course of conduct that is irretrievably inconsistent with the CAA and completely beyond EPA’s legal authority. Rather than compounding with one regulatory illegality with another, EPA should start over, reconsider the Endangerment Finding, and determine a more lawful and logical way to conduct its affairs.

X. THE EPA’S GREENHOUSE GAS POLICY IS ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION

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

- administratively impossible without rewriting the statute;²³

²³ This point is acknowledged by the EPA in the proposed 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. During this initial period, the number of permit applications would increase by 150-fold, an unprecedented increase that would far exceed administrative resources.” Tailoring Rule Proposal, p. 65; “The extraordinary number of permit applications would render it impossible for

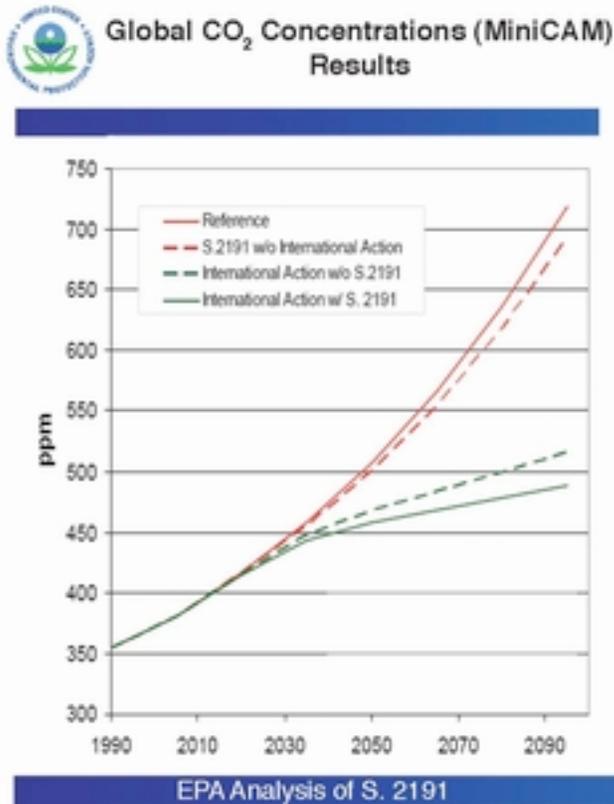
- an unconstitutional attempt to fix the impossibility problem by rewriting the statute by means of a regulation²⁴;
- climatically pointless because it will not have any detectable effect on either global CO₂ levels or AGW²⁵.

There is also compelling evidence that the policy is economically destructive, EPA's

permitting authorities to meet the requirements of section 503(c) to process title V permit applications within 18 months." *Id.*, p. 68.

²⁴ See discussion on page 16, *supra*.

²⁵ 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). The chart referred is the following:



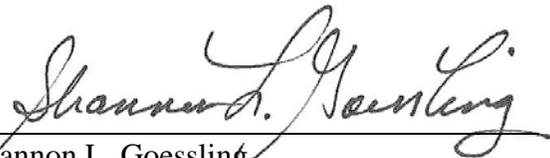
fanciful claims to the contrary notwithstanding.²⁶ The policy is therefore unconstitutional, impossible, pointless and destructive. As such it is patently irrational, arbitrary and capricious, and an abuse of discretion.

XI. CONCLUSION

The accumulation of extraordinary disclosures impeaching the work of the IPCC and of the EPA has been accompanied by a variety of new studies that directly contradict the conclusions of the EPA and the IPCC in several material respects. The supposed “consensus” of “settled” science in favor of EPA’s position on AGW is falling to pieces before our very eyes. The EPA should step back from its overzealous endorsement of catastrophic AGW, and reconsider its illegal and irrational policies before it imposes ruinous and wrongheaded regulation.

Respectfully submitted this 25 day of March 2010.

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²⁶ 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. EPA asserts in the Light Duty Vehicle Rule that the economic benefits of avoided CO₂ emissions can be valued at \$20 per ton. See “Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards,” 74 Fed. Register 49454, at 49480. In the world of economic reality, the price of carbon credits is 10 cents per ton, 1/200th of the value assumed by the EPA. See Chicago Climate Exchange, <http://www.chicagoclimatex.com/index.jsf>, last visited March 21 2010.

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