

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

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AGENCY DOCKETING STATEMENT

Administrative Agency Review Proceedings (To be completed by appellant/petitioner)

- 1. CASE NO. 10-1035 (with 09-1322) 2. DATE DOCKETED: 02/12/2010
3. CASE NAME (lead parties only) John Linder v. U.S. Environmental Protection Agency
4. TYPE OF CASE: [X] Review [] Appeal [] Enforcement [] Complaint [] Tax Court
5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? [] Yes [X] No
6. CASE INFORMATION:
a. Identify agency whose order is to be reviewed: U.S. Environmental Protection Agency
b. Give agency docket or order number(s): EPA-HQ-OAR-2009-171
c. Give date(s) of order(s): December 15, 2009
d. Has a request for rehearing or reconsideration been filed at the agency? [X] Yes [] No
e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2): (See attached)
f. Are any other cases involving the same underlying agency order pending in this Court or any other? [X] Yes [] No
g. Are any other caess, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve substantially the same issues as the instant case presents? [X] Yes [] No
h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? [] Yes [X] No

Signature /s/ Date 04-15-2010
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ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement.

Attachment: Item 6(e)

Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2)

For ease of presentation, Petitioners' brief statement of the basis for Petitioners' claims of standing are stated in terms of the seven categories of parties named in the Petition.

1. Forestry-Related Private Companies. The Langdale Company; Langdale Forest Products Company; Langboard, Inc.—MDF, and Langboard--OSB.

The Langdale Company, and its subsidiary companies Langdale Forest Products Company, Langdale Forest Products Company; Langboard, Inc.—MDF, and Langboard--OSB, are all in various businesses dependent in various ways upon forestry and forest products. EPA asserts in the Endangerment Finding that “For the near term, the Administrator finds the beneficial impact on forest growth and productivity in certain parts of the country from elevated carbon dioxide concentrations and temperature increases to date is offset by the clear risk from the observed increases in wildfires, combined with risks from the spread of destructive pests and disease. For the longer term, the risk of adverse effects increases over time, such that overall climate change presents serious adverse risks for forest productivity.” 74 F.R. 66496, 66498 (December 15, 2009). Regulation of greenhouse gases, therefore, will have an acknowledged substantial effect on

Petitioners' business and other economic interests, one way or the other.

Petitioners submit that EPA's statements on the effect of temperature and carbon dioxide changes on forest productivity, combined with other aspects of the Endangerment Finding, are all arbitrary and capricious, which in light of Petitioners' substantial economic interest in forestry, provide Petitioners with a "concrete and particularized" harm sufficient to confer standing. See *Sierra Club v. EPA*, 292 F.2d 895, 898 (D.C. Cir. 2002).

2. Agriculture-Related Businesses. Langdale Farms, LLC and Georgia Agribusiness Council, Inc.

Langdale Farms is in the business of producing soybeans, peanuts, cotton, pecans, tomatoes, hay, cattle, and fish. The Georgia Agribusiness Council, Inc. ("GAC") is a trade association whose mission is to represent the interests of agriculture within the state of Georgia. EPA makes of a number of assertions relevant to the effect of greenhouse emissions on agriculture. For example, EPA asserts, "There is a potential for a net benefit in the near term [footnote omitted] for certain crops, but there is significant uncertainty about whether this benefit will be achieved given the various potential adverse impacts of climate change on crop yield, such as the increasing risk of extreme weather events." 74 F.R. at 66498. Regulation of greenhouse gases, therefore, will have an acknowledged substantial

effect on the businesses and other economic interests, one way or the other, of both Langdale Farms and GAC's members. Langdale Farms and GAC submit that EPA's statements on the effect of temperature and carbon dioxide changes on agriculture, combined with other aspects of the Endangerment Finding, are all arbitrary and capricious, which in light of the substantial economic interest in agriculture, provide Langdale Farms and GAC, on behalf of its members with a "concrete and particularized" harm sufficient to confer standing. *See Sierra Club v. EPA*, 292 F.2d 895, 898 (D.C. Cir. 2002).

As to GAC itself:

(1) At least one of GAC's members would have standing to sue in its own right, suffering a concrete and particularized harm that is actual and imminent. Specifically, as EPA notes, the Endangerment Finding will necessarily require regulation of emissions under Section 202(a) of the Clean Air Act. Such regulation will necessarily impose costs, affect business operations, and otherwise cause economic and non-economic consequences for GAC's member companies. Regulation of greenhouse gases, therefore, will have an acknowledged substantial effect on the business and other economic interests of GAC's members. GAC and its members believe that EPA's statements on the effects of greenhouse gases on agriculture, one way or the other, combined with other aspects of the Endangerment Finding, are all arbitrary and capricious. As a result, GAC's

members have “concrete and particularized” harm attributable to the Endangerment Finding sufficient to confer standing. *See Sierra Club v. EPA*, 292 F.2d 895, 898 (D.C. Cir. 2002).

(2) The interests that GAC seeks to protect, namely sensible, reasonable, and lawful regulation, are germane to GAC’s purpose.

(3) Neither GAC’s asserted claim nor the relief requested requires that an individual member of GAC participate in the lawsuit.

See Sierra Club v. EPA, 292 F.2d 895, 898 (D.C. Cir. 2002)

3. Transportation-Related Private Companies. Collins Industries, Inc.; Collins Trucking Company, Inc.; Collins Ready-Mix Concrete Company, Inc.; Kennesaw Transportation, Inc.; J&M Tank Lines, Inc; and Southeast Trailer Mart, Inc., and Georgia Motor Trucking Association, Inc.

All of the transportation-related private companies are in the business of truck transportation, including transport of building products, transport of forest products, long-haul transportation of various products, and transportation of various bulk chemicals. EPA makes numerous assertions in the Endangerment Finding relating to the supposed effects of transportation sector emissions of greenhouse gases. For example, EPA asserts “The transportation sector is a major source of greenhouse gas emission both in the United States and in the rest of the

world.” 74 F.R. at 66499. EPA continues, “The transportation sources covered under CAA Section 202(a)—the section of the CAA under which these Findings occur—include passenger cars, light- and heavy-duty trucks, buses, and motorcycles.” *Id.* Besides Petitioners’ direct interest in the economic consequences of the Endangerment Finding and the regulations necessary as a result thereof, including current and future regulation of the transportation industry, Petitioners have indirect substantial interests in that the misinformation, disregard of scientific fact, manipulation of the administrative record, and other deficiencies, all create business uncertainties. These direct and indirect economic consequences provide Petitioners with a “concrete and particularized” harm sufficient to confer standing. *See Sierra Club v. EPA*, 292 F.2d 895, 898 (D.C. Cir. 2002).

As to the Georgia Motor Trucking Association, Inc. (“GMTA”), GMTA represents more than 400 for-hire carriers, 400 private carriers, and 300 associate members. The mission of the Georgia Motor Trucking Association is to promote: reasonable laws; even-handed, common-sense administration; equitable and competitive fees and taxes; a market, political and social environment favorable to the trucking industry; and good citizenship among the people and companies of Georgia's trucking industry. As noted above, EPA acknowledges that “The transportation sources covered under CAA Section 202(a)—the section of the CAA under which these Findings occur—include passenger cars, light- and heavy-

duty trucks, buses, and motorcycles.” EPA’s list of covered vehicles cover vehicles owned and operated by GMTA’s member companies. Accordingly, GMTA has organizational standing in that:

(1) At least one of GMTA’s members would have standing to sue in its own right, suffering a concrete and particularized harm that is actual and imminent. Specifically, as EPA notes, the Endangerment Finding will necessarily require regulation of emissions under Section 202(a) of the Clean Air Act. Such regulation will necessarily impose costs, affect business operations, and otherwise cause economic and non-economic consequences for GMTA’s member companies. Regulation of greenhouse gases, therefore, will have an acknowledged substantial effect on the business and other economic interests of GMTA’s members. GMTA believes that EPA’s statements on the effect of transportation sources on global warming, combined with other aspects of the Endangerment Finding, are all arbitrary and capricious. As a result, GMTA’s members have “concrete and particularized” harm attributable to the Endangerment Finding sufficient to confer standing. *See Sierra Club v. EPA*, 292 F.2d 895, 898 (D.C. Cir. 2002).

(2) The interests that GMTA seeks to protect, namely sensible, reasonable, and lawful regulation, are germane to GMTA’s purpose.

(3) Neither GMTA’s asserted claim nor the relief requested requires that an individual member of GMTA participate in the lawsuit.

See Sierra Club v. EPA, 292 F.2d 895, 898 (D.C. Cir. 2002)

4. Southeastern Legal Foundation. Southeastern Legal Foundation Inc. (“SLF”) is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. In particular, SLF advocates these core principles in the area of environmental regulation, where it is increasingly common to find impairments of economic freedom, excessive government, and restrictions on the free enterprise system.

SLF’s claim of standing, although it does not fit neatly into existing categories, is based on one aspect of its core mission: to make available to the public information regarding important public policy issues, including the scientific merits of alleged anthropogenic climate change. SLF alleges that EPA has systematically and deliberately ”stacked the deck” to create a biased and misleading public record, refused to give due consideration to the comments of SLF and others on the scientific deficiencies of the Endangerment Finding, and otherwise failed to exercise and document reasonable “judgment” as required by the Clean Air Act. Further, EPA has itself deliberately misrepresented and excluded scientific information contrary to EPA’s predetermined position. SLF’s mission to provide information to the public in support of its mission is directly

impaired by such actions. Therefore, SLF has a legitimate organizational interest in defeating such governmental tampering with and misrepresentation of available scientific information. See *Scientists' Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973) (noting that “Any other approach to standing in the context of suits to ensure compliance ... for long-range Government programs not yet resulting in injury to discrete economic, aesthetic, or environmental interests would insulate administrative action from judicial review, prevent the public interest from being protected through the judicial process, and frustrate the policies Congress expressed ..., a result clearly inconsistent with the Supreme Court’s approach to standing.”).

Though SLF is not a membership organization as such, SLF has board members with have concrete interests that are adversely affected by the EPA's GHG policies, and who rely on SLF to protect those interests, and who therefore have all of the indicia of membership such that SLF can be counted upon to truly represent an injured party with the requisite degree of adversity in the litigation. SLF thus has organizational standing. In particular, Kathy Barco is an SLF Board member and is co-owner and President of Barco-Duval Engineering Company, a privately owned earthmoving, site construction and development company in Jacksonville, FL. Additionally, the company owns and operates a fleet of heavy duty construction equipment, both on and off-road, that is highly likely to be

subjected to regulation as a result of the Endangerment Finding, and a fleet of light duty vehicles that will certainly be subject to GHG regulations. These harms give legal standing to SLF in that: (1) the individual persons would have standing to protect these interests, (2) the persons look to SLF to protect their interests, which interests are germane to SLF's purpose, (3) neither the claim asserted nor the relief requested requires the presence of these individuals. See *Sierra Club v. E.P.A.*, 292 F.3d 895, 898 (D.C. Circuit 2002).

5. Elected Representatives. U.S. Representative John Linder (GA-7th); U.S. Representative Dana Rohrabacher (CA-46th); U.S. Representative John Shimkus (IL-19th); U.S. Representative Phil Gringrey (GA-11th) ; U.S. Representative Lynn Westmoreland (GA-3rd); U.S. Representative Tom Price (GA-6th); U.S. Representative Paul Broun (GA-10th); U.S. Representative Steve King (IA-5th); U.S. Representative Nathan Deal (GA-9th); U.S. Representative Jack Kingston (GA-1st); U.S. Representative Michelle Bachman (MN-6th).

The Representatives' claim of standing is based in part on informational injury. The Clean Air Act requires the EPA to give thorough, reasoned, detailed and honest explanations of the basis and purpose of its proposed rules and to give thorough, reasoned and honest responses to substantive comments submitted on proposed rules. *See Clean Air Act* § 307(d)(3) and (d)(6). Further, the EPA is

subject to the Information Quality Act, which require federal agencies to meet standards of accuracy in the information they disseminate, and the Federal Advisory Committee Act, which imposes standards of transparency on advisory committees relied upon by the federal government. The Representatives are among those entitled to the information the EPA is thusly required to provide. The Representatives use the information to which they are entitled as aforesaid in the discharge of their oversight functions and in determining whether legislative changes are necessary, and in participating in the rulemaking process. EPA has breached its obligations to give thorough, reasoned, detailed and honest explanations of the basis and purpose of its proposed Greenhouse Gas Rules, including the Endangerment Finding, and its obligation to give thorough, reasoned and honest responses to substantive comments on these rules. Further, EPA has disseminated inaccurate and false information in its Endangerment Finding Documents in violation of the Information Quality Act, and has relied on the IPCC, in violation of the Federal Advisory Committee Act. Therefore, the Representatives have particularized injury sufficient to support standing, that was caused by EPA and that is redressable in this case.

The Representatives' claim of standing is also based on the fact that EPA's action represents an unlawful attempt by the Executive Branch to strip Petitioners of their constitutional rights and duties. The initial consequence of EPA's

Endangerment Finding will be the regulation of emissions from motor vehicles under Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a). However, EPA has acknowledged that the Endangerment Finding will also trigger regulation of greenhouse gas (“GHG”) emissions from stationary sources. These other consequences arise because GHGs will then be “subject to regulation” under the Clean Air Act, necessarily implicating the Title V permitting program and the regulatory structure under the Acts “Prevention of Significant Deterioration” provisions. See “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,” 74 Fed. Reg. 55292 (October 27, 2009).

Significantly, EPA has acknowledged that this cascade of legal consequences cannot be implemented within the structure of the Clean Air Act, and therefore has proposed what it calls a “tailoring rule.” (*Id.*) Under EPA’s proposed “tailoring rule,” EPA would disregard the express terms of the Clean Air Act and would instead “tailor” the Act’s express numerical thresholds to different standards that EPA simply made up. In other words, rather than admitting that an Endangerment Finding cannot be made in a way consistent with the Clean Air Act, EPA proposes to bypass the Clean Air Act and issue the Endangerment Finding anyway, in violation of the bicameralism and presentment clauses of Article 1, Section 7 of the U.S. Constitution.

Regulation of GHGs is also the subject of a number of international accords. For example, the Kyoto Protocol is a protocol to the United Nations Framework Convention on Climate Change (UNFCCC or FCCC), aimed at regulating emissions of GHGs. The Protocol was initially adopted on December 11, 1997, in Kyoto, Japan, and entered into force on February 15, 2005, by its signatory nations. As of November 2009, 187 states have signed and ratified the protocol. The Congress of the United States, however, has not ratified the Protocol. Accordingly, the Kyoto Protocol is non-binding on the United States. Once again, instead of acknowledging that Congress has declined to enter into any program to regulate GHGs, EPA and the Executive Branch propose to nullify Congressional will on this topic and implement such a scheme of regulation unilaterally and without legal authority.

As is apparent from the foregoing, among other numerous examples, EPA's Endangerment Finding disregards the express terms of the Clean Air Act and the Congressional decision not to ratify international agreements to regulate GHGs, and thus constitutes an attempt to sidestep Congressional legislative and treaty making powers, thereby directly derogating Petitioners' right to consider and vote upon such measures. Legislative powers are exclusively reserved to Congress and its members under Article I, Section 8, of the United States Constitution, and treaty-making powers are subject to the approval of the Senate under Article II,

Section 2. There is no legal authority for the Executive Branch to sidestep these constitutional allocations of express powers and authority.

It also has been widely reported that EPA's Endangerment Finding is an attempt by the Executive Branch to "pressure" Congress into action. (See, e.g., "EPA clears a path for emission limits," Los Angeles Times, December 8, 2009, found at: <http://articles.latimes.com/2009/dec/08/nation/la-na-epa-climate8-2009dec08>, last visited March 16, 2010: "Though the White House said the timing of the EPA announcement and the conference was a coincidence, the finding still sent a clear message of the administration's resolve to push ahead with emission controls -- with or without Congress." (Emphasis added); "The Endangerment Finding," New York Times, December 7, 2009, found at: <http://www.nytimes.com/2009/12/08/opinion/08tue2.html>, last visited March 16, 2010, "There is one obvious way to keep the E.P.A. from having to use this authority on a broad scale. And that is for Congress to pass a credible and comprehensive bill requiring economy-wide cuts in emissions." (Emphasis added)). It is plainly unlawful for the Executive Branch to act outside of its constitutional authority to force Congress to act in a way that Petitioners and other representatives have expressly chosen not to act.

Petitioners have a cognizable interest in the preservation of their constitutional prerogatives against unlawful intrusion by the Executive Branch, and

a cognizable interest in negating the use of unlawful machinations by the Executive Branch to “pressure” Petitioners.

Moreover, Petitioners have a strong interest in ensuring that EPA’s regulations have a rational basis in the policies and requirements of applicable legislation, specifically the Clean Air Act. Section 202 of the Act requires the Administrator to issue an endangerment finding only upon the exercise of “judgment” by the Administrator that emissions from motor vehicles “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Instead of exercising such “judgment,” however, the Administrator has largely chosen to adopt the findings of the so-called “Intergovernmental Panel on Climate Change” (“IPCC”), an international body with no legal standing in the United States, and an organization with no recognized stature under the Clean Air Act, and that by the definition of its purpose assumed rather than proved the very question at issue.

In addition, the constituents represented in each of the Petitioners’ districts will suffer concrete harms from issuance of EPA’s Endangerment Finding and the regulatory cascade it will create. These harms include, but are not limited to: increases costs for fuels and all fuel-dependent products and services, increased costs for compliance with regulatory requirements, decreased markets for goods and services, and similar economic disruptions. Like the states that participated in

the *Massachusetts v. EPA* litigation, Petitioners are duty-bound to represent their constituents' interests before the federal government and prevent the harm that would accrue to those interests from illegal government action. Thus, Petitioners occupy a representative role that will assure that these interests are vigorously advocated and that will result in a counterpoint to the advocacy of the state proponents.

In short, Petitioners assert that EPA's Endangerment Finding derogates Petitioners' constitutional authority, necessarily requires an unlawful deviation from the express terms of the Clean Air Act, and is an arbitrary and capricious refusal to exercise "judgment" under the Act. Specifically, EPA's attempt to override legislative prerogatives in this regard is an unconstitutional intrusion into legislative authority, nullifies the option of at least some forms of Congressional action, deprives Petitioners of their constitutional rights to vote on such actions, and otherwise adversely affects the effectiveness of Petitioners' actions as legislators on various climate matters in question.

6. Langdale Fuel Company. Langdale Fuel is in the business of providing wholesale fuel and other products through three divisions: LP Gas, Fuel, and Lubricants. EPA's Endangerment Finding notes that emissions of greenhouse gases are substantially entirely the result of fuel combustion. For example, EPA

states, “In 2007, U.S. well-mixed greenhouse gas emissions were 7,150 TgCO₂eq. The dominant gas emitted was carbon dioxide, mostly from fossil fuel combustion.” 74 FR at 66539. Accordingly, findings relative to greenhouse emissions and regulation of greenhouse emissions are necessarily and directly targeted at fuels. Such actions, however they are specifically implemented, have a concrete and particularized effect on the business operations of Langdale Fuel Company. Consequently, it is self-evident that Langdale Fuel Company has standing to challenge the arbitrary and capricious nature of the Endangerment Finding.

7. Retail Automobile Dealerships. Langdale Ford Company and Langdale Chevrolet-Pontiac, Inc..

Langdale Ford Company is a full-service Ford dealership selling Ford passenger and light-truck vehicles. With over 70 employees, some of whom have been at the dealership over 40 years, Langdale Ford is one of the largest new car and truck dealerships in the area of Valdosta, Georgia. Similarly, Langdale Chevrolet, located in Sylvester, Georgia, is a full-service dealer selling Chevrolet passenger and light-truck vehicles. Langdale Chevrolet-Pontiac has been in business for over 40 years, serving a customer base extending 60 miles in every direction. Although the primary market area is Worth County, Langdale Chevrolet

has a significant customer base from Valdosta to Albany, Georgia. Vehicles, such as those sold by the Langdale dealerships, are specific targets of EPA's Endangerment Finding and the ensuing regulations of vehicle emissions. For example, the Endangerment Finding states, "The transportation sector is a major source of greenhouse gas emissions both in the United States and in the rest of the world. The transportation sources covered under CAA section 202(a)—the section of the CAA under which these Findings occur—include passenger cars, light- and heavy-duty trucks, buses, and motorcycles. These transportation sources emit four key greenhouse gases: carbon dioxide, methane, nitrous oxide, and hydro-fluorocarbons. Together, these transportation sources are responsible for 23 percent of total annual U.S. greenhouse gas emissions, making this source the second largest in the United States behind electricity generation." 74 F.R. at 66499. Such a targeted focus on Langdale's business operations has had, and will continue to have, direct economic consequences on the companies. Consequently, such actions have a concrete and particularized effect on the business operations of Langdale's vehicle sale businesses. Again, it is self-evident that Langdale's vehicle sales companies have standing to challenge the arbitrary and capricious nature of the Endangerment Finding.

Attachment: Item 6(f)

Are there any other cases involving the same underlying agency order pending in this Court or any other?

Multiple cases have been filed with this Court, and have been consolidated under 09-1322 (Coalition for Responsible Regulation, Inc., Industrial Minerals Association-North America, National Cattlemen's Beef Association, Great Northern Project Development, L.P., Rosebud Mining Company, Massey Energy Services, and Alpha Natural Resources, Inc. v. U.S. EPA). The cases consolidated under that case are:

10-1024 (Petitioner: National Mining Association);

10-1025 (Petitioner: Peabody Energy Company);

10-1026 (Petitioner: American Farm Bureau Federation);

10-1030 (Petitioner: Chamber of Commerce of the United States of America);

10-1036 (Petitioner: Commonwealth of Virginia *ex rel.* Attorney General Kenneth T. Cuccinelli);

10-1037 (Petitioner: Gerdau Ameristeel Corporation);

10-1038 (Petitioner: American Iron and Steel Institute);

10-1039 (Petitioner: State of Alabama);

10-1040 (Petitioner: Ohio Coal Association);

10-1041 (Petitioners: State of Texas, Governor Rick Perry, Attorney General Greg Abbott, the Texas Commission on Environmental Quality, the Texas Agriculture Commission, and Barry Smitherman, Chairman of the Texas Public Utility Commission);

10-1042 (Petitioner: Utility Air Regulatory Group):

10-1044 (Petitioners: National Association of Manufacturers, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical and Refiners Association, and Western States Petroleum Association);

10-1045 (Petitioners: Competitive Enterprise Institute, Freedomworks, and the Science and Environmental Policy Project);

10-1046 (Petitioner: Portland Cement Association); and

10-1049 (Petitioners: Alliance for Natural Climate Change Science and William Orr).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on April 15, 2010, I electronically filed the foregoing “Agency Docketing Statement” 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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