Texas Public Policy
FOUNDATION

May 1, 2017

Via Federal Express
Mr. Scott Pruitt
EPA Administrator
United States Environmental Protection Agency
EPA Headquarters
Mail Code 1101A
William Jefferson Clinton Building (North)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Administrative Petition to Reconsider the Greenhouse Gas Endangerment Finding

Dear Administrator Pruitt:

Enclosed please find our Administrative Petition respectfully requesting EPA to reconsider its finding under the Clean Air Act that greenhouse gases pose a danger to human health and welfare. When making the Endangerment Finding in 2009, the prior EPA Administrator failed to submit the finding to the Science Advisory Board ("SAB") for peer review, as required by 42 U.S.C. § 4365(c)(1). The SAB submittal requirement is a nondiscretionary statutory mandate.

Thank you in advance of your careful consideration of the enclosed Administrative Petition.

Respectfully submitted,

Robert Henneke
General Counsel & Director
Center for the American Future
Texas Public Policy Foundation

Theodore Hadzi-Antich
Senior Counsel
Center for the American Future
Texas Public Policy Foundation

Enclosure

cc: Neomi Rao (Via Federal Express)
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Ted Boling (Via Federal Express)
Acting Director
President's Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20506

Sarah Dunham (Via Federal Express)
Acting Assistant Administrator
Office of Air and Radiation
Mail Code 6101A
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

BEFORE THE ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Liberty Packing Company LLC,
Nuckles Oil Co., Inc. dba Merit Oil Company,
Norman R. "Skip" Brown,
Dalton Trucking Company, Inc.,
Loggers Association of Northern California,
Construction Industry Air Quality Coalition, and
Robinson Industries, Inc.

PETITIONERS

PETITION TO RECONSIDER *ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT*, 74 FED. REG. 66,496 (DEC. 15. 2009) DOCKET NO. EPA-HQ-OAR-2009-0171; FRL-9091-8; RIN 2060-ZA14 ("ENDANGERMENT FINDING")

INTRODUCTION

Pursuant to the Right to Petition Government Clause of the First Amendment of the United Sates Constitution,[1] the Administrative Procedure Act,[2] the Clean Air Act,[3] and the United States Environmental Protection Agency's ("EPA's") implementing regulations, Petitioners file this petition with EPA's Administrator and, for the reasons set forth herein, respectfully request the Administrator to reconsider EPA's Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009), made pursuant to Section 202(a) of the Clean Air Act.

INTEREST OF PETITIONERS

Petitioner Liberty Packing Company LLC ("Liberty") is a bulk processor of tomato products. Located in California, Liberty relies on natural gas boilers for production of its tomato products. Burning natural gas creates carbon dioxide as a byproduct. Carbon dioxide is a greenhouse gas that is subject to the Endangerment Finding.

Petitioner Nuckles Oil Co., Inc. dba Merit Oil Company ("Merit Oil") is a family business that has operated in California for three generations. Merit Oil stores, transports, and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene, and

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1 "Congress shall make no law . . . abridging . . . the right of the people . . . to petition Government for a redress of grievances." U.S. Const. amend. I. The right to petition for redress of grievances is among the most precious of liberties safeguarded by the Bill of Rights. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government to the First Amendment freedoms and has a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "Any attempt to restrict those First Amendment liberties must be justified by clear public interest, threatened not doubtful or remotely, but by clear and present danger." *Id.* The Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1875).

2 5 U.S.C. Section 553(e).

3 42 U.S.C. Section 7401, *et seq.* (sometimes referred to here as the "CAA").

operates a number of delivery trucks. Merit Oil's operations emit greenhouse gases subject to the Endangerment Finding.

Petitioner Norman R. "Skip" Brown is an individual residing in California who has been the owner of a family roadbuilding business, Delta Construction Company, which will be required to go out of business in part because of regulations governing carbon dioxide emissions, which are the subjects of the Endangerment Finding.

Petitioner Dalton Trucking Company, Inc. is a California corporation that provides specialized transportation and off-loading services in connection with which it operates numerous heavy-duty trucks that emit greenhouse gases, which are the subjects of the Endangerment Finding.

Petitioner Loggers Association of Northern California ("LANC") is a nonprofit California trade association representing the interests of its members involved in the logging industry in Northern California.

Petitioner Construction Industry Air Quality Coalition ("CIAQC") is a nonprofit California trade association representing the interests of other California nonprofit trade associations and their members whose air emissions are regulated by California state, regional, and local regulations, as well as federal regulations.

Petitioner Robinson Enterprises, Inc. ("Robinson") is a third-generation family-owned California corporation engaged in harvesting and transportation of forest products, petroleum products, and transportation of various commodities. It has suffered unnecessary financial hardship as a result of various burdensome regulatory requirements.

EXECUTIVE SUMMARY

EPA's Greenhouse Gas Endangerment Finding is the cornerstone of EPA's effort to regulate greenhouse gases under the Clean Air Act. Carbon dioxide is the most prevalent

greenhouse gas. Because carbon dioxide is everywhere and in everything, the Endangerment Finding provides EPA with a springboard for regulating virtually every aspect of our nation's economic life. At the same time, it is the product of serious legal, scientific, evidentiary, and procedural errors. Those errors reflect the past Administration's rush to judgment, which was spurred by political expediency.

This Petition focuses on a glaring statutory violation, namely, EPA made the Endangerment Finding without seeking peer review from the Science Advisory Board, a blue-ribbon panel of experts established by Congress to ensure that EPA regulations are based on accurate data and credible scientific analyses. In enacting the peer review requirement, Congress was concerned that EPA not impose unnecessary restrictions on economic and personal freedom by unintelligently pursuing its regulatory goals. By ignoring the peer review requirement, EPA violated 42 U.S.C. § 4365(c)(1). That fundamental error stemmed from a desire to impress the community of nations by being among the first to regulate greenhouse gas emissions timed to coincide with the 2009 Copenhagen international climate conference.

In making the Endangerment Finding, EPA made no showing that the finding or any of its related greenhouse gas rules will remove any dangers to human health or welfare. Indeed, EPA disclaimed any obligation to define its ultimate regulatory objectives or its chosen means of achieving them and even refused to articulate how the Endangerment Finding could lead to successfully combating the climate change problems that EPA postulated. Furthermore, EPA claimed it was 90-99% certain that human-caused climate change threatened public health and welfare, *see* 74 Fed. Reg. at 66,518 & n.22, while failing to state what constitutes a safe climate, acceptable global temperature ranges, how levels of greenhouse gases in the atmosphere (whether natural or man-made) may affect those ranges, or even whether its regulatory actions would

ameliorate any risk. Because of these substantial gaps in its analysis, no one could accurately judge whether EPA achieved any discernable public benefit or congressionally authorized goal when it made the Endangerment Finding. As set forth in the attached declaration by a long-standing member of the Science Advisory Board, these analytical gaps would have been identified and communicated by the Board to EPA had EPA submitted the Endangerment Finding for statutorily-mandated peer review.

Moreover, Section 202(a)(1) of the Clean Air Act, under which the Endangerment Finding was made, requires the Administrator to exercise independent judgment to determine how a regulatory response to a perceived risk will reduce or eliminate that risk. The prior Administration left the gathering, sifting, and analyzing of the evidence, as well as the risk assessment, almost entirely to international non-governmental organizations, which have no authority under the Clean Air Act. The conclusions borrowed from those organizations rest primarily on theoretical computer modeling projections, which themselves are based on untested assumptions. Indeed, EPA acknowledged that the assumptions upon which it relied are subject to substantial uncertainty. Accordingly, the Agency's professed high confidence in its Endangerment Finding is unsupported, and its almost complete reliance on the work of non-governmental organizations was, put plainly, an abdication of its responsibilities under the Clean Air Act. As set forth in the attached expert declaration, these problems also would have been addressed by the Science Advisory Board had EPA submitted the proposed Endangerment Finding to the Board, as required by law.

The adverse economic impacts of the Endangerment Finding and the cascade of greenhouse gas regulations that it continues to generate are well documented. Virtually all sectors of the nation's economy are affected, including but not limited to mining, manufacturing, transportation, construction, and agriculture, as well as energy production, transmission, and use,

resulting in lost jobs affecting millions of American workers and their families.

Now, the new EPA Administration has the opportunity to correct the illegal process that culminated in the Endangerment Finding. Indeed, EPA has both the authority and the responsibility to reconsider the Endangerment Finding in light of the previous Administration's errors. Foremost among those errors is EPA's utter failure to submit the relevant documentation to the Science Advisory Board for peer review. It matters not that a court has reviewed the Endangerment Finding, because EPA is fully empowered to reconsider the finding at any time, as long as it articulates sufficient reasons for so doing. This Petition provides a surfeit of such reasons.

As set forth in more detail below, the Endangerment Finding should be reconsidered, and the Administrator should reopen the regulatory process so that the Science Advisory Board may be given the opportunity to conduct peer review, as required by 42 U.S.C. § 4365(c)(1).

STATEMENT OF LAW

Congress directed the EPA Administrator to establish the Science Advisory Board (sometimes referred to here as "SAB" or the "Board") to function as a peer review panel of experts to ensure that EPA's actions are scientifically and technically sound and defensible, 42 U.S.C. § 4365(a). The operative language of the SAB statute provides that EPA "shall" make its regulatory proposals available to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(1). The SAB submittal requirement applies to all regulatory proposals made by EPA under the statutes it administers, including the Clean Air Act, and the submittal requirement is nondiscretionary. *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981) ("*API*") ("The language of the statute indicates that making a [regulatory proposal] available to the SAB for comment is mandatory."). Upon receipt of the material, the SAB may provide "advice and comments on the

adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board's possession." 42 U.S.C. § 4365(c)(2).

The plain meaning of the mandatory SAB submittal requirement is confirmed by its purpose, which is to provide the Science Advisory Board an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of the [regulatory proposals]." 42 U.S.C. § 4365(c)(2). SAB's mission is to provide "expert and independent advice to the [EPA] on the scientific and technical issues facing the Agency" and to assist EPA "in identifying emerging environmental problems." 40 C.F.R. § 1.25(c). *See* Joe G. Conley, *Conflict of Interest and the EPA's Science Advisory Board*, 86 Tex. L. Rev. 165, 168 (2007) ("Congress established the EPA's Science Advisory Board in 1978 to provide independent scientific and technical advice to the EPA."). A key element of the SAB's mission is to render advice to EPA "on a wide range of environmental issues and the integrity of the EPA's research." *Meyerhoff v. United States EPA*, 958 F.2d 1498, 1499 (9th Cir. 1992).

Because the SAB submittal requirement is nondiscretionary, an EPA regulatory action subject to the submittal requirement that has not been submitted to the Board for peer review is "not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *API*, 665 F.2d at 1184. *See also, e.g., Sprint Corp. v. Fed. Commc'n Comm'n*, 315 F.3d 369 (D.C. Cir. 2003); *Sugar Cane Growers Co-op of Florida v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002); *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

STATEMENT OF FACTS

The prior EPA Administration commenced its activities in 2009 with a firm conviction that human greenhouse gas emissions are causing significant and harmful global climate change. In

one of her first official acts, then-EPA Administrator Lisa Jackson issued a memorandum to all EPA staff announcing the top five priorities that would receive her "personal attention." The first of those priorities was "[r]educing greenhouse gas emissions." *See Memorandum from Lisa P. Jackson to "All EPA Employees."* dated January 23, 2009, reproduced as **Exhibit A**.

Just three months later, EPA released the proposed Endangerment Finding, which was based upon two premises. First, EPA stated that air emissions of six substances — CO2, CH4, N2O, HFCs, PFCs, and SF6 — endanger public health and welfare. Second, EPA asserted that those six substances together constitute a single "air pollutant" emitted by new automobiles that contributes to harmful "air pollution," even though automobiles actually do not emit two of the six (PFCs and SF6) and emit two others (CH4 and N2O) only in minute amounts. In fact, carbon dioxide (CO2), a ubiquitous natural substance essential to life on Earth, was the primary target of the Endangerment Finding. *See* 74 Fed. Reg. 18,886-88 (Apr. 24, 2009). EPA provided only a 60-day comment period for the proposed Endangerment Finding, even though it was apparent the finding would create one of the most far-reaching regulatory programs in history, spurring numerous requests to extend the comment period, all of which EPA denied. *See* 74 Fed. Reg. at 66,503. Notably, the SAB submittal requirement was raised during the public comment period on the proposed Endangerment Finding, but ignored by EPA. *See Coalition Comments on EPA's Proposed Finding of Endangerment from Anthropogenic Greenhouse Gases to Public Health and Welfare*, reproduced in relevant part in **Exhibit B**, p.10 n 4. ("EPA also failed to make available to the Science Advisory Board for review and comment the Endangerment Finding").

On May 19, 2009, less than one month after publishing the proposed rule and well before the comment period closed, the Obama Administration announced that, "for the first time in history," the United States "set in motion a new national policy aimed at both increasing fuel

economy and reducing greenhouse gas pollution from all new cars and trucks." This "groundbreaking policy" was based on an "unprecedented collaboration" among federal agencies, automakers, environmental advocacy groups, organized labor, and the State of California to issue motor vehicle greenhouse gas regulations. *See President Obama Announces National Fuel Efficiency Policy*, reproduced as **Exhibit C**. EPA knew and understood that such an arrangement could not be implemented unless EPA were to promulgate the Endangerment Finding in the form in which it was proposed, and which would function as the springboard for the implementation of the "groundbreaking policy." *See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Fuel Economy Standards*, 74 Fed. Reg. 49454, 49464 (Sept. 28, 2009) ("If EPA makes the . . . endangerment finding . . . then section 202 authorizes EPA to issue [greenhouse gas] standards applicable to [cars and trucks].").

EPA announced its final Endangerment Finding on December 7, 2009. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009), just nine months after the publication of the proposed finding. Conveniently, that was the opening day of a highly publicized international conference on climate change held in Copenhagen, Denmark, attended by EPA's Administrator. *See Copenhagen Climate Change Conference – December 2009, United Nations Framework Convention on Climate Change*, http://unfccc.int/meetings/cop_15/items/5257.php. EPA's final rule was substantially unchanged from EPA's proposal. 74 Fed. Reg. at 66,497-99, 66,516-17, 66,540-41.

This irregular and illegal process had consequences. In EPA's own words, the Endangerment Finding causes "costs to sources and administrative burdens to permitting authorities . . . so severe that they [create] 'absurd results.'" 75 Fed. Reg. at 31,516-17. EPA also stated that whether the Endangerment Finding, or any foreseeable regulatory actions based on the finding, might or even could mitigate any projected climate effects was irrelevant. 74 Fed. Reg.

at 66,507-08.

Importantly, EPA acknowledged in a prior technical document published in connection with its Advance Notice of Proposed Rulemaking for light duty vehicles (the "Car Rule") that greenhouse gas emissions applicable to such vehicles would produce a reduction of, at most, approximately 0.01 degree Celsius in mean global temperature. *See Light Vehicle Technical Support Document*, Docket U.S. EPA-HQ-OAR-2008-0318-0084. When asked about this statement during the comment period on the Endangerment Finding, EPA declined to reevaluate its technical conclusion regarding temperature but simply "disagree[d]" that temperature effects were relevant to the Endangerment Finding, even though the Car Rule was the immediate impetus for the Endangerment Finding. *See EPA's Response to Public Comments: Volume 10: Cause or Contribute Finding, Response to Comment 10-14*, reproduced as **Exhibit D** at 11-13.

EPA made the Endangerment Finding without benefit of input from the Science Advisory Board. Instead, EPA relied almost exclusively on "assessment literature" generated by third parties that had summarized their own views of global climate change science. According to EPA, the Administrator "relied heavily" on the assessments of the United States Global Change Research Program ("USGCRP"), the Intergovernmental Panel on Climate Change, ("IPCC,") and the National Research Council ("NRC") as the "*primary* scientific and technical basis of her endangerment decision." 74 Fed. Reg. at 66,510 (emphasis added). In response to comments calling on EPA to make "its own assessment of all of the underlying studies and information," EPA refused, on the ground that it "ha[d] no reason to believe" the reports of the three non-governmental organizations were inaccurate. *Id.* at 66,511.

Significantly, the prior EPA Administrator was apparently comfortable relying substantially on the work of *one* of the non-governmental groups, IPCC, to answer what is perhaps

the most critical issue in regulating greenhouse gas emissions — the extent to which climate change arises from anthropogenic greenhouse gas emissions, as opposed to natural forces. *See Principles Governing IPCC Work at ¶ 1-9*, reproduced as **Exhibit E** (discussing the purposes, missions, and goals of the IPCC). In so doing, EPA acknowledged that, despite republishing and relying on IPCC's claim of 90-99% certainty, there are "varying degrees of uncertainty across many of these scientific issues." *See* 74 Fed. Reg. 66,506.

Notwithstanding these uncertainties, EPA issued the Endangerment Finding based on computer model predictions of man-made, severe climate change impacts, and concluded that, because of its Endangerment Finding, it was legally obligated to promulgate a separate rule to restrict greenhouse gas emissions from certain new motor vehicles. Car Rule, 75 Fed. Reg. 25,324, 35,398 (May 7, 2010).

EPA further concluded that its regulation of motor vehicle greenhouse gas emissions automatically triggered, beginning on January 2, 2011, regulation of stationary-source greenhouse gas emissions under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program and Title V programs. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,519-22 (Jun. 3, 2010) (rule rewriting, or "tailoring," the Clean Air Act's emissions thresholds for stationary sources of greenhouse gases subject to the PSD and Title V programs; s*ee also Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*,75 Fed. Reg. 17,004 (Apr. 2, 2010) (EPA rule reversing long-standing interpretation of Clean Air Act's applicability provisions to account for new greenhouse gas regulations).

EPA also found that its new statutory construction of the Clean Air Act would create "absurd results" never intended by Congress. *See* 75 Fed. Reg. at 31,516. To avoid those expected

absurd consequences, EPA elected to rewrite the statutory thresholds by creating new thresholds, not authorized by the Clean Air Act, unique to greenhouse gases. *Id.*

In short, the Endangerment Finding immediately triggered a flood of regulations governing emissions of greenhouse gases from numerous stationary and mobile sources.

Soon after the Endangerment Finding was made, affected parties filed petitions for review in the D.C. Circuit; *Coalition for Responsible Regulation v. EPA* (Case No. 09-1322). Several petitioners also filed administrative petitions for reconsideration with EPA. *See Reconsideration Denial*, 75 Fed. Reg. 49,556, 49,557 (Aug. 13, 2010). Some of the administrative petitions urged EPA to reconsider its Endangerment Rule in light of the extensive electronic files from the University of East Anglia's Climate Research Unit released to the public after the comment period closed. *See, e.g.*, 74 Fed. Reg. at 18886-18910 (April 24, 2009); *see also Addendum and Supplementation of Record to Coalition Comments*, dated December 4, 2009, reproduced as **Exhibit F**. Those documents raised important questions regarding the impartiality and data quality of the climate science on which the IPCC and thus EPA relied. Refusing to receive any public comment on the administrative petitions for reconsideration, EPA denied them all. *See* 75 Fed. Reg. at 49,556.

Some of the issues arising out of the massive Endangerment Finding litigation in the D.C. Circuit and related lawsuits are still being contested. One of the most recent lawsuits arises from EPA's promulgation of the Clean Power Plan, *State of West Virginia v. EPA*, (D.C. Circuit Case No. 15-1363), where EPA defended that lawsuit in part because of its Endangerment Finding. The Clean Power Plan has since been stayed by the United States Supreme Court. *See West Virginia v. EPA*, 136 S. Ct. 1000 (Mem.), 194 L.Ed.2d 17 (2016). In a recent executive order issued by President Trump, the EPA has been instructed to reconsider the Clean Power Plan, which deals

with existing fossil fuel electric generation facilities, and certain associated regulations dealing with new facilities. *See Executive Order on Clean Power Plan*: https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

Because the ubiquitous natural substance carbon dioxide is one of the six greenhouse gases subject to EPA's 2009 Endangerment Finding, the effects of the finding are affecting and will continue to affect virtually all parts of the nation's economy, giving EPA potentially unprecedented power to regulate life in the United States. It is uncontroverted that EPA did not submit the Endangerment Finding to the Science Advisory Board for peer review. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volume 3: Process Issues Raised by Petitioners*, pp 17-18, Response to Comment 3-7, reproduced as **Exhibit G**.

ARGUMENT

THE ENDANGERMENT FINDING SHOULD BE RECONSIDERED BECAUSE EPA VIOLATED A STATUTORY MANDATE WHEN IT FAILED TO SUBMIT THE FINDING TO THE SCIENCE ADVISORY BOARD FOR PEER REVIEW

I. The Text and Legislative History of the SAB Statute Required EPA to Submit the Endangerment Finding to the Science Advisory Board for Peer Review

In relevant part, the SAB statute provides that

> "[for] *any* proposed criteria document, standard, limitation, or regulation . . . . . provided to *any* other Federal agency for formal review and comment" [the Administrator] "*shall* make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based."

42 U.S.C. § 4365(c)(1) (emphasis added). The duty to submit proposed rules and regulations to the SAB is a mandatory requirement. *See API*, 665 F. 2d at 1188 ("The language of the statute

indicates that making a [regulatory proposal] available to the SAB for comment is mandatory.").

In an analogous context, the United States Supreme Court determined that Congress's use of the word "shall" in the Clean Water Act imposed a mandatory and discretionless obligation. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). In *Lopez*, the Supreme Court noted the significance of the fact that Congress, in the same statute, used "may" and "shall" to denote different obligations, such that "may" creates discretionary obligations, while "shall" creates discretionless obligations.

The same is true in the SAB statute. 42 U.S.C. § 4365(c)(1) mandates that the Administrator "shall" submit the material to SAB for review, but then in the very next paragraph, 42 U.S.C. § 4365(c)(2) provides that the SAB "may" provide advice and comments on the material submitted to it. Accordingly, the mandatory nature of EPA's submittal duty is clear. *See Lopez*, 531 U.S. at 241. *See also Moskal v. United States*, 498 U.S. 103, 109 (1990) (courts must give effect to every clause and word of a statute); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (describing the "rudimentary" principle of administrative law that regulatory action must comply with statutory requirements). *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (courts and agencies "must give effect to the unambiguously expressed intent of Congress").

The legislative history of the SAB submittal requirement further illustrates Congress's intent. *See Joint Explanatory Statement*, H.R. Conf. Rep. 96-722, 3296 (1977) ("The first paragraph of this section *requires* the Administrator of EPA to make available to the [Science Advisory] Board any proposed criteria document, standard, limitation, or regulation together with scientific background information in the possession of the Agency on which the proposed action is based.") (emphasis added). Accordingly, an interpretation that the submittal requirement is discretionary runs afoul of Congressional intent. *See Chevron*, 467 U.S. at 845 (agency

interpretation of a statute is impermissible if it "is not one that Congress would have sanctioned.").

A. The Endangerment Finding Is a "Regulation"

Among other regulatory actions, proposed EPA "regulations" must be submitted to the Science Advisory Board for peer review. 42 U.S.C. § 4365(c)(2); *see API*, 665 F.2d at 1188. A regulation, also known as a legislative rule, is "an agency statement of general *or* particular applicability and future effect designed to . . . prescribe law or policy." 5 U.S.C. § 551(4) (emphasis added). The Endangerment Finding is a "regulation" because it has the force of law, *Thomas v. New York*, 802 F.2d 1443, 1445-47 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), and because it is also of "particular applicability," in that the Endangerment Finding required EPA to promulgate greenhouse gas emissions standards under Section 202 of the Clean Air Act, 42 U.S.C. § 7521(a). "If EPA makes a finding of endangerment, the [a]gency [is required] to regulate emissions of [greenhouse gases] from motor vehicles." *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d 102, 126 (D.C. Cir. 2012), *aff'd in part, rev'd in part sub nom. Util. Air Reg. Group v. E.P.A.*, 134 S. Ct. 2427 (2014), and *amended sub nom.*, quoting *Massachusetts v. EPA*, 127 S. Ct. 1462 (2007). EPA itself acknowledged the Endangerment Finding obligated it to regulate motor vehicle emissions of greenhouse gases. *See* 76 Fed. Reg. at 57,129 ("With EPA's December 2009 final findings that certain greenhouse gases may reasonably be anticipated to endanger public health and welfare and that emissions of [greenhouse gases] from section 202 (a) sources cause or contribute to that endangerment, section 202(a) *requires* EPA to issue standards applicable to emissions of those pollutants from new motor vehicles.") (emphasis added). Accordingly, the Endangerment Finding is a regulation subject to the SAB submittal requirement.

B. EPA Provided the Endangerment Finding to the Office of Management and Budget "For Formal Review and Comment"

The SAB statutory language requires EPA to submit any proposed regulation to the Science

Advisory Board for peer review whenever it provides the proposal to "any other Agency for formal review and comment." 42 U.S.C. 4365. EPA acknowledged that it submitted the Endangerment Finding to the Office of Management and Budget (OMB") as a "significant regulatory action" pursuant to an overarching executive order:

> Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because it raises novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to Office of Management and Budget (OMB) recommendations have been documented in the docket for this action.

74 Fed. Reg. 66545 (Dec. 15, 2009). This was a "formal" review mandated by EO 12866, and any notion that the OMB submission was "informal" is belied by the text of the executive order cited by EPA. Specifically, EO 12866 declares:

> Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function.

58 Fed. Reg. 51735 (Sept. 30, 1993). EO 12866 goes on to specify in painstaking detail exactly what must be submitted to OMB, and prescribes a "regulatory plan" that must consist "at a minimum" of a statement of the agency's regulatory objectives, a summary of each planned significant regulatory action including anticipated costs and benefits, a summary of the legal basis for each such action, a statement of the need for each action, the agency's schedule for action, and other data. 58 Fed. Reg. 51735 (Sept. 30, 1993). The level of detail required indicates that the review is the epitome of formality. Indeed, the submission requirements are taken so seriously that within 10 days of receiving the submission from EPA, OMB is required to circulate it among other federal agencies to check for possible conflicts. *Id.*

Accordingly, EPA made available the proposed Endangerment Finding to another federal agency, namely, OMB, pursuant to Executive Order 12866, and through OMB, to other federal agencies, for formal review, bringing the review of the Endangerment Finding squarely within the ambit of "formal" federal agency review under 42 U.S.C. § 4365(c)(1), thereby triggering the SAB submittal requirement.

C. The Endangerment Finding Was Never "Made Available" by EPA to the Science Advisory Board for Peer Review

The D.C. Circuit has ruled that the mandate to "make available" a regulatory proposal to the SAB for peer review requires that EPA "submit" the proposed regulation to the SAB. *API*, 665 F.2d at 1189 ("the statute *explicitly mandates* that standards be *submitted* to the Board for review.") (emphasis added). "EPA did not submit the Endangerment Finding for review by its Science Advisory Board." *Coalition for Responsible Reg., Inc. v. E.P.A.*, 684 F.3d at 124. In addition, EPA admitted in its statements to the public that it never submitted the Endangerment Finding to the SAB for peer review. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Volume 3: Process Issues Raised by Petitioners, pp 17-18, Response to Comment 3-7*, reproduced as **Exhibit G**.

EPA's statement that the Endangerment Finding was generated as a result of the "far reaching and multidimensional" problem addressed by the finding, *see* 74 Fed. Reg. at 66497, does not excuse its violation of the SAB submittal requirement, because the seriousness of any particular issue facing an administrative agency does not permit it to violate the statute under which it takes administrative action. *See Food and Drug Admin. v. Brown & Williamson*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure

that Congress enacted into law.'") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Put plainly, Congress placed the burden on EPA to make regulatory proposals available to the Science Advisory Board for peer review, and EPA failed to meet that burden when it made the Endangerment Finding without seeking review from the Board. *See U.S. v. Kirby*, 74 U.S. 482, 486 (1868) ("[a]ll laws should receive a sensible construction."). Regardless of the extent to which the prior Administration's substantive determination regarding the Endangerment Finding merits any discretion from the courts, this Administration should correct the palpable procedural violation of the mandatory SAB submittal requirement. *See Bennett*, 520 U.S. at 172 ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.").

II. The D.C. Circuit's Decision in *Coalition for Responsible Regulation v. EPA* Does Not Constrain EPA from Reconsidering the Endangerment Finding

The Petitioners are mindful of the D.C. Circuit's decision in *Coalition for Responsible Regulation v. Environmental Protection Agency*, 684 F.3d 102 (D.C. Cir. 2012), where dozens of petitioners challenged EPA's Endangerment Finding. One of the challenges was based on EPA's failure to submit the Endangerment Finding to the SAB for peer review. The panel in the case concluded that (1) it was "not clear" whether the Endangerment Finding was submitted "to any other Federal agency for formal review and comment," thereby triggering the SAB submittal duty, 684 F.3d at 124, and (2) "even if EPA violated its mandate by failing to submit the Endangerment Finding to the SAB, Industry Petitioners have not shown that this error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" 684 F.3d at 124.

Although it may not have been "clear" to the panel in *Coalition for Responsible Regulation* whether EPA sought "formal review and comment" of the Endangerment Finding from another

federal agency, it is abundantly clear from the foregoing discussion in Section I. B. that EPA did in fact seek formal review and comment on the Endangerment Finding from the Office of Management and Budget pursuant to Executive Order 12866. By stating that it was "not clear" whether EPA sought formal review from another federal agency, the D.C. Circuit panel acknowledged that it could not determine whether EPA sought "formal review and comment." Accordingly, the record is open on that issue. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (a court's failure to make a specific ruling on an issue does not constitute binding precedent for that issue).

For three additional reasons set forth in more detail in Subsections II A., B., and C. below, the decision in *Coalition for Responsible Regulation* regarding the Endangerment Finding does not constrain EPA from reconsidering the finding. First, the SAB submittal requirement, which is set forth in a statute separate and independent of the Clean Air Act, is categorically not subject to the "central relevance" and "substantial likelihood" constraints applicable to procedural violations of the Clean Air Act itself. Second, assuming *arguendo* that the Clean Air Act's "central relevance" and "substantial likelihood" tests apply to the SAB submittal requirement, a "substantial likelihood" that EPA's regulatory proposals would undergo significant change as a result of SAB review is built into the fabric of the SAB statute and is, therefore, centrally relevant to the issue of whether a proposed regulation, including the Endangerment Finding, would have a substantial likelihood of undergoing significant change as a result of review by the Board. *See* 42 U.S.C. § 4365(c)(1). Third, in any event, EPA has the inherent authority to reconsider a prior rulemaking.

A. The "Central Relevance" and "Substantial Likelihood" Tests Do Not Apply to EPA's Duty to Submit the Endangerment Finding to the Science Advisory Board for Peer Review

In the D.C. Circuit panel's view, "Industry Petitioners *have not shown* that [the SAB] error was 'of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'" *Coalition for Responsible Regulation*, 684 F.3d at 124 (emphasis added). The panel's summary conclusion that a specific showing was not made does not address the threshold issue of whether the procedural requirements of the Clean Air Act trump those of the distinct SAB statute. *See Cooper Industries, Inc.*, 543 U.S. at 170 (a court's silence regarding issues is not precedent for future decisions).

EPA's duty to submit regulatory proposals to the Science Advisory Board for peer review applies not only to EPA's regulatory proposals under the Clean Air Act but also to regulatory proposals made under *every* "authority of the Administrator." *See* 42 U.S.C. § 4365(c)(1). Under longstanding principles of statutory construction, the statutory authorities administered by EPA must be construed in a way that makes them consistent with each other, if at all possible. *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (differing statutes should be interpreted so as to be consistent); *United States v. Freeman*, 44 U.S. 556 (1845) ("Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute"); *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985) ("All parties to the appeal agree, however, that the two statutes before us cannot be construed to reach different results. Because the NHA shares with the FDIA the common purpose of insuring funds placed in depository institutions; and because its legislative history shows that Congress intended it to create the same insurance protection for investors in savings and loan associations as the Banking Act of 1933 had created for bank depositors, these two statutes are *in pari materia* and must be construed together.") (internal citations omitted); *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796,

801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning.").

The SAB statute contains no "central relevance" or substantial likelihood" test. At the same time, the Clean Air Act places those two limitations only on judicial review of rulemaking procedures mandated by the Clean Air Act itself. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 522 (D.C. Cir 1983) (in amending the CAA in 1977, Congress "wanted to add new procedural protections" in the CAA while "[minimizing] disputes over EPA's compliance with the new procedures" in the 1977 Amendments to the Clean Air Act, and Congress "did not intend to cut back" on statutory procedural requirements and protections set forth in statutes other than the Clean Air Act). Thus, the "central relevance" and "substantial likelihood" standards set forth in the CAA for procedural violations of that Act, 42 U.S.C. § 7607(d)(8), do not apply to violations of rulemaking procedures mandated by statutes other than the CAA, such as the SAB statute. *See Small Refiner*, 705 F.2d at 522-24.

Under the longstanding interpretive principle of harmonizing statutes that an agency administers, EPA must comply with the SAB submittal requirement consistently for all of its regulatory proposals, regardless of the specific law under which a particular regulation is proposed. This result is required because the SAB submittal requirement does not distinguish among EPA's substantive regulatory authorities but applies equally to all of them, including the Clean Air Act.

Citing *API*, the D.C. Circuit's panel decision in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), incorrectly applied the "central relevance" and "substantial likelihood" tests to the SAB submittal requirement in the context the Endangerment Finding. In so doing, the panel did not recognize that *API* did not analyze nor even address the crucial relationship between EPA's singular, independent duty to comply with the SAB submittal

requirement and EPA's diverse duties under each of the programmatic statutes it administers. Thus, the panel mistakenly applied the Clean Air Act's unique "critical relevance" and "substantial likelihood" tests to EPA's overarching obligation to submit regulatory proposals, including the Endangerment Finding, to the Science Advisory Board for peer review.[4]

The report of the Standing House Committee on Interstate and Foreign Commerce (the "Committee"), which investigated the need for and crafted the language of the Clean Air Act's 1977 amendments, is particularly instructive. *See* Norman J. Singer, 2A Sutherland Statutes and Statutory Construction § 48:6 (7th ed. 2007) ("The report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is often used as a source for determining the intent of the legislature."). The Committee noted that the pre-1977 Clean Air Act lacked sufficient "procedural safeguards" and that broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process. *See* H. Rep. 95-294 at 319 (May 12, 1977). Among other things, the Committee concluded that there was a need for "clearly defined procedures applicable to establishing a publicly available record as a basis for decisionmaking" under the Clean Air Act. *Id.* at 320. Of special concern to the Committee were the "new" procedural requirements for cross-examination of witnesses on disputed factual issues, which were added by the 1977 Clean Air Act

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[4] In addition, as discussed in more detail below in Section III, *Coalition for Responsible Regulation* erred in its rote citation of *API* because in that case there was harmless error in that EPA had previously submitted two drafts of the relevant documentation to the Science Advisory Board and had made substantial changes to the regulation at issue there pursuant to the Board's recommendations. In connection with the Endangerment Finding at issue here, however, EPA never submitted anything to the Board.

Amendments in connection with hearings held on rulemaking proposals. To prevent the new procedures from getting bogged down in fine points such as "[whether] a given question involves 'facts' or 'policy' or whether a given fact is 'legislative' or 'adjudicative,'. . . the committee has limited the extent to which the Administrator's decisions on *such* procedural matters [arising under the language of the 1977 Amendments] may be reversed during judicial review." *Id.* at 322 (emphasis added).

The Committee went on to state that courts may overturn EPA rulemaking under the 1977 Clean Air Act Amendments with regard to

> *such* procedural matters [only if] if the procedural errors 'were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'

Id. (emphasis added). Thus, the only procedural violations subject to the high bar set by Congress were the then-new rulemaking procedures established by Congress in the 1977 Clean Air Act Amendments. *See Small Refiner*, 705 F.2d at 522. The independent duty to submit regulatory proposals to the SAB, which is found entirely outside of the Clean Air Act, is independent of, and is not constrained by, the 1977 Clean Air Act Amendments.

The prior Administration failed to comply with the nondiscretionary requirement to submit the Endangerment Finding to the Science Advisory Board for peer review before it was promulgated. That failure is a violation of the SAB statute and not the Clean Air Act. Accordingly, contrary to the summary conclusion of the panel in *Coalition for Responsible Regulation*, EPA's failure was not subject to the "central relevance" or "substantial likelihood" standard for procedural violations of the Clean Air Act.

It is true that the earlier D.C. Circuit's decision in *API* summarily applied the Clean Air Act's "central relevance" and "substantial likelihood" tests to the SAB submittal requirement. But

a "court's prior judicial construction of a statute trumps a [subsequent] agency construction . . . *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 548–49 (2009) (citing *Brand X*, 545 U.S. at 982) (emphasis added). Neither *API* nor *Coalition for Responsible Regulation* ever held or even asserted that their construction of the applicability of the "central relevance" and "substantial likelihood" tests to SAB review was mandated by the unambiguous terms of either the Clean Air Act or the SAB statute, or, indeed, both of them when viewed in tandem.

Accordingly, as set forth in more detail in Section II. C, *infra*, this Administration is free to revisit the issue based upon its own legal, policy, and scientific evaluations. Significantly, the Clean Air Act's "central relevance" and "substantial likelihood" standards *cannot* apply to violations of the SAB submittal requirement in connection with rules promulgated by EPA under any statutory authority *other than* the Clean Air Act because no other EPA administered statute authorizes those tests under any circumstance. Accordingly, consistent with the long-honored principle that different statutes administered by the same agency must be construed harmoniously, EPA should now determine that regulations promulgated by EPA under the Clean Air Act are subject to the same SAB peer review requirements as regulations under "any other authority of the Administrator." *See* 42 U.S.C. § 4365(c)(1); *see also Parsons*, 474 U.S. at 524.

B. By Enacting the SAB Statute, Congress Itself Implicitly Determined That Peer Review by The Board Is *Always* Centrally Relevant and Carries a Substantial Likelihood of Significant Change in Connection with EPA's Regulatory Proposals

Assuming *arguendo* that the "central relevance" and "substantial likelihood" tests apply, congressional contemplation of a "substantial likelihood" that EPA's regulatory proposals would undergo "significant change" as a result of SAB review, and the "central relevance" of such review

for proposed regulations, is built into the very fabric of the SAB statute. *See* 42 U.S.C. § 4365(c)(1). The legislative history makes clear that the SAB's role in EPA's rulemaking process is to "be able to preview conflicting claims and advise the [EPA] on the adequacy and reliability of the technical basis for rules and regulations." *See Joint Explanatory Statement*, H.R. Conf. Rep. 96-722, 3295-96. Congress' *Joint Explanatory Statement* goes on to state:

> Much of the criticism of the Environmental Protection Agency might be avoided if the decisions of the Administrator were fully supported by technical information which had been reviewed by independent, competent scientific authorities.
>
> . . . [T]he intent of [the SAB submittal requirement] is to ensure that the [SAB] is able to comment in a well-informed manner on any regulation that it so desire.

Id. at 3296. That is why SAB submittal is "mandatory." *API*, 665 F.2d at 1188. "[We] must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. Accordingly, even under the CAA's "significant likelihood" standard, the uncertainty created by EPA's failure to submit the Endangerment Finding to the SAB for peer review indicates a "significant likelihood" that the rule would have been "substantially changed" if such errors had not been made and, therefore, is of "central relevance." 42 U.S.C. § 7607(d)(8).

Such a result is compelled by *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982). In *Kennecott*, EPA denied an administrative petition for reconsideration by asserting that its failure to include certain documents in the rulemaking record was not significant because, even if the documents had been included, EPA would have come to the same regulatory conclusion. The D.C. Circuit disagreed, stating that the "absence of those documents . . . makes impossible any meaningful comment on the merits of EPA's assertions." *Id.* at 1018. "EPA's failure to include such documents constitutes reversible error, for the uncertainty that might be clarified by those documents . . . indicates a 'substantial likelihood' that the regulations would 'have been

significantly changed.'" *Id.* at 1018-19. Here too, EPA's failure to make the proposed Endangerment Finding available to the SAB for peer review is improper because the uncertainty regarding the outcome of SAB's review and EPA's response indicates a "substantial likelihood" that the regulation would have been "significantly changed" had SAB been consulted.

This conclusion is supported by the attached declaration of Roger O. McClellan, who served as a member of the Science Advisory Board for over three decades, including years of service as a member of the Board's Executive Committee and its Clean Air Scientific Advisory Committee. The declaration, attached as **Exhibit H**, was filed in the D.C. Circuit in support of one of the Petitioners in the consolidated cases of *Coalition for Responsible Regulation v. EPA* (Case No. 09-1322, Document # 1388587).

Among other things, McClellan's declaration states that the Endangerment Finding "can have a profound impact on society." Declaration of Roger O. McClellan ¶ 8. EPA never contested the fact that the Endangerment Finding can have a profound societal impact.

The McClellan Declaration goes on to state that "SAB essentially serves a critical gatekeeper role whose mission is to ensure that EPA's regulatory proposals are based upon sound scientific and technical principles." McClellan Decl. ¶ 11. "On many occasions during the long history of SAB, EPA changed its regulatory proposals and schedules based on review and comment by SAB. This has been the rule rather than the exception, which stands to reason, as SAB was created to provide an expert reality check for EPA scientific and technical determinations that inform policy judgments." McClellan Decl. ¶ 10.

McClellan further states:

> I am familiar with EPA's finding made in December of 2009 that greenhouse gases pose a threat to human health and welfare (the "Endangerment Finding"). The Endangerment Finding is certainly the type of regulatory action that SAB was created to review. It deals with novel,

> cutting edge scientific and technical issues that can have a profound impact on society. Those issues require the type of detailed expert scrutiny that SAB review was intended to provide.

McClellan Decl. ¶ 8. Moreover, the declaration states that EPA's long-standing custom and standard operating procedure was to submit regulatory proposals to SAB for review during public comment periods:

> I have always understood that EPA's proposed regulations under the Clean Air Act would be made available to the SAB for review at the earliest possible time and no later than the date the regulations are first published in the Federal Register for comment by other federal agencies and the general public.

McClellan Decl. ¶ 7.

Because the purpose of the SAB submittal requirement is to provide SAB an opportunity to make available "its advice and comments [to EPA] on the adequacy of the scientific and technical basis of [regulatory proposals]," 42 U.S.C. § 4365(c)(2), Congress could not have intended that SAB review would be no more than a mere formality or a superfluous gesture. *Moskal v. United States*, 498 U.S. 103 (1990) (courts should give effect to every clause and word of a statute). In fact, Congress intended that EPA's proposed Clean Air Act regulations would significantly evolve, mature, and otherwise change as a result of SAB's scientific and technical advice. Lynn E. Dwyer, *Good Science in the Public Interest: A Neutral Source of Friendly Facts?* 7 Hastings W-N.W. J. Envtl. L. & Pol'y 3, 6-7 (2000) (SAB was created to function as a scientific and technical peer review panel to provide EPA with guidance, so that the Agency's rulemaking is not based on erroneous or untrustworthy data or conclusions); *see also* McClellan Decl. ¶¶ 10-11.

McClellan goes on to state:

> Based upon my more than two decades of experience as a member of SAB, after it was established legislatively, my more than 15 years of service as a

> member of the SAB Executive Committee and my knowledge of how SAB interacts with EPA, I believe there is substantial likelihood that the Endangerment Finding would have been substantially changed in response to advice from the SAB had the Endangerment Finding been made available for review prior to its promulgation.

McClellan Decl. ¶ 12.

Accordingly, even if the "substantial likelihood" standards apply to SAB submittals of regulatory proposals made by EPA under the Clean Air Act, those standards are met in the case of the Endangerment Finding.

C. EPA Has Inherent Authority to Reconsider the Endangerment Finding

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (internal citations and quotation marks omitted). Furthermore, "[a]n initial agency interpretation is not instantly carved in stone [although] reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation. But so long as an agency adequately explains the reasons for a reversal of policy, its new interpretation of a statute cannot be rejected simply because it is new." *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014). Accordingly, EPA is free to reconsider the Endangerment Finding.

It matters not that the D.C. Circuit in *Coalition for Responsible Regulation* summarily discounted on extremely narrow grounds, without analysis, a claim that EPA violated the SAB statute when it made the Endangerment Finding without seeking peer review. As indicated in the foregoing discussion, the court did not rule that EPA in fact had no duty to submit the

Endangerment Finding to the Science Advisory Board, merely that there was no clear evidence before the court that the triggers for that duty had been activated. *Coalition for Responsible Regulation*, 684 F. 3d at 124-25. As the Supreme Court observed, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. . . . [I]n *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy."). *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) (citing *Chevron v. NRDC*, 467 U.S. 837, 857-58 (1984).

Accordingly, EPA may determine as a matter of policy that the Endangerment Finding should have been submitted to the Science Advisory Board for peer review and that EPA's failure to do so triggers reconsideration of the finding, coupled with submittal to the Board. *See Smiley v. Citibank (South Dakota). N. A.*, 517 U.S. 735, 742 (1996) ("[regulatory] change is not invalidating. . . ."); *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 496 (D.C. Cir. 2016) ("An agency 'must consider varying interpretations and the wisdom of its policy on a continuing basis.'") (quoting *Brand X*, 545 U.S. at 981). Indeed, as set forth in Section II. B., above, EPA may adopt such an interpretation even if a court had previously construed the statutory requirement differently. *See Cuomo* 557 U.S. at 548–49. Therefore, EPA is free to revisit the Endangerment Finding based upon the instant Administrative Petition.

III. EPA'S FAILURE TO SUBMIT THE ENDANGERMENT FINDING TO THE SCIENCE ADVISORY BOARD WAS NOT HARMLESS ERROR

A careful review of EPA's statements about the regulations reveals how critical and necessary it was to have the SAB perform a thorough evaluation of the scientific basis of the proposed rule.

The EPA began its overview of the rule by declaring that "[t]he Administrator has determined that the body of scientific evidence compellingly supports this finding." 74 Fed. Reg.

66497 (Dec.15, 2009). However, the EPA admitted that it relied almost exclusively on data gathered, sifted, and analyzed by others. *Id* at 66510-12. The input of the Science Advisory Board would have been of major influence on the evaluation of the body of scientific evidence. *See* McClellan Declaration ¶¶ 2-12. EPA acknowledges that "[p]ublic review and comment has always been a major component of EPA's process." 74 Fed. Reg. at 66500. EPA is silent, however, as to why, during that period, it failed to comply with the mandatory obligation to let the experts at the Science Advisory Board opine on the data and science underlying the rule, especially in light of the fact that the public noted the error during the public comment period, as described above in the Statement of Facts. EPA even claimed that "the science is sufficiently certain." 74 Fed. Reg. 66501 (Dec.15, 2009). Such an assertion would seem to require, at a minimum, that EPA comply with the mandatory duty to submit the science for review by the statutorily established expert organization charged with providing EPA with advice in connection with scientific determinations.

The utter failure of EPA to submit the proposed Endangerment Finding and supporting material to SAB at any stage distinguishes this case from another one where failure had been found to be harmless. In *API*, procedural challenges were raised against the ozone standards established by EPA. There, EPA had submitted two drafts of the criteria document to the Science Advisory Board and had made changes to the criteria based on SAB's recommendations. 665 F. 2d at 1187-88. The proposed ozone standard, which was based entirely upon the previously submitted criteria, as revised, was itself not submitted to the SAB. In rejecting the challenge, the court found that because the Science Advisory Board had *twice* reviewed the criteria documents, which contained the detailed scientific and technical basis for the standard, it was harmless error that EPA did not submit the documentation for a third review. *Id.* at 1189. In the case of the Endangerment Finding, however, SAB never had the opportunity to review anything. Accordingly, there is no basis to

conclude that the failure of EPA to submit the Endangerment Finding to the Science Advisory Board for peer review could under these circumstances be considered harmless error.

As discussed above in the Statement of Facts section of this Petition, the Endangerment Finding has enormous impact on the power generation and distribution industry, as illustrated by the Clean Power Plan, and on diverse other stationary sources, as illustrated by the PSD and Title V requirements triggered by the finding. In addition, the Endangerment Finding has profound consequences for the transportation industry, especially owners and operators of trucks.

In 2011, the EPA finalized its Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy Duty Engines and Vehicles rule. 76 Fed. Reg. 57106 (Sept. 15, 2011). That rule was expressly based on the earlier Endangerment Finding. *See* 76 Fed. Reg. 57109 (Sept. 15, 2011). The rule covers all new heavy-duty trucks starting with the 2014 model year and imposes stringent new fuel consumption standards on such vehicles. 76 Fed. Reg. 57106 (Sept. 15, 2011). In order to reduce greenhouse gas emissions, EPA determined it could not simply impose requirements for the truck engine; the rule requires fundamental changes to the entirety of the truck. *See* 76 Fed. Reg. 57114 (Sept. 15, 2011). The result of imposing new mandates on both truck engines and truck bodies crates an enormous increase in the cost of trucks. *See* 76 Fed. Reg. 57321 (Sept. 15, 2011). Nevertheless, EPA elected to "make no attempt at determining what the impact of increased costs would be on new truck prices." *Id.* EPA did, however, recognize that there would be research and development costs of at least $6.8 million per manufacturer per year for five years. *Id.* These costs will necessarily be passed on to the purchasers of the new trucks.

The economic impacts on stationary and mobile sources throughout the nation have had, and will continue to have, repercussions in the job market, resulting in job losses in the mining, manufacturing, construction, and transportation sectors, among others.

These adverse nationwide economic impacts are directly traceable to the Endangerment Finding, and that is yet another reason why it would be untenable to claim that the failure to submit the finding to the Science Advisory Board for peer review was "harmless error." Accordingly, EPA should reconsider the Endangerment Finding and, in the process, submit the finding to the Science Advisory Board for peer review.

CONCLUSION

For these reasons, Petitioners respectfully request that the Administrator:

1. Within 180 days of receipt of this Administrative Petition, provide a substantive response to the Petitioners informing them and the public of the commencement of an administrative proceeding to reconsider the Endangerment Finding, *see* 42 U.S.C. Section 7604;

2. During the administrative proceeding:

   a. provide the public with notice and opportunity for comment, as required by the Administrative Procedure Act and 42 U.S.C. § 7607(d);
   b. provide interested persons an opportunity for the oral presentation of data, views, or arguments, in accordance with 42 U.S.C. § 7607(d)(5);
   c. submit the current Endangerment Finding and any appropriate alternatives thereto, as well as all underlying documentation, to the Science Advisory Board for peer review, as required by 42 U.S.C. § 4365(c)(1); and
   d. based upon the totality of evidence, including input from the Science Advisory Board and public comment, make an independent scientific, technical, policy, and legal evaluation of whether it is appropriate to revise or rescind the Endangerment Finding;

3. Pending completion of the administrative proceeding, suspend the Endangerment Finding and refrain from any rulemaking or enforcement activity based in whole or in part on the Endangerment Finding; and

4. Upon completion of the administrative proceeding, take appropriate final action to revise or rescind the Endangerment Finding.

DATED: May 1, 2017

Respectfully submitted,

Robert Henneke
Theodore Hadzi-Antich
Ryan D. Walters

TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

By: _____
Theodore Hadzi-Antich
(512) 615-7956
tha@texaspolicy.com

ATTORNEYS FOR PETITIONERS

cc: Neomi Rao (via Federal Express)
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Ted Boling (via Federal Express)
Acting Director
President's Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20506

Sarah Dunham (via Federal Express)
Acting Assistant Administrator
Office of Air and Radiation
Mail Code 6101A
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington DC 20460

EXHIBIT A

Memo to EPA Employees

MEMORANDUM

DATE: January 23, 2009

TO: All EPA Employees

FROM: Lisa P. Jackson, Administrator

Science must be the backbone for EPA programs. The public health and environmental laws that Congress has enacted depend on rigorous adherence to the best available science. The President believes that when EPA addresses scientific issues, it should rely on the expert judgment of the Agency's career scientists and independent advisors. When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection.

The laws that Congress has written and directed EPA to implement leave room for policy judgments. However, policy decisions should not be disguised as scientific findings. I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome.

EPA must follow the rule of law. The President recognizes that respect for Congressional mandates and judicial decisions is the hallmark of a principled regulatory agency. Under our environmental laws, EPA has room to exercise discretion, and Congress has often looked to EPA to fill in the details of general policies. However, EPA needs to exercise policy discretion in good faith and in keeping with the directives of Congress and the courts. When Congress has been explicit, EPA cannot misinterpret or ignore the language Congress has used. When a court has determined EPA's responsibilities under our governing statutes, EPA cannot turn a blind eye to the court's decision or procrastinate in complying.

EPA's actions must be transparent. In 1983, EPA Administrator Ruckelshaus promised that EPA would operate "in a fishbowl" and "will attempt to communicate with everyone from the environmentalists to those we regulate, and we will do so as openly as possible."

I embrace this philosophy. Public trust in the Agency demands that we reach out to all stakeholders fairly and impartially, that we consider the views and data presented carefully and objectively, and that we fully disclose the information that forms the bases for our decisions. I pledge that we will carry out the work of the Agency in public view so that the door is open to all interested parties and that there is no doubt why we are acting and how we arrived at our decisions.

We must take special pains to connect with those who have been historically underrepresented in EPA decision making, including the disenfranchised in our cities and rural areas, communities of color, native Americans, people disproportionately impacted by pollution, and small businesses, cities and towns working to meet their environmental responsibilities. Like all Americans, they deserve an EPA with an open mind, a big heart and a willingness to listen.

As your Administrator, I will uphold the values of scientific integrity, rule of law and transparency every day. If ever you feel I am not meeting this commitment, I expect you to let me know.

Many vital tasks lie before us in every aspect of EPA's programs. As I develop my agenda, I will be seeking your guidance on the tasks that are most urgent in protecting public health and the environment and on the strategies that EPA can adopt to maximize our effectiveness and the expertise of our talented employees. At the outset, I would like to highlight five priorities that will receive my personal attention:

- Reducing greenhouse gas emissions. The President has pledged to make responding to the threat of climate change a high priority of his administration. He is confident that we can transition to a low-carbon economy while creating jobs and making the investment we need to emerge from the current recession and create a strong foundation for future growth. I share this vision. EPA will stand ready to help Congress craft strong, science-based climate legislation that fulfills the vision of the President. As Congress does its work, we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act.
- Improving air quality. The nation continues to face serious air pollution challenges, with large areas of the country out of attainment with air-quality standards and many communities facing the threat of toxic air pollution. Science shows that people's health is at stake. We will plug the gaps in our regulatory system as science and the law demand.
- Managing chemical risks. More than 30 years after Congress enacted the Toxic Substances Control Act, it is clear that we are not doing an adequate job of assessing and managing the risks of chemicals in consumer products, the workplace and the environment. It is now time to revise and strengthen EPA's chemicals management and risk assessment programs.
- Cleaning up hazardous-waste sites. EPA will strive to accelerate the pace of cleanup at the hundreds of contaminated sites across the country. Turning these blighted properties into productive parcels and reducing threats to human health and the environment means jobs and an investment in our land, our communities and our people.
- Protecting America's water. EPA will intensify our work to restore and protect the quality of the nation's streams, rivers, lakes, bays, oceans and aquifers. The Agency will make robust use of our authority to restore threatened treasures such as the Great Lakes and the Chesapeake Bay, to address our neglected urban rivers, to strengthen drinking-water safety programs, and to reduce pollution from non-point and industrial dischargers.

As we meet these challenges, we must be sensitive to the burdens pollution has placed on vulnerable subpopulations, including children, the elderly, the poor and all others who are at particular risk to threats to health and the environment. We must seek their full partnership in the greater aim of identifying and eliminating the sources of pollution in their neighborhoods, schools and homes.

EPA's strength has always been our ability to adapt to the constantly changing face of environmental protection as our economy and society evolve and science teaches us more about how humans interact with and affect the natural world. Now, more than ever, EPA

must be innovative and forward looking because the environmental challenges faced by Americans all across our country are unprecedented.

These challenges are indeed immense in scale and urgency. But, as President Obama said Tuesday, they will be met. I look forward to joining you at work on Monday to begin tackling these challenges together.

EXHIBIT B

HOLLAND&HART

COALITION COMMENTS ON EPA'S PROPOSED FINDING OF ENDANGERMENT FROM ANTHROPOGENIC GREENHOUSE GASES TO PUBLIC HEALTH AND WELFARE 74 FED. REG. 18886-18910 (APRIL 24, 2009)

These Comments are being filed by Holland & Hart on behalf of a coalition of companies and trade associations involved in energy, mining, and beef production in the Western United States, consisting of Great Northern Project Development, L.P., Questar Corporation, Solvay Chemicals, Inc., Ballard Petroleum Holdings, LLC, General Chemical, FMC Corporation, OCI Chemical Corporation, Searles Valley Minerals Operations Inc., the Industrial Minerals Association – North America (IMA-NA), and the National Cattlemen's Beef Association (NCBA) (collectively, the Coalition). EPA proposes to classify CO_2 and five other greenhouse gases, including methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6) (collectively, GHGs) as "air pollutants" and "air pollution" that are anticipated to endanger public health and welfare pursuant to Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521. Such action by EPA would adversely affect the ability of these companies and associations to produce, make efficient use of, and continue to improve essential supplies of energy, minerals, and food.

The proposed Endangerment Finding specifically addresses GHGs from new vehicles and new vehicle engines. As explained in more detail below, the Endangerment Finding will, if finalized, lead to regulation of stationary sources under the Clean Air Act (CAA) as a matter of law, including those owned and operated by the members of this Coalition. For example, Great Northern Project Development's planned coal gasification plant would be subject to major source review for CO_2. Ironically, this facility designed to reduce GHGs could be adversely affected by regulation of GHGs under the CAA. In like manner, the oil and gas exploration and production operations of Questar and Ballard and the cattle operations of NCBA and its members would be adversely impacted to the extent that major new source review requirements are triggered for those operations as a result of the regulation of GHGs. Solvay Chemicals, General Chemical, FMC Corporation, OCI Chemical, Searles Valley Minerals and the other members of the Industrial Minerals Association would be subject to new requirements under the CAA which would add significant costs, complexity, and schedule delays to on-going, modified or new operations.

The current state of scientific knowledge on the contribution of human-caused climate change is so profoundly uncertain that it is not clear, even when using the data and sources that the United Nations' Intergovernmental Panel on Climate Change (IPCC) and EPA rely on, whether there will be global warming or global cooling over the course of the twenty-first century. EPA has not weighed or considered the substantive scientific evidence from many of the world's scientists who disagree that there is convincing scientific evidence that all or most of the climate change that has occurred in the last few centuries is due to human causes. Indeed, numerous scientists offer cogent, well-reasoned scientific evidence that such climate change is neither remarkable nor extraordinary, but within natural temperature variations in many previous

A review of EPA's Proposed Rule and underlying TSD demonstrates that it has not independently considered, weighed, analyzed, and made a rational decision regarding the views of many eminent scientists,[4] including those who have actually collected and analyzed the necessary data, many of whom disagree emphatically with those who assert that there is "consensus" over the extent to which human-caused GHG emissions cause or contribute to climate change. EPA's mere review of "synthesis reports," rather than the underlying science itself and its uncritical reliance on the IPCC and others, is, we believe, an impermissible delegation of EPA's authority and responsibility under the Clean Air Act to provide a "reasoned explanation."

Another significant defect with EPA's rulemaking is that the evidence relied upon by EPA (derived from IPCC and other sources) is focused strictly on CO_2. As a result, there is essentially no basis for any Endangerment Finding with regard to the five other greenhouse gases supposedly considered by EPA in the rulemaking; namely, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Furthermore, EPA has essentially ignored the single-most important greenhouse gas of all, water vapor; *see* discussion below in Section II.F. EPA's failure to consider *all* the relevant scientific evidence is a pervasive and fatal deficiency in this proposed rulemaking.

To summarize, the proposed Endangerment Finding violates the Administrator's commitment to scientific integrity and EPA's own requirements to assure objectivity in presenting influential scientific information, insofar as EPA completely ignores a body of "peer-reviewed science and supporting studies" that demonstrate that there is considerable uncertainty regarding the degree to which anthropogenic GHGs are causing climate change.

The purpose of these Comments is to let those scientists and their work speak for themselves, since they have not been duly considered by EPA, the IPCC, or the record on which EPA relies. Once the contributions of these scientists are considered, it is impossible to conclude that "the science is settled." Similarly, it puts to shame those who have attempted to justify their preferred policy positions on anthropogenic greenhouse gases (AGHGs) by simply dismissing these scientists as cranks. As an example of the latter, former Vice-President Gore has attempted to portray these scientists as a desperate minority of "deniers," comparable to those who still believe the earth is flat. Mr. Gore is quoted as saying:

> Fifteen percent of people believe the moon landing was staged on some movie lot and a somewhat smaller number still believe the Earth is flat. They get together on Saturday night and party with the global warming deniers.

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[4] As the OMB suggests, "EPA has not undertaken a systematic risk analysis or cost-benefit analysis." (OMB Comments 2009: 2). As such, the Endangerment Finding fails to include sufficient information regarding "methodologies used for weighing risks and various outcomes and the risks associated with each; Confidence intervals related to model results at the regional and local scales; Underlying assumptions of findings, publications on which the findings are based, and 'business-as-usual' scenarios; Quality and homogeneity of temperature data from surface networks that may affect estimates of past temperature trends, and calibration and verification of models; [and] Impacts of climate change on the value of net economic benefits." *Ibid.* EPA also failed to make available to the Science Advisory Board for review and comment the Endangerment Finding, as well as relevant scientific and technical information on which the proposed action is based, as required by 42 U.S.C. Section 4365(c).

EXHIBIT C

Briefing Room

Your Weekly Address

Speeches & Remarks

Press Briefings

Statements & Releases

White House Schedule

Presidential Actions

- Executive Orders
- Presidential Memoranda
- Proclamations

Legislation

- Pending Legislation
- Signed Legislation
- Vetoed Legislation

Nominations & Appointments

Disclosures

The White House

May 19, 2009

President Obama Announces National Fuel Efficiency Policy

THE WHITE HOUSE

Office of the Press Secretary

FOR IMMEDIATE RELEASE May 19, 2009

President Obama Announces National Fuel Efficiency Policy

WASHINGTON, DC - President Obama today - for the first time in history - set in motion a new national policy aimed at both increasing fuel economy and reducing greenhouse gas pollution for all new cars and trucks sold in the United States. The new standards, covering model years 2012-2016, and ultimately requiring an average fuel economy standard of 35.5 mpg in 2016, are projected to save 1.8 billion barrels of oil over the life of the program with a fuel economy gain averaging more than 5 percent per year and a reduction of approximately 900 million metric tons in greenhouse gas emissions. This would surpass the CAFE law passed by Congress in 2007 required an average fuel economy of 35 mpg in 2020.

"In the past, an agreement such as this would have been considered impossible," said President Obama. "That is why this announcement is so important, for it represents not only a change in policy in Washington, but the harbinger of a change in the way business is done in Washington. As a result of this agreement, we will save 1.8 billion barrels of oil over the lifetime of the vehicles sold in the next five years. And at a time of historic crisis in our auto industry, this rule provides the clear certainty that will allow these companies to plan for a future in which they are building the cars of the 21st century."

This groundbreaking policy delivers on the President's commitment to enact more stringent fuel economy standards and represents an unprecedented collaboration between the Department of Transportation (DOT), the Environmental Protection Agency (EPA), the world's largest auto manufacturers, the United Auto Workers, leaders in the environmental community, the State of California, and other state governments.

"The President brought all stakeholders to the table and came up with a plan to help the auto industry, safeguard consumers, and protect human health and the environment for all Americans," said EPA Administrator Lisa P. Jackson. "A supposedly 'unsolvable' problem was solved by unprecedented partnerships. As a

result, we will keep Americans healthier, cut tons of pollution from the air we breathe, and make a lasting down payment on cutting our greenhouse gas emissions."

"A clear and uniform national policy is not only good news for consumers who will save money at the pump, but this policy is also good news for the auto industry which will no longer be subject to a costly patchwork of differing rules and regulations," said Carol M. Browner, Assistant to the President for Energy and Climate Change. "This an incredible step forward for our country and another way for Americans to become more energy independent and reduce air pollution.",

A national policy on fuel economy standards and greenhouse gas emissions is welcomed by the auto manufacturers because it provides regulatory certainty and predictability and includes flexibilities that will significantly reduce the cost of compliance. The collaboration of federal agencies also allows for clearer rules for all automakers, instead of three standards (DOT, EPA and a state standard).

"President Obama is uniting federal and state governments, the auto industry, labor unions and the environmental community behind a program that will provide for the biggest leap in history to make automobiles more fuel efficient," said Department of Transportation Secretary Ray LaHood. "This program lessens our dependence on oil and is good for America and the planet."

EXHIBIT D

EPA United States Environmental Protection Agency

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

EPA's Response to Public Comments

Volume 10: The Cause or Contribute Finding

When the GHG emissions from land-use change are removed from the IPCC's Fourth Assessment Report's emissions total, the total global GHG emission estimates from CAIT and the IPCC are in good agreement (less than a 5% difference).

The commenter is correct that, had EPA used the IPCC Fourth Assessment Report in the Proposed Findings (which estimated that the total global emissions of the six well-mixed GHGs were 49,000 teragrams (Tg) of CO_2 equivalent in 2004), then Section 202(a) source category emissions (1,665 Tg of CO_2 equivalent for year 2006) would be 3.4% of the global total. However, considering these alternative numbers, the Administrator would still find that Section 202(a) emissions contribute to the air pollution that endangers, because this number would still represent one of the world's largest GHG sources.

Comment (10-13):
A commenter (3394.1) states that, because of its reliance on the annual U.S. inventory on GHGs for projections, the TSD does not account for land use change and forestry emission and sinks. The commenter objects to the fact that while the forestry sinks are included in the text, they are sometimes not included in the figures. Also, the commenter notes that if other nations do include land use, land-use change, and forestry (LULUCF) emissions, the U.S. emissions may appear larger in proportion than they really are.

Response (10-13):
First, the 2005 inventories for all nations reported in the TSD are produced using the same methodologies: none of these national emission estimates include LULUCF emissions, and it is therefore appropriate to compare U.S. emissions to global emissions in 2005 on this basis. Indeed, as stated in the caption for Figure 2.3, the data "[e]xcludes land use, land-use change and forestry, and international bunker fuels. More recent emission data are available for the United States and other individual countries, but 2000 is the most recent year for which data for all countries and all gases are available including emissions from LULUCF."

However, we do address recent U.S. LULUCF emissions in the text: "Removals of carbon through land use, land-use change and forestry activities are not included in Figure 2.2 but are significant; net sequestration is estimated to be 1062.6 $TgCO_2eq$ in 2007, offsetting 14.9% of total emissions (EPA, 2009b)." The caption for Figure 2.2 also reiterates the fact that LULUCF and international bunker fuel emissions are not included in the data shown. Therefore, the TSD is clear and consistent in its discussion of emissions and the inclusion or lack thereof of LULUCF emissions.

For comparison, using the CAIT (WRI, 2009) inventory for 2000 (the last year that land-use change and forestry emissions are available globally through this tool), U.S. emissions are 21.17% of the global total CO_2-equivalent emissions without LULUCF emissions, 15.41% including those emissions, and 15.35% including those emissions and emissions from international bunker fuels. Please also refer to the response immediately above regarding the use of the CAIT tool.

Comment (10-14):
Other commenters (e.g., 3394.1, 3597) disagree with EPA's proposed contribution findings, arguing that U.S. EPA's own analysis of light-duty vehicles in the ANPR (Light Vehicle Technical Support document Docket U.S. EPA-HQ-OAR-2008-0318-0084) determined that GHG emission standards for new vehicles and new vehicle motors would produce a reduction of, at most, approximately 0.01 degree Celsius in mean global temperature. They argue that this is a value that cannot be measured except by the most

sensitive satellites.

Commenters (e.g., 3394, 3449.1, and 3747.1) argue that the "cause or contribute" prong of the Proposal's endangerment analysis fails to satisfy the applicable legal standard, which requires more than a minimal contribution to the "air pollution reasonably anticipated to endanger public health or welfare." They contend that emissions representing approximately 4% of total global GHG emissions are a minimal contribution to global GHG concentrations. These commenters disagree with statements in the Proposal that the "unique, global aspects of the climate change problem tend to support a finding that lower levels of emissions should be considered to contribute to the air pollution than might otherwise be appropriate when considering contribution to a local or regional air pollution problem." They argue there is no basis in the Act or existing EPA policy for this position, and that it reveals an apparent effort to expand EPA's authority into the "truly trivial or de minimis" sources that are acknowledged to be outside the scope of regulation, in that it expands EPA's authority to regulate pollutants to address global effects.

Commenters (e.g., 3347.1, 3747.1) also assert that contrary to EPA's position, lower contribution numbers are appropriate when looking at local pollution, like nonattainment concerns—in other words, in the context of a statutory provision (such as Section 213) specifically aimed at targeting small source categories to help nonattainment areas meet air quality standards. However, they conclude this policy is simply inapplicable in the context of global climate change.

EPA received many comments (e.g., 3252.1, 3325.1, 3347.1, 3379.1, 3394.1, and 4037) on the appropriate comparison(s) for the contribution analysis. At least one commenter (3347.1) argues that in order to get around the "problem" of basing an endangerment finding upon a source category that contributes only 1.8% annually to global GHG emissions, EPA inappropriately also made comparisons to total U.S. GHG emissions. This commenter argues that a comparison of 202(a) source emissions to U.S. GHG emissions, versus global GHG emissions, is arbitrary for the purposes of the cause or contribute analysis, because it conflicts with the Administrator's definition of "air pollution," as well as the nature of global warming. They note that throughout the Proposal, the Administrator focuses on the global nature of GHGs. Thus, they continue, while percentage share of motor vehicle emissions at the U.S. level may be relevant for some purposes, it is irrelevant to a finding of whether these emissions contribute to air pollution, which the Administrator has proposed to define on a global rather than a domestic basis. Commenters (e.g., 3449.1) also accuse EPA of arbitrarily picking and choosing when it takes a global approach (e.g., endangerment finding) and when it does not (e.g., contribution findings).

Response (10-14):

We disagree that the temperature or emissions reductions resulting from GHG standards are the appropriate emissions to use for a "contribute" finding. The appropriate measure should be the emissions from the sector as a whole, regardless of the reductions resulting from any set of proposed standards. Section V.B of the Findings provides the Administrator's approach for making the cause or contribute finding, and Section V.C contains responses to key comments.

Comments addressing the emissions contribution from projected emissions of new motor vehicles are addressed in Section V.C.2.c of the Findings.

We disagree with the commenters that a 4% contribution to global GHG emissions is trivial. As stated in the Findings, this 4% figure as a result of Section 202(a) source emissions represents a larger contribution to global emissions than almost every single country in the world, with the exceptions of China, the U.S., Russia and India; this means the contribution from 202(a) sources alone is higher than countries as large as Japan, Brazil and Germany. As stated in Section V.B.1 of the Findings, no single GHG source category dominates on the global scale—in this context, a source category that contributes 4% of GHG emissions is quite significant. *See Massachusetts v. EPA*, 549 U.S. at 1457-58 ("Judged by any standard, U.S.

motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, . . . to global warming.").

Finally, we disagree with the comment that the cause or contribute finding is based inappropriately on a comparison of Section 202(a) source category emissions to total U.S. emissions. Section V.B of the Findings describes the Administrator's rationale for the cause or contribute finding, and explains why both the U.S. and international comparisons were considered, and why these comparisons, independently and together, support the cause or contribute finding.

10.3.2 Each GHG as an Individual Air Pollutant

Comment (10-15):
Commenter (3603.1) disagrees with the finding that methane as an individual air pollutant can be found to contribute because methane emissions from existing Section 202(a) sources represent only 0.03% of U.S. GHGs, and that number is overstated because the finding should refer to only new vehicles, not the entire existing fleet. Commenter states that this 0.03% is below the threshold noted in the proposal and in other proceedings such as interstate transport.

Response (10-15):
As explained in Section V of the Findings, the Administrator is not defining methane as an individual air pollutant under Section 202(a), thus EPA is not responding directly to the argument that the Administrator could not make a finding of contribution for methane as an individual air pollutant.

Note that methane is being included in both the definition of "air pollution" and the definition of "air pollutant" because it shares all of the same common attributes with the other five well-mixed GHGs. Importantly, methane is itself the second most important GHG directly emitted by human activities, in terms of its anthropogenic heating effect on the climate. This is why methane is consistently a standard part of climate change science analysis and policy discussions. Recognizing the important role that methane plays in climate change, EPA now for several years has been running methane voluntary programs to target cost-effective emission reductions in key sectors, within the U.S. and internationally.

The amount of emissions of methane, or comparisons based on those amounts, are not relevant for determining whether emissions of the air pollutant—defined as the aggregate group of well-mixed GHGs—contributes to the air pollution. The relevant amounts and comparisons in that case concern the total emissions of the air pollutant, not a part of such emissions.

Comment (10-16):
A commenter (3377.1) notes that N_2O is produced in extremely small amounts by motor vehicles—almost certainly less than the estimate provided by automotive manufacturers. The commenter also cautions EPA that CH_4 regulations from motor vehicles might discourage compressed natural gas vehicles that would otherwise provide a CO_2 reduction benefit, and therefore recommends no CH_4 regulations.

Response (10-16):
The commenter did not provide a specific estimate or any documentation regarding their claim that N_2O emissions from motor vehicles are extremely small. Further, the commenter is in error in implying that the TSD relies upon estimates provided by automotive manufacturers. In fact, the values EPA used in Section 2(a) of the TSD are taken from EPA's *Inventory of Greenhouse Gas Emissions and Sinks 1990–*

EXHIBIT E

PRINCIPLES GOVERNING IPCC WORK

Approved at the Fourteenth Session (Vienna, 1-3 October 1998) on 1 October 1998, amended at the 21st Session (Vienna, 3 and 6-7 November 2003) and at the 25th Session (Mauritius, 26-28 April 2006)

INTRODUCTION

1. The Intergovernmental Panel on Climate Change (hereinafter referred to as the IPCC or, synonymously, the Panel) shall concentrate its activities on the tasks allotted to it by the relevant WMO Executive Council and UNEP Governing Council resolutions and decisions as well as on actions in support of the UN Framework Convention on Climate Change process.

ROLE

2. The role of the IPCC is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. IPCC reports should be neutral with respect to policy, although they may need to deal objectively with scientific, technical and socio-economic factors relevant to the application of particular policies.

3. Review is an essential part of the IPCC process. Since the IPCC is an intergovernmental body, review of IPCC documents should involve both peer review by experts and review by governments.

ORGANIZATION

4. Major decisions of the IPCC will be taken by the Panel in plenary meetings.

5. The IPCC Bureau, the IPCC Working Group Bureaux and the Bureaux of any Task Forces of the IPCC shall reflect balanced geographic representation with due consideration for scientific and technical requirements.

6. IPCC Working Groups and any Task Forces constituted by the IPCC shall have clearly defined and approved mandates and work plans as established by the Panel, and shall be open-ended.

PARTICIPATION

7. Participation in the work of the IPCC is open to all UNEP and WMO Member countries.

8. Invitations to participate in the sessions of the Panel and its Working Groups, Task Forces and IPCC workshops shall be extended to Governments and other bodies by the Chairman of the IPCC.

9. Experts from WMO/UNEP Member countries or international, intergovernmental or non-governmental organisations may be invited in their own right to contribute to the work of the IPCC Working Groups and Task Forces. Governments should be informed in advance of invitations extended to experts from their countries and they may nominate additional experts.

EXHIBIT F

Paul D. Phillips
Phone (303) 295-8131
pphillips@hollandhart.com

HOLLAND&HART LLP
THE LAW OUT WEST

December 4, 2009

VIA EMAIL & OVERNIGHT MAIL

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC), Mailcode 6102T
Attn: Docket ID No. EPA-HQ-OAR-2009-0171
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Addendum and Supplementation of Record to Coalition Comments on EPA's Proposed Finding of Endangerment From Anthropogenic Greenhouse Gases to Public Health and Welfare, 74 Fed. Reg. 18886-18910 (April 24, 2009): Docket ID No. EPA-HQ-OAR-2009-0171, or, in the Alternative, Petition to Re-Open this Proceeding in Light of Newly-Released Information

Dear Sir/Madam:

This Addendum and Supplementation of Record is being submitted by Holland & Hart LLP and Vinson & Elkins LLP to supplement our June 23, 2009 Comments on EPA's proposed Endangerment and Cause or Contribute Findings, 74 Fed. Reg. 18886-18901 (April 24, 2009) ("Endangerment Rulemaking" or "Endangerment Finding"), Docket ID Nos. EPA-HQ-OAR-2009-0171-3722, -4041, -5158, -11454, -11455 and -11536. In the alternative, this submission petitions EPA to re-open this proceeding in light of newly-released information of central importance. This Addendum and Supplementation of Record is filed on behalf of a coalition of companies and trade associations that have submitted comments under our prior Docket ID numbers and also on behalf of the Coalition for Responsible Regulation, Inc. and its members (collectively, "CRR"). CRR includes companies and trade associations involved in energy, mineral, and food production throughout the United States.

This Addendum and Supplementation is necessary due to the November 19, 2009 disclosure of key correspondence and documents from the University of East Anglia's Climatic Research Unit ("CRU") that acknowledge deficiencies in and manipulation of historical temperature datasets, which are relied upon by EPA and other to conclude that global warming is occurring. These documents, which include over 1,000 emails either sent from or sent to members of the CRU, together with meteorological station data used for research by CRU to support its findings, confirm that the fundamental underpinnings for EPA's Endangerment Finding are scientifically unsupported, lacking a rational basis, incorrect, arbitrary and capricious.

EPA and IPCC Rely Heavily on CRU's Temperature Data

CRU, in conjunction with the Hadley Center at the UK Meteorological (Met) Office, compiles and maintains one of only four of the world's temperature datasets. Further, CRU's temperature dataset is one of only two surface temperature datasets (the other is maintained by NASA's Goddard Institute for Space Studies, in collaboration with National Oceanic and Atmospheric Administration's National Climatic Data Center). (Monckton 2009b). As discussed below, the two non-land based datasets (maintained by University of Alabama Huntsville and Remote Sensing Systems) are generated by satellite measurements, and those datasets are themselves processed and reconstructed based on calibrations using CRU and NASA's surface-temperature record datasets. *Id.*

According to CRU, its land-based temperature dataset, together with CRU's monthly datasets for maximum and minimum temperature, precipitation, rainday counts, vapor pressure, cloudiness and windspeed for all the world's inhabited land areas, has provided many researchers with "basic data for a whole range of studies." (Climatic Research Unit Website 2009) CRU states that it ranks behind only a few other sources "as the acknowledged primary data source by climate scientists around the world." *Id.* CRU staff has also been instrumental in the publication of the 1990, 1995, 2001, and 2007 assessment reports by the Intergovernmental Panel on Climate Change ("IPCC"). As CRU makes clear, its "staff have been heavily involved in all four [IPCC] assessments, probably more than anywhere else relative to the size of an institution." *Id.*[1]

CRU's considerable involvement in drafting IPCC reports is illustrated by IPCC's significant reliance on CRU's HadCrut data in its 2007 IPCC Fourth Assessment Report ("AR4"). IPCC does not collect its own temperature data but instead compiles information relating to climate change, and in AR4, it marshaled CRU's HadCrut record as key evidence of warming temperatures. Based on CRU's dataset, IPCC concluded in its AR4 that "warming of the climate is unequivocal," and constructed a global mean temperature graph that is discussed in detail (IPCC 2007a: 253) and highlighted in AR4's Synthesis Report (IPCC 2007d: 31), Summary for Policymakers (IPCC 2007c: 6), and Frequently Asked Questions (IPCC 2007e: 104). Similarly, models employed by IPCC to make future predictions regarding surface warming were often gauged against CRU datasets. (IPCC 2007a: 619). These are just a few examples of IPCC's heavy reliance on CRU's temperature dataset to make assessments about climate change and to recommend policies based on those analyses.

[1] CRU's influence within IPCC circles is also established in the attached CRU correspondence, which discloses that Phil Jones, who has temporarily resigned his position as CRU director in the wake of these disclosures, planned to exclude studies casting doubt on the relationship between human activity and global warming. Jones wrote, "I can't see either of these papers being in the next IPCC report," and he vowed to "keep them out somehow – even if we have to redefine what the peer-review literature is!" (CRU Disclosures 2009b). Likewise, Keith Briffa, also of CRU, wrote to Michael Mann (another prominent scientist predicting widespread global warming), saying "I tried hard to balance the needs of the science and the IPCC, which were not always the same." (CRU Disclosures 2009c).

EPA, in turn, relies "most heavily" on IPCC's AR4 in formulating its Endangerment Rulemaking and the accompanying Technical Support Document ("TSD") (TSD: Section 1(b)). *See also* (TSD: Executive Summary) ("The conclusions here and the information throughout this document are primarily drawn from the assessment reports of the Intergovernmental Panel on Climate Change and the U.S. Climate Change Science Program."[2]). Indeed, the same global mean temperature graph that uses CRU data and is featured in AR4 also appears in the TSD as support for the conclusion that "global mean surface temperatures have risen by 0.74°C ± 0.18°C when estimated by a linear trend over the last 100 years (1906-2005)." (TSD: Section 4(b)). Likewise, IPCC conclusions and its summary graph depicting multi-model averages and assessed ranges for surface warming through the year 2100 (IPCC 2007a: 762) are used in the TSD to support the proposition that "[a]ll of the simulations performed by the IPCC project warming, for the full range of emissions scenarios." (TSD: Section 6(b)). These conclusions, which are based on defective, incomplete, or manipulated data, are central to EPA's proposed finding that greenhouse gas emissions endanger public health and welfare and thus should be regulated.

CRU Documents Reveal its Staff Manipulated Data

Due to the overwhelming significance EPA accords to IPCC conclusions, which are in turn premised on CRU data, the very foundation of EPA's proposed Endangerment Finding has been called into question by newly-released CRU documents. These materials indicate that CRU data has been adjusted for non-scientific purposes, and that IPCC has failed to consider and incorporate significant dissenting viewpoints. Indeed, these documents, attached hereto and incorporated by reference into this Addendum and Supplementation, reveal that, among other things, CRU manipulated data, destroyed evidence, and colluded to prevent reputable scientists from publishing in peer-reviewed journals. Specifically, the documents show that CRU staff and other well-known scientists involved in authoring the IPCC AR4:

- Manipulated, adjusted, and cherry-picked data to suppress unwanted results and to arrive at predetermined findings of anthropogenic global warming;
- Discarded much of the raw temperature data and computer codes on which predictions of global warming is based;
- Collaborated to exclude from AR4 scientific articles expressing dissenting viewpoints;
- Encouraged destruction or tampering of correspondence regarding AR4;
- Considered how to avoid release of data subject to requests pursuant to freedom of information laws;

[2] Likewise, CCSP Synthesis and Assessment products that EPA relied upon most in the TSD draw heavily from both CRU data and IPCC findings. (CCSP 2008: 1.1, Appx B, 107, 1.3, Section 2.3.3).

- Coordinated a boycott of submissions to a scientific journal until the editor, who had published dissenting viewpoints, was replaced;

- Sought to prevent researchers with dissenting views from publishing in leading scientific journals;

- Interfered with the peer-review process in order to block dissenting viewpoints and to secure favorable review of approved viewpoints;

- Acknowledged, despite public statements to the contrary, that global temperatures have not risen in any statistically-significant sense for fifteen years and have been falling for nine years.

(CRU Disclosures 2009). Such materials make clear that CRU data has been manipulated to yield certain results; that the adjusted CRU data, along with CRU staff involvement in internal IPCC deliberations, skewed the findings of AR4; and that EPA's overwhelming reliance on a compromised AR4 has undermined the legitimacy and integrity of the Endangerment Rulemaking and the TSD.

Most troubling, however, is the release of CRU's annotated computer code from programs used to process climate data. This annotated coding, contained in the file HARRY_READ_ME.txt (CRU Disclosures 2009a), reveals that the supposed "consensus" of anthropogenic global warming is premised on irretrievably flawed data that was artificially adjusted by CRU staffers using, as they themselves called them, "fudge factors." (CRU Disclosures 2009d). Among the most disquieting commentary weaved into the code are the following statements made by CRU programmers:

- "OH F[---] THIS. It's Sunday evening, I've worked all weekend, and just when I thought it was done I'm hitting yet another problem that's based on the hopeless state of our databases. There is no uniform data integrity, it's just a catalogue of issues that continues to grow as they're found."

- "It's botch after botch after botch."

- "As far as I can see, this renders the [weather] station counts totally meaningless."

- "But what are all those monthly files? DON'T KNOW, UNDOCUMENTED. Wherever I look, there are data files, no info about what they are other than their names. And that's useless ..."

- "COBAR AIRPORT AWS [data from an Australian weather station] cannot start in 1962, it didn't open until 1993!"

- "What the hell is supposed to happen here? Oh yeah – there is no 'supposed', I can make it up. So I have : -)"

- "You can't imagine what this has cost me – to actually allow the operator to assign false WMO [World Meteorological Organization] codes!! But what else is there in such situations? Especially when dealing with a 'Master' database of dubious provenance (which, er, they all are and always will be)."

- "So with a somewhat cynical shrug, I added the nuclear option – to match every WMO possible, and turn the rest into new stations ... In other words, what CRU usually do. It will allow bad databases to pass unnoticed, and good databases to become bad ..."

- "This whole project is SUCH A MESS ..."

(CRU Disclosures 2009a).

CRU's computer code confirms unequivocal data corruption: data were manipulated, mislabeled, destroyed, incomplete and, at times, fabricated. This data distortion does not just compromise the CRU/Hadley dataset; it affects every dataset regularly relied upon for global temperature trends, since all four such sets are inextricably interlinked and interdependent. As explained by the Science & Public Policy Institute:

> ... the whistleblower's data file reveals that there is very close collusion ... between key figures in the Climate Research Unit at the University of East Anglia and in both NASA's Goddard Institute for Space Studies and NOAA's National Climatic Data Center. Members of all of the entities in the scientific establishment are also members of the Team. They co-ordinate their results, and they co-ordinate how they present their results, and they co-ordinate how, between them, they control or seek to control – to a remarkable extent – the entire process of the UN's climate panel, as well as the process of publication of learned papers in scientific journals, and even the appointment of reviewers and editors.
>
> Professor Jones at the Climate Research Unit in the UK, Gavin Schmidt at NASA, and Tom Karl at NOAA are now known via their email correspondence to be closely ... in league with one another, and with the paleoclimate community, such as Mann, Bradley, and Hughes ...

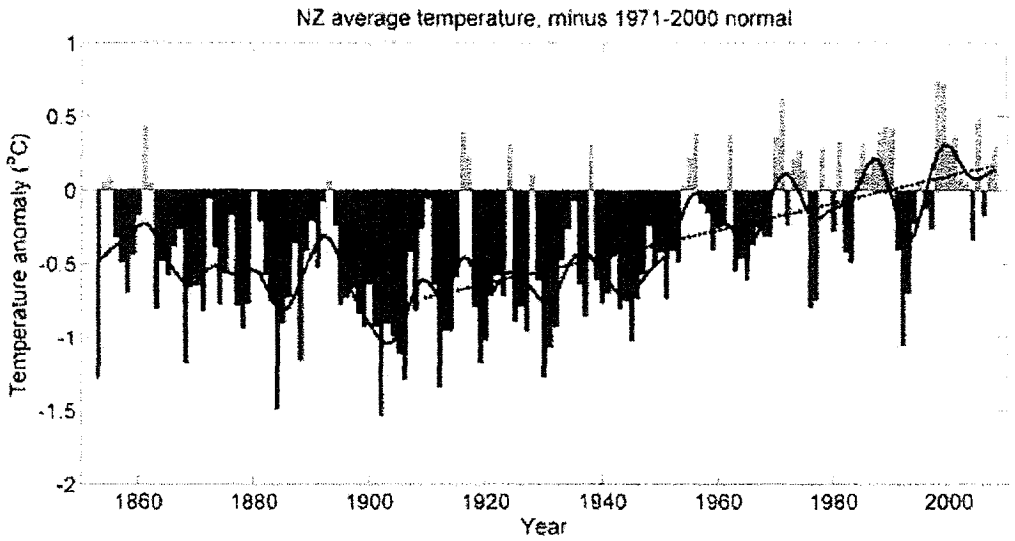
(Monckton 2009b).

The two satellite datasets are also affected by CRU's corrupted data. Because satellites do not record temperatures directly but rather measure very small changes in the behavior of certain oxygen molecules, satellite measurements must be processed and reconstructed to create a temperature record. *Id.* In order to do so, technicians calibrate the satellite data against the two land-based temperature datasets, including the CRU data. This calibration with the CRU and NASA land-base datasets has very likely compromised the reliability of the satellite-based data relied upon by EPA.

A Recent Attempt to Recreate CRU Graph Data Failed

The manipulation of underlying historical temperature data is of central importance in assessing the validity of the human-caused global warming hypothesis, as evidenced by a November 25, 2009 publication by The New Zealand Climate Science Coalition. (Treadgold 2009). This article challenges a widely-known graph, as shown in Figure 1. This graph was first prepared by Dr. Jim Salinger in the 1980s while he was at CRU, and it has served as the basis for establishing global warming in New Zealand. Figure 1 shows a steady trend of rising temperatures in New Zealand from early in the twentieth century through the year 2000.

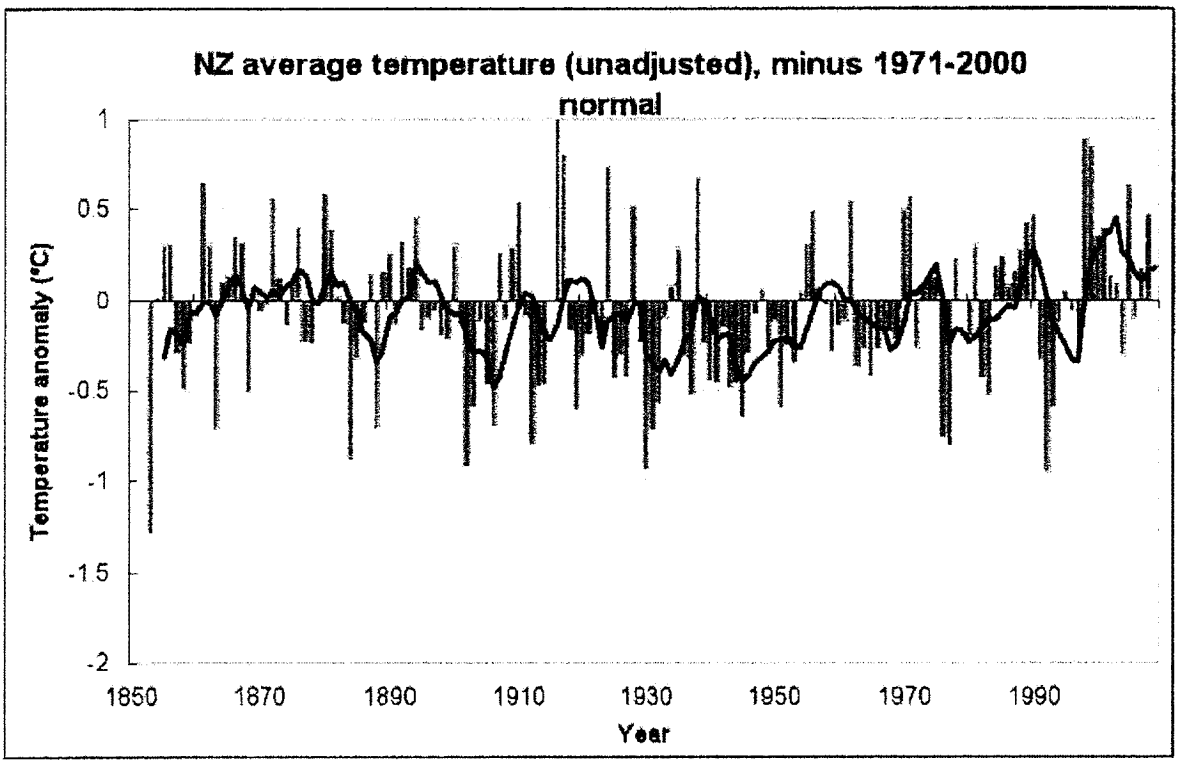
Figure 1



Mean annual temperature over New Zealand, from 1853 to 2008 inclusive, based on between 2 (from 1853) and 7 (from 1908) long-term station records. The blue and red bars show annual differences from the 1971 – 2000 average, the solid black line is a smoothed time series, and the dotted [straight] line is the linear trend over 1909 to 2008 (0.92°C/100 years) (Treadgold 2009, from NIWA's website).

Just recently, the New Zealand Climate Science Coalition tested Dr. Salinger's analysis of the official New Zealand NIWA temperature database. It employed the same original temperature data to prepare its own graph, as depicted below in Figure 2.

Figure 2



As depicted, Dr. Salinger's graph (Figure 1) predictably shows warming, but the graph prepared by the New Zealand Climate Science Coalition (Figure 2) shows none whatsoever. The paper concludes that "We have discovered that the warming in New Zealand over the past 156 years was indeed man-made, but it had nothing to do with emissions of CO2—it was created by man-made adjustments of the temperature." (Treadgold 2009: 3). The article notes that all of the "adjustments" made by Salinger and the New Zealand government agency (NIWA) served to show inaccurate increases in warming.

These graphs illustrate the significance of such data "adjustments," which make the difference between a finding of no statistically significant temperature change and supposed warming. As with the New Zealand dataset, EPA must reassess (as the University of East Anglia has just decided it must do) the actual data without CRU adjustments to determine whether the

historical temperature record shows any warming at all. EPA must also reconsider its findings, given that the corrupted CRU data has been used to test the General Circulation Models, which the IPCC, CCSP and others rely upon to predict future warming from human-caused GHGs. As a result, the defective data has corrupted the very models on which EPA, through its adoption of IPCC AR4's conclusions based on CRU data, relies upon in its Endangerment Finding to project future widespread warming and other severe weather conditions. The manipulation of the CRU dataset has likely led to inaccurate and baseless findings, and it destroys any reasoned or reliable basis for EPA's conclusion that human-caused GHG emissions will lead to future warming and result in endangerment of public health and welfare.

All Temperature Data has Been Corrupted by CRU's Manipulation of Data

Because all of the extant historic temperature databases are fundamentally unsound, so too are all of the conclusions based on that data, including the IPCC AR4 and CCSP assessment reports. Because the EPA relies heavily, if not exclusively, on these synthesis reports, its Endangerment Finding likewise is insuperably compromised. In short, since the foundation for EPA's Endangerment Rulemaking is arbitrary and capricious, the Rulemaking itself is arbitrary and capricious.

Accordingly, as called for in the December 2, 2009, letter from Rep. Darrell Issa, Rep. F. James Sensenbrenner, Sen. John Barrasso, M.D., and Sen. David Vitter to EPA Administrator Jackson (Issa 2009: 1), we urge withdrawal of the Endangerment Rulemaking in light of this new information of central relevance. The University of East Anglia itself has recognized the gravity of the situation and has pledged to make an independent investigation into CRU's data and research to determine whether its research outcomes are compromised by staff manipulation or suppression of data. (University of East Anglia 2009). Before EPA commits the nation to expenditures of billions or trillions of dollars in resources to regulate GHGs through the Endangerment Finding, it is incumbent on the Agency to likewise investigate the very suspect scientific foundation upon which the Endangerment Finding has been conceived.

In support of our request, we are submitting the newly-released CRU emails and data, which were not publicly available until after the Endangerment Rulemaking's comment period ended. As described above, these documents are material and relevant to the Endangerment Rulemaking, and they address key scientific issues and new data that EPA must consider. As such, these materials constitute evidence of central relevance to the outcome of the Endangerment Rulemaking, which EPA is legally obligated to include in the record of this Rulemaking and related rulemakings, and to consider in its deliberative process. *See* 42 U.S.C. 7607(d)(4)(B)(i).

We have included a CD containing electronic copies of the CRU disclosures and hard copies of the new non-CRU references. We have also included an updated Exhibit 2 to our Comments, which is current through the date of this letter and includes the references submitted

today (#214 - #221), along with the references submitted on June 23, 2009; June 30, 2009; August 31, 2009; and November 20, 2009.

In the Alternative, this Submission Petitions EPA to Re-Open the Proceeding

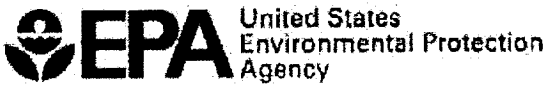
As we have done in the past, these comments are submitted as an Addendum and Supplementation of the Record in EPA's Endangerment Rulemaking. In addition, and in the alternative, we petition EPA in this submission to re-open its Endangerment Finding proceeding based on the CRU disclosures described above, which are of central importance in this rulemaking. These documents merit EPA's reexamination of all studies and synthesis reports based on corrupted CRU data, and a reopening of the comment period to allow public response to this issue.

Submitted December 4, 2009

Paul D. Phillips
Robert T. Connery
Patrick R. Day
James A. Holtkamp
Cori S. Peterson
Cathryn R. Milkey
of Holland & Hart LLP

Eric Groten
of Vinson & Elkins LLP

EXHIBIT G



EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act

Volume 3: Process Issues Raised by Petitioners

U.S. Environmental Protection Agency
Office of Atmospheric Programs
Climate Change Division
Washington, D.C.

The public was able to review all documents used by EPA in developing the TSD, including copyrighted material, by requesting a copy or visiting EPA's Air Docket. There was a full opportunity to review and comment on every piece of data relied on by EPA.

EPA's Review Process for the TSD Was Appropriate

Comment (3-7):
Several petitioners (the Coalition for Responsible Regulation, the Pacific Legal Foundation, and Peabody Energy) make the overarching argument that EPA's TSD did not go through a truly independent peer-review process. The petitioners argue that past EPA peer review of the science is now insufficient in light of new information in the CRU e-mails, and that the SAB must be given an opportunity to conduct an independent review of the Findings. They argue that the "SAB has not been able to perform its statutory function as an independent scientific review panel." More specifically, one petitioner states that review by the SAB is required under 42 U.S.C. § 4365(c)(1), because the substantial uncertainty surrounding EPA's scientific determination warrants reopening of the comment period. The Pacific Legal Foundation states that Section 4365(c) requires EPA to submit relevant technical information and data to the SAB for their review whenever the public comment period is open.

Response (3-7):
The general issue raised by petitioners regarding review of the TSD is not new and, in fact, was raised and responded to through the public comment process (see Volume 1 of the RTC document). Thus, it was not impracticable to raise the objection during the public comment period and the reasons for the objection did not arise between June 24, 2009, and February 16, 2010. To the extent petitioners argue that new information in the CRU e-mails calls into question the reasoning behind EPA's position on this issue in the final Findings, the petitioners do not demonstrate that additional information has become available that merits reconsideration of the Findings. We have carefully reviewed the issue raised regarding the implications of the CRU e-mails, and considered whether information in the CRU e-mails calls for EPA to reconsider the procedural steps with respect to the scientific and technical information used as basis for the endangerment determination. We find nothing in the CRU e-mails that relates to EPA's decision regarding peer review of the TSD. Also, and as explained in detail elsewhere in this document and the Denial, the e-mails and other "new" information provided by petitioners do not call into question the underlying science of climate change, nor the validity of the assessment reports.

As stated in Volume 1 of the RTC document, the purpose of the federal expert review was to ensure that the TSD accurately summarized the conclusions and associated uncertainties from the assessment reports. This is reasonable given our approach to the scientific literature (described in Section III.A of the Findings and Volume 1 of the RTC document). We also note that the federal expert review was only one part of a much larger process of developing the TSD from 2007 until the present. In addition to the three rounds of technical review by the 12 federal experts, the TSD has also gone through two rounds of public comment. The scope and depth of the record on the Endangerment Finding—including an 11-volume RTC document responding to comments on all aspects of the science, law, and procedure—demonstrate both the volume of information the Administrator considered in developing the Findings and the seriousness with

which the task of assessing the science was approached. Based on this, EPA rejects the Pacific Legal Foundation's allegation that the peer-review process EPA employed was insufficient in light of new information in the CRU e-mails. See other sections of this RTP document for our response to petitioner arguments regarding the implications of the CRU e-mails.

The petitioner's argument regarding the SAB is somewhat unclear. To the extent the petitioner is claiming that EPA was required to submit the proposed Endangerment Finding to the SAB when it was proposed, the petitioner clearly could have raised this objection during the comment period, and thus this objection is not a basis for reconsideration of the Endangerment Finding. To the extent that the petitioner is claiming that EPA is required to submit the Endangerment Finding to the SAB for review at this time, because the various other grounds raised in the petitions to reconsider warrant reopening of the public comment period, EPA interprets this as a claim that SAB review will be required under this provision if EPA grants the petition to reconsider and reopens the comment period. For all of the reasons discussed elsewhere in the Decision and the RTP document, EPA is not granting the petitions to reconsider and is not reopening the comment period. Thus, there is no reopening of the comment period to trigger the SAB review claimed by the petitioner.

In addition, this statutory provision did not require EPA to submit the proposed Endangerment Finding to SAB for review. Under its terms, the provision calls for EPA to make a "proposed criteria document, standard, limitation, or regulation" available to the SAB for review. The proposed Endangerment Finding is not a criteria document, standard, limitation, or regulation, and is thus not in the scope of this provision. In addition, the requirement to submit the proposed document to the SAB applies when "any proposed criteria document, standard, limitation, or regulation ... is provided to any other Federal agency for formal review and comment." It is not clear whether this includes the kind of informal interagency review conducted pursuant to Executive Order (E.O.) 12866, as compared to the more formal agency review envisioned in statutory provisions such as 49 U.S.C. 32902(j).

Finally, the objection does not provide substantial support for the argument that the Endangerment Finding should be revised. In the Endangerment Finding the Administrator determined that the body of scientific evidence compellingly supports a positive endangerment finding. The major assessments by the USGCRP, the IPCC, and the NRC (published before 2010) served as the primary scientific basis supporting the Administrator's Endangerment Finding. The objections raised by the various petitioners have not changed EPA's view of the science. In May 2010, the NRC of the U.S. National Academies published its comprehensive assessment, "Advancing the Science of Climate Change." It concluded that "climate change is occurring, is caused largely by human activities, and poses significant risks for—and in many cases is already affecting—a broad range of human and natural systems." Furthermore, the NRC stated that this conclusion is based on findings that are "consistent with the conclusions of recent assessments by the U.S. Global Change Research Program, the Intergovernmental Panel on Climate Change's Fourth Assessment Report, and other assessments of the state of scientific knowledge on climate change." These are the same assessments that served as the primary scientific references underlying the Administrator's Endangerment Finding. Importantly, this recent NRC assessment represents another independent and critical scientific inquiry into the state of climate change science, separate and apart from the previous IPCC and USGCRP

EXHIBIT H

No. 10-1310
(Consolidated with 09-1322 (Lead), et al.) (COMPLEX)

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

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petitions for Review of 74 Fed. Reg. 66,496 (Dec. 15, 2009)
and 75 Fed. Reg. 49,556 (Aug. 13, 2010) (Consolidated)

DECLARATION OF ROGER O. McCLELLAN IN SUPPORT OF PACIFIC LEGAL FOUNDATION'S MOTION FOR RECONSIDERATION

THEODORE HADZI-ANTICH, No. 53056
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner
Pacific Legal Foundation

I, Roger O. McClellan, do hereby declare as follows:

1. I have personal knowledge of the following facts and, if called upon to do so, could competently testify thereto under oath. As to matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a former member of EPA's Science Advisory Board ("SAB"), having served as a member from its creation without legislative authorization in 1974 to 1978 when it was authorized by specific legislation. I served on the SAB as authorized by statute from 1978 to 2006. This service involved participating as an active member of numerous Committees and Panels organized as part of the SAB. This included serving as Chair or Co-Chair of seven major committees, including the Environmental Radiation Exposure Advisory Committee Review Committee, Review Committee on Scientific Criteria for Environmental Lead, Committee for Annual Review of 5-Year Research Plan, Committee on Review of Health Effects Program, Environmental Health Committee, Radionuclide Emissions Review Committee, Clean Air Scientific Advisory Committee and Research Strategies Advisory Committee. My chairmanship of the Review Committee on Scientific Criteria for Environmental Lead (1977-1978) is noteworthy because, in my opinion, the peer review activities of that Committee served as a positive example as part of the motivation for the legislative authorization in 1978 of both the Science Advisory Board and related Clean Air Scientific Advisory Committee in 1978.

3. From creation of the SAB by EPA leadership in 1974 to 1978, I served as a member of its Executive Committee. I continued to serve as a member of the Executive Committee of the SAB from the time it was formally mandated by statute in 1978 to 1994 with a brief hiatus during 1980-1981.

4. In my capacity as a member of SAB and its Executive Committee, I was involved in a wide variety of issues addressed by SAB, including, among other things, numerous scientific and technical issues arising under the Clean Air Act.

5. SAB was created in order to provide scientific and technical credibility to EPA regulations by bringing together experts in various scientific and technical disciplines to provide scientific advice to the senior leadership of the EPA, including the Administrator, on all manner of scientific issues. The scope of the advisory activities was, and continues to be, very broad ranging from programs at their conceptual stage to review of regulatory proposals of EPA, including the underlying scientific studies and analyses upon which the regulatory proposals are based.

6. The main function and purpose of SAB is to provide EPA with expert advice and peer review regarding EPA's scientific and technical determinations and judgments. The motivation is to ensure that regulatory decisions are based on good underlying science and sound technical judgments. This is especially important where the scientific or technical issues being addressed by EPA are new or cutting

edge, leading to the promulgation of new regulatory programs that could have substantial impacts on society.

7. I have always understood that EPA's proposed regulations under the Clean Air Act would be made available to the SAB for review at the earliest possible time and no later than the date the regulations are first published in the Federal Register for comment by other federal agencies and the general public. Indeed, for activities with major impact, the Agency regularly asks the SAB to review the plan for key activities, including the planned schedule for development and subsequent SAB review of key documents.

8. I am familiar with EPA's finding made in December of 2009 that greenhouse gases pose a threat to human health and welfare (the "Endangerment Finding"). The Endangerment Finding is certainly the type of regulatory action that SAB was created to review. It deals with novel, cutting edge scientific and technical issues that can have a profound impact on society. Those issues require the type of detailed expert scrutiny that SAB review was intended to provide.

9. If I were a member of SAB at the time the Endangerment Finding was proposed by EPA, I certainly would have wanted and expected the SAB to have had the opportunity to review that important regulatory proposal, as well as the scientific and technical data underlying it. If EPA failed to submit the Endangerment Finding to SAB for review before it was promulgated, I would have felt that EPA was

interfering with the purposes for which SAB had been created, namely, to provide scientific and technical credibility to EPA regulatory decisions. I would be surprised if any then-current member of SAB would not have wanted the opportunity to review the Endangerment Finding before it was promulgated.

10. On many occasions during the long history of SAB, EPA changed its regulatory proposals and schedules based on review and comment by SAB. This has been the rule rather than the exception, which stands to reason, as SAB was created to provide an expert reality check for EPA scientific and technical determinations that inform policy judgments.

11. SAB essentially serves a critical gatekeeper role whose mission is to ensure that EPA's regulatory proposals are based upon sound scientific and technical principles. When they are not, SAB sounds the gatekeeper's alarm, informing EPA that its proposal is unwarranted, unsupported by the underlying science, otherwise scientifically or technically improper or indefensible, or in need of modification so as to be consistent with sound scientific and technical principles. It has been my experience that the members of SAB take their gatekeeper responsibilities very seriously.

12. Based upon my more than two decades of experience as a member of the SAB, after it was established legislatively, my more than 15 years of service as a member of the SAB Executive Committee and my knowledge of how SAB interacts

with EPA, I believe there is a substantial likelihood that the Endangerment Finding would have been substantially changed in response to advice from the SAB had the Endangerment Finding document been made available to SAB for review prior to its promulgation.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed this 17th day of July, 2012, at Albuquerque, New Mexico.

Roger O. McClellan

ROGER O. McCLELLAN

17 July 2012

Albuquerque, NM

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TEXAS
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AUSTIN, TX 78701
UNITED STATES US

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