BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In re:	)	
	)	EPA Docket No.
Endangerment and Cause or Contribute	)	
Findings for Greenhouse Gases Under	)	EPA-HQ-OAR-2009-0171
Section 202(a) of the Clean Air Act	)	
	)	

PETITION FOR RECONSIDERATION AND WITHDRAWAL OF EPA'S ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT

Filed by

THE OHIO COAL ASSOCIATION

Scott C. Oostdyk
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
804.775.1000

Gordon R. Alphonso
McGuireWoods LLP
The Proscenium
1170 Peachtree Street N.E., Suite 2100
Atlanta, Georgia 30309
404.443.5500

Neal J. Cabral
McGuireWoods LLP
Washington Square
1050 Connecticut Avenue N.W., Suite 1200
Washington, D.C. 20036
202.857.1700

Virginia L. H. Nesbitt
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
804.775.1000

Counsel to The Ohio Coal Association

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I. INTRODUCTION

Pursuant to Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), the Ohio Coal Association ("the Association") hereby petitions the U.S. Environmental Protection Agency ("EPA" or "the Agency") to convene a proceeding for reconsideration and withdrawal of the "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule" published by the Agency on December 15, 2009 (74 F.R. 66496, Dec. 15, 2009) ("the Endangerment Finding").

The Association's petition is based on the release of email and other information from the University of East Anglia ("UEA") Climatic Research Unit ("CRU") in November of last year. The CRU information undermines a number of the central tenets on which the Endangerment Finding rests, particularly the work of the U.N. Intergovernmental Panel on Climate Change ("IPCC"). In the Federal Register publication of the Endangerment Finding, EPA specifically noted that it relied upon the "major assessments" of IPCC for the "scientific and technical basis" of the decision.[1] By casting IPCC as a prominent intellectual pillar of the Agency's work, EPA vouched for this organization and predicated the reliability of its own work on the integrity of IPCC. The CRU admissions, simultaneously damaging and shocking, debase EPA's uncritical faith in IPCC's output. Among the CRU documents disclosed is an email from Dr. Keith Briffa, CRU Deputy Director and an IPCC lead author: "I tried hard to balance the needs of the science and the IPCC, which were not always the same . . . ."[2] The Association respectfully requests the EPA to reconsider and withdraw the Endangerment Finding in

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[1] 74 F.R. 66510.

[2] Briffa, Keith. Email. April 24, 2007, available at http://www.eastangliaemails.com/emails.php?eid=794&filename=1177890796.txt (emphasis added).

light of this new and extremely disconcerting information from CRU—given the EPA's admitted reliance on CRU and IPCC research.

In addition, the Association's petition is based on comments by state environmental permitting agencies with respect to the "Greenhouse Gas Tailoring Rule" (74 F.R. 55292, Oct. 27, 2009) ("the Tailoring Rule") that were received **after** the finalization of the Endangerment Finding on December 15, 2009. These state agencies point out the onerous and prohibitive permitting requirements that would stem from the Endangerment Finding and associated regulation of Greenhouse Gases ("GHGs")—onerous results that even EPA admits are so consequential as to justify deviation from specific statutory permitting thresholds under the doctrines of administrative necessity and absurd results—will not be cured despite the supposed relief afforded by the Tailoring Rule. That the very permitting authorities who will be obligated to implement GHG permitting assert that EPA's proposed "fix" to avert wide-spread permitting and associated economic disaster will not work necessitates a more thorough reexamination of the plausibility of Endangerment Finding. Considering the implications of both the CRU communications and the states' Tailoring Rule comments, it is beyond any reasonable dispute that EPA must convene a proceeding to consider these issues. To refuse to do so would be irrational, arbitrary, and capricious.

II. LEGAL STANDARD

Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), states in relevant part:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such an objection within such time or if the grounds for such objection arose after the period for public comment (but

> within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

Thus, EPA is required to convene a proceeding for reconsideration upon a showing of two conditions precedent: (1) that the information arose after the period for public comment on the Endangerment Finding, and (2) that the objection is of "central relevance to the outcome of the rule."

The first element is easily met with respect to both of the Association's grounds for this petition for reconsideration. The public comment period for the proposed Endangerment Finding closed on June 23, 2009. The scandal with respect to the emails and other communications from CRU first surfaced in late November 2009. Additionally, the comment period for the Tailoring Rule did not end until December 28, 2009, at which time some of the country's most populated states such as California, New Jersey, and Texas were still raising additional concerns about the impossibility of implementing permitting regulations that would necessarily soon follow as a result of the Endangerment Finding.

The second element is also clearly met with respect to the CRU documents and the states' comments on the Tailoring Rule. The CRU documents and their implications are of central relevance to the Endangerment Finding because they go to the core requirements of Section 202, including the public's opportunity to comment on those provisions under 307(d)(3), and the consistency of those provisions with the Act and with fundamental standards of reasoned agency decision-making. This challenged error is "so serious" that there is a substantial likelihood that the rule may not have been issued at all

or would have been significantly changed if such errors had not been made. *See* 42 U.S.C. 7607 (d)(8), (d)(9)(D)(iii). The information revealed by the recently uncovered CRU materials directly impeaches the validity and reliability of the purported scientific consensus on which EPA relies, the factual data upon which the Endangerment Finding is based, and the validity and reliability of the methodology used in determining and analyzing said data. Likewise, the states' Tailoring Rule comments go to the heart of EPA's reason for issuing the Endangerment Finding at all – that is, to protect the health of the American public. EPA should further explore the extent to which implementation of the Endangerment Finding is practically impossible under State Implementation Plans, since impossibility calls into question all justification for the Endangerment Finding.

The central question for the Administrator's determination in response to this Petition is whether the CRU materials and that state's Tailoring Rule comments are of central relevance to the "outcome" of the Endangerment Rule. The Association submits that an affirmative conclusion is clear and unequivocal.

III. THE PRE-DETERMINED SCIENTIFIC "BASIS" FOR THE ENDANGERMENT FINDING

EPA must reconsider, stay in the interim, and ultimately withdraw its Endangerment Finding based on new material that was not available during the comment period and which is central to the outcome that EPA reached in promulgating its Endangerment Finding. EPA failed to properly exercise its judgment as required by the Clean Air Act and acted in an arbitrary and capricious fashion by relying almost exclusively on flawed reports of the IPCC in attributing climate change to GHG emissions. As evidenced by material that became available last fall from CRU, as well as additional information that has become available since the Endangerment Finding was

issued, the IPCC reports were not the product of a rigorous, transparent, and neutral scientific process. Dr. Tom Wigley's email, an IPCC contributing author, sums up an alarming situation: "In my (perhaps too harsh) view, there have been a number of dishonest presentations of model results by individual authors and by IPCC."[3] Because EPA elected to outsource its obligation to make a "judgment" as to whether GHGs may endanger public health and welfare to the IPCC, EPA should reconsider and withdraw its Endangerment Finding in light of the recently discovered defects in the IPCC's procedures, and convene full evidentiary hearings on the recent findings with respect to the relevant IPCC reports and analyses relied upon by EPA.

Press, academic, and critical accounts of IPCC's actions are too pungent to ignore. The CRU information reveals that many of the principal scientists who authored key chapters of the IPCC scientific assessments were driven by a policy agenda that caused them to cross the line from neutral science to advocacy.[4] Indeed, they went far beyond even what is acceptable as advocacy, as they allegedly actively suppressed information that was contrary to the "nice, tidy story" that they purportedly planned to present.[5] What is more, they refused to disclose underlying data concerning the studies in which they were involved to third parties who might use the information as critique. Moreover, they engaged in a wide variety of allegedly improper and questionable tactics to manipulate the type of scientific information that appeared both in the IPCC reports and in the peer-reviewed scientific journals upon which the IPCC largely relied. Finally,

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[3] Wigley, Tom. Email. Oct. 14, 2007, available at http://www.eastangliaemails.com/emails.php?eid=1057&filename=1255553034.txt (emphasis added).

[4] *See supra* footnote 2.

[5] Briffa, Keith. Email. Sept. 22, 1999, available at http://eastangliaemails.com/emails.php?eid=136.

they are accused of relying on inaccurate and unverified information from secondary source material that was produced by advocacy groups, information that the authors apparently knew was unverified but included anyway to advance the authors' advocacy agenda.

The IPCC's recent retraction of its "poorly substantiated estimates of the rate of recession and the date for the disappearance of Himalayan glaciers" as set forth in the AR4 Working Group II Report,[6] and the numerous other recent IPCC errors that have come to light, is indicative of a process that was far from neutral and robust, but rather promoted policy goals admittedly pursued by a group that has been unmasked as partisan and calculating. The Agency no longer has a basis for unquestioned confidence that the IPCC reports present a fair, unbiased, and accurate assessment of climate science. Since these reports were relied on extensively in the Endangerment Finding, the Agency has no choice but to conclude that the Endangerment Finding itself is now tainted, and must be withdrawn. EPA must either develop its own scientific assessments or justify why it continues to rely on IPCC's questioned reports.

IV. THE INFEASIBILITY OF IMPLEMENTING THE GHG REGULATIONS BASED ON THE ENDANGERMENT FINDING

State environmental permitting agencies have pointed out the impossibility of the permitting scheme that will necessarily follow from EPA's Endangerment Finding with respect to GHGs. Once an Endangerment Finding is issued, and GHGs become regulated "pollutants" under the Clean Air Act, a substantial and practically impossible administrative burden will occur as a consequence of EPA's regulation of GHG

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[6] *IPCC statement on the melting of Himalayan glaciers*, Jan. 20, 2010, available at http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf.

emissions from mobile sources, which EPA plans to issue in March 2010. Furthermore, because EPA's Endangerment Finding classifies GHGs as "pollutants," between 40,000 and six million GHG emissions sources would be required to obtain permits from state environmental permitting agencies under the Clean Air Act. The assessment comes from the very officials that will be compelled to implement EPA's action.[7]

EPA has offered a proposal to "tailor" Clean Air Act permitting requirements to address this issue. EPA specifically describes the impacts of GHGs as regulated pollutants under the Clean Air Act as "overwhelming" and "paralyzing" to state permitting agencies, producing "multi-year permitting backlogs."[8] To alleviate this administrative burden, EPA is proposing to change the statutory permitting thresholds to exempt comparatively smaller sources of GHGs. Under the doctrine of "administrative necessity"[9] and "absurd results,"[10] EPA will temporarily increase the applicable emissions trigger for when a permit must be obtained with respect to GHGs. However, EPA's proposal provides an absurdly truncated time for state agencies that operate pursuant to a State Implementation Plan to increase their statutory and regulatory thresholds—which have the force of law within state borders—so as to be able to reduce the administrative burden on the state level. State permitting authorities are constrained by state law and legislative session schedules, as well as by required administrative

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7 Letter of Public Comment, Docket No. OAR-2009-0517, National Association of Clean Air Agencies, December 28, 2009.

8 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 F.R. 55294–95 (Oct. 27, 2009).

9 *See* Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1980).

10 *See* Buffalo Crushed Stone, Inc. v. Surface Transportation Board, 194 F.3d 125, 129–30 (D.C. Cir. 1999).

procedures (including their own public notice and comment periods), and cannot raise emission thresholds for a "pollutant" in the limited time period that GHG emissions would be subject to regulation due to the Endangerment Finding. This contention was made by the state officials themselves during the comment period for the Tailoring Rule who, as the actual GHG permitting authorities, argue that EPA's proposed rule will not in actuality achieve its objective of avoiding absurd results.[11] These states have proposed various alternative solutions to the Tailoring Rule, all of which amount to (at minimum) delaying the effective date that GHGs become regulated pollutants under the Clean Air Act. The most viable and sensible option would be instead for EPA to withdraw its Endangerment Finding so that the GHG permitting impacts that have been raised by the states can be assessed.

Furthermore, even if states could conform their own laws to the Tailoring Rule, most states anticipate that the number of permit actions that would remain under EPA's proposed thresholds for GHGs will be far greater than estimated by EPA. Finally, states that are now feeling the heaviest impact of the latest economic recession are faced with the impossible task of drumming up sufficient administrative resources to handle the inevitable increase in workload. EPA has the responsibility of ensuring that state and local permitting authorities have adequate resources in place to address the additional permitting workload that flows from an Endangerment Finding before a determination is made based uncritically on the work of a results-oriented advocacy group like IPCC.

The very permitting authorities who will be obligated to implement GHG permitting because of EPA's Endangerment finding have emphasized in their comments

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[11] *See* Letter of Public Comment, Docket No. OAR-2009-0517, National Association of Clean Air Agencies, December 28, 2009.

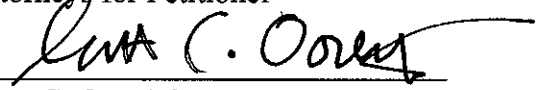
to the Tailoring Rule that EPA's proposed "fix" will not work. These very real and practical concerns which have only come to light after the finalization of the Endangerment Rule necessitate a more thorough reexamination of the fundamental plausibility of the Endangerment Finding.

V. CONCLUSION

For all of the foregoing reasons, EPA should convene a proceeding to reconsider, stay, and/or withdraw the Endangerment Finding.

Respectfully submitted this 12th day of February, 2010.

Attorneys for Petitioner



Scott C. Oostdyk
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
804.775.1000

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McGuireWoods LLP
The Proscenium
1170 Peachtree Street N.E., Suite 2100
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McGuireWoods LLP
Washington Square
1050 Connecticut Avenue N.W., Suite 1200
Washington, D.C. 20036
202.857.1700

Virginia L. H. Nesbitt
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
804.775.1000

Counsel to The Ohio Coal Association

\10674011.1