UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF VIRGINIA, ex rel. KENNETH T. CUCCINELLI, II in his official capacity as Attorney General of Virginia **Petitioner,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** **Respondent.**	Docket No. 10-1036 (consolidated with Case Nos. 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1049)

JOINT MOTION
OF THE STATE OF ALABAMA
AND THE COMMONWEALTH OF VIRGINIA
TO REMAND TO ADDUCE ADDITIONAL EVIDENCE

Petitioners the State of Alabama and the Commonwealth of Virginia move pursuant to 42 U.S.C. § 7607(c) to remand the "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule" (74 F.R. 66496) to the Environmental Protection Agency for further proceedings to adduce additional evidence.

INTRODUCTION

Congress has provided the remedy of remand where it is apparent that the record is incomplete. It is now a matter of common knowledge that the "climate-gate" revelations which have thrown the scientific basis for the Endangerment Finding into grave doubt occurred after the closing of the record. Despite the explosive revelations of climate-gate, EPA insouciantly issued its Finding on December 15, 2009 without providing any mechanism for the consideration of this new information. Despite the pendency of motions for reconsideration, the agency has announced its intent to begin rule-making in reliance on the un-re-examined Finding. It would be a waste of judicial resources to prosecute appeals based upon a stale record when it is apparent that at some point remand will be ordered to consider these new developments.

On December 15, 2009, EPA issued its first pronouncement on the dangers posed by greenhouse gases (in the form of its final Endangerment Finding) without considering newly-discovered pertinent, post-comment information that

undermines EPA's entire announced bases for relying upon the climate science of others to reach is endangerment conclusion. EPA chose to publish its Endangerment Finding on December 15, 2009 despite the explosive revelations that began in November 2009 and continued thereafter consisting of emails and other materials from the Climate Research Unit ("CRU") at the University of East Anglia in England. The CRU is the climate research arm of the United Nations Intergovernmental Panel on Climate Change ("IPCC"), the international organization on whose climate change pronouncements and conclusions EPA principally relied to reach its Endangerment Finding. The emails and associated materials suggest that prominent CRU scientists suppressed academic dissent, manipulated the peer-review process, and withheld, lost or discarded source data from academic and public inspection. These practices not only violate clear EPA standards of conduct for scientific research, they also wholly undermine EPA's bases for relying upon IPCC science instead of conducting its own research. The existence of these charges and the basis for them is subject to judicial notice. In the alternative, Petitioners tender these facts as an offer of proof. The actual significance of this information must be evaluated in light of agency expertise following public hearing and comment.

EPA acknowledges that it is responsible for assessing and verifying adherence to accepted Agency standards of scientific information on which it

intends to rely. However, here EPA simply accepted IPCC's undemonstrated assertions that IPCC actually acts in accordance with its aspirational statements. While EPA concluded that IPCC had adequate procedures to justify agency reliance on its reports and assessments, the newly revealed emails indicate that IPCC did not follow or adhere to its own or EPA's procedures in developing fundamental elements of its conclusions.

Despite these revelations, the Agency went forward – causing the final Endangerment Finding to be published in the Federal Register without reference to climate-gate, just three days before President Obama arrived in Copenhagen for the U.N. Climate Change Conference 2009. The Endangerment Finding was not tethered to any substantive rule and EPA had no deadline for its release – other than a political one. It is unprecedented for EPA to issue an endangerment finding in this fractured way. EPA could have easily re-opened the record for further public comment about concerns over politicized science and undertaken a pre-release investigation of the impact of the CRU disclosures as required by EPA's own guidelines and internal rules. These steps would have served to quell a widespread controversy, so as to permit complete appellate review of EPA's assessment of IPCC's work. But EPA forged ahead as it continues to do.

After EPA issued the Endangerment Finding on December 15, 2009, a number of parties moved for EPA's reconsideration of the Finding before the

February 16, 2010 deadline established by 42 U.S.C. § 7607(d)(7)(B). Those Parties asked EPA to address on the record climate-gate and other procedural science irregularities, all of which contradicted published EPA standards of scientific review and invalidated EPA's ultimate conclusions as a matter of administrative law and procedure. EPA accepted and docketed the petitions, but denied them *de facto* on April 1, 2010, when, along with the Department of Transportation, it announced its intention to publish the "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule" ("Light Duty Motor Vehicle rule," or "LDMV rule").

Although EPA is seeking an order holding these consolidated appeals in abeyance pending its anticipated July 30, 2010 ruling on the reconsideration motions, there can be no realistic expectation that EPA will actually grant reconsideration because recent public statements of the Administrator and the announced intention to issue the LDMV rule demonstrate a fixed commitment to the present Agency course. Instead, an ultimate denial sets up the likelihood of protracted consolidated appeals in which the likely outcome is a remand. This Court does not have to permit this unfair and inefficient mode of proceeding. Virginia has availed itself of all procedural remedies before the Agency to redress these methodological failures, and Petitioners now call upon a special provision Congress created at 42 U.S.C. § 7607(c) for remedying the rare procedural

situation in which important but after-discovered evidence has evaded primary review by an agency. This provision permits this Court to remand a judicial review proceeding to EPA when a party can identify "additional evidence" that is "material" to the record now subject to "review," but which could not have been "adduce[d] . . . in the proceeding" below. The irregularities surrounding the Endangerment Finding represent just such a rare circumstance, and Petitioners move this Court to cut through the procedural knot by remanding the Endangerment Finding to EPA for complete fact-finding subject to the Court's subsequent appellate review.

ARGUMENT

I. This Court Should Remand These Judicial Review Proceedings of the Endangerment Finding to EPA in Light of Additional Evidence.

42 U.S.C. § 7607(c) provides:

> In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if

> any, for the modification or setting aside of his original determination, with the return of such additional evidence.

That "material" evidence within the meaning of 42 U.S.C. § 7607(c) has come to light since the statutorily mandated public hearings and the closing of the record is beyond serious dispute. The release of CRU emails call in to question the objectivity and methodology of IPCC contributors who seem to have been embarked upon a scheme of advocacy far in excess of the degree of certainty justified by the underlying evidence. The new information unveils concerns about transparency and replicability that are simply not consistent with American standards or law. Whatever the motivations of IPCC contributors, and whatever the impact the new revelations might have on the reliability of the underlying science, these new facts clearly show that it is unreasonable for EPA to continue to rely on IPCC's work as the primary scientific backing for its endangerment conclusions when the processes thought to be in place at IPCC to assure the generation of "good science" were not followed.

Congress provided for a remand mechanism in the Clean Air Act in recognition of the reality that an agency's scientific conclusions are always subject to revision in the face of new information. The U.S. Senate added the remand provision in the 1970 amendments to the Clean Air Act. The Senate's Committee on Public Works emphasized the importance of a vehicle for remand because "it would not be in the public interest to measure for all time the adequacy of a

promulgation . . . by the information available at the time." S. Rep. No. 91-1196, at 41 (1970). Common sense prescribes that the development of new information "may dictate a revision or modification" of an EPA determination, and the Senate believed any person should be able to "challenge any promulgated standard [or] regulation . . . *whenever it is alleged that significant new information has become available*." *Id.* at 41-42 (emphasis added).

Congress included similar mechanisms for administrative remand in other environmental protection statutes besides the Clean Air Act. In both the Resource Conservation and Recovery Act of 1976 ("RCRA") and the Clean Water Act ("CWA"), a party challenging an EPA regulation in court may seek remand on the basis of "additional evidence" that is "material" and could not have been presented to the agency in the rulemaking proceeding. RCRA § 7006(a)(2) (42 U.S.C. § 6976(a)(2)), *cited by Amer. Portland Cement Alliance v. EPA*, 101 F.3d 772, 774-75 (D.C. Cir. 1996); CWA § 509(c) (42 U.S.C. § 1369(c), *cited by Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977). *See also* 28 U.S.C. § 2347(c).

In the interest of judicial economy, this Court has previously recognized the value in remanding a proceeding to EPA due to new and additional evidence previously unconsidered by the Agency. In *Ethyl Corp. v. Browner*, 989 F.2d 522 (D.C. Cir. 1993), Ethyl appealed to this Court for review of EPA's denial of its application for a waiver for a fuel additive, MMT, under 42 U.S.C. § 7545(f)(4).

Pending judicial review, evidence appeared that tended to "undermine[]" the Agency's basis for denial. *Id.* at 523. This Court observed that motions for remand should be granted when appropriate in order that the agency may "consider new evidence and make a new decision." *Id.* at 524.

As in *Ethyl*, it is indisputable that new facts and evidence "undermine" the foundation of the Agency's final decision on the Endangerment Finding. *See id*. at 523. A number of parties, including Virginia, have utilized all avenues to bring these new facts to EPA's attention—most recently, in the form of petitions for reconsideration. Yet EPA has chosen to postpone a rigorous examination and formal response to these new facts and has announced its intention to issue a LDMV rule despite the undermining of the Endangerment Finding's conclusions. There is no reason why EPA should be permitted to slow walk its inadequate record through the appellate process. Instead, a remand will allow EPA to "cure [its] own mistakes rather than wasting the courts' and the parties' resources" lending to a review of the Endangerment Finding on a complete record. *Id.* at 524. *See also SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("A remand is generally required if the intervening event may affect the validity of the agency action.").

II. The New Evidence is Highly Material.

A. EPA relied on the IPCC's work to conclude that global warming was attributable to human-caused emissions of greenhouse gases.

Section 202(a) of the Clean Air Act requires that the Administrator make a "judgment" as to whether the emission of certain air pollutants poses a danger to public health and welfare. Throughout the Endangerment Finding, however, the Administrator admitted that the Agency *did not itself* conduct a comprehensive review of climate change science in making its "judgment" that anthropogenic GHG emissions endanger the public. Instead, EPA relied primarily on what it termed the "assessment literature" in reaching its scientific conclusions. While the "assessment literature" on which the Administrator relied generally consisted of the work of both the IPCC and the U.S. Climate Change Science Program ("CCSP"), the Administrator relied primarily on the work of the IPCC on the critical issue of whether anthropogenic GHGs are causing climate change.

Most of the EPA's Technical Supporting Document ("TSD"), which the Agency authored to support the Endangerment Finding, examined observed and projected climate changes and their effect on public health and welfare. Only eight pages of the TSD, however, were devoted to the critical "attribution" issue: that is, whether changes to the climate system that EPA says are occurring and will accelerate can be "attributed" to anthropogenic GHG emissions and not natural forces. TSD at 47–54. The "attribution" section of the TSD particularly relied on the work of the IPCC, as opposed to other "assessment literature," or any additional or independent studies. Forty-seven (47) of the sixty-seven (67)

citations in this section are to the IPCC's work, and all the graphics in this section were taken from the IPCC as was the introduction as well.

B. EPA uncritically accepted that IPCC had adhered to its own protocols for transparency and peer-review instead of conducting its own independent review in accordance with the Agency's standards.

EPA recognized in the Endangerment Finding that it is responsible for verifying that scientific information on which the Agency relies meets standards for quality, integrity and transparency that are set forth in U.S. law, including the Clean Air Act and the Information Quality Act ("IQA"). TSD at 4. In 2002, EPA was required by the IQA to issue a set of guidelines for evaluating scientific conclusions that influence the Agency's decision-making. These standards are embodied in EPA's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA."[1] EPA acknowledges in these Guidelines that, in decision-making, it uses some data collected by others, but insists that it "maintain[s] a robust quality system." *Id.* at 7. Importantly, EPA's standards specify that "influential information"[2] must have a "higher degree of transparency regarding (1) the source of the data used, (2) the

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1 http://www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf

2 "Influential information" is "[i]nformation disseminated in support of top Agency actions (*i.e.* rules, substantive notices, policy documents, studies, guidance) that demand the ongoing involvement of the Administrator's office." *Id.* at 20.

various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures employed." *Id.* at 21. As a matter of course, "[f]or those work products that are intended to support the most important decisions or that have special importance in their own right, external peer review is the procedure of choice." *Id.* at 11. The guidelines further require that, where full transparency and access to another organization's data and methods is not possible because of "privacy" or "other confidentiality protections," EPA must perform its own "especially rigorous robustness checks" of that information to ensure the information's reliability and objectivity and "carefully document all [such] checks that were undertaken." *Id.* at 21.

EPA claimed that it ensured compliance with its Guidelines in issuing the Endangerment Finding because it reviewed the IPCC's written procedures for preparation of that body's science assessment reports.[3] Based on that review, EPA determined that the IPCC had methods in place to ensure "a basic standard of quality, including objectivity, utility and integrity,"[4] and presumed that IPCC was actually following these procedures. Accordingly, EPA concluded that it had "no reason to believe" that the "assessment reports do not represent the best source material to determine the state of the science and the 'consensus' view of the

[3] EPA Response to Public Comments, Vol. 1 at 9–23.
[4] *Id.* at 57.

world's scientific experts on the issues central to making an endangerment decision with respect to greenhouse gases."[5]

C. EPA Neither Delayed Issuing the Endangerment Finding In Spite of New Developments Nor Revisited the Endangerment Finding Afterwards.

In November 2009, disclosures of emails from the University of East Anglia's CRU began climate-gate. In the United Kingdom alone, a number of investigations subsequently commenced. Nevertheless, on December 15, 2009, EPA issued the Endangerment Finding and utilized IPCC as its principal authority for the Agency's central conclusion that anthropogenic GHG emissions are causing deleterious climate change. EPA faced no deadline to issue the final Endangerment Finding, which has the force of an agency rule. The first major rulemaking the Endangerment Finding was to support was the LDMV rule. Pursuant to a settlement among the U.S. government, several states and the auto industry, the LDMVR was not due until April 1, 2010. EPA could have promulgated the Finding anytime it believed it had satisfactorily responded to all comments and issues, and resolved all concerns already apparent by resorting to its Guidelines.

Having promulgated a faulty finding, EPA has continued to rely on the IPCC assessments despite growing evidence of the unreasonableness of that course of

[5] Endangerment Finding, 74 Fed. Reg. at 66,511.

action. On February 11, 2010, the University of East Anglia ordered an academic misconduct review of its own CRU scientists, headed by Sir Muir Russell.[6] On March 22, 2010, the University asked Lord Ron Oxburgh, former chair of the House of Lords Science and Technology Select Committee, to head a second independent inquiry into the viability of all the scientific results produced by the CRU studies.[7] On March 31, 2010, the U.K. Parliament's Science and Technology Select Committee completed its investigation in a facially inadequate one day pre-dissolution hearing but nonetheless criticized the University for a lack of transparency and failing to take head-on a "culture of withholding information" among the CRU scientists.[8] The U.N. itself eventually announced an investigation on March 10, 2010, soliciting the help of the InterAgency Council, a collaboration between international science academies, to review every aspect of how the IPCC's reports are prepared, including the use of non-peer reviewed literature, the

[6] David Adam, "Hacked climate emails inquiry will not 'audit scientific conclusions,'" Guardian, Feb. 11, 2010, available at http://www.guardian.co.uk/environment/2010/feb/11/hacked-emails/inquiry.

[7] David Adam, "Lord Oxburgh to head new UEA inquiry," Guardian, Mar. 22, 2010, available at http://www.guardian.co.uk/environment/2010/mar/22/lord-oxburgh-uea-inquiry.

[8] James Randerson, "Climate researchers 'secrecy' criticized," Guardian, Mar. 31, 2010, available at http://www.guardian.co.uk/environment/2010/mar/31/climate-mails-inquiry-jones-cleared.

reflection of diverse viewpoints, and how the report's conclusions are communicated.[9]

In addition, following the damaging email disclosures, serious errors in the IPCC's work came to light. In November 2009, an internationally recognized expert on Himalayan glaciers, V.K. Raina, produced a study that contradicted IPCC reports on Himalayan glacier melts. Although Dr. Raina's report was initially dismissed by the IPCC chairman as "voodoo science," the IPCC was later forced to admit in January 2010 that the Report had misstated the possible melt of the Himalayan glaciers.[10] Because of this error, India announced on February 5, 2010, that it would establish its own National Institute of Himalayan Glaciology to monitor climate change in the region, independent of the IPCC's ongoing research.[11]

On December 15, 2009—the very day that EPA announced the Endangerment Finding—the Russian Institute of Economic Analysis ("IEA")

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[9] Dan Vergano, "Science academies to review climate report production," USA Today, Mar. 10, 2010, available at http://content.usatoday.com/communities/sciencefair/post/2010/03/science-academies-to-review-climate-report-production/1.

[10] *Glacier Scientist: I knew data hadn't been verified*, David Rose, Jan. 24, 2010, Daily Mail, available at http://www.dailymail.co.uk/news/article-1245636/Glacier-scientist-says-knew-data-verified.html; *IPCC statement on the melting of Himalayan glaciers*, Jan. 20, 2010, available at http://www.ipcc.ch/pdf/presentations/himalaya-statement-20january2010.pdf.

[11] "India abandons IPCC, sets up own panel," International Business Times, Feb. 5, 2010, available at http://www.ibtimes.com/articles/20100205/india-ipcc-un-climate-change-global-warming.htm.

reported that CRU probably tampered with Russian climate data and that the Russian meteorological station data do not support human-caused global warming. It was well established that CRU had dropped many Russian stations in the colder regions of the country supposedly because these stations were no longer maintained. The IEA stated that, on the contrary, the stations still report temperatures but that CRU ignores the results. Only 25% of the temperature reporting stations in Russia are used in the Report, and they are in population centers that are influenced by the urban heat island effect. Rural areas were largely ignored by CRU, giving the data a pro-warming bias. Given that Russia accounts for 12.5% of the world's land mass, the CRU dataset has been highly compromised, reporting global surface temperature trends that are unreliable and biased towards achieving a politically driven predetermined outcome.[12]

In late January 2010, it was revealed that IPCC claims of warming's adverse effects in the Amazon rainforests and on coral reefs came from publications of environmental groups such as the World Wildlife Fund and Greenpeace. Further, claims of glacier melts in the Andes and the Alps came from anecdotal comments

[12] *What the Russian Papers Say*, Dec. 16, 2009, Rianovosti, available at http://en.rian.ru/papers/ 20091216/157260660.html.

in a magazine article and a master's thesis. Thus, any Agency conclusion that the findings in IPCC's report are based on peer-reviewed science was misplaced.[13]

On February 7, 2010, the Sunday Times (London) reported on the extent to which false claims that warming will destroy rain-based agriculture in Africa permeate IPCC findings. The IPCC had claimed that global warming would reduce yields from rain-fed agriculture by up to 50% in many African countries.[14] IPCC's claim is not based on peer-reviewed science but instead on a 2003 policy paper from a Canadian think-tank.[15] Yet EPA cites this assertion in its Technical Support Document as support for its Endangerment Finding. TSD Table 16.1.

As a final measure of the carelessness of IPCC's work, on February 3, 2010, the Netherland's environment minister, Jacqueline Cramer, demanded a thorough

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[13] Christopher Booker, "Amazongate: new evidence of the IPCC's failures," Telegraph, Jan. 30, 2010, available at http://www.telegraph.co.uk/comment/columnists/christopherbooker/7113582/Amazongate-new-evidence-of-the-IPCCs-failures.html; Editorial, "Climate debate needs facts, not anecdotes," NZ Herald, Feb. 3, 2010, available at http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10623715; Lawrence Solomon, Op-Ed., "Beyond the Himalayas," Nat'l Post, Feb. 6, 2010, available at http://network.nationalpost.com/np/blogs/fpcomment/archive/2010/02/05/lawrence-solomon-beyond-the-himalayas.aspx; David Adam and Suzanne Goldenberg, "UN Climate Scientists Blame IPCC Colleagues for 'Sloppy' Glacier Error," Guardian (London), Feb. 9, 2010.

[14] *Climate Change 2007: Synthesis Report – Summary for Policymakers*, IPCC, available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

[15] *Africagate: top British Scientist says UN panel is losing credibility*, Jonathan Leake, Feb. 7, 2010, Times Online, available at http://www.timesonline.co.uk/tol/news/environment/article7017907.ece.

investigation into IPCC's research after it was revealed that its Report incorrectly stated that 55 percent of the Netherlands lies below sea level, when the correct figure is actually 26 percent.[16]

For its part, in response to the controversy, EPA has done nothing to date. It announced no review. It commissioned no inquiry that it ever announced to the public. While a congressional committee issued a minority report attacking what the press had dubbed by this time climate-gate and glacier-gate, EPA officials expressed categorical confidence in the IPCC through public speeches and statements. In the LDMV rule announcement, EPA ratified without review—for a second time—the IPCC conclusions on which the Endangerment Finding was based. In the absence of an analysis and statement of why EPA can or should continue to conclude that the IPCC information is reliable, appropriate appellate review of EPA's Endangerment Finding cannot efficiently proceed.

EPA's standards of conduct, established in 2002 by the Agency's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA," are clear and beyond dispute. They require "rigorous robustness checks" anytime data transparency, quality, or peer review issues emerge regarding "influential information," defined to include

[16] "New mistake found in UN climate report," NRC Handelsblad, Feb. 4, 2010, available at http://www.nrc.nl/international/article2476086.ece.

information supporting a rule making. These "rigorous robustness checks" must be documented contemporaneously with the Agency's review, and before issuance of a final rule.

Numerous commentators have objected to EPA's non-transparent handling of climate-gate. By February 16, 2010, ten petitions for reconsideration were filed, asking the Agency to reconsider its Endangerment Finding. EPA has displayed no indication of imminent action. Instead, it proposes to rule on whether to permit further public comment by July 30, 2010 while holding this appeal in abeyance. This is a formula for inefficiency and needless delay.

III. The Additional Evidence Shows that EPA Did Not Follow Its Own Standards of Conduct When It Finalized the Endangerment Finding.

A. EPA's Own Standards Require Transparency and Objectivity in the Scientific Research It Relies Upon.

In the Endangerment Finding, EPA made the affirmative claim that IPCC's climate change assessments conform to the Agency's Guidelines "for data and scientific integrity and transparency."[17] The TSD accompanying the Endangerment Finding also declares that IPCC's information is "objective, technically sound and vetted, and of high integrity" as required by EPA standards. TSD at 5. Yet IPCC's work does not meet the "higher degree of transparency" that is a prerequisite for EPA's reliance according to its own guidelines as IPCC

[17] 74 F.R. 66511, n.14.

members lack much of the raw temperature data that supports the group's claims of anthropogenic climate change.[18]

B. This Court Requires Agencies to Adhere to Their Established Standards of Conduct in Their Rulemakings.

In issuing the final Endangerment Finding, EPA failed to follow its own standards of conduct for scientific research by relying primarily on the tainted and politically influenced conclusions of the IPCC. Although this Court typically defers to an agency's conclusions drawn from scientific data, *see, e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), this presumption disappears when an agency has failed to follow its own established standards of conduct in the course of evaluating that scientific data. *See Edison Electric Inst. v. EPA*, 391 F.3d 1267, 1269 (D.C. Cir. 2004) (EPA cannot "ignore or contradict" its "own criteria"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (an agency cannot "casually ignore[]" its policies and standards).

CONCLUSION

Additional evidence directly implicating the EPA's Endangerment Finding has arisen after final promulgation of the rule, necessitating a remand to the Agency for its official review and comment. The newly available information is clearly material to the Endangerment Finding because it goes to the core requirements of § 202(a) and § 307(d)(3). This additional evidence is

[18] http://www.timesonline.co.uk/tol/news/environment/article7004936.ece.

unquestionably so serious that there is a substantial likelihood that the Endangerment Finding would not have issued when it did if EPA had taken the time to examine and comment upon it. *See, e.g.*, *NRDC v. Herrington*, 768 F.2d 1355, 1421 (D.C. Cir. 1985) (holding that agencies are obliged to produce substantial evidence for major assumptions in rulemaking).

This Court, in ordering remand, may "order such additional evidence . . . to be taken before the Administrator, in such manner and upon such terms and conditions as [to] the court may deem proper." 42 U.S.C. § 7607(c). Petitioners respectfully submit that a reopening of the period for public comment will permit the Agency to receive all of the additional evidence pertaining to the Endangerment Finding that has surfaced since December 15, 2009 calling IPCC's conclusions into question. EPA will then have an opportunity to conduct its own rigorous robustness check of all of IPCC's methodologies and conclusions in light of the additional evidence contained in the public's remarks. After the close of the court-ordered remand period, EPA can then revisit the merits of the Endangerment Finding as required by the Act which obligates the Administrator to "modify [her] findings as to the facts, or make new findings, by reason of the additional evidence so taken and [to] file such modified or new findings, and [her] recommendation, if any, for the modification or setting aside of [her] original determination, with the return of such additional evidence." *Id.*

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