US EPA ARCHIVE DOCUMENT

**BEFORE THE ADMINISTRATOR**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

# PETITION FOR RECONSIDERATION OF THE ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT – 74 FED. REG. 66496 (DEC. 15, 2009)


**Petitioners**

Coalition for Responsible Regulation, Inc.
Industrial Minerals Association – North America
Great Northern Project Development, L.P.
National Cattlemen's Beef Association
Rosebud Mining Company
Massey Energy Company, and
Alpha Natural Resources, Inc.

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The Industrial Minerals Association – North America, National Cattlemen's Beef Association, Great Northern Project Development, L.P., Rosebud Mining Company, Massey Energy Company, Alpha Natural Resources, Inc. and the Coalition for Responsible Regulation, Inc. (collectively the Coalition) petition the United States Environmental Protection Agency (EPA, the Administrator or the Agency) to reconsider its Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) (Endangerment Finding or Finding). The grounds for this request arose after the period for public comment expired and are of central relevance to the Endangerment Finding. The Administrator therefore must convene a proceeding for reconsideration and provide the Coalition with "the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. § 7607(d)(7)(B). Furthermore, in order to meet the fundamental requirements of sound science, legal due process, and valid administrative rulemaking, EPA should stay any further regulatory actions or rulemakings based upon the Endangerment Finding until this reconsideration is completed.

## I. SUMMARY OF THE GROUNDS FOR RECONSIDERATION.

The documents released on November 19, 2009, from the University of East Anglia's Climatic Research Unit (CRU) in England (the Disclosures, attached as Exhibit A), and new studies and public disclosures since publication of EPA's Finding, demonstrate that EPA must reconsider its Endangerment Finding.

*First*, the Disclosures reveal that CRU "fudged" and fabricated temperature data.[1] These unsound data likely underlie much of the science informing the IPCC assessment reports[2] upon which EPA places "primary and significant weight" in reaching its Finding. 74 Fed. Reg. at 66511. EPA does not know, and has made no publicly-disclosed effort to determine, whether its Finding relies on unsound data. As a result, the Finding cannot stand. Further, although EPA asserts that these underlying data have been "extensively peer reviewed," *id.* at 66504, the Disclosures call into question the sufficiency and independence of this peer review process, both for the CRU dataset and the other surface-based temperature datasets. In sum, EPA's Endangerment Finding has at its foundation flawed data and suspect science.

*Second*, the Disclosures demonstrate that EPA unlawfully sub-delegated its duties under the Clean Air Act to other bodies, including foreign entities, with policy priorities of their own. These policy goals – namely, to promote the theory of human-caused climate change – influenced the final IPCC assessment reports upon which EPA relies, which means EPA's "scientific judgment" envisaged by *Massachusetts v. EPA*[3] is the product of policy considerations outside the scope of the Clean Air Act and not reflected in the record. Scientists involved in preparing the IPCC assessment reports openly state that "the needs of the science and the IPCC . . . were not always the same . . ." Exhibit A, 1177890796.txt, Apr. 29, 2007. Further disclosures in the last few weeks even suggest that the IPCC made meritless "predictions" couched as science to serve its policy goals. The IPCC assessment reports are therefore not objective summaries of science, but instead reflect the IPCC's policy priorities, none of which

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[1] CRU is one of the acknowledged primary data sources used by climate scientists around the world. *See* Exhibit B, http://www.cru.uea.ac.uk/cru/about/history/.

[2] The IPCC (Intergovernmental Panel on Climate Change) is an "intergovernmental" body established by the United Nations Environment Programme and the World Meteorological Organization. Exhibit C, http://www.ipcc.ch/organization/organization.htm.

[3] *See* 549 U.S. 497, 534 (2007).

are part of the Clean Air Act. The Disclosures further demonstrate that data managers relied upon by the IPCC sought to block public disclosure of the data and related reports on the grounds that the IPCC is not subject to Freedom of Information Act requests under U.S. law. EPA therefore failed to adhere to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553, and the Data Quality Act, 44 U.S.C. § 3516. Because EPA's Endangerment Finding was based in significant part on undisclosed policy and political goals of non-U.S. entities, and relied upon data concealed from public disclosure, it must be reconsidered.

*Third*, the Disclosures show that a clique of climate scientists, fundamentally relied upon by EPA, deliberately interfered with the publication of scientific conclusions contrary to those disseminated in the IPCC assessment reports. These climate scientists, including several at CRU, played critical roles in developing the IPCC assessment reports[4] and, therefore, EPA's Endangerment Finding. Other prominent climate scientists have asserted for years that their efforts to publish contrary science or identify flaws in the IPCC assessment reports have been actively quashed. The Disclosures prove the merit of these assertions, and undercut EPA's position that a scientific "consensus" exists. An artificially-created consensus, based on the suppression of contrary views, is no consensus at all.

The problems inherent in EPA's substitution of "peer review" for independent scientific investigation is underscored by the IPCC's recent admission that its assessment report regarding the impending disappearance of Himalayan glaciers was in error. *See infra,* Section IV. Recently, other IPCC claims regarding Amazonian desiccation, African agriculture, the attribution of extreme weather-related damages to rising temperatures, and other alleged harms have likewise been shown to lack sound scientific basis. *See infra,* Section IV. EPA has thus

[4] 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." Exhibit B.

relied upon scientists who deliberately undermined the peer review process and, by relying upon the IPCC, EPA made judgments based upon scientific assertions that the IPCC itself now admits were false.

Roger Pielke, Sr., a respected climate scientist, has stated, "These emails [the Disclosures] open up the possibility that big scientific questions we've regarded as settled may need another look. [The emails] ... reveal that some of these scientists saw themselves not as neutral investigators but as warriors engaged in battle with the so-called sceptics." Exhibit D, http://www.dailymail.co.uk/news/article-1235395/SPECIAL-INVESTIGATION-Climate-change-emails-row-deepens--Russians-admit-DID-send-them.html.

Because these recent disclosures document fundamental flaws in the science and the processes upon which EPA relies, the objections raised in this Petition are of "central relevance" to the Endangerment Finding and provide further support for the public comments filed by the Coalition and other parties in this proceeding.[5] EPA has a statutory obligation to convene a reconsideration proceeding to reassess thoroughly the data, studies and analysis upon which its Finding is premised.

## II. LEGAL STANDARD.

Under Section 307(d)(7)(B) of the Clean Air Act, the Administrator is obligated to convene a proceeding for reconsideration where the grounds for the objection either arose after the period for public comment or were otherwise impracticable to raise during that period, and are of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). An objection that demonstrates the agency's rule is invalid because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is of central relevance to the rule. *Id.*

[5] Comments submitted by the Western Energy Climate Coalition and the Coalition are available at Docket ID Nos. EPA-HQ-OAR-2009-0171-0322, -4041, -5158, -11454, -11455, -11536, and -11686.

§ 7607(d)(9). Reconsideration must "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.* § 7607(d)(7)(B).

The Disclosures became available on or about November 19, 2009, approximately five months after the close of the public comment period.[6] EPA's Finding hinges materially upon the reliability, independence, and scientific objectivity of the IPCC assessments and related synthesis reports. But the Disclosures and subsequent cascade of revelations of defective science by the IPCC over recent weeks show that these assessments and related synthesis reports relied in substantial part upon flawed data and were predicated on the policy and political priorities of the IPCC, which are different from those established for EPA under the Clean Air Act.

These facts fit squarely within the mandate for reconsideration contained in Section 307(d)(7)(B). Therefore, EPA must reconsider its Endangerment Finding, and should suspend any regulatory activity premised upon the flawed Endangerment Finding until the reconsideration is complete.

## III. EPA'S ENDANGERMENT FINDING IS BASED UPON FLAWED DATA.

One of the central assertions underlying EPA's Endangerment Finding is that global temperatures have risen 0.7 degrees Celsius over the last hundred years and that "unprecedented" warming has occurred over the last several decades. In its Technical Support Document (TSD), EPA states that "global mean surface temperatures have risen by 1.3 ± 0.3°F (0.74 ± 0.18°C) when estimated by a linear trend over the last 100 years (1906-2005)." TSD: Section 4(b).

[6] When the Disclosures were made public, the Coalition immediately supplemented the record on December 4, 2009, with this new information. *See* Exhibit E, EPA Docket ID No. EPA-HQ-OAR-2009-11686. EPA announced finalization of the Endangerment Finding on December 7, 2009, and the Coalition's supplementation was not posted to the docket until December 22, 2009. The Administrator has not demonstrated she considered the Coalition's supplementation in making her Finding, and so the Coalition hereby incorporates by reference the entirety of its December 4, 2009, comments and the accompanying materials into this Petition for Reconsideration.

This specific temperature finding depends upon a handful of temperature databases, one of which is maintained by CRU in conjunction with the Hadley Center at the UK Meteorological (Met) Office. This temperature dataset, known as "HadCRUT," served as a primary data source for the IPCC's finding of global warming. Other CRU datasets directly and indirectly underlie the IPCC findings on related climate indicators, including the CRU TS2.1 and CRU TS3.0 dataset of monthly maximum and minimum temperature, precipitation, rainday counts, vapor pressure, cloudiness and wind speed.[7] In fact, according to CRU, the HadCRUT dataset has provided many researchers with "basic data for a whole range of studies." Exhibit B.

The Disclosures demonstrate that at least some of the CRU datasets are fundamentally compromised, which undermines the "whole range" of climate science directly dependent on those datasets.[8] The IPCC relied on both the flawed CRU datasets and the resulting flawed science, and EPA, in turn, based its Finding on the IPCC.[9] As such, the CRU data form the primary basis for EPA's determination that "unprecedented" warming has occurred in recent decades. *See* Exhibit B and TSD. These data are also used to verify climate model outcomes. If the data are flawed, so too are the models and studies that rely upon those data. Therefore, because EPA based its Finding of future potential harm in large part on flawed datasets, EPA must reconsider its Finding.

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[7] These datasets are cited by the IPCC as Mitchell and Jones (2005).

[8] For a full accounting of the history of Climategate and its implications, *see* Exhibit F, http://joannenova.com.au/global-warming/climategate-30-year-timeline/.

[9] CRU is an "acknowledged primary data source by climate scientists around the world," and its "staff have been heavily involved in all four [IPCC] assessments, probably more than anywhere else relative to the size of an institution." Exhibit B. EPA, in turn, relies "most heavily" on IPCC's Fourth Assessment Report (AR4) in formulating its Endangerment Finding and the accompanying Technical Support Document. 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.").

## A. The CRU Data Are Not Reliable or Reproducible, and So Cannot Form the Basis of EPA's Finding of Anthropogenic-Induced Warming Over the Past 100 Years.

### 1. Data were "fudged."

According to CRU's own programming staff, the CRU temperature data were "fudged." Many files contained in the Disclosures evidence CRU's use of what CRU personnel describe as "fudge factors" to "massage" data. For example, the file BRIFFA_SEPT98_E.PRO reveals the programmer "***Appl[ied] a VERY ARTIFICIAL correction for decline!!,***" and literally labeled several of the adjustments as "fudge factors."[10] Exhibit A.

Elsewhere, the programmer asserts in the HARRY_READ_ME.txt file that, in the absence of data from the period 1990 through 2003, he made up what to do, stating, "What the hell is supposed to happen here? Oh yeah – there is no 'supposed', **I can make it up. So I have** :-)" Exhibit A (emphasis added).

EPA cannot support a scientific judgment premised on "very artificial," "fudged," and "made up" data. Because these Disclosures demonstrate that at least some of the temperature data managed and maintained by CRU were "fudged" or "made up," EPA must reconsider its Finding and demonstrate that the data upon which it relied are valid and not corrupted.

### 2. False temperature stations were created.

Among the most disquieting commentary weaved into the CRU programming code are remarks contained in the HARRY_READ_ME.txt file, which, in part, documents a CRU programmer's creation of fraudulent data when an "update" station matches a "master" station by WMO [World Meteorological Organization] code, but the data are "unpalatably inconsistent." Exhibit A. Confronted with these inconsistencies, this programmer appears to have created false

[10] *See* Exhibit G, http://wattsupwiththat.com/2009/12/04/climategate-the-smoking-code/ for one commenter's analysis of the adjustments contained in this file.

station codes for the update station data, thus deliberately fabricating non-existent temperature-recording stations. The programmer states:

> 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, but I really don't think people care enough to fix 'em, and it's the main reason the project is nearly a year late.

Exhibit A. He then admits, "You can't imagine what this has cost me – to actually allow the operator to assign false WMO 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)." *Id.*

The programmer goes on to explain,

> False codes will be obtained by multiplying the legitimate code (5 digits) by 100, then adding 1 at a time until a number is found with no matches in the database. THIS IS NOT PERFECT but as there is no central repository for WMO codes – especially made-up ones – we'll have to chance duplicating one that's present in one of the other databases. In any case, anyone comparing WMO codes between databases – something I've studiously avoided doing except for tmin/tmax where I had to – will be treating the false codes with suspicion anyway. Hopefully.

*Id.* During this work, the CRU programmer worries that "I could be throwing away all kinds of corrections – to lat/lons, to WMO (yes!), and more." *Id.* This kind of data manipulation, including creation of false temperature stations, undercuts the credibility of the CRU databases and requires EPA to reconsider its Endangerment Finding.

### 3. CRU cherry-picked data to create a warming bias in the temperature record.

Prompted by the Disclosures, scientists have uncovered other issues related to CRU's dataset, including evidence that CRU likely injected an artificial warming bias into the

temperature data.[11] For example, the Moscow-based Institute of Economic Analysis (IEA) claims the Met Office's Hadley Center for Climate Change tampered with Russian meteorological station data that did not support the anthropogenic global warming theory. *See* Exhibit I, http://en.rian.ru/papers/20091216/157260660.html; and http://www.cato-at-liberty.org/2009/12/17/new-study-hadley-center-and-cru-apparently-cherry-picked-russias-climate-data/. The IEA states that the HadCRUT dataset employed data from only twenty-five percent (25%) of the available Russian weather stations, many of which supplied incomplete data but supported the global warming hypothesis. *Id.* In contrast, data from Russian stations that provided complete observations, but that did *not* support the global warming hypothesis, were discarded. Failure to include those stations created 0.64°C *more* warming than if all the raw data had been employed. *Id.*

EPA has not even attempted to independently examine documentation of the temperature records and supporting computer algorithms, but instead has accepted the CRU data and output at face value, based entirely on the assertion that the data were "peer reviewed." But the Disclosures' revelations that the underlying data were flawed, "fudged," and cherry-picked in an attempt to support a pre-determined outcome wholly undermines EPA's assumption of validity. EPA erred in equating "peer review" with scientific accuracy and legitimacy, as evidenced by the fact that the alleged "peer review" was performed by a small, self-selected group and failed to insure that data were soundly maintained and generated.

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[11] The UK Information Commissioners Office has recently determined that the University of East Anglia's CRU violated the UK's Freedom of Information Act by refusing to comply with requests for data, but acknowledging that it could not prosecute those involved because the complaint was made untimely. Exhibit H, http://www.timesonline.co.uk/tol/news/environment/article7004936.ece. ("The university at the centre of the climate change row over stolen e-mails broke the law by refusing to hand over its raw data for public scrutiny. The University of East Anglia breached the Freedom of Information Act by refusing to comply with requests for data concerning claims by its scientists that man-made emissions were causing global warming.")

### 4. The data have been partially destroyed, cannot be recreated, and lack scientific integrity.

Indeed, in the HARRY_READ_ME.txt file (*see* Exhibit A), the CRU programmer admits the CRU data are without integrity:

> 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.**

Exhibit A (emphasis added). And:

> 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... take the above example, the filenames in the _mon and _ann directories are identical, but the contents are not. And the only difference is that one directory is apparently 'monthly' and the other 'annual' – yet both contain monthly files.

*Id.* And:

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

*Id.* And:

> Back to the gridding. I am seriously worried that our flagship gridded data product is produced by Delaunay triangulation – apparently linear as well. As far as I can see, this renders the [weather] station counts totally meaningless. It also means that we cannot say exactly how the gridded data is arrived at from a statistical perspective – since we're using an off-the-shelf product that isn't documented sufficiently to say that. . . . Was too much effort expended on homogenisation, that there wasn't enough time to write a gridding procedure? Of course, it's too late for me to fix it too. Meh.

*Id.* And:

> Wrote 'makedtr.for' to tackle the thorny problem of the tmin and tmax databases not being kept in step. Sounds familiar, if worrying. am I the first person to attempt to get the CRU databases in working order?!!"

The programmer concludes by noting that "This whole project is SUCH A MESS," that "It's botch after botch after botch," and that "I am seriously close to giving up, again. The history of this is so complex that I can't get far Enough into it before my head hurts and I have to stop. Each parameter has a tortuous history of manual and semi-automated interventions that I simply cannot just go back to early versions and run the update prog." *Id.*

Ultimately, this programmer's frustrations were affirmed by the organization for which he worked: CRU disclosed in October 2009 that it had destroyed the raw data for its global surface temperature dataset and kept only the so-called "value-added" data. Exhibit J, http://www.cru.uea.ac.uk/cru/data/availability/. Thus, at the present time, neither EPA nor the public has any way to review the original temperature data to remove (or even identify) the so-called "value" added by the agenda-driven scientists at CRU. This makes verification impossible and flies in the face of the spirit of the Administrative Procedure Act and the Data Quality Act. EPA has no choice but to end its reliance on the scientific analysis and assessment reports – including the IPCC reports – that used or relied in any fashion upon the flawed, inaccurate, unreliable, corrupted and/or subsequently-destroyed CRU data. *See Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 935 (5th Cir. 1998) (a "regulation cannot stand if it is based on a flawed, inaccurate, or misapplied study").

### B. The Unreliability of the CRU Data Renders Unreliable Any Study Based on that Data.

Although the Administrator has asserted that the Endangerment Finding can survive the now demonstrably-defective CRU data,[12] EPA provides no support for this assertion, nor can it. EPA admits the public record consists primarily of "synthesis products" and "assessment reports," which are in turn summaries of scientific studies performed by others. The CRU data

[12] *See, e.g.,* EPA Response to Comments, Volume 11: 2-3.

supported a "whole range of studies" in climate science and were heavily used by the IPCC in preparing its assessment reports. *See* Exhibit B and footnote 9, *supra*. EPA, in turn, admits it relied heavily upon the IPCC reports. *See* 74 Fed. Reg. 66511 and footnote 9, *supra*. Further, the U.S. Climate Change Science Program (CCSP) and other agencies and scientists have likewise relied upon the IPCC reports and CRU data. Since these other bodies evidently employed the flawed data,[13] it is not apparent what (if any) valid, untainted science remains in EPA's administrative record. Indeed, by failing to make any effort to address the tainted and questionable science, or to distinguish it from other sources, EPA has failed to demonstrate that it relied on valid data or science to support its Endangerment Finding.

It is incumbent upon EPA to assemble an administrative record that is free of flawed or questionable data. Without such a record, the public and the courts are deprived of any ability to assess whether there is a valid basis for EPA's Finding. EPA cannot simply assert, without explanation, that there are "multiple lines of evidence" that are free of taint. *See* EPA Response to Comments, Volume 11: 3. EPA has not publicly identified and separated any flawed CRU data from the hundreds of studies that refer to or are based on that flawed data. Nor has EPA determined the extent to which the CRU data influenced or underlay the IPCC assessments. EPA therefore acts arbitrarily when it merely asserts, without documentation or explanation, that its Finding is independent of any defective data. As the D.C. Circuit has stated, "The EPA claims it made a reasonable choice-and it may be right-but simply to state such a claim does not make it so." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053 (D.C. Cir. 2001). *See also Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1186-87 (D.C. Cir. 1981) ("Of course the

[13] *See, e.g.*, U.S. Global Change Research Program 2009, n.44, 45, 49-53 (citing IPCC for assertions that human activities have caused recent global warming).

Administrator's conclusions must be supported by the record, and [s]he may not engage in sheer guesswork.").

### C. The Biases Revealed by the CRU Scientists Likely Infected Other Temperature Datasets.

Although the Disclosures specifically document data corruption and management problems with the CRU dataset, the conduct documented in the Disclosures – as well as other evidence that has come to light in the past two months – calls into question all of the temperature data cited by EPA. The climate scientists EPA relies upon often "peer reviewed" each other's work and collaborated to limit the persons reviewing their work to those who shared their policy agenda. These are not the objective, arms-length relationships that give the peer review process scientific integrity. *See infra*, Section V.

Under Office of Management & Budget (OMB) guidelines applicable to scientific support for agency decisions, this manipulation of the peer review process destroys any presumption that "peer review" alone is sufficient to insure all of the databases are independent and free of bias, deliberate or inadvertent. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8454-55 (Feb. 22, 2002) (noting that the presumption of objectivity normally accorded to peer-reviewed information is rebuttable based on a persuasive showing in a particular instance). Given the lack of objectivity demonstrated by some of the key scientists upon whom EPA relies, EPA must now independently reconsider all of the temperature records.

The scientists at CRU responsible for the tainted data appear to have had over the past decade a close collaborative relationship with the climate scientists responsible for managing the other surface-based temperature databases through NASA and NOAA. James Hansen (and NASA colleagues) who maintained the NASA GISS (Goddard Institute for Space Studies)

dataset, along with Thomas Karl (and NOAA colleagues) who maintained the NCDC (National Climatic Data Center) dataset, sent, received, or were copied upon scores of the emails released in connection with the Disclosures. At a minimum, Phil Jones, Hansen, Karl and others at these agencies shared an unusually close relationship that extended to sharing portions of their respective datasets and discussing disparities among them. *See, e.g.,* Exhibit A, 926087421.txt, May 7, 1999; and 939154709.txt, Oct. 5, 1999. The extent to which these very close relationships affected the manner in which the separate databases and homogenizing algorithms were created is not fully disclosed in the current record. However, the cliquish nature and lack of objectivity of this so-called peer review process eliminates EPA's ability to assume the databases are valid, merely because they have been "peer reviewed."

There are numerous and recently-released studies documenting significant warming biases in the temperature databases that, in light of the Disclosures, reveal the fruit of this manipulated process.[14] For example, adjustments made by the Global Historical Climatology Network (GHCN)[15] in Darwin, Australia, transformed a temperature trend *falling* at 0.7°C per century to one that was *warming* 1.2°C per century. Exhibit W, http://wattsupwiththat.com/2009/12/08/the-smoking-gun-at-darwin-zero/. In Darwin, raw data was averaged from three temperature monitoring stations; data from one station had remained untouched, while data from the other two stations had been adjusted not only to change the degree of the trend, but also the direction of the trend itself. *Id.* To do so, GHCN imported a

[14] *See, e.g.*, Exhibit K, Balling and Idso 2002; Exhibit L, Christy et al. 2006; Exhibit M, Christy and Norris 2009; Exhibit N, D'Aleo 2009; Exhibit O, D'Aleo 2010; Exhibit P, Davey and Pielke 2005; Exhibit Q, Davey et al. 2006; Exhibit R, Hale et al. 2006; Exhibit S, Pielke et al. 2007a; Exhibit T, Pielke et al. 2007b; Exhibit U, Soon et al. 2004; and Exhibit V, Watts 2009.

[15] The Global Historical Climatology Network database contains historical temperature, precipitation, and pressure data for thousands of land stations worldwide, and it is used and referenced by NOAA's NCDC and NASA's GISS. It is also been employed in several international climate assessments, including the IPCC's Fourth Assessment Report.

stair-stepped upward "adjustment" of approximately 0.5°C per decade from 1940 to 1980, even though urban heat island effects in the recent past indicate the need for downward adjustments to properly account for such effects. *Id.*

Similar "adjustments" are also evident in one striking comparison of raw temperature data with homogenized temperature data "adjusted" by the New Zealand national weather service, the National Institute of Water & Atmospheric Research (NIWA). Exhibit X, Treadgold 2009. There, a widely-known graph prepared in the 1980s by Dr. Jim Salinger, formerly of the CRU, has long served as the basis for establishing global warming in New Zealand. That graph, attached as Exhibit X to this Petition, shows a steady warming trend of rising temperatures in New Zealand from early in the twentieth century through the year 2000. Recently, however, 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, which shows no warming whatsoever. *Id.* The New Zealand Climate Science Coalition concluded that all of the "adjustments" made by Salinger and the NIWA served to show inaccurate increases in warming. *Id.*

Faulty temperature monitoring has also created a warming bias in the temperature records. A dramatic reduction in the number of monitoring stations reflected in the current databases used by IPCC and EPA, combined with the relocation of instruments, likely contributed to false warming trends over the entire globe, as reported by the Moscow Institute of Economic Analysis and others. *See* Exhibit I. *See also* Exhibit Y, D'Aleo & Watts (2010). These marked discontinuities in the temperature monitoring stations likely skew global temperature records and create erroneous warming trends in the data.

All of these studies take on increased importance in light of the Disclosures, which not only call into question the key CRU dataset, but also serve warning that some other climate scientists have fallen afoul of the temptation to "fudge" data. EPA has no basis to rule out whether other datasets have been "fudged," whether purposefully or not, because EPA has not independently evaluated the data.

EPA's assertion that global temperatures have risen markedly in recent years as a result of anthropogenic GHG emissions has been further undermined by an important study just released by NOAA, which attributes much of the alleged warming in prior decades to water vapor. Exhibit Z, http://www.noaanews.noaa.gov/stories2010/20100128_watervapor.html. In fact, according to Susan Solomon, lead author of the study, the findings indicate that human emissions may have a considerably smaller role in climate change than previously thought. Exhibit AA, http://www.ecofactory.com/news/noaa-nasa-water-vapor-largely-responsible-global-warming-012910. Again, this recent NOAA study, which corroborates the views of many scientists that water vapor is the primary GHG that influences warming, has not yet been considered by EPA. By itself, the significant new study requires the reconsideration mandated by Section 307(d)(7)(B).

## IV. EPA UNLAWFULLY DELEGATED ITS STATUTORY RESPONSIBILITIES TO A FOREIGN ENTITY.

EPA avowedly places "primary and significant weight" on the IPCC assessment reports. 74 Fed. Reg. at 66511. EPA defends this approach on the grounds that these assessment reports include "consensus conclusions" based on the "body of scientific literature" and "undergo a rigorous and exacting standard of peer review." *Id.* In fact, however, the Disclosures demonstrate that the IPCC assessments were driven by policy priorities outside the Clean Air

Act.[16] Recent media reports have also documented numerous breakdowns in the IPCC process in favor of advancing policy objectives masquerading as science.[17] EPA has therefore unlawfully sub-delegated authority to a foreign agency with different policy priorities and relied upon invalid scientific assessments resulting from IPCC's agenda.

The Disclosures demonstrate that climate scientists felt pressured to present a unified front – and an agreed-upon narrative of global warming – even when there was not one. *See* Exhibit CC, Carter 2007; Exhibit DD, http://online.wsj.com/article/SB10001424052748704398304574598230426037244.html. While working on an IPCC assessment report, Keith Briffa, a scientist at CRU, wrote to Michael Mann, a professor at Pennsylvania State University: "**I tried hard to balance the needs of the science and the IPCC, which were not always the same.**" Exhibit A, 1177890796.txt, Apr. 29, 2007 (emphasis added). Kevin Trenberth, Head of the Climate Analysis Section of National Center for Atmospheric Research in Boulder, Colorado, and lead author of a chapter in the IPCC AR4 Working Group I report, stated in an October 2009, email that "we can't account for the lack of warming at the moment and it is a travesty that we can't." Exhibit A, 1255530325.txt, Oct. 2009. Briffa also spoke of pressure to produce a clean picture of "apparent unprecedented warming in a thousand years or more in the proxy data," yet Briffa admitted that, "I believe that the recent warmth was probably matched about 1000 years ago," which is contrary to the IPCC

[16] As noted in footnote 2, the IPCC is comprised of members from the United Nations and World Meteorological Organization, including nations from a broad spectrum of economic, energy, development and social circumstances and goals. The United States is a member of the UN and IPCC, but the needs and goals of the U.S. (and the judgment and expertise of EPA) obviously are not necessarily the same as those of the IPCC.

[17] EPA cites to the IPCC's *Procedures for Preparation, Review, Acceptance, Adoption, Approval, and Publication of the IPCC Reports* (1999) to justify the use of assessment reports and show that IPCC has a formal drafting and review process. (EPA Response to Comments, Volume 1: 9). EPA relied on the stated policies and procedures for the IPCC report process, yet EPA has thus far failed to publicly evaluate whether the procedures and processes were, in fact, adhered to. *See* Exhibit BB, Feb. 4, 2010 Barton Letter to Administrator Jackson. The Disclosures demonstrate that these procedures likely were not adhered to, and EPA must re-evaluate its heavy reliance on the assessment reports based on this new knowledge.

position. Exhibit A, 0938018124.txt, Sep. 22, 1999. As Christopher Landsea, a former IPCC scientist and a leading expert on hurricanes and cyclones, stated, he could not "in good faith continue to contribute to a process that I view as both being motivated by preconceived agendas and being scientifically unsound." Exhibit EE, http://www.heartland.org/full/16806/Climate_Scientist_Quits_IPCC_Blasts_Politicized_Preconceived_Agendas.html.

In order to present a narrative of "unprecedented" global warming, IPCC authors colluded to exclude various scientific studies from the IPCC reports. Phil Jones, who has temporarily resigned from his position as CRU Director and who was a co-author with Trenberth on IPCC Working Group I chapters, 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," vowing that "Kevin and I will keep them out somehow – even if we have to redefine what the peer-review literature is!" Exhibit A, 1089318616.txt, Jul. 8, 2004.

The pressure to conform to a perceived "global warming" consensus also led to manipulation of data to produce the outcome IPCC authors wanted. Emails and computer code contained in the Disclosures reveal that scientists at CRU manipulated their temperature databases and their findings with undisclosed, unverified and arbitrary adjustments. *See supra*, Section III(A) and (B). Emails contained in the Disclosures confirm certain scientists' efforts to "artificially adjust" data through active collaboration to "reduce the positive slope," "reduce the ocean blip," and "contain the medieval warm period." *See, e.g.,* Exhibit A, 843161829.txt, Sept. 19, 1996 (Gary Funkhouser, of the University of Arizona, writing to Briffa, "I really wish I could be more positive about the Kyrgyzstan material, but I swear I pulled every trick out of my sleeve trying to milk something out of that"); Exhibit A, 1163715685.txt, Nov. 16, 2006 (Briffa noting

that "the PC1 time series in the Mann et al. analysis was adjusted to reduce the positive slope in the last 150 years," and that "this adjustment was arbitrary and the link between Bristlecone pine growth and CO2 is, at the very least, arguable."); Exhibit A, 1254108338.txt, Sept. 27, 2009 (Tom Wigley, of the University Corporation for Atmospheric Research, (UCAR) strategizing "to partly explain the 1940s warming blip," and noting that "if we could reduce the ocean blip by, say, 0.15 degC, then this would be significant for the global mean – but we'd still have to explain the land blip . . . It would be good to remove at least part of the 1940s blip, but we are still left with 'why the blip'."); Exhibit A, 1059664704.txt, July, 31, 2003 (Mann sending calibration residuals to Tim Osborn, at CRU, and acknowledging that some are "pretty red," and asking Osborn not to "pass this along to others without checking w/ me first. This is the sort of 'dirty laundry' one doesn't want to fall into the hands of those who might potentially try to distort things..."); Exhibit A, 0939154709.txt, Oct. 15, 1999 (Osborn discussing how data are truncated to stop an apparent cooling trend that appears in the results); Exhibit A, 1054736277.txt, June 4, 2003 (Mann noting "it would be nice to try to 'contain' the putative 'MWP' [Medieval Warm Period]").

Perhaps the most egregious example of manipulation to get the "correct" political result comes from a November 1999 email in which Phil Jones, CRU's former director, boasted, "I've just completed Mike's Nature trick of adding in the real temps to each series for the last 20 years (ie from 1981 onwards) and from 1961 for Keith's to hide the decline." Exhibit A, 942777975.txt, Nov. 16, 1999.[18] Jones's email evidences CRU staff's effort to deliberately

[18] Jones's communication refers to a noticeable temperature divergence, beginning in the 1960s, between proxy temperature data derived from tree rings and data from instrumental temperature measurements. To deal with this divergence, Jones describes his technique of disguising the temperature declines in the proxy data by simply replacing such data after 1961 with instrumental temperature measurements, which trended upward over time. In short, rather than objectively report that the tree ring data showed a temperature decline, Jones replaced the tree ring data with instrumental records showing a temperature increase, an obvious effort to manipulate data to fit a preconceived warming conclusion.

manipulate data to yield desired results that best fit CRU's and IPCC's predetermined conclusions. *See, e.g.*, Exhibit FF, http://www.americanthinker.com/2009/11/crus_source_code_climategate_r.html.

More recent revelations similarly illustrate efforts by IPCC scientists to advance the anthropogenic warming hypothesis. Most notably, new reports show that the IPCC's prediction of a "very high" probability Himalayan glaciers will disappear by 2035 was not grounded in science but was instead placed in the assessment reports for political purposes. Exhibit GG, http://www.dailymail.co.uk/news/article-1245636/Glacier-scientists-says-knew-data-verified.html (The coordinating lead author of the report's chapter on Asia, Dr. Murari Lal, said he was aware the statement did not rest on peer-reviewed scientific research, but "thought that if we can highlight it, it will impact policy-makers and politicians and encourage them to take some concrete action.")[19]

Recently, new revelations of errors, omissions or lack of valid scientific support for assertions made in the IPCC reports have come to light on an almost-daily basis. *See* Exhibit II, http://eureferendum.blogspot.com/2010/01/and-now-for-amazongate.html (IPCC reports alleging climate-caused harm to the Amazon forests not supported by science); Exhibit JJ, http://www.telegraph.co.uk/earth/environment/climatechange/7111525/UN-climate-change-panel-based-claims-on-student-dissertation-and-magazine-article.html (IPCC reports alleging mountain ice reductions in the Andes, Alps, and Africa were based on unsubstantiated and non-scientific material, such as anecdotal evidence from mountain guides or articles in climbing magazines); Exhibit KK, http://www.timesonline.co.uk/tol/news/environment/article7017907.ece

[19] In the wake of the news that IPCC reports contained erroneous claims concerning Himalayan glaciers, India has now formed a new climate change body to publish its own findings regarding the country's climate, expressing concern over perceived shortcomings of the IPCC's processes for compiling its reports. *See* Exhibit HH, *http://www.telegraph.co.uk/earth/environment/climatechange/7157590/India-forms-new-climate-change-body.html.*

(Prof. Chris Field, current lead author of IPCC's climate impact team, states he "cannot find support" for claim in IPCC 2007 Synthesis Report that global warming could cut rain-fed North African crop production by up to 50% by 2020); Exhibit LL, http://www.timesonline.co.uk/tol/news/environment/article7000063.ece?token=null&offset=0&page=1 (IPCC's attribution of an increase in the number and severity of extreme weather-related events to global warming misconstrued underlying report's findings, which found insufficient evidence of a statistical relationship between temperature increase and damage); Exhibit MM, http://www.telegraph.co.uk/earth/environment/climatechange/7177230/New-errors-in-IPCC-climate-change-report.html (recent disclosures of other IPCC errors, including flaws in a diagram used to illustrate energy potential from wave power, and erroneous reports that half the Netherlands was below sea level).

What these recent revelations demonstrate is that, throughout the IPCC process which EPA so heavily relies upon, mistakes were made, questionable evidence relied upon, data manipulated, and a systematic bias pursued of "proving" anthropogenic warming, with headlong disregard for any contrary data or scientific viewpoints. At a minimum, these recent disclosures should give EPA considerable pause, and cry out for the kind of thorough-going reconsideration needed to ensure EPA's ultimate determination is based on sound science and valid data.

The end result is the policy-driven agenda of a foreign entity substituting for the "scientific judgment" required of EPA under the Clean Air Act. Courts have held that sub-delegations of decision-making authority to outside parties is improper for exactly this reason. "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). Further, sub-delegation to outside entities

"increases the risk that these parties will not share the agency's 'national vision and perspective,' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme . . . aggravat[ing] the risk of policy drift inherent in any principal-agent relationship." *Id.* at 565-66 (internal citations omitted).

Sub-delegation by an agency is assumed to be improper absent an affirmative showing of Congressional authorization. *Id.* at 565. No such legitimate authorization exists here. The IPCC is not authorized by Congress to make policy for the American public. The actual bases for EPA's Finding that unprecedented and dangerous global warming exists is not the Administrator's independent "scientific judgment," but rather the result of an international "intergovernmental" process and agenda. EPA has not made its own independent and objective analysis and assessment of all of the pertinent data and science. Instead, EPA has merely "rubber-stamped" the IPCC's conclusions with only "vague [and] inadequate assertions of final reviewing authority." *Id.* at 568.

This renders EPA's reliance on the IPCC an unlawful sub-delegation of its regulatory responsibilities to an outside, non-U.S. entity, and provides a separate legal basis as to why EPA must reconsider the Endangerment Finding. *See Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001) (ruling that an agency abdicates its role as a rational decision-maker if it does not exercise its own judgment and instead cedes near-total deference to a private party's conclusions); *Assiniboine & Sioux Tribes v. Bd. of Oil and Gas,* 792 F.2d 782, 795 (9th Cir. 1986) (noting that without meaningful independent review of an outside body's actions, an agency unlawfully delegates its authority). At this juncture, the only proper course for EPA is to reconsider its Endangerment Finding in its entirety, and to refrain from taking any further regulatory action based on that Finding until the reconsideration process is completed.

## V. THERE IS NO TRUE SCIENTIFIC CONSENSUS WHEN THE PEER REVIEW PROCESS IS COMPROMISED.

As discussed above, EPA justifies its heavy reliance on the "science" of others, rather than on its own scientific determinations, solely on the basis that such "science" was "peer reviewed." Yet the Disclosures reveal an orchestrated effort by a clique of climate scientists to subvert the peer review process and stifle scientific debate. The Disclosures show that certain IPCC and CRU scientists interfered with the editorial boards of scientific journals, boycotted various journals, suppressed publication of dissenting viewpoints, and collaborated together to gain favorable peer review. For example, lead IPCC authors and key climate scientists including Wigley, Jones, Mann and Mike Hulme (of the University of East Anglia) worked together to remove the editor of *Geophysical Research Letters* (GRL) and *Climate Research* for publishing, or considering publication of, articles that contradicted their views on climate change. Tom Wigley wrote, "If you think that Saiers [GRL editor] is in the greenhouse skeptics camp, then, if we can find documentary evidence of this, we could go through official AGU [American Geophysical Union] channels to get him ousted." Exhibit A, 1106322460.txt, Jan. 20, 2005. Later, following the resignation of Mr. Saiers, Mann, author of the now-discredited hockey stick graph, boasted, "The GRL leak may have been plugged up now w/ new editorial leadership ...." Exhibit A, 1132094873.txt, Nov. 15, 2005.

Likewise, in an April 24, 2003 email to Timothy Carter, copying Mike Hulme and Phil Jones, Wigley considered the best way to remove editor Hans von Storch from *Climate Research* and discussed Hulme's idea to get the editorial board to resign. Exhibit A, 1051190249.txt, Apr. 24, 2003. Dr. von Storch subsequently resigned. Exhibit A, 1060002347.txt, Aug. 4, 2003. The Disclosures also show that Phil Jones, former CRU director, and Ben Santer, of the Lawrence Livermore National Laboratory in California, went over the head of the editor of *Weather*, with

Jones threatening the Royal Meteorological Society Chief Executive that he would no longer submit information to Royal Meteorological Society journals if the *Weather* editor refused to "back down." Exhibit A, 1237496573.txt, Mar. 19, 2009. Mann[20] has also encouraged his colleagues to change their opinion of the widely-read, well-respected journal *Climate Research*, and considered proposing that they "no longer submit to, or cite papers in, this journal." Exhibit A, 1047388489.txt, Mar. 11, 2003.

These scientists did not act as a group of independent, objective scientists who welcomed public airing of the complex science issues and embraced legitimate criticism. Instead, these scientists tried mightily to allow only one perspective on the global warming debate to be published and legitimized. EPA then relied heavily on this manufactured "scientific consensus" to disregard any contrary views or contrary evidence to its Finding of anthropogenic "endangerment." This utter breakdown of the scientific method is epitomized by Wigley's expression of concern that individuals with genuine scientific credentials, but who disagree with the IPCC position, "could . . . ensure that 'anti-greenhouse' science can get through the peer review process . . ." and that "How to do deal with this is unclear." Exhibit A, 1051202354.txt, Apr. 23, 2003.

This biased approach to science not only suppresses legitimate debate; it endorses findings that may prove to be scientifically erroneous or unsubstantiated. For instance, serious scrutiny cannot be expected from hand-picked, wholly-supportive reviewers, yet Jones encouraged a like-minded author to submit the names of five scientists as recommended peer reviewers because they "know the sorts of things to say." Exhibit A, 1249503274.txt, Aug. 5,

[20] Mann, who features prominently in many of the emails discussing removal of journal editors and suppression of alternate viewpoints, has received nearly $2.4 million in stimulus money to study issues related to global warming through grants awarded to the National Science Foundation. To date, no effort has been made to suspend or reconsider Mann's stimulus grants. Exhibit NN, *http://online.wsj.com/article/SB10001424052748704541004575010931344004278.html#printMode.*

2009. Conversely, prominent scientists have stated for years that their efforts to publish contrary science have been stifled and that they have seen their grant money dry up and research positions become unavailable to them. These same scientists claim they have been publicly ridiculed and their reputations made to suffer if they take issue with the supposed "consensus" on the science. *See* Exhibit CC; Exhibit DD; Exhibit OO, http://opinionjournal.com/extra/?id=110008220; and Exhibit PP, Carter 2008.

Indeed, Roger Pielke, a climate scientist who has, on occasion, publicly disagreed with IPCC conclusions, has described how differing points of view were suppressed, observing:

> There has been, however, in my view an unfortunate change over time where reviewers who disagree with already published work recommend rejection of subsequent work rather than letting the community view and assess the different perspectives on a science issue.

Exhibit A, 1101133749.txt, Nov. 19, 2004. This systemic suppression of differing viewpoints, in turn, has dissuaded prominent scientists from seeking publication in peer-reviewed journals. As noted by one IPCC author, "even here [in the UK] they [climate change skeptics] don't seem to be bothering with journals at all recently." Exhibit A, 1256765544.txt, Oct. 28, 2009. Yet EPA, like the IPCC, has ignored or downplayed contradictory science or science published in alternative formats, where publication was available to scientists who challenged the IPCC's global warming agenda.

In light of the documented flaws in the peer review process used by the IPCC and some of its associated scientists, EPA cannot continue to assert that a true "scientific consensus"[21]

[21] Although the Endangerment Finding acknowledges that the IPCC and other synthesis assessment reports convey merely "consensus conclusions," 74 Fed. Reg. at 66511, EPA nevertheless places primary and significant weight on them. Yet, as discussed more fully in Comments submitted by the Western Energy Climate Coalition and the Coalition at Docket ID No. EPA-HQ-OAR-2009-0171-0322 (p. 2-5), a purported "consensus" is irrelevant to science and should be immaterial to EPA's Finding. EPA's duty in making its Finding is not to tally votes – that is not science – but to make a sound scientific judgment within the parameters of the Clean Air Act.

exists regarding alleged "unprecedented" global warming simply because the science was "peer reviewed." As the IPCC process amply illustrates, "'scientific consensus' can be created through purchased research and the manipulation of a 'scientific' literature...." Haack, *Peer Review and Publication: Lessons for Lawyers*, 36 Stetson L. Rev. 789, 818 (2007) (internal citations omitted). Given the Disclosures, EPA cannot rely on synthesis assessments simply because they were "peer reviewed," any more than it can discredit contrary science merely because it was not. Consistent with its responsibilities under the Clean Air Act, EPA must make its own independent assessment and scientific judgment. Here, such an assessment and judgment has not yet occurred. The major deficiencies identified in this "peer review" process demands that EPA reconsider its Finding.

## VI. EPA'S FINDING VIOLATES THE ADMINISTRATIVE PROCEDURE ACT AND THE DATA QUALITY ACT.

### A. EPA's Finding Violates the Administrative Procedure Act.

The Disclosures demonstrate that much of the technical data and studies on which EPA based the Endangerment Finding were, quite purposefully, hidden from public disclosure by IPCC scientists. EPA has made no attempt to disclose these studies or data, in direct contravention of the Administrative Procedure Act (APA). 5 U.S.C. § 553.

The APA requires agency decisions to be supported by a public record that is sufficiently transparent to permit the public to understand the basis of the decision and to allow courts to review the decision for compliance with the law. 5 U.S.C. § 553. *See also United States v. Nova Scotia Food Prod. Corp.*, 568 F. 2d 240, 251 (2d Cir. 1977) (agreeing that "unless the scientific data relied upon by the agency are spread upon the public records, criticism of the methodology used or the meaning to be inferred from the data is rendered impossible"). Under Section 553 of the APA, "[i]n order to allow for useful criticism, it is especially important for the agency to

identify and make available *technical studies and data* that it has employed in reaching the decisions to propose particular rules." *Am. Radio Relay League, Inc., v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (emphasis added). *See also Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006).

Far from disclosing the underlying technical studies or data, EPA relies instead on summaries and assessments from third parties. These summaries and assessments rely on scientific studies, which in turn rely on undisclosed data and data adjustments. Indeed, EPA states that it relies heavily on the IPCC synthesis reports, yet the IPCC admits it "does not conduct any research nor does it monitor climate related data or parameters." Exhibit C. Thus, EPA is at least two steps removed from most of the "technical studies and data" upon which its Finding is based. By relying on such summaries and assessments, rather than actual technical studies and/or underlying data, EPA has failed to comply with the law. EPA does not even purport to have reviewed the data or data adjustments relied on by IPCC or other agencies. Likewise, neither the raw nor homogenized data are posted to the Endangerment rulemaking docket or have been made available for public review by EPA. In short, EPA's Finding concludes that anthropogenic global warming endangers public health, yet it has failed to provide the public with the technical studies or data on which it places primary and significant weight to support those assertions.

The D.C. Circuit has criticized this type of "hide the ball" tactic, where the public cannot easily review or verify the sources relied upon by EPA, stating, "To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere

bureaucratic sport." *Solite Corp. v. EPA,* 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting *Conn. Light & Power Co.,* 673 F.2d at 530). *See also Am. Radio Relay League, Inc.,* 524 F.3d at 237. Now that the Disclosures have been made public, the "accuracy of important material in the record is in question," including both underlying data and peer reviewed studies, which should be made available for public comment. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1403 (9th Cir. 1995). It is now incumbent on EPA to disclose this information; allow fully-informed comment by the public; and then, taking those informed comments into account, reevaluate its Finding.

In fact, however, it is doubtful EPA can disclose the technical studies and data upon which it so heavily relies, not only because Phil Jones and his colleagues at CRU deliberately withheld data from both EPA's and the public's review, but also because some of that raw data has now been destroyed. Jones often discussed how CRU and IPCC could evade requests for information and freedom of information (FOI) laws, instructing colleagues to delete emails and correspondence regarding the IPCC's Fourth Assessment Report, Exhibit A, 1212063122.txt, May 29, 2008, and promising that "[i]f they ever hear there is a Freedom of Information Act now in the UK, I think I'll delete the file rather than send to anyone." Exhibit A, 1107454306.txt, February 2, 2005. Jones also observed that CRU data and code are covered by agreements with outsiders, and that CRU would be "hiding behind them." Exhibit A, 1106338806.txt, January 21, 2005.

Further, at least one scientist engaged by EPA to review and approve EPA's TSD was aware that underlying data were being concealed under the pretext of standing behind the IPCC's foreign status. Gavin Schmidt,[22] a manager of NASA's temperature database who participated in

[22] Gavin Schmidt is involved in the management of the NASA temperatures records. NASA and its Goddard Institute for Space Studies have dragged their feet for nearly three years in responding to a Competitive Enterprise

the review of EPA's TSD, was aware that data supporting EPA's conclusions were being hidden from the Agency. In 2008, once FOI requests were received, Jones wrote to Schmidt that, "The FOI line we're all using is this. **IPCC is exempt from any countries FOI** – the skeptics have been told this. Even though we (MOHC, CRU/UEA) possibly hold relevant info the IPCC is not part our remit (mission statement, aims etc) therefore we don't have an obligation to pass it on." Exhibit A, 1219239172.txt, Aug. 20, 2008 (emphasis added). *See also* Exhibit A, 1210341221.txt, May 9, 2008; and 1228330629.txt, Dec. 3, 2008. EPA's Findings therefore rely on the input of at least one scientist who knew data were being withheld from review by EPA and the public.

As noted above in footnote 11, the British government has recently found this conduct illegal under UK law. *See* Exhibit H. This helps illustrate why the IPCC processes relied upon by EPA are wholly inadequate under comparable American disclosure laws as well. While IPCC may not be subject to U.S. Freedom of Information Act (FOIA) requests, EPA is, and it cannot evade its statutory obligations under FOIA and the APA by offshoring its work to an entity unaccountable under United States law.

### B. EPA's Finding Violates the Data Quality Act.

The Disclosures also demonstrate that EPA's Finding does not comply with federal transparency and data quality laws. To help ensure transparency, Congress passed the Data Quality Act (Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001) (44 U.S.C. § 3516), which ensures that scientific risk assessments made by

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Institute ("CEI") Freedom of Information Act request for documents and code relating to NASA's data adjustments. Ultimately, CEI filed notices of intention to file suit in the United States District Court for the District of Columbia to compel NASA's production of this information. *See* Exhibit QQ, http://www.washingtontimes.com/news/2009/dec/03/nasa-embroiled-in-climate-dispute.

agencies follow established guidelines designed to promote transparency, scientific discipline and accountability.

Guidelines promulgated by the Office of Management and Budget (OMB) under the Data Quality Act provide guidance to federal agencies to ensure and maximize the quality, objectivity, utility and integrity of information, including statistical information. *See* 67 Fed. Reg. at 8452. These OMB guidelines require that an agency's dissemination of "influential" scientific and statistical information include a high degree of transparency about data and methods to facilitate the reproducibility of that information. To that end, agencies are required to ensure sufficient transparency about data and methods - including those analyses of data that combine information from multiple studies - such that an independent reanalysis could be undertaken by a qualified member of the public. *See* 67 Fed. Reg. at 8460. *See also* Exec. Order No. 12866, 58 Fed. Reg. 51735, 51736 (Sept. 30, 1993) (providing that regulatory decisions "shall" be based on "the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation").

Although original and supporting data are not subject to a reproducibility requirement by OMB, particularly when data cannot be reproduced given confidentiality constraints, agencies must apply "especially rigorous robustness checks" to analytic results, and they must document what checks were undertaken in order to ensure compliance with the OMB guidelines' transparency standards. *Id.* In response to these OMB guidelines, EPA published its *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency,* in which EPA affirmed that for disseminated influential data, EPA would ensure reproducibility according to commonly accepted scientific or statistical standards, pledging a high degree of transparency for such

information regarding the source of the data used, the various assumptions employed, the analytic methods applied, and the statistical procedures employed.

In addition, President Obama issued a Memorandum dated March 9, 2009 on scientific integrity, which provides in pertinent part that:

> If scientific and technological information is developed and used by the Federal Government, **it should ordinarily be made available to the public**. To the extent permitted by law, **there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking**.

Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 10671 (Mar. 9, 2009) (emphasis added).

EPA has violated the requirements of the Data Quality Act, Executive Order No. 12,866, the OMB guidelines, the March 9, 2009 Presidential Memorandum, and its own guidelines by failing to provide full disclosure and transparency in the data it relied upon. Instead, EPA attempts to avoid these requirements by sub-delegating the risk assessment regarding greenhouse gases to other entities, in particular to the IPCC. As discussed in detail above, the Disclosures reveal how EPA's unlawful sub-delegation to the IPCC undermined compliance with the transparency and data quality requirements of American law. Indeed, EPA could not possibly have complied with these requirements, given that the IPCC authors deleted information and hid behind foreign laws to avoid disclosure of key data supposedly supporting "influential" science determinations.

Because EPA was never provided (and thus never reviewed) key data from CRU, the Data Quality Act requirements governing data transparency and reproducibility were not applied to CRU data and data-normalizing algorithms.[23] Further, these requirements were not applied to

[23] Independent efforts to reproduce temperature records and IPCC historical temperature findings have been unsuccessful. One study, noting that the raw temperature records in the United States Historical Climatology

the work performed by the IPCC, upon whose assessment reports the Administrator relies so heavily. The Disclosures show that this failure to meet data quality standards was significant, because the scientists involved not only sought to delete information and hide behind the IPCC's foreign status, but did so to protect "fudged" data used to support the IPCC assessments. Under these circumstances, EPA must reconsider its Finding, because EPA's record here fails the transparency and accountability requirements of the law and thereby violates the Data Quality Act.

## VII. CONCLUSION.

The Coalition requests EPA convene a proceeding for reconsideration to (1) thoroughly reevaluate EPA's heavy reliance upon the IPCC reports which have been called into fundamental question; (2) prepare a complete and objective record for the reconsideration proceeding which contains all the relevant scientific data, studies, and viewpoints and is cleansed of questionable or one-sided data; (3) obtain and fully disclose all computer programs, data and algorithms used to "homogenize" all temperature records upon which EPA relies; (4) subject the temperature records and programs to an independent review by qualified and objective scientists and statisticians; (5) determine whether or not there is any statistically valid demonstration of unprecedented global warming over the last century; and (6) stay any further regulatory actions

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Network (USHCN) are adjusted substantially to account for a variety of potential contaminants, concluded the effects of such adjustments "produce a significantly more positive, and likely spurious, trend in the USHCN data." Exhibit K. Another study could not successfully replicate the long-term Northern Hemispheric surface thermometer temperature trends of IPCC's Third Assessment Report. Exhibit U. The study concluded that the inability to replicate the trend was likely a result of "data padding" used to smooth and filter data, which was not incorporated in the reports of the data trends, and it recommended avoidance of "subjective data-padding procedures." *Id.*

or rulemakings which are based upon the Endangerment Finding until these fundamental requirements of sound science, legal due process, and valid administrative rulemaking are completed.

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# INDEX OF EXHIBITS SUBMITTED

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