US EPA ARCHIVE DOCUMENT

United States Environmental Protection Agency

Docket EPA-HQ-OAR-2009-0171

IN RE:
ENDANGERMENT AND
CAUSE OR CONTRIBUTE FINDINGS FOR
GREENHOUSE GASES UNDER SECTION 202(a)
OF THE CLEAN AIR ACT; FINAL RULE,
74 FR 66,495 (DEC. 15, 2009)

Supplement to Petition For Reconsideration of the Nongovernmental International Panel on Climate Change, the Science and Environmental Policy Project, and the Competitive Enterprise Institute

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February 16, 2010

Supplement to Petition for Reconsideration
To the Environmental Protection Agency
Regarding Its Final Rule
Concerning Endangerment and Cause or Contribute Findings for Greenhouse Gases
Under Section 202(a) of the Clean Air Act

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Petitioners hereby supplement their Petition for Reconsideration (filed February 12, 2010) with the following points:

I
DR. PHIL JONES' LATEST STATEMENTS UNDERCUT EPA'S ENDANGERMENT FINDING

On February 13th, a BBC interview with Dr. Phil Jones, head of the British Climate Research Unit (CRU), was posted, which revealed some major disagreements with EPA's Endangerment Finding and reversals of his prior views.

For example, EPA states in its final rule that warming has continued in recent years, declaring that "eight of the 10 warmest years on record have occurred since 2001." 74 FR 66,517.

But in answer to the BBC interviewer's question, "Do you agree that from 1995 to the present there has been no statistically-significant global warming?", Dr. Jones replies "yes" (explaining that there has been warming, but that it was not statistically significant).[1]

[1] BBC News, *Q&A: Professor Phil Jones,* Feb. 13, 2010, http://news.bbc.co.uk/2/hi/science/nature/8511670.stm; see also Daily Mail, *Climategate U-turn*

Dr. Jones goes on to state that from January 2002, there has been actual cooling, though it was not statistically significant. This appears to contradict his past statements on how the period 2001-07 was warmer than the previous decade.[2]

Dr. Jones' comments on the recent lack of warming are consistent with the views stated by at least three other scientists in the Climategate emails.

- Dr. Kevin Trenberth, IPCC coordinating author and head of the Climate Analysis Section at the National Center for Atmospheric Research (Oct. 14, 2009): "The fact is that we can't account for the lack of warming at the moment and it is a travesty that we can't."[3]

- Dr. Thomas Wigley, IPCC contributing author (later in the above thread): "...here are some notes of mine on the recent lack of warming."

- Dr. Stephen H Schneider, editor of the journal *Climate Change* (October 11, 2009), referring to "the past 10 years of global mean temperature trend stasis ...."[4]

EPA states that "the greatest warming occur[ed] over the last 30 years." 74 FR 66,517.

But according to Dr. Jones, for the periods 1860-1880, 1910-1940, 1975-1998, and 1975-2009, the warming rates did not show any accelerating trends. In his words, "the warming rates for all 4 periods are similar and not statistically significantly different from each other."[5]

If there has been no change in warming rates, this contradicts one of EPA's basic contentions. During this same period, atmospheric levels of carbon dioxide and other greenhouse gases levels dramatically increased—according to EPA, to "essentially unprecedented levels". 74 FR 66,517. Yet if increasing levels of these gases did not produce a clear acceleration of warming, then the role of these gases as a major driver of temperature becomes even more dubious.

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as scientist at centre of row admits: There has been no global warming since 1995, Feb. 14, 2010, http://www.dailymail.co.uk/news/article-1250872/Climategate-U-turn-Astonishment-scientist-centre-global-warming-email-row-admits-data-organised.html?ITO=1490

[2] New24.com, *Earth still warming,* Jan. 11, 2008, http://www.news24.com/Content/SciTech/News/1132/1249c274c6df42cca1302d82e4236ef6/11-01-2008-06-57/Earth_still_warming#

[3] 1255532032.txt, http://www.eastangliaemails.com/emails.php?eid=1054&filename=1255532032.txt

[4] 1255318331.txt, http://www.eastangliaemails.com/emails.php?eid=1047&filename=1255318331.txt

[5] See fn.1.

As one appellate court has noted, a situation such as this "on its face, raises questions about the reliability of the EPA's projections. While courts routinely defer to agency modeling of complex phenomena, model assumptions must have a 'rational relationship' to the real world. *See, e.g., Chemical Mfrs. Ass'n v. EPA,* 28 F.3d 1259, 1265 (D.C.Cir.1994)." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053 (D.C. Cir. 2001).

II
THE IPCC'S CLAIMS REGARDING HURRICANES, ADOPTED BY EPA, ARE NOW IN EVEN MORE SERIOUS DOUBT

A new report on hurricanes, independently reviewed and released only today, finds no increase in storm or hurricane frequency over the last 60 years. The report, *1999-2009: Has the Intensity and Frequency of Hurricanes Increased?*, by Dr. Les Hatton, Kinston University, London, concludes:

> "Over the periods 1999-2007 or 1999-2009, it can be concluded that *there is no evidence to support that the average number of tropical storms, hurricanes, major hurricanes or proportion of hurricanes which mature into major hurricanes has changed in the last 60 years".*[6]

Id. at 11 (emphasis in orginal). The report goes on to note that "the match between the data and the IPCC 2007 analysis is poor at best." *Id.* at 15.

This not only undercuts EPA's increasingly questionable reliance on the IPCC report[7], it also undermines EPA's own claims regarding the supposedly increased risk of storms and hurricanes. See 74 FR 66,498.

III
EPA's HIGHLY QUESTIONABLE USE OF THE ABSURDITY CANON IN ITS PROPOSED TAILORING RULE REQUIRES THAT THE AGENCY RECONSIDER ITS ENDANGERMENT FINDING

In comments filed with EPA on December 28 and 30, 2009, the National Association of Homebuilders (NAHB) pointed out that EPA's proposed Tailoring Rule[8] involved an unprecedented use by the agency of the "absurdity canon" of statutory construction. In NAHB's words: "Apparently for the first time in its 40-year history, EPA proposes in the Tailoring Rule

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[6] http://www.leshatton.org/Documents/Hurricanes-are-not-getting-stronger.pdf; see also http://www.leshatton.org/Hurricanes_2010.html

[7] The Register (UK), *Now IPCC hurricane data is questioned,* Feb. 15, 2010, http://www.theregister.co.uk/2010/02/15/hatton_on_hurricanes/

[8] EPA, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,* 74 FR 55,292 (Oct. 27, 2009).

to invoke the absurdity canon of construction in interpreting a law it administers." NAHB, Legal Comments on EPA's Tailoring Rule and Interrelated Agency Actions, at 1.[9]

The Tailoring Rule proposal was issued on October 27, four months after the close of the public comment period in EPA's Endangerment proceeding. The agency's discussion of the absurdity canon in its proposal makes it seems as if the agency is doing little out of the ordinary. See 74 FR 55,306-07. However, as the NAHB comments point out, EPA's approach here is anything but ordinary.

And it is doubly extraordinary, given that EPA provided no real warning about the inevitability of these problems to the Supreme Court when, *Massachusetts v. EPA*, 549 U.S. 497 (2007), it considered the agency's authority to regulate carbon dioxide under the Clean Air Act. In fact, the Prevention of Significant Deterioration (PSD) program is not mentioned in that decision, and the National Ambient Air Quality Standards program to which PSD applies is mentioned only in the dissent. *Id.* at 559 (Scalia, J., dissenting).

As NAHB points out, in *Massachusetts* the parties advocating regulation actually contended that a ruling in their favor would have no implications at all for the PSD program:

> "The Supreme Court briefs filed by the Commonwealth of Massachusetts and the other petitioners in *Massachusetts* clearly took the position that resolving the *Massachusetts* case did *not* require a resolution of questions about the applicability to greenhouse gases of the Clean Air Act's stationary source control provisions. Indeed, the petitioners in *Massachusetts* went farther and insisted that the Court could decide the case in their favor, possibly paving the way for regulation of GHGs under Title II of the Act, without any consequences for National Ambient Air Quality Standards program at all."

NAHB comments, Attachment B at 7. As for EPA, NAHB states that "while the Solicitor General's brief in *Massachusetts* did note that the NAAQS program could not be coherently applied to GHG emissions, that brief also importantly noted (immediately after making that observation) that '[t]he petition for rulemaking in this case did not request that EPA promulgate NAAQS for greenhouse gases, but instead sought regulation of greenhouse gas emissions from new motor vehicles.'"

Id. NAHB concludes, in short, that, given

> "... that the *Massachusetts* petitioners argued that the NAAQS issue was not before the Court; and that the Solicitor General's briefing did not contest that point; that neither the petitioners, nor Solicitor General, nor the *Massachusetts* Court mentioned the PSD and Title V programs; and that neither side nor the court mentioned the absurdity canon, all arguments relating to the Title V, PSD and NAAQS programs clearly remain unresolved in the wake of *Massachusetts*."

Id. But in our view, the implications of this omission are even more serious. If EPA had forthrightly admitted to the Supreme Court that construing the Clean Air Act to cover carbon dioxide would end

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[9] NAHB's comments, Document ID EPA-HQ-OAR-2009-0171-11690.1, were filed in both the Tailoring Rule proceeding and in several other related proceedings. They can be found at http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a75f96

up forcing EPA to resort to the absurdity canon to deal with that construction, the outcome in *Massachusetts* might well have been totally different.

EPA created this dilemma through both its briefing in *Massachusetts* and its wholly discretionary decision to issue its Endangerment Finding. Like the Supreme Court's decision, that finding contains no mention of any need to resort to the absurdity canon. EPA's dubious resort to that canon for the purpose of re-writing, by administrative means, the clear and unambiguous numerical thresholds in the Clean Air Act is a de facto admission of error. When an agency's own actions create absurd results, it should not be able to evade those results through ad hoc means. EPA's need to paper over the statutory contradictions that it itself created constitute a powerful, independent ground for reconsidering the action that has brought the agency to this point—the Endangerment Finding itself.

IV
CONCLUSION

For the foregoing reasons, in addition to those previously set forth in Petitioners' Petition for Reconsideration (filed February 12, 2010), EPA should reconsider its Endangerment Finding.

Respectfully submitted,

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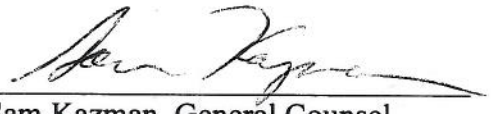

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