ORAL ARGUMENT NOT YET SCHEDULED

NO. 09-1322 (Lead) and Consolidated Cases (COMPLEX)

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

COALITION FOR RESPONSIBLE REGULATION, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, ADMINISTRATOR,

Respondents.

STATE OF MICHIGAN, et al.,

Intervenors.

ON PETITIONS FOR REVIEW OF 74 FED. REG. 66,496 (DEC. 15, 2009) & 75 FED. REG. 49,556 (AUG. 13, 2010) (CONSOLIDATED)

BRIEF *AMICUS CURIAE* OF THE STATE OF KANSAS IN SUPPORT OF PETITIONERS

Derek Schmidt
Attorney General of Kansas
John Campbell
Chief Deputy Attorney General
120 S.W. 10th Avenue, 2nd Floor
Topeka, KS 66612
(785) 296 - 2215

Counsel for the State of Kansas

June 7, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, your *amicus* submits the following supplemental statement:

(A) Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Join Brief for the Non-State Petitioners and Supporting Intervenors, the Brief of Texas for State Petitoners and Supporting Intervenors:

State of Kansas

(B) Rulings Under Review

References to the rulings at issue appear in the Brief of Non-State Petitioners and Supporting Intervenors.

(C) Related Cases

References to related cases appear in the Brief of Non-State Petitioners and Supporting Intervenors.

/s/ John Campbell
John Campbell

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

Authorities upon which we chiefly rely are marked with asterisks.

OTHER AUTHORITIES

GLOSSARY

CAA	Clean Air Act
CRU	Climate Research Unit, at the University of East Anglia
GHGs	Greenhouse Gases
IPCC	United Nations Intergovernmental Panel on Climate Change
RPC	EPA Response to Public Comments
RTP	EPA Response to Petitions
TSD	EPA Technical Support Document for Endangerment Finding
UEA	University of East Anglia

IDENTITY AND INTEREST OF THE *AMICUS*

The State of Kansas through its Attorney General Derek Schmidt respectfully submits the following brief *amicus curiae* in support of Petitioners, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29.

Kansas, under the leadership of Attorney General Schmidt who assumed office on January 10, 2011, has a strong interest in the regulation of the environment and in the proper roles of the federal government and the States in such regulation. To safeguard the integrity of the federal agency rulemaking process and to ensure that the federal government relies only on the "best science" when making far-reaching regulatory decisions that may have significant impacts on the States, Kansas seeks to participate in this case as *amicus curiae*. As an *amicus*, Kansas asks this Court to require the Environmental Protection Agency (the EPA) to reconsider the Endangerment Rule. Such reconsideration is warranted in light of new evidence that was unavailable to the States and the public during the notice and comment period, evidence that casts significant doubt on the integrity and reliability of the "science" on which the EPA relied.

SUMMARY OF ARGUMENT

This case challenges the EPA's regulation of "greenhouse gases" (GHGs) under the Clean Air Act (Act or CAA) following the Supreme Court's remand in

Massachusetts v. EPA, 549 U.S. 497 (2007). The EPA's entire GHG regulatory regime rests, in key respects, on that agency's wholesale adoption of purportedly scientific assessments made by the United Nations' Intergovernmental Panel on Climate Change (IPCC). Those assessments concluded that anthropogenic GHG emissions endanger public health and welfare.[1] On the basis of the IPCC conclusions—which new evidence demonstrates are flawed and open to serious question—the EPA added "greenhouse gas" via the Endangerment Rule as a pollutant that the EPA may regulate under the CAA.[2]

ARGUMENT

INTRODUCTION

The EPA's assessment of whether human activity is the primary cause of an increase in atmospheric GHGs does not rely on scientific evaluations that the EPA either directly commissioned or itself conducted. Instead, because the EPA relied predominantly on outside entities' conclusions and findings, the EPA necessarily assumed the burden to assess and verify those entities' adherence to the Agency's own standards for scientific conclusions.[3] In particular, the EPA relied heavily, and for some critical decisions, exclusively, on assessments produced by the IPCC.

[1] 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Rule).
[2] *Id.* at 66,536.
[3] *See* EPA, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA," available at

After the comment period for the Endangerment Rule had closed, but before the rule was issued, significant new information came to light that called into serious question whether a key contributor to the IPCC assessments had adhered to the standards and procedures widely acknowledged as producing the "best" science.[4] Specifically, thousands of e-mails and other documents from the University of East Anglia's Climatic Research Unit (CRU) in the United Kingdom were made public in November 2009, a disclosure often referred to as "Climategate." The e-mails were primarily between and among U.S. and British climate scientists, most of whom were leading authors of the IPCC assessments upon which the EPA relied. These newly public materials cast substantial doubt on the scientific propriety of the methods and practices of the CRU scientists.

Although this new evidence raises serious questions about the integrity and reliability of the IPCC reports, the EPA nonetheless relied heavily on those very IPCC assessments in issuing the Endangerment Rule. For example, the EPA declined to conduct its "own assessment of all the underlying studies and information" on which the "assessment literature" relied.[5] Necessarily, then, the propriety of the EPA's reliance on the IPCC assessments has been called into serious question by the revelations contained in the CRU documents.

---

http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf.

[4] EPA was aware of this information because it was raised in late comments.

[5] 74 Fed. Reg. at 66,511/2.

I. THE EPA IMPROPERLY REFUSED TO RECONSIDER ITS RULE AFTER RELEASE OF THE "CLIMATEGATE" MATERIALS.

A. The Proper Legal Standard for Reconsideration of an EPA Rule under the CAA is that New Material is of "Central Relevance to the Outcome of the Rule."

The CAA mandates that the EPA "shall" convene a reconsideration proceeding if petitioners raise concerns of "central relevance to the outcome of the rule" based on new information disclosed after the close of the comment period but prior to the period for seeking judicial review. 42 U.S.C. § 7607(d)(7)(B). For decades, the EPA has interpreted concerns to be of "central relevance" if they "provide *substantial support* for the *argument* that the regulation should be revised." 75 Fed. Reg. 49,556, 49,561 (Aug. 13, 2010) (emphasis added). So interpreted, the "central relevance" standard is a materiality standard that requires the objection to support an *argument* that the rule should be changed. That interpretation is consistent with the concern that the public, including the States, be afforded opportunity to comment on information relevant to a rulemaking decision.

Here, the EPA rejected the ten Petitions for Reconsideration on the ground that the petitioners had to prove that the Endangerment Rule *must* be changed as a result of the Climategate materials. That disregard of the "central relevance" standard denied the States and the public the opportunity to comment on important new evidence Climategate revealed, and is the primary reason this Court should direct the EPA to convene a proceeding to reconsider the Endangerment Rule.

B. The Climategate Revelations Seriously Undermine the EPA's Reliance on the IPCC Reports.

1. Introduction.

On November 20, 2009, computer hackers who had breached the CRU's servers made public more than 1,000 e-mails and 3,000 other CRU documents.[6] Scientists and political figures concerned with climate change registered immediate alarm over the CRU documents, which the press dubbed "Climategate." The released documents "called into question . . . [t]he integrity of the scientific evidence on which [countries], through the Intergovernmental Panel on Climate Change, claim to base far-reaching and hugely expensive policy decisions."[7] The director of the climate research unit at the London School of Economics declared:

> "There needs to be some assurance that these email messages have not revealed inappropriate conduct in the preparation of journal articles and in dealing with requests from other researchers for access to data. This will probably require investigations by the host institutions and by the relevant journals. There may also be a role for the UK Research Integrity Office to advise on any investigation."[8]

On December 3, the University of East Anglia commenced an inquiry titled the Independent Climate Change Email Review, to investigate whether the CRU's

[6] House of Commons, Science and Technology Committee - Eighth Report: The disclosure of climate data from the Climatic Research Unit at the University of East Anglia (March 24, 2010) at 5.
[7] Hickman, Leo, "Climate change champion and skeptic both call for inquiry into leaked emails," *The Guardian*, Nov. 23, 2009, p. A5.
[8] *Id*.

scientific policies and practices in fact conformed to best scientific practices.[9] In the United States, Pennsylvania State University announced its own investigation on November 30, 2009, into the research of Professor Michael Mann, whose work was implicated in the released CRU e-mails and documents.[10]

2. In Adopting the IPCC Assessments to Support the Endangerment Rule, The EPA Necessarily Assumed that the IPCC Studies Complied with Appropriate Scientific Procedures.

Despite these investigations and the obvious lack of confidence in the IPCC's adherence to best science practices, the EPA issued the Endangerment Rule *on December 7, 2009*—only 17 days after the release of the Climategate materials—adopting wholesale the IPCC's conclusions as if those conclusions were flawless and unquestionable. The EPA stated that its reliance on the IPCC reports was predicated on a "through review" of the IPCC's science standards, including the IPCC's "author selection, report preparation, expert review, public review, information quality, and approval procedures."[11] The EPA further concluded that the "IPCC's procedures are sufficient and effective for ensuring

---

[9] *See* The Independent Climate Change Email Inquiry, available at: http://msnbcmedia.msn.com/i/msnbc/ sections/news/ClimateInquiry.pdf, last accessed April 19, 2011.

[10] *Id.*

[11] EPA's Response to Public Comments (RPC), Vol. 1, Response 1-14, available at http://www.epa.gov/climatechange/endangerment/downloads/rtc_volume_1.pdf, last accessed April 19, 2011.

quality, transparency and consideration of multiple and diverse perspectives."[12] Finally, the EPA stated that "because [the IPCC] supporting studies were conducted in accordance with sound and objective scientific practices, were peer reviewed, and adhered to standards of quality based on objectivity, utility, and integrity, we find the IPCC's information quality process is consistent with EPA's" own Science Guidelines.[13]

In sum, the EPA deliberately justified its reliance on the IPCC assessments on the ground that the relevant IPCC scientists actually followed best science practices. But, in fact, if the IPCC scientists did not adhere to best science practices (as the Climategate documents demonstrate), then the EPA's primary justification for the Endangerment Rule simply vanishes.

Especially compared to the reactions of other governments and scientific institutions to the Climategate revelations, the EPA's refusal to investigate or reconsider its reliance on the IPCC reports is irrational, except perhaps as a matter of expediency as demonstrated by the EPA's apparent desire to release the Rule by the opening of the 2009 United Nations Climate Change Conference (commonly known as the Copenhagen Summit), which opened on December 7, the same day the EPA announced the final Endangerment Rule, and less than three weeks after the initial Climategate revelations. Even the chairman of the IPCC told the BBC in

[12] *Id.*, Response 1-65.
[13] *Id.*, Response 1-15.

December 2009 that the allegations of CRU scientific improprieties raised "a serious issue" that could not be swept "under the carpet."[14] Yet on the other side of the Atlantic, the EPA got out its broom and lifted the carpet in its rush to finalize the Endangerment Rule in time for the Copenhagen Summit.

C. Numerous Entities Filed Reconsideration Petitions to Seek Public Comment on the Climategate Materials and Their Implications.

In the face of the EPA's continued insistence that the IPCC climate change science on which the Rule rested was the "best" science conducted in compliance with "exacting procedures," ten entities requested that the EPA reconsider the Rule in light of the new information regarding the CRU and the IPCC.[15] Meanwhile, as the agency considered these petitions, the Climategate saga continued, spawning no less than six independent investigations around the world.[16]

In the midst of these academic and governmental investigations, the EPA denied the petitions for reconsideration, refusing to allow public comment on the new material. To be clear, the EPA stood alone in this regard: every other

---

[14] BBC News, "UN body wants probe of climate e-mail row," Dec. 9, 2009, available at http://news.bbc.co.uk/2/hi/science/nature/8394483.stm, last accessed April 19, 2011.

[15] *See* U.S. EPA, Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings, available at http://www.epa.gov/climatechange/endangerment/petitions.html, last accessed May 23, 2011.

[16] *See* House of Commons Science and Technology Select Committee, Session 2009-10: Uncorrected oral evidence, 1 March 2010, available at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/387i.pdf, last accessed May 23, 2011.

organization that had produced or relied on the CRU materials, including the IPCC itself, conducted a public investigation.[17] In contrast, when it denied the Petitions, the EPA issued a three volume, 360-page Response to Petitions (RTP).[18] The RTP proceeded to reject *on the merits* the Climategate revelations, and in so doing relied on additional, new information that *did not even exist* when the Petitions for Reconsideration were filed. It goes without saying that such information had never been considered or contemplated during the original notice-and-comment period.

The EPA's denial misapplied the statutory criteria for evaluating reconsideration petitions, which was to determine only whether the allegations about the IPCC's failure to adhere to best science standards provided "substantial support for *the argument* that the regulation should be revised." That standard does not contemplate the full scale, merits-based review that the EPA conducted. Indeed, that the EPA deemed it necessary to refute the Petitions on the merits itself demonstrates that those petitions raised and "substantially support[ed]" "arguments" that the Rule should be reconsidered.

With the reconsideration standard met, the EPA was required to reconsider the Rule, and to allow appropriate public comment. Aggravating its improper refusal to allow such comment, the EPA also unlawfully relied upon new evidence that has never been available for public comment. The EPA cannot be permitted to

[17] 75 Fed. Reg. 49,556 (Aug. 13, 2010).
[18] *See supra*, note 15.

deny reconsideration based on new evidence that no one but the EPA has ever had the opportunity to consider and assess.

D. The Petitions Provided "Substantial Support" for Reconsidering The Endangerment Rule.

The Petitions demonstrated that the EPA's decision to rely on IPCC assessment literature to support the Endangerment Rule was unreasonable in light of the Climategate documents. The Petitions also faulted the EPA for failing to conduct its "own assessment of all the underlying studies and information" on which the "assessment literature" relied.[19] In sum, the Petitions forcefully argued, with explicit support from the Climategate materials, that critical climate scientists did not follow the IPCC's "exacting" and "rigorous" scientific standards for, among other things, peer review or data sharing.

Incongruously, the EPA asserted in the Endangerment Rule that "it has no reason to believe" that the IPCC assessments reports were not the "best" materials on which to rely, but the Climategate documents prove the exact opposite. In rejecting the Petitions, the EPA implausibly declared that the new evidence proving that key IPCC scientists did not follow the "exacting" IPCC scientific procedures could not even support *an argument* that the EPA should no longer rely on those materials without undertaking a thorough review of them.

[19] 74 Fed. Reg. at 66,511.

Indeed, in denying reconsideration, the EPA trumpeted the findings of some academic and government-led investigations into Climategate which "found no evidence of scientific misconduct or intentional data manipulation."[20] But it is illogical to equate "best science" practices with reports that were merely "found not to be based on scientific misconduct or intentional data manipulation." The "best science" standard is much higher than simply avoiding the fabrication of data or results.

More importantly, the reviews on which the EPA relied actually support the Petitions, not the EPA's denial of them. The IPCC summarizes its governing procedures as follows: "comprehensiveness, objectivity, openness and transparency: these are the principles governing IPCC work." These are ***exactly*** the criterion that the independent assessments of Climategate *found to be absent*, including that the research had "not been carried out in close collaboration with professional statisticians," despite its heavy reliance on statistical methods, and that the research had not been conducted in a transparent manner.[21] Moreover,

[20] 75 Fed. Reg. at 49,557-58.

[21] *See* House of Commons Science and Technology Select Committee, "The Disclosure of Climate Data from the Climatic Research Unit at the University of East Anglia, available at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/387i.pdf, last accessed April 29, 2011.

"the disclosed e-mails suggest a blunt refusal to share scientific data and methodologies with others . . . ."[22]

The EPA rationalized its reliance on the "assessment literature" by claiming that it had carefully reviewed the processes by which this literature was prepared, and confirmed that these processes met the standards to which the EPA itself is subject when preparing scientific reports.[23]

The quality of the IPCC's science, however, was far from exemplary, and there is a yawning gap between the way the IPCC actually operated and the way the EPA claims it did. Importantly, the IPCC is not a scientific body but a political body. The IPCC's website states that it is "an intergovernmental body" open to all members of the United Nations. A large number of the scientists who participate in the IPCC are government scientists, who could be expected to sympathize with their countries' climate change policies.

1. The EPA Failed to Ensure that the Information It Relied Upon Was "Accurate, Reliable and Unbiased."

The EPA is subject to rigorous data quality obligations under the Information Quality Act ("IQA"), Pub.L. 106-554, and the agency's IQA Guidelines, *Guidelines for Ensuring and Maximizing the Quality, Objectivity,*

[22] *Id.* at 3.

[23] 74 Fed. Reg. at 66,511/3; RPC, Response 1-2 (based on its review of IPCC procedures, the "EPA has determined that the approach taken provided the high level of transparency and consistency outlined by EPA's" information quality requirements).

Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (Oct. 2002).[24] Because the Endangerment Finding meets the EPA's definition of "influential information" (information having "a clear and substantial impact (*i.e.*, potential change or effect) on important public policies or private sector decisions," *id.* at §6.2, the Endangerment Finding is "subject to a higher degree of quality (for example, transparency about data and methods) than [other] information . . . ." *Id.* at §6.3. The substance of the information underlying the Endangerment Finding must be "accurate, reliable and unbiased," requiring use of "the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and … data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data)." *Id.* at §6.4.

As demonstrated in great detail in the Petitions, however, the IPCC reports frequently relied on "studies" that were not peer reviewed, that were unscientific, and that were in fact prepared by advocacy groups such as the World Wildlife Fund ("WWF"), Greenpeace, and other similar groups. As a letter in the journal *Science* stated in examining how the IPCC made the mistake as to the rate of

[24] EPA, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA," available at http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf, last accessed April 19, 2011.

recession of Himalayan glaciers, "[t]hese errors could have been avoided had the norms of scientific publication, including peer review and concentration upon peer-reviewed work, been respected."[25]

Another example is the EPA's prediction of "severely compromised" African food supplies, TSD, Table 16.1 (p. 162), which was based on Chapter 9.4.2 (p. 448) of the IPCC report on African Agriculture, which in turn was based on the Agoumi 2003 study. The Agoumi study was published by The International Institute for Sustainable Development (IISD), an organization with a stated political interest in climate change and policy—it was *not* a study in peer-reviewed scientific literature, and the studies Agoumi cited to support its findings on the future of African agriculture under climate change are themselves not peer-reviewed studies in the scientific literature, but rather are other U.N. reports and national communications.[26]

These are not isolated examples of the EPA relying on flawed "evidence"; rather, they are part of a widespread pattern.

---

[25] Graham Cogley et al., *Tracking the Source of Glacier Misinformation*. 327 SCI. 522 (2010).

[26] *See* Petition for Reconsideration by Peabody Energy Company, VII – 16-18, available at http://www.epa.gov/climatechange/endangerment/petitions.html, last accessed May 19, 2011.

2. The IPCC Reports Did Not Undergo Rigorous Peer Review

The IPCC reports did not "undergo a rigorous and exacting standard of peer review by the expert community," one that is superior to the peer review process of scientific journals, contrary to what the EPA claimed. 74 Fed. Reg. at 66,511/3. In the first place, the IPCC review procedures do not mimic the peer-review process of scientific journals. Typically, a peer-review journal editor serves as an impartial referee and decides whether the author must modify his or her draft in response to criticism by peer reviewers.

In contrast, the IPCC Lead Authors—who write the chapters in the IPCC reports—are the ones who decide whether to accept or reject critical reviews, and they can change text on their own, without further peer evaluation after the review period is closed. Thus, there is no neutral or objective scientist standing between the author and reviewer to ensure that reviews are judged dispassionately and that there are no backroom rewrites after the close of the review period. Lead Authors are in the position not only of reviewing their own work, but also that of their critics, a clear conflict of interest. As a result, the central function of the peer review process—to ensure that peer reviews are taken into consideration by the author—was not present in the IPCC drafting process.

Given the flaws of this structure, it is unsurprising that the IPCC review process was characterized by instances of Lead Authors flagrantly disregarding

views that differed from their own. In one instance, a Lead Author tried to keep out of his report the peer-reviewed journal articles with which he disagreed (telling a colleague "Kevin and I will keep them out somehow - even if we have to redefine what the peer-review literature IS!" *See* CRU email 1089318616.txt (Jul 8, 2004) (all capitals in original)).[27] When forced to include the "offending" material, the Lead Author mischaracterized the articles' findings and fabricated information to argue that the articles were wrong. Such behavior was not an isolated instance.

Another common practice that undermined IPCC objectivity was the citation by report authors of their own papers and those of report reviewers. This practice represents yet another instance in which conflicts of interest were not held in check to ensure that the IPCC reports provided a neutral summary of all views of the relevant science. Because of these concerns, Jonathan Overpeck, Coordinating Lead Author of Chapter 6 of the AR4 WGI report, told the chapter authors:

> PLEASE do not cite anything that is not absolutely needed, and please do not cite your papers unless they are absolutely needed. Common sense, but it isn't happening. Please be more critical with your citations so we save needed space, and also so we don't get perceived as self serving, or worse.[28]

---

[27] The e-mails are available in EPA's docket for the Endangerment Finding. *See* 75 Fed. Reg. at 49,557 n.2 (referencing availability of e-mails under title "CRU E-mails 1996-2009," in Docket No. EPA-HQ-OAR-2009-0171 at http://www.regulations.gov.)

[28] CRU email 1120014836.txt (June 28, 2005), reproduced at http://epa.gov/climatechange /endangerment/petitions/volume2.html#2-20, last accessed May 20, 2011.

The EPA, however, brushed aside these concerns.

3. The IPCC Reports Failed to Adhere to a High Degree of Transparency.

Under the EPA's IQA Guidelines, §6.3, the Endangerment Finding—as "Influential Information"—was required to have "a higher degree of transparency regarding (1) the source of the data used, (2) the various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures employed." Climategate, however, revealed the hollowness of the EPA's claim that the IPCC met this level of transparency, as key IPCC authors routinely relied on their own studies while simultaneously refusing to disclose to other scientists the data underlying those studies.

As discussed at greater length in the Petitions for Reconsideration, Dr. Michael Mann and his colleagues—critically important IPCC authors on the central issue of whether current temperatures are unusual—engaged in a decade-long effort to deny other scientists access to the data underlying their studies. And the CRU scientists at the center of Climategate, who were critically important IPCC authors both on whether current temperatures are unusual and who constructed the basic temperature data sets on which the IPCC reports relied, did the same. The U.K. House of Commons Science and Technology Committee conducted an investigation and reported an "unacceptable" "culture of withholding

information from those perceived by CRU to be hostile to global warming."[29] Another review panel found "a consistent pattern of failing to display the proper degree of openness."[30]

Such behavior strikes at the heart of the scientific method. Resistance to making underlying information available so that others may replicate or refute the results is bad science. Importantly, such behavior is not the "high" level of transparency demanded by the EPA's IQA Guidelines in order to ensure the high quality of the science on which the EPA relies.

E. The EPA Applied the Wrong Legal Standard to the Petitions.

In rejecting the Petitions the EPA concluded that the serious concerns Climategate raised were "not of central relevance to the outcome of the rule because they do not provide substantial support for the argument that the Endangerment Finding should be revised." *Id*. at 49,561. However, the agency repeatedly rejected the arguments *on the merits* without notice or comment.

For example, the EPA states that it is denying the petitions because "they do not change or undermine our understanding" of the science, they do "not change

[29] House of Commons, The disclosure of climate data from the Climatic Research Unit at the University of East Anglia – Science and Technology Committee, Conclusions and Recommendations, March 31, 2010, available at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/38709.htm, last accessed May 24, 2011.

[30] The Independent Climate Change E-mails Review, July 2010 at 11, available at: http://msnbcmedia.msn.com/i/msnbc/sections/news/ClimateInquiry.pdf, last accessed May 24, 2011.

any of the scientific conclusions" made by the EPA, nor do they "lower the degrees of confidence" associated with "each of these major scientific conclusions."[31]

By relying on the merits, including new evidence, the EPA has changed what was in effect a materiality standard (support for an argument) into an outcome-determinative merits standard (the argument must ultimately prevail). Thus, instead of determining whether the matters at issue "provide[d] substantial support" for the arguments raised, the agency rejected the arguments on the merits without notice or comment, and relied on new evidence in doing so. That is neither the proper legal standard nor the proper procedure for deciding whether reconsideration is required.

F. The EPA Compounds Its Legal Error By Arguing for An Additional, Improper Standard.

The EPA compounds its error by suggesting that the standard in section 307(d)(8) that courts are to use in determining whether the EPA made a "procedural error" also applies to the EPA's denial of reconsideration. That suggestion is simply wrong as a matter of law. In denying the Petitions, the EPA suggests that its reconsideration standard is "consistent with" the procedural error standard in section 307(d)(8). In so doing, the EPA may be suggesting that a denial of reconsideration is arguably a "procedural" determination, and thus the EPA need not apply the CAA statutory reconsideration standard because the EPA

[31] 75 Fed. Reg. 49,557.

can only be reversed if its denial also meets the standard for procedural reversal in section 307(d)(8). However, this Court has instructed the EPA that the agency cannot ignore its procedural obligations under cover of 307(d)(8), and it is very clear that section 307(d)(8) does not apply to a denial of reconsideration because such a denial is not a "rule" within the meaning of that section. *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 521-23 (D.C. Cir. 1983).

Section 307(d)(8) provides that a court may invalidate a "rule" that suffers from a "procedural" defect if "the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8). This section, by its terms, only applies to a "rule," which is defined in section 307(d)(2) as follows: "Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule")." 42 U.S.C. § 7607(d)(2).

Thus, a "rule" under section 307(d) is "any action to which this subsection applies." In turn, section 307(d)(1) states that "this subsection applies to the promulgation or revision of" a series of listed rulemaking actions provided for under the Clean Air Act. Although the list is long, and encompasses the endangerment and motor vehicle rule in section 307(d)(1)(k) ("the promulgation or

revision of regulations under section 7521"), it does not include a denial of reconsideration. 42 U.S.C. § 7607(d)(1).

In fact, the EPA itself generally does not treat a denial of reconsideration as a "rule" under section 307(d). Section 307(d)(3) provides that "any rule to which this subsection applies," must be made available for public comment. 42 U.S.C. § 7607(d)(3). Because the EPA indisputably did not make its reconsideration denial available for public comment, the EPA itself did not treat that decision as a "rule" subject to any of the provisions of section 307(d). Indeed, were a reconsideration denial a rule covered by section 307(d), Congress would not have had to provide, as it did in section 307(d)(7)(B), that when the EPA denies such a request, a "person may seek review of such refusal in the United States court of appeals for the appropriate circuit." 42 U.S.C. § 7607(d)(7)(B).

Thus, the EPA also committed legal error by, in effect, applying the outcome-determinative standard from section 307(d)(8) ("significant likelihood that the rule would have been substantially changed") to deny the Petitions, a standard that is clearly inapplicable here.

G. The EPA Committed Legal Error By Relying on New Evidence to Reject the Petitions.

Finally, EPA unlawfully relied on new evidence to support its decision to deny the petitions. Here, the EPA denied reconsideration based on new evidence that was (1) never made available for public comment, (2) added to the docket by

the EPA for the first time after the comment period had ended, and (3) created, in some instances, after the original Rule was finalized. The entire point of the CAA's reconsideration provision is to require the EPA to consider new information submitted by ***petitioners*** when ***petitioners*** believe such evidence is inconsistent with the information the EPA relied upon to support its final rule. The notice-and-comment requirements, and the purposes they serve, can never be satisfied if the EPA without public input changes the record on which a rule is based.

A review of Section 307(d)(7)(B) of the Act illustrates why the EPA committed legal error here. That section allows a petition for reconsideration to be filed regarding a "rule," and requires the EPA to determine whether such reconsideration of a "rule" is warranted. The statutory reference to "rule" necessarily includes the lawful record that supports the rule: "[a]ll data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule." 42 U.S.C. § 7607(d)(3)(C).

Moreover, section 307(d)(4)(B) requires that "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." *Id.* at 7607(d)(4)(B) (emphasis added). Once this process is complete, section 307(d)(6)(C) states that

the "***promulgated rule may not be based (in part or in whole) on any information or data which has not been placed in the docket as of the date of such promulgation***." *Id.* at 7607(d)(6)(C) (emphasis added).

Because petitions for reconsideration are based on the "rule" that the EPA issued, and that rule may be based only on information included in the docket upon promulgation, it is apparent that the EPA's denial of reconsideration of that "rule" must be based solely on the information in the docket as of the date of the rule's promulgation, plus any "new" information the Petitions raise. Any other reading, besides leading to an absurd process of potentially endless petitions for reconsideration, denials by the EPA relying on new evidence, followed by more petitions, simply allows EPA to end-run Congress' directive in 307(d)(6)(C) that the rulemaking record be complete upon promulgation.

Here, the EPA *added more than four hundred documents* to the record *after* the close of the comment period, and cited more than fifty of these documents in its RTP. Thus, the EPA not only added significant material to the docket *after* issuing the Rule, it *heavily relied on those materials* in denying reconsideration.[32]

[32] *See* EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Preface at 2-3; http://www.epa.gov/climatechange/endangerment/downloads/response-preface.pdf ; EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Vol. 1 at 23, 68, 69, 71, 95, 102, 129, and 130, http://www.epa.gov/climatechange/endangerment/downloads/response-

Such action was legal error under section 307. *See Kennecott Corp. v. EPA*, 684 F.2d 1007, 1018 (D.C. Cir. 1982). The EPA's decision to deny reconsideration by relying on new evidence guarantees that the record before this Court is devoid of any public criticism or assessment of the new evidence in the RTP.

Obviously, the EPA's internal review of the Climategate documents, as reflected throughout the RTP, has not been subject to public comment, even though the whole purpose of the 42 U.S.C. § 7607(d) requirement that reconsideration proceed under "the same procedural rights as would have been afforded had the information been available at the time the rule was proposed" is to avoid just such a situation. As a result of the EPA's actions, the record currently before the Court is woefully incomplete. The public has had no opportunity to evaluate or comment upon the EPA's analysis of the Climategate materials. Just as importantly, this Court does not have the benefit of the EPA's response to any

---

volume1.pdf; EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Vol. 2 at 6, 7, 8, 22, 27, 29, 42, 58, and 59, http://www.epa.gov/climatechange/endangerment/downloads /response-volume2.pdf; EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Vol. 3 at 31, 32, 33, 54, 76, 77, 78, 79, 80, 81, 82, 83, 87, 89, 90, 91, 93, 94, 95, 99, 101, 102, 110, and 111, http://www.epa.gov/ climatechange/endangerment/downloads/response-volume3.pdf; and EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, EPA-HQ-OAR-2009-0171, http://www.epa.gov/climatechange/endangerment/downloads/ response-decision.pdf, p. 10, 11, 147, 148, and 149.

public comments on that evidence to guide the Court's assessment of the EPA's decisional process here.

II. THE EPA'S REPEATED AND HEAVY RELIANCE ON "ASSESSMENT LITERATURE" DEPRIVED THE PUBLIC OF A MEANINGFUL OPPORTUNITY TO COMMENT.

Although it purported to recognize the enormous complexity of climate science ("very wide range of risks and harms to be considered)," 74 Fed. Reg. at 66,509/3, the EPA limited the comment period to a mere 60 days based in part on the agency's mistaken view that the public had had an opportunity to comment on the IPCC reports when such reports were being prepared. *Id.* at 66,509/3; *see also* Opening Br. of State Petitioners Texas and Virginia, May 20, 2011 at 34-35.

The EPA's failure to allow meaningful comment on issues of central importance is a critical flaw. Effective public participation in the rulemaking process is a hallmark of that process, as Congress has emphasized. For example, Sen. Edmund Muskie stated in reference to the 1990 CAA amendments:

> We have learned from the standards-setting process that public participation is important [and] … [t]he effectiveness of existing law depends in great part on the willingness of people to make tough decisions concerning the quality of air they want to breathe. And it depends on their willingness to make their wishes known in public hearings on the local level. This experiment in public participation has worked. It has opened doors once closed. People have become involved in the standards-setting process. They have learned of the threats to their health and they have sought to make the program responsive to their needs.

1990 CAA Leg. Hist. 5955, 5976. Sen. Daniel Patrick Moynihan, a co-sponsor of the 1990 amendments, emphasized that:

> We must remember that full public participation in the issues is not only desirable, it is necessary … It is a lesson which EPA, even as it becomes a Cabinet-level Department, ought to make a fundamental principle of its efforts.

1990 CAA Leg. Hist. 6946, 7116-17. Furthermore, public comment is essential to provide an adequate record for judicial review. *NRDC v. Thomas*, 805 F.2d 410, 437 (D.C. Cir. 1986). The EPA's failure to afford ample and meaningful opportunity for comment on the assessment literature is in direct violation of the CAA requirements for public participation, and a remand is necessary to correct that error.

Furthermore, the EPA ignored its own policy of independent peer review by retaining peer reviewers who were all government scientists, many of whom had worked on the "assessment literature." As a result, the EPA necessarily failed to obtain independent peer review of its ultimate finding because it failed to receive independent peer review of the literature on which it relied for that finding. Indeed, the EPA could not have ignored its own peer review policy more completely.

Finally, the EPA has failed to create an adequate record of the relevant climate science for this Court to review. Importantly, the EPA did not include the

studies and other information on which the "assessment literature" relied.[33] *See* 42 U.S.C. § 7607(d)(6)(C) (final rule can only be based on information included in docket). Instead, the EPA maintained that the "data and modeling studies presented in those reports . . . can be accessed by consulting these assessment reports and the underlying studies." RPC, Vol. 1 at 54. Thus, the EPA apparently expects the public and this Court to independently locate, collect and review the underlying data from multiple agencies not even present before this Court.

In effect, the EPA is forcing the Court to assume, as the EPA does, that the IPCC's assessments are valid, rather than permitting this Court to evaluate the EPA's judgment against a record of the actual science on which the agency purported to rely. *See, e.g.*, 42 U.S.C. § 4607(d)(2)-(4) (requiring the EPA to include in the rulemaking docket "[a]ll data, information, and documents" upon which it relies); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) ("'in 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'") (emphasis in original) (internal citation omitted).

[33] Moreover, as explained in the Administrator's April 23, 2009 "Memo to EPA Employees," EPA can only ensure that the principles of transparency and openness are observed in the rulemaking process "if EPA clearly explains the basis for its decisions and *the information considered by the Agency appears in the rulemaking record*." (emphasis added), available at http://www.epa.gov/Administrator/operationsmemo.html?src=QSA2, last accessed May 26, 2011.

Moreover, among other things, the Climategate revelations showed that the data underlying key studies on which the IPCC relied was never made publicly available, either by the IPPC or by the authors of the IPCC reports. Thus, much of the information the EPA cited as the "assessment literature" is not even publicly and readily available to the parties or this Court.

III. CONCLUSION

For the reasons stated above, the EPA improperly denied reconsideration of its Endangerment Finding. Thus, Kansas respectfully requests that the Court remand to the EPA with directions to grant the Petitions and conduct further proceedings to reconsider the Endangerment Finding.

Respectfully submitted,

Derek Schmidt
Attorney General of Kansas

/s/ John Campbell
John Campbell
Chief Deputy Attorney General
Attorneys for Amicus Curiae
State of Kansas

Dated: June 7, 2011

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I HEREBY CERTIFY THAT the foregoing brief complies with the type-volume limitations, and typeface and type-style requirements of Fed. R. App. P. 32(a). As determined by the Microsoft Word 2003 software, the proportionally spaced typeface Times New Roman, 14 point, was used to produce this brief, which contains 6,527 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ John Campbell
John Campbell

June 7, 2011

CERTIFICATE OF SERVICE

I certify that on June 7, 2011, I electronically filed the foregoing Brief of Amicus Curiae the State of Kansas with the clerk of court of the U.S. Court of Appeals for the District of Columbia Circuit using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented to accept this Notice as service of this document by electronic means. I also certify that I have further served the foregoing document upon the following counsel by first-class mail on June 8, 2011, because they have not consented to electronic filing:

Katherine Jean Spohn Office of the Attorney General, State of Nebraska 2115 State Capitol PO Box 98920 Lincoln, NE 68509-8920	Kimberly P. Massicotte Office of the Attorney General, State of Connecticut 55 Elm Street Hartford, CT 06106
Kelvin Allen Brooks Office of the Attorney General, State of New Hampshire 33 Capitol Street Concord, NH 03301-6397	

/s/ John Campbell
John Campbell

\31619763.1