No. 12-1272

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, STATE OF ALASKA, AND AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR TRADE, STANDARDS AND SUSTAINABLE DEVELOPMENT IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Regulations and Rules

Other Authorities

LIST OF ABBREVIATIONS

APA	Administrative Procedure Act
AR3	Third IPCC Assessment Report
AR4	Fourth IPCC Assessment Report
CAA	Clean Air Act
CCSP	U.S. Climate Change Science Program
CRR	Coalition for Responsible Regulation
EPA	U.S. Environmental Protection Agency
EPA-IQA	EPA Information Quality Act Guidelines
EPA-OIG	EPA-Office of the Inspector General
EPA-PRH	EPA Peer Review Handbook
EPA-PRPM	EPA Peer Review Policy Memo
GHG	Greenhouse Gases
HISA	Highly Influential Scientific Assessment
IAC	InterAcademy Council

IQA	Information Quality Act
IPCC	Intergovernmental Panel on Climate Change
ISI	Influential Scientific Information
NAS	National Academies of Science
NRC	National Research Council
OMB	Office of Management and Budget
OMB-PRB	OMB Peer Review Bulletin
RFC	Request for Correction
RTC	Response to Comment
RTP	Response to Petition
SAP	Synthetic Assessment Product
TSD	Technical Support Document
UN	United Nations
UNEP	United Nations Environment Program
USGCRP	United States Global Change Research Program
WMO	World Meteorological Organization

INTEREST OF *AMICUS*

The Institute for Trade, Standards and Sustainable Development (ITSSD) respectfully submits this Brief as *Amicus Curiae* in support of Petitioners in *Chamber of Commerce of the United States, et al., v. Environmental Protection Agency, et al.*, No. 12-1272, focusing on the issue of inadequate compliance by EPA with information-based standards.[1]

ITSSD is a nonprofit legal research and educational organization; its Advisory Board consists of scientists and engineers. ITSSD analyzes and reports on the growing influence of domestic, foreign and intergovernmental environment, health, safety and other regulations grounded in sustainable development concepts.

Amicus' interest in this case stems from EPA's disregard for the procedural due process requirements intended to ensure the quality of agency-disseminated third-party-developed scientific data.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus made a monetary contribution intended to fund the brief's preparation or submission. Timely notice of intent to file was provided and the parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

In *Coalition for Responsible Regulation, Inc. ("CRR") v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) the D.C. Circuit Court erroneously ruled that EPA's Final Greenhouse Gas ("GHG") Endangerment Findings ("Final Endangerment Findings") and subsequent promulgation of economically significant regulations governing mobile and stationary GHG emissions sources were not arbitrary or capricious. 684 F.3d 102, 113.

The D.C. Circuit Court did not examine carefully whether EPA's evaluation of the United States Global Change Research Program/Climate Change Science Program ("USGCRP/CCSP"), National Research Council ("NRC") and Intergovernmental Panel on Climate Change ("IPCC") assessments upon which the Administrator's Final Endangerment Findings primarily relied satisfied Information Quality Act ("IQA") requirements and applicable IQA-implementing agency guidelines. Had the Court done so, it would have discovered that EPA's noncompliance with these standards undermined the credibility of the Administrator's Final Endangerment Findings.

EPA embraced and disseminated these non-EPA assessments as its own, and there was interagency agreement that they were properly characterized as highly influential scientific assessments ("HISAs") subject to the Office of Management and Budget ("OMB")/EPA IQA-implementing guidelines' highest and least discretionary peer review, transparency and independence/conflict-of-interest standards

("peer review standards"). EPA, however, mischaracterized these assessments as merely "influential scientific information" ("ISI"), subject to lower standards. EPA's summary review of the USGCRP/CCSP NRC and IPCC assessments, its reliance upon such bodies' flawed peer review processes, and its improper substitution of general Administrative Procedure Act ("APA") notice-and-comment procedures for specific IQA administrative reviews of Petitioners' Requests for Correction ("RFCs"), failed to satisfy these higher standards, and undermined the scientific basis for the Administrator's Findings.

ARGUMENT

This Court should grant review in this case, as it did in *Massachusetts v. EPA*, 549 U.S. 497, 505-506 (2007), because of "the unusual importance of the underlying issues."

The case at bar involves, among other issues, EPA's disregard for procedural due process. EPA ignored its legal obligation to ensure that affected members of the public can transparently review and submit comments which the agency must consider, about the quality of third-party-developed scientific data that the agency utilizes as the basis for promulgating economically significant regulations with national impact.

Agency adherence to such data quality rules and procedures is indispensable where scientific assessments and the major regulations that are based on them are premised on a "dramatically expanded" hazard-based precautionary principle. This precautionary principle formulation engenders drastically altered paradigms of

scientific risk evaluation, economic cost-benefit analysis, and legal burdens and standards of proof. *See* First Round of OMB Comments to USEPA on Proposed Findings, Dkt. No. EPA-HQ-OAR-2009-0171-0124 (April 22, 2009), at 1-2; *CRR v. EPA*, 684 F.3d at 115, 121-123, *citing Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C.Cir.1976) and *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C.Cir.1980). *See also* L.A. Kogan, *Revised U.S. Deep Seabed Mining Policy Reflects UNCLOS and Other International Environmental Law Obligations* LexisNexis (Jan. 2013), at 13-22, 33-37, n.67-83, 85, 105, 189-204 and articles cited therein (explaining the negative impact that rules based on a "dramatically expanded" precautionary principle, including those governing GHG emissions, would have on legal standards and burdens of proof.).

The D.C. Circuit Court Committed Reversible Error by Not Examining Carefully Petitioners' IQA Claims

Petitioners initiated this action pursuant to 42 U.S.C. §7607(b) for review of *EPA's Denial of Petitions to Reconsider the Final GHG Endangerment and Cause or Contribute Findings; Final Rule* ("Denial of Petitions"), 75 Fed.Reg. 49556 (8/13/10). Petitioners were also entitled under APA §702 and the IQA, 44 U.S.C. §3516 (note), to a review of EPA's prior denial of their RFCs, which had sought substantiation of agency methodologies employed in peer reviewing the HISAs underlying the Administrator's Final Endangerment Findings and subsequent rulemaking.

a. The D.C. Circuit Court Accepted EPA's IQA Compliance Claims

The Administrator relied upon the major climate assessments prepared by the USGCRP/CCSP, NRC and IPCC as the primary scientific basis for her Final Endangerment Findings. EPA Br. Document #1324992 (8/8/11) ("EPA Br.") at 29. EPA then used these findings to support its subsequent promulgation of mobile and stationary source GHG emissions regulations.

EPA asserts that it followed its IQA-implementing guidelines, purportedly relying on information that was, and is, "accurate, reliable, and unbiased." EPA Br. at 90. That information included major USGCRP, NRC and IPCC assessments. *Id*., at 29. EPA conceded that "[t]he guidelines may apply to a subsequent dissemination of the information in which EPA adopts, endorses, or uses the information to formulate or support a regulation, guidance, or other Agency decision or position." *Id*., at 90, citing *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (Oct. 2002) ("EPA-IQA Guidelines") ("EPA-IQA") at §5.3, at 16.

EPA, also asserted that "Petitioners cannot support the conclusion[s]" that the IPCC assessments underlying EPA's Endangerment Finding "relied on 'unscientific,' non-peer-reviewed studies" (so-called "gray literature") and a flawed "IPCC[] peer review process" that led to IPCC assessment errors. EPA Br. at 90-92. EPA denied that "the various investigations of

the CRU emails…[were]…as a general matter, directed at the IPCC process; they were, instead, limited to a review of practices at the CRU and by a particular researcher in the United States." *Id*., at 92. According to EPA, "[t]he overall conclusion of the independent investigations" was that "***while some IPCC procedures could be improved, any procedural deficiencies did not cast doubt on either the work performed by the CRU or the IPCC's use of that work***." [emphasis added]. *Id*., at 92, citing, Muir Russell, *The Independent Climate Change E-mails Review* (July 2010), available at <http://www.cce-review.org/pdf/FINAL%20REPORT.pdf>. These self-serving conclusions notwithstanding, had EPA properly complied with applicable OMB/EPA IQA-implementing guidelines for HISAs, EPA would have likely identified and perhaps helped the IPCC to address these errors sooner.

EPA also claims that the public notice-and-comment process it utilized to facilitate review of the Endangerment Findings "provided for the thorough consideration of the information relied upon by EPA", and met guidelines requirements "by providing an opportunity for correction of any information that does not comply with the Guidelines." EPA Br. at 90, citing EPA IQA Guidelines, §8.5, at 32.

The D.C. Circuit Court accepted EPA's argument that Petitioners had failed to show that the Administrator's Endangerment Findings should be revised or overturned. It reasoned that the errors Petitioners associated with non-peer-reviewed studies incorporated in

IPCC assessments were few and isolated, and that EPA's Findings did not rely on them. *CRR v. EPA*, 684 F.3d at 125. The Court also noted that IPCC report development procedures permitted the use of gray literature and that the errors Petitioners identified had been corrected *post hoc*. *Id*.

EPA's assertions, claims and averments on which its arguments were based are untrue, as discussed below.

b. EPA Did Not Adhere to Applicable OMB/EPA IQA-Implementing Guideline Standards

i. EPA Improperly Categorized the Technical Support Document ("TSD") as ISI to Utilize Lower OMB/EPA Peer Review Standards

OMB/EPA IQA-implementing guidelines required EPA to ensure that all publicly disseminated ISI that also qualify as HISAs is peer reviewed. EPA, however, intentionally mischaracterized HISAs as ISI to avoid the higher and more demanding IQA peer review standards applicable to HISAs, thus contravening the letter and spirit of the OMB/EPA IQA-implementing guidelines. Virginia Br., Document #1309185 (5/20/11) at 32-33, 36-37.

EPA ignored the distinct and well-defined peer review standards applicable to publicly disseminated ISI and HISAs. See *OMB's Final Information Quality Bulletin for Peer Review* ("OMB-PRB") (12/16/04); *United States Environmental Protection Agency Peer Review*

Handbook 3d ed. ("EPA-PRH") (2006); *Peer Review and Peer Involvement at the U.S. Environmental Protection Agency Memorandum* ("EPA Peer Review Policy Memo" – ("EPA-PRPM")) (1/31/06). These guidelines provide that "all influential scientific and technical work products [ISI] used in decision making will be peer reviewed". EPA-PRH, §§2.2.1-2.2.2, 1.2.10; OMB-PRB, at 12. EPA's 2006 Peer Review Policy Memo, which explains §4.2 of EPA's IQA Guidelines, explicitly states that ISI, including HISAs, as defined in OMB-PRB §§ I.5, I.7, "should be peer reviewed in accordance with the Agency's [PRH]." *See* EPA-PRPM, at 1; EPA Office of the Science Advisor, *Peer Review Program*, <http://www.epa.gov/peerreview/> (last viewed 5/7/13).

ISI are "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions". OMB-PRB, §I.6; *OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* ("OMB-IQA Guidelines"), 67 FR 8452, 8460 (2/22/02), at §V.3.ii.9; EPA-PRH, §2.2.2; EPA-IQA, §6.2.[2] HISA is "[ISI] that the agency

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[2] Scientific work product is "considered [ISI] if it "support[s] a regulatory program or policy position and it: "support[s] top Agency actions (*i.e.*, rules, substantive notices, policy documents, studies, guidance; *and/or* its preparation demands ongoing Administrator and extensive cross-Agency involvement; *and/or* it addresses issues that could potentially result in major cross-Agency policies"; *and/or* it

(continued...)

or the Administrator determines to be a scientific assessment that…(i) could have a potential impact of more than $500 million in any year, or (ii) is novel, controversial, or precedent-setting or has significant interagency interest". OMB-PRB, §III.1; EPA-PRH, §2.2.4. Since similar factors are used "in determining if a scientific assessment is [influential or] highly influential", OMB/EPA IQA-implementing guidelines instruct EPA officials to treat scientific assessments that meet the criteria of both as highly influential (i.e., as HISAs). EPA-PRH, §2.2.3, §2.2.4; OMB-PRB, §III.2; EPA-PRPM, at 1; EPA-PRH (2012) at Figs. 1-2; OMB-PRB, at 2.

External peer review of ISI intended to support important decisions is *preferred*, while external peer review of HISAs is *expected*. EPA-PRPM, at 1. An ISI that also "meets the definition of a [HISA]", is subject to "additional peer review procedures (EPA-PRH, §2.2.2) that impose relatively higher peer reviewer independence/conflict-of-interest and

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[2](...continued)
addresses highly novel or controversial issues; *and/or* "it could significantly advance the Administrator's priorities"; *and/or* it "ha[d] an annual effect on the economy of $100 million or more". EPA-IQA, §6.2; EPA-PRH, §2.2.3; Final Endangerment Findings, 74 FR 66497, 66545. ISI deemed already subjected to 'adequate peer review' based on various factors need not be further peer reviewed. OMB-PRB, §II.2; EPA-PRH, §2.3.2.

transparency standards intended to further ensure data quality.[3]

EPA, in the case at bar, invoked the lower OMB/EPA peer review standards applicable to ISI and, most critically, interpreted them as not

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[3] Peer reviewers of ISI cannot participate in work product development, but may engage in its peer review. OMB-PRB, §II.3.c. For ISI, "[a]gencies are encouraged to rotate membership on standing panels." *Id*. Peer reviewers of HISAs who are scientists cannot participate in work product development, and can engage in its peer review only if employed by the sponsoring agency for only that purpose. OMB-PRB, §III.3.c. Only premier government scientists lacking management or policy responsibilities, possessing special expertise and employed by a different Cabinet-level agency are eligible for exemption from this bar. *Id*. For HISAs, "[a]gencies shall avoid repeated use of the same reviewer on multiple assessments." *Id*. Peer review report requirements for HISAs are more extensive than for ISI. ISI reports must: a) describe the nature of their review, findings and conclusions; b) include a verbatim copy of reviewers' comments, the reviewer group's views as a whole, and reviewers' names and organizational affiliations; c) be disseminated in final version along with all related peer review materials on the agency's website; and d) "be discussed in the preamble to any related rulemaking and included in the administrative record for any related agency action." *Id*., § II.5. HISA reports must also, in addition to these requirements; e) include a short paragraph on the credentials and relevant experiences of each peer reviewer; f) include a written response explaining reviewers' agreement/disagreement with report views, agency response actions, and how those actions satisfy the report's concerns; and g) be subject to public review and comment. *Id*., §III.5-6.

requiring EPA's peer review of the USGCRP/CCSP, NRC and IPCC assessments upon which the Administrator primarily based her Final Endangerment Findings. Instead, EPA relied on syntheses of such assessments that "[had] undergone their own peer-review processes" (*EPA Technical Support Document ("TSD") For Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* ("Final TSD") (12/7/09), §1, p. 2; EPA Br. at 56), which EPA then publicly disseminated via the TSD in summarized form. See *EPA's Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* ("Final Endangerment Findings"), 74 FR 66496, 66497 at n. 1.

EPA also indirectly referred to the TSD as if it constituted ISI. EPA claimed that the TSD Satisfied agency IQA guidelines requiring that "analytic results for influential information have a higher degree of transparency", because it comprehensively referred to the USGCRP/CCSP, IPCC, and NRC assessment literature, and "clearly indicate[d] assumptions (e.g., emissions scenarios), analytical methods, and statistical procedures where that information was necessary in describing the conclusions". See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: EPA's Response to Public Comments, Volume 1: General Approach to the Science and Other Technical Issues* ("EPA-RTCs, Vol. 1") (4/17/09), Response 1-63; *see also* EPA-RTCs, Vol. 1, Response 1-75 (explaining how "EPA ha[d] acted consistently with…Section

6.4 of EPA's Guidelines", addressing "dissemination of influential scientific information regarding human health, safety or environmental risk assessments.")[4]

EPA diverted the D.C. Circuit Court's attention away from the relied-upon third-party syntheses of other third-parties' assessments which EPA had not peer reviewed, toward EPA's TSD summaries of them, effectively permitting EPA to evade OMB's/EPA's peer review standards applicable to HISAs. Indeed, the Court even cited to the EPA's TSD. *CRR v. EPA*, 684 F.3d at 121. ("Scientific studies upon which EPA relied place high confidence in the assertion that global mean surface temperatures over the last few decades are higher than at any time in the last four centuries. Technical Support Document for the Endangerment Finding (TSD), at 31."). *Id*.

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[4] EPA also referred to the TSD as ISI in its written response to a formal EPA investigation. *See* EPA Office of Inspector General, *Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes* ("EPA-OIG Report") (9/26/11), at pp. 61-62. The D.C. Circuit Court failed to adjudicate the admissibility of this report before issuing its ruling. Order No. 09-1322 (6/26/12).

ii. EPA's "Deemed Dissemination" of the Major HISAs Subjected Them to OMB/EPA Guidelines' Highest Peer Review Standards

EPA acknowledged that its IQA Guidelines may apply to disseminated information that EPA "adopts, endorses, or uses...to formulate or support a regulation, guidance, or other Agency decision or position". EPA Br. at 90. Agency-disseminated information includes influential "information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information...[such that it appears] the information represent[s] agency views." OMB-PRB at p. 9; OMB-IQA Guidelines, 67 FR 8452, 8454.

"[T]he Administrator [relied] on the major assessments of the USGCRP, IPCC, and NRC as the primary scientific and technical basis of her endangerment decision." Final Endangerment Findings, 74 FR 66496, 66510; EPA Br. at 12. And, the U.S. government accepted these assessments as "essentially represent[ing] the U.S. government's view of the state of knowledge on [GHGs] and climate change." 74 FR at 66511; EPA Br. at 31. But, EPA failed to treat them as HISAs under its guidelines.

EPA ignored the fact that these assessments qualified as HISAs. First, their conclusions are novel, controversial and precedent-setting, and the Final Endangerment Findings they support triggered EPA's promulgation of mobile and stationary source GHG emissions regulations that will have wide-ranging and significant national economic impacts of more than $500

million annually. OMB-PRB, §III.1; EPA-PRH, §2.2.4; *see* Margo Thorning, *Impact of CAA GHG Regulations on U.S. Investment and Job Growth*, Testimony Before the Subcommittee on Energy and Power, Committee on Energy and Commerce, U.S. House of Representatives (2/9/11) ("Thorning Testimony"), available at: <http://democrats.energycommerce.house.gov/sites/default/files/image_uploads/Thorning_Testimony.pdf> (last viewed 5/15/13).

Second, each of the sixteen TSD-summarized USGCRP/CCSP Synthetic Assessment Products ("SAPs"), including the two for which EPA served as "lead" agency developer, are "classified as 'highly influential.'" *See, e.g.* CCSP (2008b) *Analyses of the Effects of Global Change on Human Health and Welfare and Human Systems*, A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. Gamble, J.L., ed., U.S. Environmental Protection Agency, Washington, D.C., USA (Sept. 2008) ("SAP4.6/CCSP2008b") at 2, available at: <http://downloads.globalchange.gov/sap/sap4-6/sap4-6-final-report-all.pdf> (last viewed 5/18/13); CCSP (2009b) *Coastal Sensitivity to Sea-Level Rise: A Focus on the Mid-Atlantic Region*, A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [J.G. Titus (Coordinating Lead Author), U.S. Environmental Protection Agency, Washington D.C., USA (Jan. 2009) ("SAP4.1/CCSP2009b") at 2, available at: <http://downloads.globalchange.gov/sap/sap4-1/sap4-1-final-report-all.pdf> (last viewed 5/18/13).

Third, EPA agreed with OMB's determination that "the underlying peer-reviewed scientific assessments of the NRC, IPCC, USGCRP identified and discussed in the TSD [as opposed to the TSD itself]…have the impacts or characteristics required to meet the OMB [-PRB]'s definition of a highly influential scientific assessment". EPA-OIG Report, at 61-62.

Contrary to EPA's assertions, therefore, these major HISAs should have been subjected to OMB's/EPA's highest and least discretionary peer review standards for HISAs, but were not.

iii. EPA's Reliance on USGCRP/CCSP and IPCC Peer Review Process Failed to Satisfy OMB/EPA's HISA Peer Review, Standards

EPA avoided peer reviewing the seven NRC TSD-summarized assessments, and instead, merely relied upon the National Academies of Sciences' ("NAS") reputation and NRC's relationship with NAS to focus only on NRC's peer review processes. *See* Final TSD, Table 1.1, at 172; OMB-PRB, §IV.i; EPA-PRH, §2.2.10.

EPA did not peer review the sixteen TSD-summarized USGCRP/CCSP assessments or the thirteen TSD-summarized IPCC assessments, focusing, instead, on each of these organizations' internal peer review processes. *See* Final TSD, §1(b), Box 1.1; OMB-PRB, §IV.ii; EPA-RTCs Vol. 1, 1-14-to-1-15, 1-20, 1-25. However, these processes were subsequently shown to be flawed.

A. USGCRP/CCSP Peer Review Process

The Administrator's Endangerment Findings primarily relied on sixteen TSD-summarized USGCRP/CCSP-developed SAPs addressing different focus-areas. Final TSD, at Box 1.1, 165-166. Yet these SAPs failed to satisfy OMB's/EPA's peer review standards for HISAs.

Each SAP contains a virtually identical statement that "[t]he CCSP Interagency Committee relies on Environmental Protection Agency certifications regarding compliance with Section 515 and Agency guidelines as the basis for determining that this product conforms with Section 515…of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554)." *See, e.g.*, SAP4.6/CCSP2008b, at 2; SAP4.1/CCSP2009b, at 2. These statements demonstrate *prima facie* that EPA had 'certified' to other federal agencies vis-à-vis the Committee that the two SAPs for which EPA served as "lead" agency developer satisfied such requirements.

EPA failed to substantiate in the administrative record, as required by OMB-PRB,§VII, how its review of each individual SAP met IQA statutory and OMB/EPA IQA-implementing guideline HISA standards. Additionally, it failed to demonstrate; 1) whether the USGCRP/CCSP peer review process described by EPA had actually been followed; 2) that the CCSP Interagency Committee had actually scrutinized EPA's certifications on more than a pro forma basis; 3) that the fourteen TSD-summarized SAPs for which other federal

agencies served as "lead" developers[5] satisfied such standards; and 4) that the CCSP Interagency Committee had reliably scrutinized other federal agencies' certifications on more than a pro forma basis.

The administrative and judicial records do not speak to any of these issues; nor does EPA's brief. They address only how these organizations' peer review processes are supposed to operate, not how they actually operated. Thus, EPA failed to demonstrate that its reliance on such processes was justified and that its review of these assessments satisfied OMB/EPA's HISA peer review standards.

B. IPCC Peer Review Process

IPCC science generally, and specifically, was central, if not pivotal, to EPA's ascertainment of endangerment. *See* EPA Br., Document No. 1324992, at 31-35 (reflecting EPA acceptance of the following IPCC findings: 1) GHGs cause warming; 2) Atmospheric GHG levels are increasing due to human activity; 3) The climate is warming; 4) Recent warming is attributable to GHG increases; and 5) Climate warming threatens human health and welfare.). Two or

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[5] These agencies include the U.S. Departments of Agriculture, Energy, Interior, Transportation and Commerce/National Oceanic and Atmospheric Administration and the National Aeronautics and Space Administration. *See* United States Global Change Research Program, Resource Library, available at: <http://www.globalchange.gov/about/agencies> (last viewed 5/18/13).

more of the thirteen TSD-summarized IPCC assessments were cited in each of the sixteen TSD-summarized USGCRP/CCSP SAPs and seven TSD-summarized NRC reports upon which the Administrator's Endangerment Findings were based. Final TSD, §1(b) p. 4; Box 1.1; pp. 169-171; Final Endangerment Findings, 75 FR 49556, 66510-66511

This strongly suggests that EPA had not been overly selective in choosing from among the IPCC's many findings, and had decided, instead, to embrace IPCC climate science broadly. The D.C. Circuit Court apparently concurred with EPA's approach. *See CRR v. EPA*, 684 F.3d at 120. See also *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, Volume 3: Process Issues Raised by Petitioners* ("EPA-RTPs, Vol. 3") (8/13/10), §3.2.1-3.2.3 (addressing Petitioners' claims that because "the USGCRP and NRC assessments regularly cite and rely on data, resources and conclusions in the IPCC reports", said assessments "are not separate and independent of the available science").

EPA claims that its review of IPCC peer review processes was sufficient to ensure the quality of the IPCC assessments (EPA-RTPs Vol. 3, Response (3-3) at 13) ring hollow. The findings of a United Nations ("UN") Secretary General and IPCC Chair-commissioned report that had specifically evaluated the IPCC's peer review processes and the EPA's Inspector General's Report raise serious questions about the credibility of the Administrator's Final

Endangerment Findings. InterAcademy Council, *Climate Change Assessments Review of the Processes and Procedures of the IPCC* ("IAC-2010 Report") (10/1/10), available at: <http://www.interacademycouncil.net/24026/26050.aspx> ("IAC-2010 Report") at iii, 59-65; EPA-OIG Report at 39. They indicate that the Third and Fourth IPCC Assessment Reports ("AR3", "AR4") had been developed amidst numerous systemic IPCC process and procedure failures in the critical areas of peer review, reviewer independence/ conflict-of-interest, lead author selection, assessment scoping, and assessment communication transparency, which required correction, the very failures the IQA and OMB's/EPA's IQA-implementing guidelines are meant to guard against. *See* IAC-2010 Report, at iii, 59-65; EPA-OIG Report, at 39.

The D.C. Circuit Court overlooked numerous systemic IPCC process and procedure failures which the IAC-2010 Report revealed. The report found that, although "the IPCC has heightened public awareness of climate change, raised the level of scientific debate, and influenced the science agendas of many nations...***some fundamental changes to the process and the management structure are essential.***" [emphasis added]. *See* IAC-2010 Report at 59 [emphasis added]. Although the report's findings were publicly released only after EPA had issued its Denial of Petitions for Reconsideration (August 2010), EPA had been aware of its existence and its broad focus since as early as February 27, 2010 – when it was first publicly announced. *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, Volume 2: Issues Raised by Petitioners on EPA's Use of IPCC (Aug. 13, 2010) ("EPA-RTPs, Vol. 2"), Comment/Response (3-3) at 13.

The IAC-2010 Report disclosed that established IPCC processes for flagging, critically assessing and listing unpublished or non-peer-reviewed sources were often ignored, leading to AR4 lead-author review errors. IAC-2010 Report, at xiii-xiv, 16-17, Box 2.1, 22. The Report also revealed that 16%, 41%, and 64% of the approximately 14,000 IPCC references that Working Groups ("WG") I, II and III, respectively, cited in AR3 consisted of non-peer-reviewed journal articles. IAC-2010 Report at 16, citing the findings of Bjurström, A., and M. Polk, *Physical and Economic Bias in Climate Change Research: A Scientometric Study of IPCC Third Assessment Report*, Climatic Change (2010), §3.2, available at: <http://gaia.jhuapl.edu/sites/default/files/Bjurstrom_IPCC_bias.pdf> (last viewed 5/7/13).

These authors estimate that AR4 reflects roughly similar rates of reliance upon non-peer-reviewed "gray" literature. *See* Roger Pielke Jr., Blog, *Gray Literature in the IPCC TAR, A Guest Post by Andreas Bjurström* (3/5/10) available at: <http://rogerpielkejr.blogspot.com/2010/03/gray-literature-inipcc-tar-guest-post.html> (last viewed 5/7/13). This estimate appears reasonable, especially with respect to WG-III whose AR3 contribution had relied *mostly* on gray literature. Two of the three editors of WG-III's AR4 report (Metz and Davidson) had been

lead-authors in WG III's AR3 report strongly suggesting that no significant change in the use of non-peer-reviewed sources had taken place. *See* IPCC (2001) *Climate Change 2001: Mitigation*, A Report of Working Group III of the Intergovernmental Panel on Climate Change ("IPCC AR3 WG-III Report"), at §10.4.2.2, available at: <http://www.ipcc.ch/ipccreports/tar/wg3/index.php?idp=437> (last viewed 5/17/13); IPCC (2007) Climate Change 2007 - *Mitigation of Climate Change*, Contribution of Working Group III to the Fourth Assessment Report of the IPCC, B. Metz, eds., Cambridge University Press ("IPCC AR4 WG-III Report"), available at: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4_wg3_full_report.pdf> (last viewed 5/17/13). These systemic peer review process flaws go beyond the specific errors previously identified by Petitioners. *See* RTPs, Vol. 2, Comments/Responses 2-17, 2-19.

The IAC-2010 Report also found that the IPCC lacks institutional and scientific independence. As an intergovernmental subsidiary panel of the World Meteorological Organization ("WMO") and the United Nations Environment Program ("UNEP"), the IPCC is overseen by WMO and UNEP and must report to the UNEP, the WMO, the UN Framework Convention on Climate Change, and the UN General Assembly. *See* IAC-2010 Report at 44.

Indeed, the WMO Secretary-General and UNEP Executive Director signed the Forewords to the AR3 and AR4 assessments. *See* IPCC (2001), *Climate Change 2001: The Scientific Basis*, Contribution of Working Group I to the

Third Assessment Report of the Intergovernmental Panel on Climate Change, Foreword, M. Noguer, et al., Cambridge University Press, available at: <http://www.grida.no/climate/ipcc_tar/wg1/pdf/WG1_TAR-FRONT.pdf> (last viewed 5/17/13); IPCC (2007), Climate Change 2007: *The Physical Science Basis,* Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Foreword (Solomon, S., et al., eds.), Cambridge University Press, available at: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-frontmatter.pdf> (last viewed 5/7/13).

The IAC-2010 Report, furthermore, expressed concern about the "lack of a conflict-of-interest and disclosure policy for IPCC leaders and Lead Authors". IAC-2010 Report at 52-53. The IPCC "does not have a conflict-of-interest or disclosure policy for its [own] senior leadership (i.e., IPCC Chair and Vice Chairs), Working Group Co-chairs and authors, or the staff of the Technical Support Units". *Id*., p. 52. Rather, "IPCC Secretariat. . . professional staff members . . .are employees of WMO and/or UNEP and are subject to their disclosure and ethics policies." *Id*. However, the report also revealed that "WMO and UNEP have not established conflict-of-interest or disclosure policies for experts who serve on most WMO and UNEP assessment teams." *Id*. This strongly suggests that IPCC senior leadership was not subject to any conflict-of-interest rules at all.

Given "the nature of the IPCC's task (i.e., in presenting a series of expert judgments on issues of great societal relevance)", the Report's authors emphasized the need for the IPCC to "pay special attention to issues of independence and bias to maintain the integrity of, and public confidence in, its results." *Id*., at p. 53. These systemic independence/conflict-of-interest flaws go beyond the specific errors previously raised by Petitioners. *See* EPA-RTPs Vol. 2, Comments/Responses 2-25, 2-30.

IPCC peer review processes, moreover, suffered from transparency failures. The author selection process lacked formal criteria which rendered the AR4 susceptible to political influence. IAC-2010 Report at 14-15. And, IPCC leaders and spokespersons often strayed into policy advocacy in violation of the organization's mandate. IAC-2010 Report at 54-55. These systemic transparency flaws go beyond the specific errors previously raised by Petitioners. *See* EPA-RTPs Vol. 2, Comments/Responses 2-17, 2-18, 2-25.

These numerous systemic IPCC process and procedure failures raise serious doubts about the quality of the IPCC assessments and the USGCRP/CCSP and NRC assessments that cite them, upon which the Administrator's Final Endangerment Findings primarily rely. *See* EPA-RTCs Vol. 1, Responses 1-14-to-1-15, 1-20. EPA was well aware of these failures and the need for their immediate correction, but continues to express confidence in the IPCC and its forthcoming AR5. *See* Intergovernmental Panel on Climate Change 32d Sess., *Review of*

the IPCC Processes and Procedures Report by the Inter Academy Council, Compilation of Comments Received from Governments, Comments by the Government of the United States (10/14/10-10/16/10), at 1, 4-6; EPA Br. at 29-35, 53-56, 62, 64, 66, 72. Such misplaced reliance on flawed IPCC processes, however, severely undermined the Administrator's ability to satisfy the IQA's statutory mandate and the OMB/EPA IQA-implementing guidelines' peer review standards for HISAs. It thus damages the credibility and reliability of the Administrator's scientific findings and weakens the legal justification underlying EPA's sweeping GHG emissions regulations. *See also* Virginia Petition, No. 12-1152, at 21-26.

iv. EPA's Notice-and-Comment Procedure Failed to Provide a Transparent Public Review of Petitioners' IQA Claims

EPA states that it addressed Petitioners' IQA-based RFCs in a transparent notice-and-comment rulemaking procedure. EPA Br. at 90; EPA-RTCs Vol. 1, Comment/Response 1-61; EPA-PRH, §8.5. This is not true because EPA did not publicly and transparently discuss the scientific underpinnings of the IPCC, USGCRP/CCSP and NRC assessments. Texas-Virginia Opening Brief, Doc. #1309185 (5/20/11), at 11, 31-36; Texas-Virginia Reply Brief (10/17/11), at 14-17. EPA's administrative mechanism did not allow "affected persons to seek and obtain correction of [contested] information maintained and disseminated by the agency that does not comply with [the] OMB

guidelines", especially information "supporting regulations in the context of rulemaking." 44 U.S.C. §3516, note; OMB-IQA Guidelines, 67 FR 8452, 8457-8459; OMB-PRB, at 11, §§II.2-II.3, §III.3; OMB, Administrator, Office of Information and Regulatory Affairs ("OIRA"), Memorandum, Information Quality Guidelines – Principles and Model Language (Sept. 5, 2002) at 2 ("agencies must provide well-established procedural safeguards that allow affected persons to contest information quality on a timely basis", especially "[i]n cases where the agency disseminates a study, analysis or other information prior to the final agency action. . ."). EPA also did not adequately consider public comments on the adequacy of its internet-accessible peer review plans for HISAs. OMB-PRB, §V.1-§V.3.

EPA's treatment of Petitioners' RFCs as comments on a public rulemaking (EPA-RTCs Vol.1, Comment/Response 1-61) conflated the notice-and-comment and peer review procedures, ignoring important distinctions between them. APA notice-and-comment (stakeholder) procedures do not constitute adequate peer review because they do "not assure that qualified, impartial specialists in relevant fields have performed a critical evaluation of the agency's draft product". OMB-PRB, at 28.

Public comment "does not necessarily draw the kind of independent, expert information and in-depth analyses expected from the peer review process…[which]…is limited to consideration of specified technical issues", and therefore "does not substitute for peer review". *Id*. at 4; EPA-

PRH, §1.2.8. Unlike stakeholder involvement which is concerned with the outcome of an agency's technical work product or regulatory position, peer review is concerned with the scientific quality and technical credibility of the work product supporting a policy or decision. EPA-PRH, §1.2.9. Consequently, contrary to EPA assertions and the D.C. Circuit Court's conclusion, EPA denied Petitioners the meaningful administrative review of their RFCs to which the IQA entitles them. 44 U.S.C. §3516 (note), P.L. 106-554 (2000), §515(b)(2)(B).

The D.C. Circuit's failure to examine closely whether EPA provided administrative measures sufficient to permit adequate public review of the scientific quality and technical credibility of the major assessments, arguably constitutes reversible error. This failure allowed EPA to violate the letter and spirit of the IQA and OMB/EPA's IQA-implementing guidelines, and denied Petitioners judicial review of EPA's rejection of their RFCs. As a result, the Administrator was permitted to base her Endangerment Findings on outside-party-developed scientific assessments that were fatally infected by flawed processes and procedures.

Had the Court conducted a more careful review it would have concluded that EPA had not complied with IQA standards. If EPA's IQA noncompliance had been discerned and subjected to a more rigorous and informed scientific and judicial review at an earlier stage, the Administrator would likely have been prevented from reaching the kind of sweeping

Endangerment Findings that led to EPA's promulgation of very broad and extremely costly and burdensome GHG emissions regulations of national impact.

EPA's Final Endangerment Findings should be overturned and revised.

CONCLUSION

For the foregoing reasons, the petitions should be granted and the Final Endangerment Finding reversed and remanded for further proceeding in accordance with law, including rehearing.

Respectfully submitted,

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