CASE NO. 14-60535

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LENNOX INTERNATIONAL, INCORPORATED & AIR-CONDITIONING, HEATING AND REFRIGERATION INSTITUTE,

Petitioners,

V.

UNITED STATES DEPARTMENT OF ENERGY & ERNEST MONIZ, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE DEPARTMENT OF ENERGY

AGENCY NO. EERE-2008-BR-STD-0015 &
AGENCY NO. EERE-2014-BT-PET-0041 (CONSOLIDATED)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

Kate Comerford Todd
Sheldon Gilbert
U.S. Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Linda E. Kelly
Quentin Riegel
Manufacturers' Center for Legal Action
733 10th Street, NW, Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

Ryan Bangert
Baker Botts L.L.P.
2001 Ross Avenue
Dallas, Texas 75201-2980
(214) 953.6915 (Telephone)
(214) 661.4915 (Facsimile)

J. Mark Little
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229.1489 (Telephone)
(713) 229.2789 (Facsimile)

Counsel for Movants

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

In addition to the parties and counsel listed in Petitioners' brief, the undersigned certifies that the following listed persons and entities have an interest in the outcome of the case. These representations are made in order that judges of this court may evaluate possible disqualification or recusal.

***Amici Curiae*:**

The Chamber of Commerce of the United States of America

The National Association of Manufacturers

Attorneys for *Amici Curiae*:

Kate Comerford Todd
Sheldon Gilbert
U.S. Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062

Linda E. Kelly
Quentin Riegel
Manufacturers' Center for Legal Action
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Ryan Bangert
Baker Botts L.L.P.
2001 Ross Avenue
Dallas, Texas 75201-2980
(214) 953.6915 (Telephone)
(214) 661.4915 (Facsimile)

J. Mark Little
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229.1489 (Telephone)
(713) 229.2789 (Facsimile)

By: /s/ *Ryan Bangert*
Ryan Bangert

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INFORMATION QUALITY ACT (44 U.S.C. § 3516 (NOTE))

ADMINISTRATIVE AUTHORITIES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Chamber of Commerce of the United States of America** ("Chamber") is the world's largest business federation, representing interests of more than three million businesses and organizations of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system.

The **National Association of Manufacturers** ("NAM") is the largest industrial trade association in the United States, representing over 12,000 small, medium, and large manufacturers in all 50 states. NAM is the leading voice in Washington, D.C., for the manufacturing economy, which provides millions of high wage jobs in the U.S. and generates more than $1.6 trillion in GDP. In addition, two-thirds of NAM members are small businesses, which serve as the engine for job growth. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

Amici's members have a strong interest in the Department of Energy's Walk-in Cooler and Freezer Rule ("WICF Rule") because the Social Cost of Carbon ("SCC") precedent set by DOE in the rulemaking process may have an impact on their members, many of which manufacture products that, when

combusted, result in greenhouse gas emissions, including carbon dioxide ("CO_2"), and emit CO_2 in the course of their business. Those business activities may be substantially impacted by future regulations, similar to the WICF Rule, grounded in part in either the 2010 or 2013 estimates of the SCC created by the federal Interagency Working Group ("IWG"). Therefore, *Amici's* members have a direct and meaningful interest in ensuring that any estimates and applications of the SCC are based on a transparent and lawful process, and that the resulting SCC estimates are neither arbitrary nor capricious.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* have sought leave of this Court to file this brief.

SUMMARY OF ARGUMENT

The Department of Energy lists among the "national benefits" of its new energy-efficiency standards for walk-in coolers and freezers a reduction in the emission of carbon dioxide (CO_2).[2] DOE places the net present monetary value of that hoped-for reduction between $1.2 billion and $16.3 billion.[3] To calculate that range of values, DOE employed an estimate of the Social Cost of Carbon ("SCC Estimates"). The SCC Estimates ambitiously seek to estimate the present value of projected future damages that may be caused by CO_2-driven climate change.

The SCC Estimates are inappropriate for use in the regulatory context because they suffer from significant procedural and legal defects. First, the estimates were developed by an ad hoc Interagency Working Group operating behind closed doors and outside the purview of notice and comment rulemaking or other meaningful public scrutiny. That process violates well-established requirements that influential information used by federal agencies to inform public policy decisions be developed through a transparent process.

Second, the inputs and calculations used by the IWG to produce the SCC Estimates have not been subjected to peer review. Federal agencies, including the Office of Management and Budget ("OMB"), recognize the important role played

[2] 79 Fed. Reg. 32,050, 32,053 (June 3, 2014).

[3] *Id.*

by peer review to ensure the quality and accuracy of data used in the rulemaking process. Yet neither OMB nor the IWG subjected the SCC Estimates to peer review. Combined with the lack of transparency of the IWG's proceedings, the lack of peer review raises serious questions about the legality and reasonableness of the SCC Estimates.

Third, OMB and the IWG failed to subject their selection of discount rates used to derive the SCC Estimates to the peer review process, and selected low discounts rates in violation of the Regulatory Right-to-Know Act. This use of improperly low discount rates has the effect of artificially inflating the present value of highly speculative future damages projected to be caused by future climate changes, enabling more restrictive regulation of present-day emissions.

These foundational flaws render the SCC Estimates unsuitable for use in any regulatory proceeding under both the Administrative Procedure Act ("APA") and the Information Quality Act ("IQA"). Accordingly, the Court should vacate the WICF rule and direct that DOE refrain from employing the SCC Estimates in this rulemaking.

ARGUMENT

I. THE IWG'S OPAQUE PROCESS FOR DEVELOPING THE SCC ESTIMATES FAILS TO SATISFY GUIDELINES UNDER BOTH THE INFORMATION QUALITY ACT AND THE REGULATORY RIGHT-TO-KNOW ACT.

The SCC Estimates relied upon by DOE were developed through an opaque process administered by the ad-hoc IWG, wholly lacking in the transparency required for information that will be used to guide *billions* of dollars of agency decision-making. To satisfy IQA's transparency requirement, OMB guidelines require that the source of the utilized data must be made public, along with the various assumptions employed and analytic methods applied; and the findings must be reproducible by third parties (within an acceptable range of imprecision).[4] The process used to develop the SCC estimates fails to meet these important IQA transparency requirements. By relying on fundamentally flawed SCC Estimates without undertaking an independent analysis of the data, the DOE failed in its duty to examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."[5] Rather, the DOE merely accepted, incorporated, and applied the SCC Estimates without questioning their underpinnings.

[4] 67 Fed. Reg. 369, 378 (Jan. 3, 2002).

[5] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A. The SCC Estimates Qualify as "Influential Information" Subject to Heightened Transparency Requirements Under IQA Guidelines.

The IQA Guidelines, developed by OMB, require the "maximized" quality of "influential" information, which generally refers to information that "will have a clear and substantial impact on important public policies or important private sector decisions."[6] The SCC Estimates and their supporting models and data clearly fall under this definition, because their broad purpose "is to allow agencies to incorporate the monetized social benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory action."[7] Under OMB's IQA Guidelines, influential information like this must meet a higher level of transparency. OMB has described this heightened transparency as "an essential feature of high-quality analysis" that allows the public "to assess how much an agency's analytic results hinge on the specific analytic choices made by the agency."[8] This "public trust" benefit of IQA transparency finds additional support in the Administration's March 9, 2009 "Memorandum for the Heads of Executive Departments and Agencies" on "Scientific Integrity" ("Scientific Integrity Memo"), calling for "transparency in

[6] Office of Management and Budget Information Quality Guidelines 8 (Oct. 1, 2002).

[7] 79 Fed. Reg. at 32,094.

[8] 67 Fed. Reg. at 374.

the preparation, identification, and use of scientific and technological information in policymaking" to the "extent permitted by law."[9]

B. The Source of the Data Utilized by IWG, Including the Assumptions Employed and Methods Applied, Is Unknown.

Other than the SCC Estimates themselves and some limited information provided in technical support documents, very little is known about the IWG or the data, assumptions, and methods it used to produce the estimates. In short, the public does not know which persons participated on the IWG; whether, or how often, they met; what was discussed; what information was considered; what information was rejected; or how decisions were made. The SCC Estimates are the product of an opaque process, the inputs and outputs of which have never been subjected to peer review. The government has failed to provide the legally adequate support for the accuracy and, therefore, usefulness and reasonableness of the SCC Estimates in policy-making.

The concept of defining and recognizing the SCC in the regulatory context appears to have first emerged in the Ninth Circuit Court's decision in *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008). In addressing a challenge to the Administration's fuel economy standards for light trucks, the Ninth Circuit remanded the final rule because the agency failed to assign a

[9] Office of the Press Secretary, The White House, *Memorandum for the Heads of Executive Departments and Agencies* (Mar. 9, 2009) ("Scientific Integrity Memo").

monetary value to CO_2 emissions reductions. The following year, the Office of Information and Regulatory Affairs within the OMB began an interagency process to value the cost of carbon, in part by establishing the Interagency Working Group with 13 federal agencies.[10] In February 2010, the IWG published a Technical Support Document, setting forth estimates for "the monetized damages associated with an incremental increase in carbon emissions in a given year," over a time horizon stretching to the year *2300*.[11]

At a 3 percent discount rate, IWG estimated the present value of damages caused by the emission of one metric ton of CO_2 for 2010 as [21.4], and for 2050 as [44.9].[12] The IWG updated its estimates for the SCC in May 2013, and then made slight modifications to those estimates in November 2013, yielding values that, inexplicably jumped 50 percent or more *higher* than the valued IWG released just three years earlier.[13]

---

[10] Those agencies are the Council of Economic Advisors, Council on Environmental Quality, Department of Agriculture, Department of Commerce, Department of Energy, Department of Transportation, Environmental Protection Agency, National Economic Council, Office of Energy and Climate Change, Office of Management and Budget, Office of Science and Technology Policy, and the Department of the Treasury. Interagency Working Group on Social Costs of Carbon, United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* 2–3 (Feb. 2010) ("2010 Estimate").

[11] 2010 Estimate at 5.

[12] 2010 Estimate at 1.

[13] Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* 3 (Nov. 2013) ("2013 Estimate").

What is unknown about the IWG itself dwarfs the very little that is publicly known about the group. For example, OMB never even provided public notice of its decision to task the IWG with developing the SCC estimates. Indeed, the public only learned of the IWG and its important role when this information was referenced in an efficiency standard for microwave ovens. To date, the IWG has provided no notice of its meetings (before or after they occur), and the public has had no opportunity to observe and participate at meetings, to review minutes, communications, or even to view summaries of those materials. A record of the IWG's interaction and consultation with OMB, including charges and instructions, is unknown. The membership of the IWG is secret, as are the means by which its members are selected. Their areas of expertise are entirely unknown. It is even uncertain whether the persons participating in the IWG on behalf of various agencies are federal employees, contractors, or third parties.[14]

The modeling systems and inputs used to generate the SCC Estimates are just as opaque as the IWG itself. Indeed, OMB and IWG have refused to subject the SCC Estimates to the usual rigors of peer review. This refusal is deeply concerning given that, like DOE in this case, federal agencies are likely to import the SCC Estimates into their rulemaking processes without conducting any

[14] According to OMB Circular A-4's directive to agencies and presumably OMB itself, "You should also disclose the use of outside consultants, their qualifications, and history of contracts and employment . . . ." Office of Management and Budget, *Circular A-4* 17 (Sept. 17, 2003) ("OMB Circular A-4").

independent review of the underlying data or assumptions used to generate them. The importance of peer review to ensure the quality of information used in government decision-making is widely-accepted. The OMB's Final Information Quality Bulletin for Peer Review ("Peer Review Bulletin") states, "[p]eer review is one of the most important procedures to ensure that the quality of published information meets the standards of the scientific and technical community."[15] Indeed, the OMB recognizes that

> [m]ore rigorous peer review is necessary for information that is based on novel methods or presents complex challenges for interpretation. Furthermore, the need for rigorous peer review is greater when the information contains precedent-setting methods or models, presents conclusions that are likely to change prevailing practices, or is likely to affect policy.[16]

Similarly, the Administration's 2009 Scientific Integrity Memo states that "[w]hen scientific or technical information is considered in policy decisions, the information should be subject to well established scientific processes, including peer review . . . ."[17]

---

[15] Office of Management and Budget, *Final Information Quality Bulletin for Peer Review* 2 (Dec. 16, 2004).

[16] *Id.* at 12.

[17] *See supra* at n. 9. Similarly, EPA–which will likely utilize the SCC Estimates more than most agencies–recognizes that the hallmark of scientific integrity is a robust and independent peer review process. *See* Peer Review Handbook, 3rd Edition, Prepared for the U.S. Environmental Protection Agency by Members of the Peer Review Advisory Group for EPA's Science Policy Council, EPA/100/B-06/002.

Despite the fact that OMB's IQA Rule and Guidelines, as well as its Peer Review Bulletin, recognize the critical need for peer review in administrative decision-making and in support of administrative findings, neither OMB nor the IWG subjected the final SCC Estimates, or their key foundations, to peer review. This failure is a critical flaw, and the credibility of the estimates cannot be determined without it. The IWG used three models—called FUND, DICE, and PAGE—to calculate the SCC estimates. While those models were published in peer-reviewed journals, the data that the IWG plugged into those models to develop the SCC Estimates was not. The SCC Estimates are as much a product of the inputs to the models as they are the product of the models themselves. If unreliable or questionable data are entered into the models, there is no basis for concluding that reliable estimates would result—if garbage goes in, garbage will come out. Far from being peer-reviewed, a majority of the inputs that drive both the 2010 and 2013 SCC Estimates *are not even known*. Moreover, the final 2010 and 2013 estimates (*i.e.*, the products of these opaque models and these inputs) were never peer reviewed.

Further, it is not clear if and/or how modest changes to the inputs to the models could drastically change the SCC Estimates (*i.e.*, the sensitivity of inputs to model outcomes is not transparent). Indeed, given that the 2013 SCC Estimates are 50 percent or more higher than even the estimates developed just three years

ago, peer review is needed to assure the quality, consistency, and accuracy of the modeling assumptions. Unfortunately, OMB and the IWG have sheltered the model choices, models, data inputs, and analyses from badly-needed scrutiny. Without any information as to the hundreds of model inputs (or the people or processes that selected and/or developed them), and their sensitivities, expertise, or biases, it is impossible to call the SCC Estimates rational or supportable.

C. IWG's Selection of Discount Rates Is Incompatible With Express Regulatory Right-to-Know Act Guidelines.

The choice of the discount rate—which is a rate used to determine the present value of future costs or benefits—arguably is the most significant factor in derivation of the SCC Estimates. The higher the discount rate used, the lower the future predicted damage impacts. The IWG recognized that "the interagency group has been keenly aware of the deeply normative dimensions of both the debate over discounting in the intergenerational context and the consequences of selecting one discount rate over another."[18] Despite the central role of the discount rate to the SCC estimation process, OMB failed to subject the IWG's selection of the discount rate to peer review and disregarded explicit instructions from OMB, promulgated pursuant to the Regulatory Right-to-Know Act.

[18] 2010 Estimate at 19. Those normative issues include weighing potentially speculative future benefits to generations not yet born against immediate costs to the living.

The Regulatory Right-to-Know Act requires OMB to issue standardized guidelines to federal agencies on the measurement of costs and benefits. Circular A-4, the current version of these guidelines, states that "a real discount rate of 7 percent should be used as a base-case for regulatory analysis."[19] Circular A-4 also allows "a further sensitivity analysis using a lower but positive discount rate" when a rule "will have important intergenerational benefits or costs," but requires that the 7 percent rate be used for the base-case analysis.[20]

Instead of using 7 percent as a base-case, the SCC Estimates identify 3 percent as the "central value."[21] The highest discount rate used to calculate the SCC Estimates is 5 percent, while the low value is 2.5 percent.[22] By selecting discount rates lower than prescribed by current OMB guidelines, and failing to subject the change in discount rates to the external peer review process, DOE has failed to follow the procedures mandated by OMB in the Regulatory Right-to-Know Act.

---

[19] OMB Circular A-4 at 33.

[20] *Id.* at 36 ("If your rule will have important intergenerational benefits or costs you might consider a further sensitivity analysis using a lower but positive discount rate in addition to calculating net benefits using discount rates of 3 and 7 percent."). A lower discount rate is prescribed "when regulation primarily and directly affects private consumption (e.g., through higher consumer prices for goods and services)," *id.* at 33, a scenario that is not primarily implicated with respect to the SCC.

[21] 2010 Estimate at 23.

[22] *Id.*

II. DOE'S RELIANCE ON THE SCC ESTIMATES VIOLATES BOTH THE ADMINISTRATIVE PROCEDURE ACT AND THE INFORMATION QUALITY ACT.

Amicus U.S. Chamber filed an IQA petition during the comment period raising the legal deficiencies discussed above, yet the DOE failed to remedy these violations.[23] The plain language of the IQA and the APA, and the presumption in favor of judicial review of administrative action, make clear that the DOE's failure to comply with the IQA is reviewable by this Court. The DOE violated the APA by failing to adhere to the sound informational standards of the IQA, which Congress designed with the objective of ensuring the accuracy of the underlying data. The IQA requires that federal agencies "issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information" disseminated by the agency.[24] Both OMB and DOE have issued guidelines pursuant to the IQA requiring that the agencies employ methods to ensure the use of accurate, reliable, and unbiased information.[25] The failure of both OMB and, in

[23] *See* IQA Pet., Doc. # 0095-A2; 79 Fed. Reg. 32,050, 32,096 (June 3, 2014).

[24] IQA § (b)(2)(A). The IQA is set out at 44 U.S.C. § 3516 (note).

[25] The DOE's IQA Guidelines emphasize the need for transparency and peer review. *See* Final Report Implementing Office of Management and Budget Information Dissemination Quality Guidelines, 67 Fed. Reg. 62,446 (Oct. 7, 2002). Those Guidelines mandate ensuring the "transparency" of the data and methods behind scientific and financial information. *Id.* at 62,446, 62,452, 62,454. And they also explain that "formal, independent, external peer review" is a principal method for satisfying the "objectivity" IQA requirement, which "focus[es] on ensuring accurate, reliable, and unbiased information." *Id.* at 62,452. Unlike the OMB IQA Guidelines, the DOE IQA Guidelines disclaim judicial review, but they

this case, DOE to adhere to those requirements renders the WICF Rule arbitrary and capricious and contrary to law.

The IQA places affirmative obligations on federal agencies and creates corresponding rights for interested persons to ensure the agencies' compliance. Under the IQA, each federal agency "shall . . . issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency."[26] The IQA then directs that the agencies "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines."[27] In short, the IQA mandates both substantive informational standards and the right for "affected persons" to "obtain" compliance with those standards.

The APA provides for judicial review of an agency's failure to comply with these statutory directives, especially in the rulemaking context. The APA's plain language makes this clear: "[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[28] There is no question

---

nevertheless constitute substantive mandates that must guide the DOE's actions. *Id.* at 62,450.

[26] IQA § (b)(2)(A).

[27] IQA § (b)(2)(B).

[28] 5 U.S.C. § 704.

that publishing a final rule constitutes "final agency action."[29] Similarly, although not implicated here, even a standalone rejection of an IQA petition would also qualify as a "final agency action" because such a definitive ruling would in no way be "preliminary, procedural, or intermediate."[30]

Further, although the APA provides two exceptions to judicial review, neither applies here. First, the "statute[does not] preclude judicial review."[31] Quite the contrary. The IQA in fact implies judicial review by creating affirmative duties and empowering "affected persons" with the right to "obtain" compliance with them.[32] Second, this is not an instance in which "agency action is committed to agency discretion by law."[33] That is a "very narrow exception" "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[34] Here, by contrast, the IQA and the accompanying regulations provide substantial law for the courts to apply.

---

[29] *See Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007).

[30] 5 U.S.C. § 704.

[31] 5 U.S.C. § 701(a)(1).

[32] IQA § (b)(2)(B).

[33] 5 U.S.C. § 701(a)(2).

[34] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

The Supreme Court has recognized a heavy presumption in favor of the reviewability of agency action.[35] Congress legislates with full knowledge of this presumption of reviewability, and it strains credulity to suggest that Congress intended to eliminate all judicial review of an agency's compliance with IQA's mandates without leaving any trace of that intent in the statutory text: "It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, . . . it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review."[36]

In the final analysis, all the legal guideposts point in the same direction—the reviewability of the IQA's mandates. The IQA imposes affirmative obligations on agencies; grants rights to "affected persons" to "obtain" compliance with those obligations; and contains nothing that then (paradoxically) forecloses any judicial means of enforcing that compliance. Neutering the IQA of judicial review—without any textual indication of Congress's intent to do so—flies in the face of the APA and the well-established presumption of reviewability of agency action.

[35] *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

[36] *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

Therefore, the only reasonable conclusion is that an agency's compliance with the IQA's mandates is subject to judicial review.

In any event, DOE accepted the issues raised in amici's IQA petition into the administrative record, and must stand on its decision to do so, and must now defend the criticisms of the SCC Estimates on only those arguments it raised in response to the IQA petition. Not only did DOE accept *Amici*'s IQA petition into the record, it also acknowledged the criticisms contained therein, and made some attempts, albeit inadequate, to address those criticisms.[37] It did not claim that the IQA was unenforceable or unreviewable. DOE cannot now raise new grounds of defense to the criticisms raised in the IQA petition; specifically, DOE cannot now argue that the IQA creates only an empty right without a remedy enforceable in this Court. Thus, the DOE's position below forecloses any debate on the reviewability of its IQA violations in this specific instance.

CONCLUSION

The DOE's WICF rule should be vacated because of its reliance on the unlawfully promulgated SCC Estimates.

[37] *See* 79 Fed. Reg. at 32,096 (noting the "extensive comments" about "whether the SCC estimates comply with OMB's 'Final Information Quality Bulletin for Peer Review'" and then stating that "DOE believes that the SCC estimates comply").

Respectfully submitted,

Baker Botts L.L.P.

By: */s/ Ryan Bangert*
Ryan Bangert
ryan.bangert@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201-2980
(214) 953.6915 (Telephone)
(214) 661.4915 (Facsimile)

J. Mark Little
mark.little@bakerbotts.com
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229.1489 (Telephone)
(713) 229.2789 (Facsimile)

Counsel for Movants

Kate Comerford Todd
Sheldon Gilbert
U.S. Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Linda E. Kelly
Quentin Riegel
Manufacturers' Center for Legal Action
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above document was served on this the 17th day of April, 2015, via the Court's CM/ECF system on counsel of record, as follows.

John Andrews Hodges
jhodges@wileyrein.com
Brett Allen Shumate
bshumate@wileyrein.com
Wiley Rein, L.L.P.
1776 K Street, N.W.
Washington, DC 20006

Jeffrey Bossert Clark, Sr.
jeffrey.clark@kirkland.com
Kirkland & Ellis, L.L.P.
655 15th Street, N.W.
Washington, DC 20005

Robert P. Edwards, Jr.
bob.edwards@troutmansanders.com
Matthew Addison Dent Draper
addison.draper@troutmansanders.com
Troutman Sanders, L.L.P.
600 Peachtree Street, N.E., Suite 5200
Bank of America Plaza
Atlanta, GA 30308-2216

Michael Flynn McBride
mfm@vnf.com
Van Ness Feldman, L.L.P.
Suite 700
1050 Thomas Jefferson Street, N.W.
Washington, DC 20007

Monica Derbes Gibson
mdgibson@liskow.com
Stephen W. Wiegand
swwiegand@liskow.com
Liskow & Lewis, P.L.C.
701 Poydras Street
1 Shell Square, Suite 5000
New Orleans, LA 70139

Sydney Foster
sydney.foster@usdoj.gov
H. Thomas Byron, III
h.thomas.byron@usdoj.gov
Catherine H. Dorsey
catherine.dorsey@usdoj.gov
Michael S. Raab
michael.raab@usdoj.gov
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Rachel Eileen Heron
rheron@nrdc.org
Natural Resources Defense Council
1152 15th Street, N.W., Suite 5000
Washington, DC 20005

/s/ Ryan Bangert
Ryan Bangert

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,109 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in Times New Roman 14-point font.

/s/ Ryan Bangert
Ryan Bangert

April 17, 2015