

III. STANDARD OF REVIEW

Section 307 of the Clean Air Act directs that the Administrator “*shall* convene a proceeding for reconsideration” if two things are shown:

First, it was either “impracticable” to raise the objection during the public comment period, or the grounds for such objection arose after the period of public comment (but within the time specified for judicial review). . . .⁸ Second, the objection is of central relevance to the outcome of the rule—in this case the Endangerment Finding.⁹ The State’s Petition meets both requirements.

The information on which this Petition is based came to light after the June 23, 2009 deadline for public comment ended. The deadline for seeking judicial review of the Endangerment Finding is February 16, 2010.¹⁰ Therefore, the grounds for the objections presented in this Petition arose after the period of public comment but within the time specified for seeking judicial review.¹¹

The Endangerment Finding stipulates that “the Administrator [relied] on the major assessments of the USGCRP, IPCC, and NRC as the primary scientific and technical bases of her endangerment decision.”¹² The appropriateness of the Administrator’s misplaced reliance on those assessments is *of central relevance* to the Endangerment Finding.¹³

IV. THE STATE OF TEXAS’ COMMITMENT TO THE ENVIRONMENT

A. TEXAS’ RECORD OF ENVIRONMENTAL ENFORCEMENT

This Petition should not be misconstrued as a waning commitment by Texas to protect the environment. Rather, Texas asserts that environmental protection is best achieved when based on sound legal and scientific principles. Texas has aggressively protected air quality. The State has joined with EPA in record-setting enforcement actions and has become a national leader in renewable energy sources that have reduced greenhouse gas emissions.

Last December, the State of Texas teamed with EPA and the U.S. Department of Justice in a successful enforcement effort against the mining and refining company Asarco, LLC. As a result, Asarco will spend \$1.8 billion remediating 80 hazardous waste sites in 19

⁸ See 42 U.S.C. § 7607(d)(7)(B).

⁹ *Id.*

¹⁰ Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clear Air Act, 74 Fed. Reg. 66,496.

¹¹ See 42 U.S.C. § 7607(d)(7)(B) (providing that an objection to an agency rule under the CAA may be filed before the end of the period of judicial review if the grounds for the objection arose after the period for public comment).

¹² Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clear Air Act, 74 Fed. Reg. at 66,510.

¹³ See 42 U.S.C. § 7607(d)(7)(B) (an objection must be of “central relevance to the outcome of the rule”)

states across the country. Of that amount, \$52 million was allocated to Texas to fund the environmental remediation of a lead smelter in El Paso.¹⁴ In August, 2008, Texas obtained \$6.5 million in penalties in an enforcement action against two Lyondell Chemical Company subsidiaries that operated seven petrochemical plants along the Gulf Coast. The State's action stemmed from an EPA-led initiative that encouraged states to resolve long-standing disputes with polluters in non-attainment areas.¹⁵

And, a joint enforcement effort by Texas, EPA, and six other states led to the largest-ever federal environmental air quality settlement involving a refining company. Under its agreement with these state and federal authorities, Valero Refining, Inc., was ordered to spend \$700 million installing emission-reduction technologies at multiple refining facilities in Texas, Louisiana, Oklahoma, Colorado, New Jersey, and California.¹⁶

Currently, the Attorney General's Office is pursuing an enforcement action against BP Products North America, Inc., which was cited for 53 separate unlawful pollutant emissions at its Texas City facility.¹⁷ The State's action is built on separate criminal and civil enforcement actions brought by EPA and the Department of Justice—enforcement actions that led BP to plead guilty to felony Clean Air Act violations.¹⁸

B. TEXAS' RECORD OF REDUCING GREENHOUSE GAS EMISSIONS

Texas is successfully fostering the use of renewable energy sources. Since 2004, no other state in the nation has reduced power-sector CO₂ emissions more than Texas.¹⁹ Further, Texas has already installed more wind power than any other state—and all but four

¹⁴ Press Release, Office of the Attorney General, Asarco Pays \$52 Million to Fund Cleanup at Former El Paso Smelter (December 10, 2009), available at www.oag.state.tx.us (last visited Feb. 15, 2010). See also *id.* (noting that a separate state enforcement action from the same bankruptcy case yielded another \$29 million for remediation at an Asarco-owned state-superfund facility in southeast Texas). See also, Bob Christie, *Asarco Paying \$1.8B to Clean Up More Than 80 Sites*, ASSOCIATED PRESS, December 10, 2009.

¹⁵ Press Release, Office of the Attorney General, Attorney General Abbott Resolves Environmental Case Against Seven Gulf Coast Petrochemical Plants (August 25, 2008), available at www.oag.state.tx.us (last visited Feb. 15, 2010).

¹⁶ Press Release, Office of the Attorney General, Attorney General Wins for Texas in Largest Environmental Settlement with a Refiner (June 16, 2005) available at www.oag.state.tx.us (last visited Feb. 15, 2010). Additionally, Texas achieved another record-breaking enforcement action involving Huntsman Petrochemical Corp., which paid the largest penalty ever levied for a Texas Clean Air Act Violation. Press Release, Office of the Attorney General, Attorney General Abbott Lands Record Environmental Penalty From Huntsman (May 13, 2003), available at: www.oag.state.tx.us (last visited Feb. 15, 2010).

¹⁷ Press Release, Office of the Attorney General, BP Products North America Agrees to Temporary Injunction Ensuring Compliance with the Texas Clean Air Act (June 29, 2009), available at www.oag.state.tx.us (last visited Feb. 15, 2010).

¹⁸ Press Release, Environmental Protection Agency, BP Products to Pay Nearly \$180 Million to Settle Clean Air Violations at Texas City Refinery (February 19, 2009), available at www.epa.gov (last visited Feb. 15, 2010).

¹⁹ Texas is building on that by developing new transmission lines that will move more than 18,000 megawatts across the State—almost as much as other states' current capacity combined. See Press Release, Office of the Governor, Governor Perry Urges EPA to Withdraw Ruling on Danger of Carbon Dioxide (December 9, 2009), available at www.governor.state.tx.us (last visited Feb. 15, 2010).

countries—and the State’s leadership is working to ensure adequate infrastructure to continue growth in the wind generation sector.²⁰

The Texas Public Utility Commission created Competitive Renewable Energy Zones (CREZ) and has developed a plan to construct the electricity transmission capacity necessary to deliver renewable energy to Texas consumers.²¹ As a result, the transmission infrastructure necessary to triple renewable energy capacity is expected to be in place by 2013.²²

The State’s renewable energy efforts are already yielding results for the environment. Texas saw one of the two largest “absolute declines” in greenhouse gas emissions of any state in the nation.²³ “Many northeastern states have reduced carbon dioxide emissions from electric power plants by switching from polluting (and expensive) oil to cleaner natural gas. Texas, meanwhile, has led the nation in wind energy installations, helping to stabilize emissions from its power sector.”²⁴ “On a per capita basis, emissions from electric generators in Texas fell by 4% between 2004 and 2007—the result of reduced reliance on coal and an increased share of power produced by natural gas and wind.”²⁵ These statistics—as well as others that show that industrial-source nitrogen oxide fell by 46% between 2000 and 2006, and the 22% decline in major metropolitan areas’ ozone levels between 2000 and 2008—demonstrate Texas’s commitment to the environment.

Significantly, during the same four-year period when CO₂ emissions from electric generators decreased in Texas by 4%, such emissions in the rest of the nation increased by an average of .7%.²⁶ Further, U.S. Department of Energy statistics indicate that Texas’s greenhouse gas emissions first began dropping in 2002--and that the period between 2002 and 2007 showed an even larger, 5% decline.²⁷

Texas continues to expand its commitment to renewable energy sources. In the first three months of 2009, non-hydro renewables accounted for nearly 6% of electricity produced in Texas.²⁸ One of the nation’s largest biomass power plants is currently being constructed in Nacogdoches. And in Freeport, Texas, a new high-tech facility is slated to use algae to convert CO₂ and wastewater into energy.²⁹

²⁰ *Id.*

²¹ Texas Advisory Panel on Federal Environmental Regulations, Comments on the Environmental Protection Agency’s Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(A) of the Clean Air Act, at 24 (June 23, 2009).

²² *Id.*

²³ Tony Dutzik, et. al., *Too Much Pollution* ENVIRONMENT TEXAS RESEARCH AND POLICY CENTER, at ES-3 (Fall 2009), available at www.environmenttexas.org (last visited Feb. 15, 2010).

²⁴ *Id.*

²⁵ *Id.* at 23.

²⁶ John McFarland, *Report: Texas Greenhouse Gas Emissions Down*, ASSOCIATED PRESS, Nov. 12, 2009, available at www.abenews.go.com/business/wirestory?id=9073610 (last visited Feb. 15, 2010).

²⁷ *Id.*

²⁸ Tony Dutzik, et. al., *Too Much Pollution* ENVIRONMENT TEXAS RESEARCH AND POLICY CENTER, Fall 2009, at 24, available at www.environmenttexas.org (last visited Feb. 15, 2010).

²⁹ Rick Perry, Governor of Texas, Speech at the Texas Renewable Energy Industries Association Conference (Nov. 9, 2009), available at www.governor.state.tx.us (last visited Feb. 15, 2010).

Texas has a demonstrated record of working with EPA to enforce environmental laws. Equally important, the State has a demonstrated record of successfully encouraging and implementing clean, renewable energy technologies that have fostered a cleaner environment.

V. THE ENDANGERMENT FINDING

The Administrator takes the position—and the State does not disagree—that the United States Supreme Court decision in *Massachusetts v. EPA* required the Administrator to: “determine whether or not emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.”³⁰

EPA’s Endangerment Finding explicitly acknowledges that its decision must be exclusively governed by science: “the [Supreme] [C]ourt clearly indicated that the Administrator’s decision must be a ‘scientific judgment.’ She must base her decision about endangerment on the science, and not on policy considerations about the repercussions or impact of such a finding.”³¹ Further, a federal law requires that she not base her decision on just *any* science, but rather “on the best reasonably obtainable science.”³² Also, the plain language of Section 202(a) requires that the Administrator’s decision be “*in [her] judgment...*”³³ (emphasis added). Thus, in reaching her Endangerment Finding, the Administrator is obligated to make her own, independent, ‘reasoned decision’ that is based exclusively on the best available science.

Evidence is mounting that the Administrator’s decision was (1) not well-reasoned, (2) based on faulty scientific analysis, and (3) not truly her own but instead a blind-faith acceptance of flawed scientific conclusions by third parties.

VI. THE IPCC REPORT’S CENTRAL RELEVANCE TO THE ENDANGERMENT FINDING

A. THE RELATIONSHIP BETWEEN THE ENDANGERMENT FINDING, THE IPCC AND THE CLIMATE RESEARCH UNIT AT EAST ANGLIA UNIVERSITY’S HADLEY CENTER

Established by the United Nations and the World Meteorological Organization, the IPCC is the self-proclaimed “leading body for the assessment of climate change.”³⁴ Among

³⁰ U.S. Environmental Protection Agency, Climate Change – Regulatory Initiatives, Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, *available at* <http://www.epa.gov/climatechange/endangerment.html> (last visited Feb. 13, 2010).

³¹ Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66515.

³² Exec. Order. No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

³³ 42 U.S.C. § 7521.

³⁴ International Panel on Climate Change, Organization, *available at* <http://www.ipcc.ch/organization/organization.htm> (last visited February 14, 2010).