

from August 18, 2014

Group Targets GHG Risk Finding Via ESPS

A free-market group critical of EPA's greenhouse gas (GHG) rules is seeking to use the agency's recent plan for regulating GHG emissions from existing power plants as a new vehicle to challenge its climate "endangerment finding," the threshold assessment that EPA conducted to justify its GHG rules and which the Supreme Court has so far let stand.

In Aug. 13 comments on EPA's proposed existing source performance standards (ESPS) for power plants, the Institute for Trade, Standards and Sustainable Development (ITSSD) says that flaws with the peer review of studies supporting the 2009 endangerment finding mean that EPA cannot rely on them as the technical or legal foundation for the ESPS.

The finding was a prerequisite for EPA regulation of vehicle GHG emissions, the first such regulation EPA issued after the Supreme Court ruled in *Massachusetts v. EPA* that GHGs are "pollutants" and subject to Clean Air Act regulation, which in turn triggered permitting of stationary sources' GHG emissions.

ITSSD's comments echo arguments that others are making in their efforts to challenge or undermine the 2009 endangerment finding — which EPA first developed to justify its vehicle GHG rules — or at least prevent the agency from using it to justify new GHG rules.

For example, the Pacific Legal Foundation in 2013 unsuccessfully petitioned the Supreme Court to review the D.C. Circuit ruling upholding the endangerment finding, *Coalition for Responsible Regulation v. EPA*.

ITSSD is now using the ESPS, which EPA proposed June 2, to revive a challenge to the finding. The group, which says it advocates for "scientifically and economically benchmarked and justified, market-driven" regulations, says that EPA failed to ensure proper peer review under the Information Quality Act (IQA) of 28 "core reference documents" that supported EPA's conclusion that GHGs endanger public health and welfare.

The group in its comments notes that EPA offers as the basis for the ESPS "major assessments" by the federal government, the United Nations and the National Academy of Sciences (NAS), a body outside of government but funded substantially with federal dollars. These same assessments, deemed "highly influential" under the IQA, formed part of the body of research supporting the endangerment finding.

"EPA's failure to ensure that its process for validating these mostly third-party-developed major assessments satisfied the most rigorous and least discretionary peer review, transparency, conflict-of-interest, objectivity/bias, independence, panel balance and administrative review standards applicable to 'highly influential scientific assessments' ('HISAs'), now precludes EPA, *as a matter of law*, from adopting, endorsing and using those assessments as the scientific foundation for its proposed power plant rule, *unless* EPA peer reviews them once again in conformance with such IQA standards," the group says.

The group has also sent EPA requests for data under the Freedom of Information Act as part of an investigation of the science underlying the endangerment finding.

An ITSSD source says that the group submitted its comments now, rather than waiting for the end of the public comment period Oct. 16, because "the more time EPA has to correct scientific information that has been shown not be properly validated, the more likely it is that the final rule can be changed to reflect those corrections."

The source points to a government-wide disregard for ensuring IQA-compliant peer review of science used to support regulation, accusing researchers involved in peer review of conflict of interest driven in part by their dependence on government funding and in their close association with the authors of scientific papers they review.