

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
)
Deseret Power Electric Cooperative) **PSD Appeal No. 07-03**
)

**THE HEARTLAND INSTITUTE’S *AMICUS CURIAE* RESPONSE BRIEF
IN SUPPORT OF PERMITTEE DESERET POWER ELECTRIC COOPERATIVE
AND IN OPPOSITION TO THE PETITION OF PETITIONER SIERRA CLUB**

The Heartland Institute (“Heartland”) respectfully submits to the Environmental Appeals Board (“EAB”) The Heartland Institute’s *Amicus Curiae* Response Brief in Support of Permittee Deseret Power Electric Cooperative (“Deseret”) and in Opposition to the Petition of Petitioner Sierra Club (the “Sierra Club”).

STATEMENT OF INTEREST

The Heartland Institute is a 23-year-old national nonprofit public policy research organization created to discover, develop, and promote free-market solutions to social and economic problems. It provides free-market ideas to the nation’s 8,300 state and national elected officials and approximately 8,400 county and local officials. It also communicates these ideas to the media, civic and business leaders, educators, other groups, and the general public.

Some 500 state elected officials serve on Heartland’s legislative advisory board, acting as liaisons to their colleagues. Heartland also has a cadre of nearly 200 free-market policy experts—managing editors, senior fellows, policy advisors, and contributing editors—able to provide testimony, articulate issue positions through the media, and help educate in other ways policymakers at all levels of government in the fifty states and Washington, DC.

Heartland has a long history of conveying sound scientific information regarding climate change to the public. James M. Taylor, J.D., Heartland's senior fellow for environment policy, travels the country conveying accurate climate change data to elected officials, schools, and issue forums. He also is managing editor of *Environment & Climate News*, Heartland's national monthly publication devoted to sound science and free-market environmentalism with a circulation of approximately 75,000 readers.

He is the author of *What Climate Scientists Think about Global Warming* (Heartland Institute, 2007) and coauthor of *State Greenhouse Gas Programs: An Economic and Scientific Analysis* (Heartland Institute, 2003) and *New Source Review: An Evaluation of EPA's Reform Recommendations* (Heartland Institute, 2002). He has appeared on CNN and the Fox News Channel, and on the "Good Morning America" and "Newsmakers" national radio programs. His writing on environmental issues has appeared in the *Los Angeles Times*, *Houston Chronicle*, *Detroit News*, *Boston Globe*, *Chicago Tribune*, *Chicago Sun-Times*, and elsewhere.

He was the Chairman of the 2008 International Conference on Climate Change sponsored by Heartland on March 2-4, 2008, in New York City. This was the first major international conference focusing on the widespread dissent in the scientific community on the alleged "consensus" that modern warming is primarily man-made and is a crisis warranting drastic measures. More than 500 people attended, and 100 expert speakers delivered keynote addresses or participated in panel discussions.

Dennis Avery, Heartland's senior fellow for climate change, and S. Fred Singer are the authors of the New York Times bestselling book, *Unstoppable Global Warming: Every 1,500 Years*. Avery, an agricultural economist is also a senior fellow of the Hudson Institute. He has held positions with, and won distinguished service awards from, the U.S. Department of State and U.S. Department of Agriculture.

Dr. Singer, a climate physicist, is among the most prominent scientists in the world. He was the first director of the U.S. National Weather Satellite Service, served five years as vice chairman of the U.S. National Advisory Committee on Oceans and Atmospheres, and is the author of more than 400 technical papers in scientific, economic, and public policy journals. He is president of the Science and Environmental Policy Project, professor emeritus of environmental sciences at the University of Virginia, and Distinguished Research Professor at George Mason University. He is the editor of *Nature, Not Human Activity, Rules the Climate*, published by Heartland for the Nongovernmental International Panel on Climate Change (“NIPCC Report”) in March 2008. A copy of this report is attached to this Brief as Exhibit 1.

As discussed more fully below, Heartland believes the EAB ought not to be considering whether CO₂ emissions should be regulated, because it lacks jurisdiction. If this body does determine that this issue is properly before it, Heartland requests the opportunity to supplement the record with additional written materials and the oral testimony of Heartland’s climate change experts.

ARGUMENT

I. Introduction

The five *Amici Curiae* filing briefs in this proceeding in support of the Sierra Club (the “*Amici*”)¹ seek to place at issue the causes and consequences of climate change. This is an enormously complicated subject over which the EAB lacks jurisdiction. If the EAB were to consider these issues, its actions would constitute a rulemaking that would stand concepts of administrative law and Due Process on their heads.

In the event the EAB does consider these issues, it should also consider the NIPCC Report. This Report—compiled by scientists with no conflicts-of-interest, unlike the IPCC panels—indisputably establishes that the science of climate change is uncertain and its negative consequences are exaggerated and do not take into account benefits of global warming.

For all of these reasons, the Sierra Club’s petition should be denied.

II. The EAB Lacks Jurisdiction over the Science of Anthropogenic Climate Change and the Adverse Health and Welfare Effects Thereof.

The EAB has no jurisdiction over the issues injected into this proceeding by the *Amici*.

The issue before the EAB, pursuant to its Order, is the narrow one of whether U.S. Environmental Protection Agency Region 8 “erred by failing to require a best available control technology (“BACT”) limit for controls of CO₂ emissions” in the Prevention of Significant Deterioration (“PSD”) permit issued to Deseret.² The EAB set a briefing schedule, limited to this

¹ The five *Amici* filing briefs in support of the Sierra Club are: the Physicians for Social Responsibility; the National Parks Conservation Association; Dr. James E. Hansen; Brief Amici Curiae of Utah and Western Non-Government Organizations; and the states of New York, California, Connecticut, Delaware, Maine, Massachusetts, Rhode Island, and Vermont. *See* http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/f22b4b245fab46c6852570e6004df1bd/c38150f6c4bba3608525736900687af4!OpenDocument

² EAB Order dated November 21, 2007.

sole issue, for the parties and for *amicus curiae*.³

In response to this Order, the *Amici* have vastly exceeded this narrow scope. They argue, among a multitude of other things, that CO₂ limits should have been included in the Deseret permit because: (1) CO₂ emissions from anthropogenic sources cause global warming; and (2) CO₂ emissions are subject to regulation because CO₂ can “reasonably be anticipated to endanger public health or welfare.”⁴ These two issues are not properly before the Board.

What the *Amici* are actually trying to do is to convert this proceeding into an administrative rulemaking on the causes and effects of climate change. Heartland trusts the EAB will readily recognize that any rulemaking conducted by it on this massive and immensely complicated subject, under the guise of a permit appeal, would be unconstitutional, illegal, and void. It would take place without a proper administrative record, in the wrong forum, without proper notice to the parties affected—which number in the hundreds of thousands⁵—and without providing those parties with an opportunity to be heard. And no party will know the terms of any CO₂ rule that might emerge from this void until afterwards. By then it will be too late. Any such “rulemaking” would make a mockery of Due Process.

These issues were not raised directly either in the Sierra Club’s petition or in the record below. And the record made by *Amici* before this body on the causes and effects of climate change is woefully inadequate. Particularly in the briefs filed by the Physicians for Social Responsibility⁶

³ *Id.*

⁴ See briefs filed by the *Amici* listed *supra* n. 1.

⁵ See Brief of Amicus Curiae Competitive Enterprise Institute, identifying as affected sources a multitude of commercial, municipal, industrial, and private property owners who would be required to install BACT emission controls if regulations are issued as the Sierra Club and *Amici* envision.

⁶ See “P[h]ysicians for Social Responsibility’s Amicus Curiae Brief in Support of Petitioners” dated January 31, 2008.

and by the Attorneys General of several states,⁷ sweeping conclusions are made by the *Amici* as to climate change causes and effects. They cite voluminous authority said to support their statements, but almost entirely, and merely, in footnotes. Copies of the cited documents have not been supplied to the EAB to make part of the record. Nor have copies been provided to the parties, or other interested individuals or groups for their review and comment and, more importantly, submission of opposing data. Thus, the record is woefully inadequate.

Notice of these EAB proceedings fully comported with this body's rules,⁸ but was wholly insufficient for the scope of action by the EAB sought by the *Amici*. Notice went to all persons who received notice of the original permit issuance and five newspapers in Utah and Colorado, which is all that EAB rules require.⁹ But a proceeding seeking regulation of CO₂, as sought by the *Amici*, to be lawful and constitutional, should take place before the Administrator of the U.S. Environmental Protection Agency, not the EAB. And Federal Register notice would be required.¹⁰

As this body is undoubtedly well aware, regulatory proceedings are now underway before the Administrator on the issue whether U.S. EPA should regulate greenhouse gas vehicle emissions because they cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare."¹¹ For the EAB or Region 8 to conduct parallel proceedings in a permit appeal would illegally invade the province of the proper statutory forum. Accordingly, the EAB should defer to those proceedings, as it is authorized to do by law.¹²

⁷ "Brief of Amici Curiae States of New York, California, Connecticut, Delaware, Maine, Massachusetts, Rhode Island, and Vermont in Support of Petitioner, dated January 31, 2008.

⁸ 40 C.F.R. §§124.10, 124.19.

⁹ Region 8's Notification of Public Notice of Grant of Review herein, dated December 18, 2007.

¹⁰ 5 U.S.C. 553(c)

¹¹ 42 U.S.C. §7601(a)(1). *See* 72. Fed. Reg. 69,934.

¹² 40 C.F.R. §124.2.

For these reasons, Sierra Club’s petition should be denied by the EAB.

III. Climate Change Is Not a Crisis

A. The Science Is Uncertain.

Quantity does not trump quality. The *Amici* cite thousands of pages of data supposedly linking man-made emissions of greenhouse gases to climate change, with particular reliance on reports gathered by politicians around the world by the United Nations’ International Panels on Climate Change.

If the EAB determines to rely on this data, it must also rely on the NIPCC Report.¹³

The NIPCC is “an international panel of *nongovernmental* scientists and scholars who have come together to understand the causes and consequences of climate change.”¹⁴ They evaluated the IPCC data—and wound up calling it into serious question.¹⁵ These 23 NIPCC experts have no agenda. Their time was donated. Dr. Singer, who edited it, said: “Because we do not work for any governments, we are not biased toward the assumption that greater government activity is necessary,” unlike the IPCC authors.¹⁶

The NIPCC Report “focuses on two major issues – the very weak evidence that the causes of the current warming are anthropogenic (Section 2) and the far more robust evidence that the causes of the current warming are natural (Section 3). . . .”¹⁷ Among the points made by the NIPCC Report:

¹³ See Exhibit 1 hereto. As noted above, if the EAB determines to resolve issues of climate change science, it ought to open up the record for submittals by all interested parties, allowing sufficient time to ensure all have an adequate opportunity to do so.

¹⁴ *Id.* at vi (emphasis original).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1.

It should be obvious, but apparently is not, that such facts as melting glaciers and disappearing Arctic sea ice, while interesting, are entirely irrelevant to illuminating the *causes* of warming. *Any* significant warming, whether anthropogenic or natural, will melt ice – often quite slowly. Therefore, claims that anthropogenic global warming (AGW) is occurring that are backed by such accounts are simply confusing the consequences of warming with the causes, a common logical error. In addition, fluctuations of glacier mass depend on many factors other than temperature, and thus they are poor measuring devices for global warming.¹⁸

The IPCC cites correlation of global mean temperature with increases in atmospheric concentrations of carbon dioxide (CO₂) in the twentieth century to support its conclusion. The argument sounds plausible; after all, CO₂ is a GH gas and its levels are increasing. However, the correlation is poor and, in any case, would not prove causation.

The climate cooled from 1940-1975 while CO₂ was rising rapidly (Figures 4a,b). Moreover, there has been no warming trend apparent, especially in global data from satellites, since about 2001, despite a continuing rapid rise in CO₂ emissions.¹⁹

The IPCC reports rely heavily on computer climate models.²⁰ Such modeling is notoriously unreliable. Said famed mathematician John von Neuman, “Give me four adjustable parameters and I can simulate an elephant. Give me one more and I can make his trunk wiggle.”²¹

Even the IPCC admits computer modeling is unreliable, stating:

In climate research and modeling, we should recognise [sic] that we are dealing with a coupled non-linear chaotic system, and therefore that the long-term prediction of future climate states is not possible.²²

¹⁸ *Id.* at 2 (emphasis original).

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *Id.* at 4.

²² *Id.* at 12.

Among other things, the IPCC models did not factor in the influences on climate change of cloud feedback, solar activity, water vapor, and many other effects,²³ and have been criticized even by IPCC authors.²⁴

The best way to determine the reliability of computer climate models is by “fingerprinting” their predictions against actual measured data. They don’t match, the NIPCC Report finds.²⁵

Computer modeling is an enormously complicated subject, and the defects noted here are only a few among many addressed by the NIPCC Report, which Heartland urges the EAB to consult in more detail. Yet modeling is the linchpin of IPCC’s conclusions that climate change will worsen in coming years due to manmade emissions of CO₂. If IPCC’s modeling is flawed—and, undeniably, it is—then the entire justification for massive governmental regulation of greenhouse gases, in this case or any other one, collapses. As it should.

The defects in computer modeling upon which the entire regulatory construct of the *Amici*, the IPCC, and others are based is bad enough. But what if the manner in which global temperatures have been measured in recent years is unreliable? And what if, as a result, we can’t be certain whether the globe has been warming or not?

As time goes on, more and more defects in recorded temperature data are noted. Surface data doesn’t “control for urban heat-island effects—the fact that asphalt, buildings, air conditioning units, and other parts of urban life cause warming of urban areas that has nothing to do with greenhouse gases.”²⁶ The geographic distribution of sampling stations is poor and tends to be in

²³ *Id.* at 4-7, 12-15.

²⁴ *Id.* at 14-15.

²⁵ *Id.* at 4-15.

²⁶ *Id.* at 8.

more populated areas.²⁷ And NASA surface temperature data has been found to contain a serious error.²⁸

And where exactly should these air temperature measurements take place as to latitude, longitude, and verticality? At the surface of the earth, in Antarctica, near the equator? In the upper reaches of the atmosphere, up to 15 kilometres? Or lower, in the troposphere? And what mechanisms should be used to record temperature data? Weather balloons or satellite data?²⁹

The same questions apply to measurements of oceanic temperatures. It is said these temperatures are increasing, though recent reports cast doubt.³⁰ Should the measurements be made at the surface, slightly lower, or at various levels throughout the oceans' depths?³¹

And if the above-mentioned computer climate models are inaccurate to start with, for other reasons, and then use inaccurate, incomplete, or uncertain data—if “garbage in” is taking place—how certain can we be that the globe is warming at all?³²

These complexities and many more are addressed in the NIPCC Report. As it states, with supporting data:

[I]t is often stated that the climate has warmed in the twentieth century – but without mentioning that the warming up to 1940, compared to the cool LIA [Little Ice Age], was almost certainly of natural origin and that there was cooling from 1940 to 1975 (Figure 4a) when atmospheric CO₂ levels were rapidly increasing. Even the late twentieth-century warming trend may not be real. The global trend, derived since

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Since 2003, NASA has been sending a fleet of 3,000 undersea robots down 3,000 feet below sea level to measure ocean temperature. Since 2003, they have measured no warming, rather “a very slight cooling.” Richard Harris, National Public Radio, Morning Edition, March 19, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=88520025>

³¹ *Id.* at 18-19.

³² *Id.* at 2-9.

1979 from satellite data, depends very much on the choice of ending date. Figure 13 shows the complete satellite data record. One can legitimately conclude there was no warming trend prior to 1997, then a small but sudden jump in 1998, followed by another interval of almost no warming since 2001.³³

And what if it is not even known for certain that levels of CO₂ in the earth's atmosphere are rising for certain? The IPCC reports conclude levels are rising; the NIPCC Report is not so sure.³⁴ For one thing, the amount of CO₂ emitted remaining in the atmosphere fluctuates, influenced by natural factors such as ocean temperature, El Nino warmings, and the coolings from volcanic eruptions. Uncertainties abound.³⁵

As Dr. Singer concludes:

We hope the present study will help bring reason and balance back into the debate over climate change, and by doing so perhaps save the peoples of the world from the burden of paying for wasteful, unnecessary energy and environmental policies. We stand ready to defend the analysis and conclusion in the study that follows, and to give further advice to policymakers who are open-minded on this most important topic.³⁶

B. The *Amici*'s Parade of Horribles Is Unwarranted.

The list of catastrophes that await the world due to climate change, as recited by the *Amici*, seems endless. It is also greatly overstated, even if global temperatures are increasing due to anthropogenic emissions of CO₂.

Most alarming is Dr. Hansen's predictions of a sudden 20-foot rise in ocean levels.³⁷ Even the IPCC doesn't go this far, predicting most recently a rise of 18 cm per century.³⁸ His projections

³³ *Id.* at 9.

³⁴ *Id.* at 19-21.

³⁵ *Id.* at 20.

³⁶ *Id.* at vii.

³⁷ *Id.* at 15.

³⁸ *Id.* at 17.

don't match actual measurements, however.³⁹ And Dr. Hansen's dire prediction assumes a sudden collapse and melting of polar ice sheets, which did not happen during earlier much warmer periods and is considered unlikely to happen now.⁴⁰

And the parade of horrors does not take into account the fact that higher levels of CO₂ are beneficial to plants, enabling them to more readily survive drought and higher air temperatures, and also benefit animals such as polar bears.⁴¹ As Dr. Singer states:

The evident survival of polar bears and other species, of polar ice sheets and glaciers, and of corals, all demonstrate that warmer temperatures have not been catastrophic, as many seem to fear. In contrast, a markedly colder climate would certainly be harmful. Were a warmer climate also to be harmful, then logic would seem to dictate that the present climate is optimal – an unlikely occurrence.⁴²

Humans benefit from warmer climates. Human mortality and morbidity increase in winter and decrease in summer. Crops grow in more plentiful amounts during longer growing seasons, as does timber.⁴³ Furthermore, energy costs decrease in warmer weather.⁴⁴

In sum, the benefits of global warming—even if it is occurring and even if it results from man-made emissions of CO₂—outweigh the negative consequences when viewed according under sound science.

³⁹ *Id.*

⁴⁰ *Id.* But see n.30.

⁴¹ *Id.* at 24.

⁴² *Id.*

⁴³ *Id.* at 25.

⁴⁴ *Id.*

IV. CONCLUSION

As Dr. Singer states:

In conclusion, this NIPCC report falsifies the principal IPCC conclusion that the reported warming (since 1979) is very likely caused by the human emission of greenhouse gases. In other words, increasing carbon dioxide is not responsible for current warming. Policies adopted and called for in the name of ‘fighting global warming’ are unnecessary.

It is regrettable that the public debate over climate change, fueled by the errors and exaggerations contained in the reports of the IPCC, has strayed so far from scientific truth. It is an embarrassment to science that hype has replaced reason in the global debate over so important an issue.⁴⁵

For these and the foregoing reasons, the Sierra Club’s Petition should be denied.

Dated: March 21, 2008

Respectfully submitted,



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⁴⁵ *Id.* at 27.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that she served the foregoing document by First Class

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