ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1322, and consolidated cases (complex)

Coalition for Responsible Regulation, Inc., et al.,
Petitioners

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al., Intervenors

Consolidated with 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

REPLY BRIEF FOR STATE PETITIONERS TEXAS AND VIRGINIA ON DENIAL OF RECONSIDERATION OF THE ENDANGERMENT FINDING AND OF STATE PETITIONERS AND SUPPORTING STATE INTERVENORS ON ENDANGERMENT FINDING DELEGATION ISSUES

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**Authorities upon which we chiefly rely are marked with asterisks.*

GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
EPA	Environmental Protection Agency
IPCC	Intergovernmental Panel on Climate Change
IQA	Information Quality Act
RTP	EPA Response to Petitions
TSD	EPA Technical Support Document for Endangerment Finding

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Opening Brief for State Petitioners Texas and Virginia on Denial of Reconsideration of the Endangerment Finding and for State Petitioners and Supporting State Intervenors of Endangerment Finding Delegation Issues. (Document 1309185).

REPLY BRIEF

The Commonwealth of Virginia, by and through its Attorney General, Kenneth T. Cuccinelli, II, hereby files its Reply Brief for State Petitioners Texas and Virginia on Denial of Reconsideration of the Endangerment Finding and of State Petitioners and Supporting State Intervenors on Endangerment Finding Delegation Issues.

SUMMARY OF ARGUMENT

Where new evidence of central relevance is timely presented, the Administrator is required to conduct rehearing with notice and comment. Such review is triggered when the new evidence provides substantial support for an argument that the regulation should be revised. The Endangerment Finding here is simply a conceptual statement justifying future rulemaking. The standard necessitating rehearing was clearly satisfied because, in response to the new evidence, the EPA found it necessary to revise and extend its Finding based upon a substantial quantity of new evidence not in the record and not subject to comment. This amounts to a *de facto* rehearing without the required public participation.

With respect to the original Endangerment Finding, the EPA so pervasively delegated its statutory functions that it lacked the information to ensure that its data quality standards were satisfied. Indeed, it lacked information to know whether the IPCC adhered to its own declared standards. The EPA Inspector General has found that the agency violated its own peer-review standards. As the EPA lacks any standard to evaluate when it is proper to rely on the conclusions of other entities, the *de facto* delegation here was *ad hoc* and consequently arbitrary.

ARGUMENT

A. THE EPA IMPROPERLY DENIED THE PETITIONS FOR RECONSIDERATION.

The EPA admits that it weighed the new material submitted to it and made a merits decision concerning the significance of that material without the benefit of notice and comment. (Doc. 1324992 at 82). The agency claims that it is free to do this under Section 307(d)(7)(B) of the Clean Air Act. 42 U.S.C. § 7607(d)(7)(B). According to the EPA, in determining whether the "central relevance standard" is met, it must determine whether the new evidence "would provide *substantial support* for the argument that the regulation should be revised." (Doc.

1324992 at 83). While that is true as far as it goes, it is not dispositive of the issues. First, the granting or denial of a petition for reconsideration is governed by 42 U.S.C. § 7607(d)(7)(B) as provided by 42 U.S.C. § 7607(b)(1). Because the Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. 1) was docketed as a rulemaking under Clean Air Act § 307(d)(1)(K), 42 U.S.C. § 7607(d)(1)(K), it should be deemed a rule for purposes of Clean Air Act § 307(d)(8), 42 U.S.C. § 7607(d)(8), as the EPA concedes. (Doc. 1324992 at 21, n.7). That provision authorizes this Court to invalidate a rule based upon procedural errors where the errors are "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." Furthermore, "there is less to § 307(d)'s requirement for procedural reversal than meets the eye." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983). "At a minimum, failure to observe the basic APA procedures, if reversible error under the APA, is reversible error under the Clean Air Act as well." *Id.* at 523. And reliance on data for which an objector has had no opportunity for comment violates "both the

structure and spirit of section 307." *Id.* at 540 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981), and citing *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982)). On the other hand, if the Endangerment Finding is not deemed a rule for purposes of § 7607(d), then it was adopted in a rulemaking for purposes of Administrative Procedure Act [APA] § 551(4), 5 U.S.C. § 551(4) (2006), rendering any prejudicial procedural error reversible. APA § 706, 5 U.S.C. § 706. A procedural error is prejudicial for purposes of APA § 706(2)(D), 5 U.S.C. § 706(2)(D), where there is "a *possibility* that the error would have resulted in *some* change in the final rule." *Small Refiner*, 705 F.2d at 521. Here, of course, the final rule was changed and supplemented in actual fact, not just potentially. (Doc. 1309185 at 29, n.11, 32-33, 34-35).

The EPA has not countered these arguments with authority or analysis – it simply makes an *ipse dixit* pronouncement that those arguments are wrong. (Doc. 1324992 at 83, n.36). Nor does the EPA deny that it supplemented the record, and thereby changed the basis for the Endangerment Finding with new evidence not subject to comment. Instead, the agency seeks to dismiss the problem of substantive

alteration of the rule by calling it a "page-count argument." (Doc. 1324992 at 83, n.37).

The EPA also sets up a straw man argument, complaining that under Petitioners' supposed view of the law if "a petition included any evidence or argument that, when viewed in the abstract and assumed to be correct, could substantially support an argument that an agency action should be revised, the EPA would be forced to grant reconsideration – no matter how flawed the proffered evidence, or how insignificant in comparison to other evidence in the administrative record." (Doc. 1324992 at 84). But Petitioners are not arguing that the agency cannot engage with the new evidence provided in support of reconsideration. What Petitioners submit is that the EPA cannot massively rework an Endangerment Finding in what amounts to agency reconsideration without public comment. It is in this context that Petitioners argue that "an agency is *incapable* of knowing and deciding scientific matters in the absence of notice and comment." (Doc. 1324992 at 84, n.38).

Although the EPA disputes that it altered the basis of the Endangerment Finding in denying the petitions for reconsideration,

(Doc. 1324992 at 85, n.39), this *ipse dixit* assertion is conceptually incoherent. Because the agency took the unprecedented step of hastily issuing a stand-alone Endangerment Finding, the rule making was nothing more than an explanation of the basis for future action. Altering the explanation necessarily alters the rule. The EPA again sets up a straw man when it accuses Petitioners of arguing "that an agency is not entitled to rely on the full record for the underlying agency action, or to place *any* additional material in the reconsideration record without seeking comment." (Doc. 1324992 at 86). In attempting to frame the issue in this way, the EPA simply ignores the vast qualitative and quantitative reworking of the original Endangerment Finding. (Doc. 1309185 at 33, n.15). For example, as detailed in a report issued by the EPA Inspector General on September 26, 2011, Procedural Review of EPA's Greenhouse Cases Endangerment Finding Data Quality Processes, Report 11-P-0702 (Sept. 26, 2011) (www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf), the EPA produced a very extensive new analysis, 70 pages of which were added to the Response to Petitions, to support its use of certain temperature records. *Id.* at 85. As discussed in more detail later, the crux of the

Inspector General Report is its finding that the EPA failed to comply with its own standards for evaluating the quality of externally generated information before it issued the Endangerment Finding, and its acknowledgement that the EPA for the first time addressed some of these failings in its response to the Petitions. *Id.* at 29-30. Thus, the EPA's changes to the bases for the Endangerment Finding were neither additive nor trivial.

Turning to the climategate emails, the EPA claims that "the assertions made by Petitioners regarding these emails were 'exaggerated,' are 'often contradicted by other evidence,' and did not provide a 'material or reliable basis to question the validity and credibility of the body of science underlying the Administrator's Endangerment Finding.'" (Doc. 1324992 at 88). But, of course, these are merits conclusions which properly could only follow a formal rehearing informed by notice and comment. The only question properly before the agency was whether the emails support an argument for unreliability of the science sufficient to argue for a change in the rule. The fact that the appearance of this information has brought into existence both "multiple independent investigative bodies" (*id.*) and the

term "climategate" are the strongest possible evidence that they, at the very least, support an argument for change in the Endangerment Finding.

With its discussion of other investigations, the EPA descends farther into incoherence. On the one hand, the agency says in the body of its brief that these investigations "did not cast doubt on the underlying body of science they had developed." (Doc. 1324992 at 89). On the other hand, because all of the investigations state on their face that they do not consider the overall reliability of the underlying science, the EPA states in a footnote that the "investigations were, however, cited only as being 'in line with the *EPA*'s review and analysis of [the CRU emails].'" (*Id.* at n.43).

The EPA argues that it "followed its Information Quality Act guidelines, relying on information that was, and is, 'accurate, reliable, and unbiased.'" (Doc. 1324992 at 90). In fact, as the EPA Inspector General's September 26, 2011 Report found, the agency did not properly follow its procedures prior to the release of the Endangerment Finding TSD. Report 11-P-0702, *supra* at 28-29. And while the EPA told the Inspector General that it conducted further review in connection with

the reconsideration proceedings, *id.* at 29, the Inspector General found the agency's procedures for reliance on outside entities to be inadequate and recommended that it "establish minimum review and documentation requirements for assessing and accepting data from other organizations." *Id.*

The EPA continues to defend its reliance on the IPCC by arguing that "the vast majority of studies reviewed by the IPCC were fully peer-reviewed." (Doc. 1324992 at 90). The peer-review process is not primarily directed to scientific reliability, nor does it ensure it. (Doc. 1309185 at 29). *See also Federal Judicial Center Reference Manual on Scientific Evidence,* 75, n.11 (2d. ed. 2000). Although the EPA relies on the IPCC peer-review process, that reliance was *ad hoc* because the EPA lacked standards for determining whether third-party peer-review was sufficient. And because the agency effectively delegated its scientific assessment obligation to the IPCC, it could not know what actually happened in detail nor make all supporting information for the assessment a matter of record. *See* Clean Air Act § 307(d)(6), 42 U.S.C. § 7607(d)(6).

With respect to the EPA's own peer review of the Endangerment Finding TSD, the EPA Inspector General has reported that the agency "did not meet all OMB requirements for peer review of a highly influential scientific assessment primarily because the review results and the EPA's response were not publicly reported, and because 1 of the 12 reviewers was an EPA employee." Report 11-P-0702, at Executive Summary.

The EPA's response to this charge, as presented to the Inspector General, is contradictory. The EPA argued to the Inspector General that the TSD is not a "scientific assessment" under OMB data quality standards because "no weighing of information, data and studies occurred in the TSD," as "this process had already occurred in the underlying assessments. . . ." Report 11-P-0702, *supra* at 23. In contrast, in denying the petitions for reconsideration, the EPA asserted that the Administrator had exercised the requisite independent judgment:

> It is useful to describe the process EPA followed in exercising its scientific judgment in making the Endangerment Finding. EPA did not passively and uncritically accept a scientific judgment and finding of endangerment supplied to it by outsiders. Instead, EPA evaluated all of the scientific information before it, determined the current state of the

> science on greenhouse gases, the extent to which they cause climate change, how climate change can impact public health and public welfare, and the degree of scientific consensus on this science.

75 Fed. Reg. at 49,581. This contradiction is not surprising given the Agency's want of standards for assessing and accepting data from other organizations, rendering the EPA prone to varying and even contradictory *ex post facto* explanations.

On the other hand, if the EPA did not weigh and sift the data, as would be necessary under any common-sense notion of what is required to exercise the "judgment" required under the Act to make an endangerment finding, then the EPA would be in no position to assert, as it repeatedly has, that the underlying science is substantively and procedurally sound.

As noted in the Inspector General's report, the "EPA did not evaluate IPCC's compliance with its principles and procedures." Report 11-P-0702, *supra* at 34. Hence, it can be concluded that (1) the EPA did not weigh or assess the underlying information and data in the scientific assessments on which the TSD was based, (2) that the EPA did not evaluate whether the IPCC actually adhered to its own principles and procedures for assuring data quality and the integrity of

peer review even though (3) the climategate materials call into very serious question IPCC adherence to its own principles and procedures for assuring data quality and (4) the EPA's own Inspector General found that the EPA itself did not adhere to its own standards for assuring data quality when it issued the Endangerment Finding.

The EPA's discussion of withheld, lost or destroyed data, author self-citation, conflicts of interest among IPPC personnel, and attempts to suppress contrary conclusions begs the question by merely stating that the agency responded to all of that in detail in the RTP. (Doc. 1324992 at 92, n.44). The question being begged is whether this and other information provided in connection with the petitions for reconsideration amounted to substantial support for an argument that the Endangerment Finding should be changed. Because the answer to that question is yes, the EPA was not entitled to discuss these issues in detail without public comment. The EPA's discussion of the Himalayan glaciers, African agricultural yields, Amazon rain forests, percentage of the Netherlands lying below sea level, and its projections of more violent storms (Doc. 1324992 at 93) is similarly circular.

Although Petitioners demonstrated in their opening brief that rehearing was required because the central relevance test had been met, that the EPA misapplied that standard, that the EPA conducted a *de facto* reconsideration without notice or comment, that problems with the IPPC process revealed by climategate establish that evidence relied upon failed to meet information quality standards, and that the EPA continued to improperly delegate its functions in responding to the petitions for rehearing, the EPA has responded with *ipse dixit* assertions and generalities, claiming that everything was done properly without actually clearly joining issue with the substance of Petitioner's arguments. The same pattern holds true with respect to the argument that the agency erroneously delegated its statutory duty to third parties in its issuance of the Endangerment Finding.

B. THE EPA IMPERMISSIBLY DELEGATED ITS STATUTORY AUTHORITY TO OUTSIDE ENTITES IN MAKING THE ENDANGERMENT FINDING.

As Petitioners demonstrated in their opening brief, federal administrative agencies generally may not delegate their authority to outside parties. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). While an agency may look to outside groups for advice and policy

recommendations, as the EPA does in proposed rulemakings, delegation is improper because "lines of accountability may blur, undermining an important democratic check on government decision-making." *Id.* at 565-66, 568. Because outside sources do not necessarily "share the agency's 'national vision and perspective,'" the "goals of the outside parties may be inconsistent with those of the agency and the underlying statutory scheme." *Id.* at 566.

The EPA's response to this is to argue that the delegation in *U.S. Telecom Ass'n* was express and that no express delegation occurred here. (Doc. 1324992 at 54, n.19). Of course, Petitioners never argued that an express delegation had occurred. What they have argued and demonstrated is that the *de facto* delegation to the IPCC here was too pervasive for the EPA to discharge its statutory functions in accordance with its own standards.

The Information Quality Act (IQA), Pub. L. No. 106-554, 114 Stat. 2763 (2000), and the EPA's Information Quality Act, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*

(Oct. 2002), subject the EPA to rigorous data quality requirements.[1] The scientific basis for the Endangerment Finding must meet "a higher degree of quality (for example, transparency about data and methods) than [other] information," *id.* at 20, as it falls within the EPA's Guideline's definition of "influential information" (information having "a clear and substantial impact (*i.e.*, potential to change or effect) on important public policies or private sector decisions." *Id.* at 19. To meet this standard, the substance of the information underlying the Endangerment Finding must be "accurate, reliable and unbiased," requiring use of "(i) the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data)." *Id.* at 22. It is simply unreasonable to suppose that the EPA could ascertain that these standards were met given the degree of delegation that occurred here. That the scientific bases for the Endangerment Finding was compromised as a result is

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[1] The Guidelines are available at http://epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf.

illustrated by the EPA's reliance, *see* TSD at 162, upon an erroneous rainforest deforestation projection adopted by the IPCC's Fourth Assessment Report, Section 13.4.1,[2] a projection that was formulated by an advocacy group known as the International Union for the Conservation of Nature and was not subjected to peer review.[3]

That the EPA impermissibly delegated its duty to exercise its own judgment is further demonstrated by the fact that the EPA's reliance on the "assessment literature" nullified the public's right to comment. Relying as it was on the work and conclusions of others, the agency did not think much of a public comment period was necessary. Although recognizing the enormous complexity of climate science ("very wide range of risks and harms that need to be considered"), 74 Fed. Reg. at 66,509, the EPA limited the comment period to 60 days.

In the end, the time allowed became immaterial to the right of comment because the EPA reflexively responded to public comments by saying that the "assessment literature" had reached a contrary

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[2] IPPC Working Group 2 Assessment Report 5, Chapter 13, *available at* http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch13s13-4.html#13-4-1 (last visited October 14, 2011).

[3] *The Corruption of* Science, EU Referendum (Jan. 26, 2010), http://eureferendum.blogspot.com/2010/01/corruption-of-science.html.

conclusion. This approach foreclosed "genuine interchange" between the agency and the public, the fundamental purpose of the comment process, as the agency failed to make available all the underlying studies and data, preventing the public from providing "meaningful commentary." *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). If the Administrator dismisses the public comments on the ground that a third party disagrees, this interchange is a futile exercise. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("[b]y requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment").

As discussed above, under the EPA's own IQA Guidelines, the Endangerment Finding, as "Influential Information," was required to "have a higher degree of transparency regarding (1) the source of the data used, (2) the various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures employed." *Id.* at 21. The degree of delegation which occurred here makes it impossible for that standard to have been satisfied. But it is even worse than that.

As the EPA Inspector General found, the EPA has no procedures with respect to reliance on third parties. Therefore, when the agency uncritically accepted the conclusions of others without established standards for doing so, it necessarily engaged in arbitrary and capricious rulemaking.

CONCLUSION

Wherefore the Endangerment Finding should be reversed and remanded for further proceeding in accordance with law, including rehearing with rights of notice and comment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I HEREBY CERTIFY THAT the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C) and this Court's Order of March 22, 2011. *See* Order, *Coalition for Responsible Regulation v. EPA*, No. 09-1322, (Doc. 1299368) (March 22, 2011) (limiting state reply briefs to a combined 7,500 words). As determined by the Microsoft Word 2007 software, Century Schoolbook, 14 point, used to produce this brief, it contains 3,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

/s/ E. Duncan Getchell, Jr.
Counsel

October 17, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONERS was filed electronically with the Court by using the CM/ECF system on this 17th day of October 2011. All participants in the case are thought to be registered CM/ECF users and will be served by the appellate CM/ECF system.

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