No. 12-1152

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF IN SUPPORT OF VIRGINIA'S PETITION FOR A WRIT OF CERTIORARI AND IN SUPPORT OF VIRGINIA'S, KENTUCKY'S AND UTAH'S PETITION ON THE DELEGATION ISSUE

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The overarching theory of the briefs in opposition is that review is not warranted because the agency was clearly correct. The Environmental Protection Agency purports to respond to the issues raised in No. 12-1152 between pages 25-26 of its brief in opposition. In doing so the agency merely sets up straw man arguments which it rejects through mere assertion. The Environmental Organization Respondents follow the same course between pages 24-25 of their brief. The State Respondents merely incorporate these assertions by reference in note 10 at page 24 of their brief. The actual issues can be briefly restated as follows.

A. The Administrator Was Obligated To Grant Reconsideration Because Petitioners Demonstrated That Their Timely Objections Were Based on Evidence of Central Relevance to the Outcome of the Endangerment Finding.

A timely motion for reconsideration is due to be granted where new evidence would "provide substantial support for the argument that the regulation should be revised." *See Denial of Petition to Revise NSPS for Stationary Gas Turbines*, 45 Fed. Reg. at 81,653 (Dec. 11, 1980); *Denial of Petition for Reconsideration of National Ambient Air Quality Standards for Particulate Matter*, 53 Fed. Reg. 52,698 (Dec. 29, 1988); *Prevention of Significant Deterioration and Non-Attainment New Source Review: Reconsideration*, 68 Fed. Reg. 63,021 (Nov. 7,

2003). The EPA, in response to the reconsideration motion, produced a 360-page, three-volume supplement to the Endangerment Finding and added numerous documents to shore up its scientific bases, all the while maintaining that it had not reconsidered its original decision. *See EPA's Response to the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (RTP)*, 75 Fed. Reg. 49,556 (Aug. 13, 2010); JA Vol. X, Doc. 1339079 (Oct. 31, 2011), pp. 29 through 401 of 403. Having supplemented its findings, the agency's claim that the new information was unlikely to cause it to revise its action should be rejected. *See West Virginia* v. *EPA*, 362 F.3d 861 (D.C. Cir. 2004). The EPA issued the Endangerment Finding as a free-standing document unassociated with any implementing rule. Having done so, any objection powerful enough to require a response citing extensive new extra-record evidence plainly provided substantial support for an argument that the Finding needed reworking. Of course, the rehearing petitions were not merely likely to lead to a revision. An Endangerment Finding whose supporting bases have to be materially supplemented and reweighed to adequately respond to objections should be found to require reconsideration under notice and comment standards. That is the plain meaning of 42 U.S.C. § 7607(d)(7)(B), and the court of appeals erred in holding otherwise. *See Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency,* 684 F.3d 102, 125-26 (D.C. Cir. 2012).

B. The Administrator Misapplied the Central Relevance Standard.

The Endangerment Finding was promulgated as the first step in rulemaking under Section 202(a) of the Clean Air Act, codified at 42 U.S.C. § 7521. *See Endangerment and Cause or Contribute Findings (Endangerment Finding)*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); J.A. Vol. I, Doc. 1339709 (Oct. 31, 2011), p. 30 of 695. This rulemaking was required to be accompanied by "a statement of basis and purpose," as well as "a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." 42 U.S.C. § 7607(d)(6)(A)(i) & (d)(6)(B). Furthermore, the Endangerment Finding "could not be based (in part or whole) on any information or data which ha[d] not been placed in the docket as of the date of such promulgation." 42 U.S.C § 7607(d)(6)(C). Hence, after promulgation on December 15, 2009, any revision to the statement of basis and purpose or to the response to comments was a revision requiring the same process as that required in the initial promulgation. 42 U.S.C. § 7607(d)(1)(K). *See Donner Hanna Coke Corp.* v. *Costle*, 464 F. Supp. 1295 (W.D.N.Y. 1979) (EPA enforcement officials cannot circumvent rulemaking requirements of 42 U.S.C. § 7607 by making substantial changes in testing methods without notice and hearing).

The EPA misapplied the central relevance and likelihood of revision test because, in purporting to deny reconsideration, the EPA did, in fact, revise the

statement of basis and purpose and its response to comments. This is not only an arbitrary and capricious violation of the EPA's own standard, but is also a facial violation of the Clean Air Act, or of the APA if the Endangerment Finding is not considered a rule for purposes of 42 U.S.C. § 7607(d)(8).

C. The EPA Administrator Erred by Making Determinations without Notice or Comment.

42 U.S.C. § 7607(d)(3) forbids the revision of any rule without notice and comment and limits the basis for such revision to data, information, and documents contained in the docket when the revision is published. 42 U.S.C. § 7607(d)(7)(B) requires any reconsideration to be conducted with rights of notice and comment. Moreover, 42 U.S.C. § 7607(h) reveals a congressional intent, "consistent with the policy of the Administrative Procedures Act," that the Administrator "ensure a reasonable period for public participation of at least 30 days." Finally, 42 U.S.C. § 7607(d)(6)(A) provides that any promulgated rule "shall be accompanied by (i) a statement of basis and purpose," among other things. A revision of the statement of basis and purpose is clearly a revision requiring notice and comment.

Supplementing the statement of basis and purpose with a 360-page response to objections, which includes data not included in the Endangerment Finding and, in some cases, not even compiled prior

to its publication, is a revision that violates the statutory scheme when conducted without rights of notice and comment.

D. The EPA's Reasons for Relying on the IPCC Were Undermined by the Climategate Data Provided in the Reconsideration Petitions Which Data Compel the Conclusion that the Endangerment Finding Fails To meet essential Information Quality Standards such that Reconsideration is Required.

The EPA Administrator sought to justify reliance on the "assessment literature" by claiming that the agency carefully reviewed the processes by which this literature was prepared, confirming thereby that these processes met the standards to which the EPA is subject in preparing scientific findings. 74 Fed. Reg. 66,496; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 45-47 of 695; *EPA Response to Public Comments (RTC)* at 1-2 (based on its review of IPCC procedures, "EPA has determined that the approach taken provided the high level of transparency and consistency outlined by EPA's" information quality requirements); J.A. Vol. VII, Doc. 1339079 (Oct. 31, 2011), at 253 of 395. The Administrator asserted that reliance on this literature "is entirely reasonable and allows EPA to rely on the best available science." *Endangerment Finding*, 74 Fed. Reg. at 66,511 (footnote omitted); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. But, as the EPA Inspector General found, not only was this not so, but the

Administrator, in making the Endangerment Finding, lacked access to the information necessary to evaluate the quality of the IPCC's scientific conclusions, violated the agency's own peer-review standards, and, by having no procedure for evaluating the circumstances in which it is appropriate to rely on outside data, comprehensively delegated her statutory duties to the IPCC and other outside groups. *See* Report of the EPA Inspector General, Data Quality Processes, Report 11-P-0702 (Sept. 26, 2011), www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf) ("Inspector General Report").

Even if IPCC's scientific procedures had been of the highest quality, the Administrator would still have been required to exercise her own judgment on climate science, and this she did not do. In issuing the Endangerment Finding, the EPA failed to comply even with its own standards for evaluating externally generated information, insufficient as the EPA Inspector General subsequently found them to be. Thus, it should have been no surprise that climategate revealed the quality of IPCC's science was anything but the highest sort, and that there is a great disconnect between the way IPCC operated in reality compared with the way the EPA says it did based on its review of IPCC's written procedures. By relying so heavily on the IPCC, the agency failed to observe basic information quality standards to which it is subject.

1. The EPA failed to ensure that Endangerment Finding's information was "accurate, reliable and unbiased."

The EPA is subject to rigorous data quality obligations under the Information Quality Act (IQA), Pub. L. No. 106-554, 114 Stat. 2763 (2000), and the EPA's IQA Guidelines, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (IQA Guidelines)* (Oct. 2002), www.epa.gov/QUALITY/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf. Because the Endangerment Finding meets the EPA's definition of "influential information," that is, information having "a clear and substantial impact (i.e., potential change or effect) on important public policies or private sector decisions," *id.* at 19, the Endangerment Finding is "subject to a higher degree of quality (for example, transparency about data and methods) than [other] information." *Id*. at 20. The substance of the information underlying the Endangerment Finding must be "accurate, reliable and unbiased," requiring use of "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.

As demonstrated in detail in the petitions for reconsideration the IPCC reports frequently relied on unscientific "studies" that were prepared by advocacy groups such as the World Wildlife Fund (WWF), Greenpeace, and other similar organizations. *See* EPA Inspector General's Report, *supra* at 28-29; *see also id.* at Executive Summary (reporting 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."). Furthermore, 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*.

2. The EPA's reliance on IPCC reports undermined the Public's right to comment.

The EPA's reliance on the "assessment literature" rendered the public's right to comment meaningless. There was another defect with the comment process. The EPA tended to respond to public comments on a particular point by saying that the "assessment literature" had reached a different conclusion. The fundamental purpose of the comment process, however, is to ensure that a "genuine interchange" is carried on between the agency and the public, where the agency makes available all the underlying

studies and data and the public is able to provide "meaningful commentary." *Conn. Light & Power* v. *NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). No such interchange occurs when the Administrator dismisses public comments on the ground that a third party disagrees with them. Furthermore the EPA's reflexive citation to the "assessment literature," some of which was not part of the TSD, undermined the substantive credibility of the agency's findings. *See Chamber of Commerce* v. *SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("By 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. . . .").

Finally, in the Endangerment Finding, the EPA justified its use of third-party synthesis and assessment reports as "allow[ing] EPA to rely on the best available science." 74 Fed. Reg. at 66,511; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Now, however, the EPA argues that it was entitled to deny reconsideration in part because other institutions found "no evidence of scientific misconduct or intentional data manipulation" by the climate researchers on whom the IPCC had so extensively relied. *RTP*, 75 Fed. Reg. at 49,558; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 84 of 695. Informal reconsideration without notice or comment based on a "no evidence of scientific misconduct or intentional data manipulation" standard is not authorized by the Clean Air Act.

3. The EPA's reliance on IPCC reports prevented public transparency.

Under § 6.3 of the EPA's 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." *IQA Guidelines* at 21. Climategate revealed the hollowness of the EPA's claim that IPCC met this same level of transparency, because key IPCC authors routinely relied on their own studies while simultaneously refusing to disclose to other scientists the data underlying those studies. The United Kingdom House of Commons Science and Technology report cited by the EPA in denying reconsideration found an "unacceptable" "culture of withholding information—from those perceived by CRU to be hostile to global warming." Parliament of the United Kingdom—Science & Technology Comm., The Disclosure of climate data from the Climatic Research Unit at the University of East Anglia: Conclusions & Recommendations ¶13 (Mar. 31, 2010), http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsctech/387/38709.htm. Another report cited by the EPA found "a consistent pattern of failing to display the proper degree of openness." The Independent Climate Change E-mails Review: Findings § 1.3(15) (July 2010), http://www.cce-review.org/pdf/FINAL%20REPORT.pdf. The President of the National Academy of Sciences in commenting on

climategate stated that "'[f]ailure to make research data and related information accessible not only impedes science, it also breeds conflicts.'" Ralph J. Cicerone, Editorial: Ensuring Integrity in Science, 327 Science 624 (2010), www.nasonline.org/about-nas/leadership/president/cicerone-editorial-science.pdf. It is also at odds with the "high" level of transparency demanded by the IQA Guidelines in order to ensure the high quality of the EPA's science.

E. In Issuing the Endangerment Finding and in Denying Rehearing, the EPA Impermissibly Delegated Its Statutory Authority to Outside Entities.

The EPA acknowledges that it "relied principally on 'recent synthesis and assessment reports' of three scientific organizations" including, the IPCC. As the petitions for rehearing demonstrated, these data sets were not independent of each other.

Federal administrative agencies generally may not delegate their authority to outside parties. *U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). An agency may look to outside groups for advice and policy recommendations, as the EPA did in proposed rulemakings, *e.g.*, *Advanced Notice of Proposed Rulemaking for Endangerment Finding*, 73 Fed. Reg. at 44,354 (July 30, 2008); J.A. Vol. I, Doc. 1339709 (Oct. 31, 2011), p. 122 of 695, but delegation is improper because "lines of accountability may blur, undermining an important democratic check on

government decision-making." *U.S. Telecom Ass'n*, 359 F.3d 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 (quoting *Nat'l Park & Conservation Ass'n* v. *Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

The EPA's wrongful delegation in this case graphically illustrates those dangers. The agency relied on the judgment of a number of outside groups, but the IPCC's Fourth Assessment Report was accorded special weight. *See* J.A. Vol. XI, Doc. 1339079 (Oct. 31, 2011), pp. 29 through 184 of 355. Not only did the EPA cite it more often than the others, but the U.S. Global Change Research Program (USGCRP)—another of EPA's major sources—also relied heavily on the IPCC Report for its "own" findings. *See Endangerment Finding*, 74 Fed. Reg. at 66,511 (noting that the "USGCRP incorporates a number of key findings from the [IPCC Report]" including "the attribution of observed climate change to human emissions of greenhouse gases, and the future projected scenarios of climate change for the global and regional scales"); J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), p. 45 of 695. Despite the serious deficiencies of the IPCC process demonstrated in the reconsideration petitions and the fact that scientific data underlying the assessments is not in the administrative record, in violation of the CAA, *see* 42 U.S.C. § 7607(d)(3) ("All data, information,

and documents . . . on which the proposed rule relies shall be included" in the rulemaking docket "on the date of publication of the proposed rule"), the EPA used the same assessments again to unilaterally reject reconsideration without notice or comment. RTP, 75 Fed. Reg. at 49,565-66; J.A. Vol. I, Doc. 1339079 (Oct. 31, 2011), pp. 91-92 of 695; *see Nat'l Welfare Rights Org.* v. *Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976) (explaining that "judicial review is meaningless where the administrative record is insufficient to determine whether the action is arbitrary and capricious"). The EPA's de facto delegation of its statutory duties was unreasonable and illegal because Congress empowered the Administrator to decide whether "in his judgment" certain emissions endanger public health and welfare. 42 U.S.C. § 7521(a)(1).

CONCLUSION

Wherefore the petition should be granted and the Endangerment Finding reversed and remanded for

further proceeding in accordance with law, including rehearing with rights of notice and comment.

Respectfully submitted,

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