

**ORAL ARGUMENT SCHEDULED FEBRUARY 28, 2012
BEFORE SENTELLE, C.J., ROGERS & TATEL, J.J.**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**COALITION FOR RESPONSIBLE
REGULATION, INC., ET AL.**

Petitioners,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.**

Respondents.

**No. 09-1322 (lead) and
consolidated cases**

**NON-STATE PETITIONERS' AND SUPPORTING INTERVENORS'
OPPOSITION TO RESPONDENT'S MOTION TO STRIKE
PORTIONS OF THEIR REPLY BRIEF**

EPA moves to strike two sets of sentences in Non-State Petitioners' and Supporting Intervenors' Reply Brief ("Reply Brief"), *i.e.*, those that, respectively:

(1) address the subject of a pending Motion for Judicial Notice (Doc. #1332845) of the Inspector General's ("IG") Report on an investigation concerning EPA's Endangerment Rule; and

(2) refer to documents, which EPA does not contest are contained in the administrative record, that rebut EPA's assertion in its merits brief that "the overwhelming weight of the administrative record," EPA Br. at 43, supports its conclusion that there is a high degree of certainty that recent "unusual," *id.*, warming exists that is global in extent and is not merely an artifact of averaging regional temperature variations.

EPA's request to strike Reply Brief statements and arguments related to the IG report simply reiterates arguments EPA made in response to Non-State Petitioners' Request for Judicial Notice ("Motion for Judicial Notice"), and

therefore appears to be an improper effort to have the last word on an issue already fully briefed. And EPA's request to strike the argument based on record evidence of temperature data ignores that Petitioners' rebuttals regarding that data in their Reply Brief were invited by EPA's argument on that subject in its merits brief. Petitioners therefore request that the Motion to Strike be denied.

A. EPA'S ARGUMENTS REGARDING THE IG REPORT ARE MERITLESS AND AN IMPROPER ATTEMPT TO GET THE LAST WORD ON PETITIONERS' PENDING MOTION FOR JUDICIAL NOTICE.

1. The chronology relevant to the first part of EPA's Motion to Strike is:

September 26, 2011	EPA's IG releases Report No. 11-P-0702, titled <i>Procedural Review of EPA's Greenhouse Gases Endangerment Finding — Data Quality Processes</i> ("IG Report")
September 30, 2011	Certain Non-State Petitioners file the Motion for Judicial Notice of the IG Report
October 14, 2011	EPA files an extensive Opposition to the Motion for Judicial Notice, arguing (as it does in much more abbreviated form in its Motion to Strike) that the IG Report is not part of the administrative record and cannot be given judicial notice
October 17, 2011	Petitioners file their reply briefs on the merits
October 24, 2011	Certain Non-State Petitioners file the Reply in Support of Motion for Judicial Notice
November 8, 2011	EPA files this Motion to Strike, with its first ground being a call for striking references to and argumentation from the IG Report
November 18, 2011	State Petitioners and Supporting Intervenors file their Opposition to EPA's Motion to Strike

2. EPA presents in a single paragraph its argument to strike the Reply Brief's IG Report-related discussion. That argument boils down to the claim that the IG Report was issued nearly two years after EPA promulgated the Endangerment Rule and therefore any argument related to it exceeds the bounds of the administrative record. But this argument was already rebutted in the Reply in Support of Non-State Petitioners' Request for Judicial Notice (Doc. #1337450). *See id.* at Point 3 (pages 5-6) (rebutting EPA's argument that judicial notice must be denied because the IG Report issued nearly two years after the Endangerment Rule); *id.* at Points 1-2, 4-8 (rebutting EPA's other points concerning record-review limitations and their interaction with judicial notice doctrine). In its Motion to Strike, EPA offers neither new cases nor new responses. We will not burden the Court by repeating the arguments in our reply in support of the Motion for Judicial Notice.

3. The Motion for Judicial Notice is fully briefed. EPA cannot use a new Motion to Strike to reopen motions practice on the issue of judicial notice concerning the IG Report and thereby confer on itself the procedural right to have the last word in briefing Petitioners' Motion for Judicial Notice. Insofar as EPA's reply in support of its Motion to Strike may attempt to respond with new points to arguments made in the Motion for Judicial Notice or in the reply in support

thereof, the Court should reject that tactic and disregard EPA's forthcoming reply, and a motion to strike that reply would be in order.

4. Among the points made in briefing the Motion for Judicial Notice are (i) that EPA was engaged in the IG's investigatory process *before* it finalized reconsideration of the Endangerment Rule, yet (ii) none of the material relevant to that process is in the administrative record EPA certified to the Court. *See* Doc. #1337450 (point 3 at page 5). EPA should voluntarily supplement the record to include all of its correspondence and other documents concerning the Endangerment Rule that were created in connection with the IG investigation before EPA denied reconsideration of the Endangerment Rule, or be ordered to do so by the Court if it refuses. Communications with the IG preceding reconsideration denial obviously may be relevant to whether that denial was proper.

B. PETITIONERS' ARGUMENT REGARDING THE TEMPERATURE RECORD WAS IN RESPONSE TO EPA'S EXPRESS INVITATION.

1. In their Reply Brief, Petitioners pointed out that recent unusual "global" warming is not actually shown by the temperature information included in EPA's rulemaking record but is instead an artifact of averaging regional variations around the planet, which has the misleading effect of suggesting warming in places like the tropics or the Southern Hemisphere, areas as to which there is little if any warming or statistically significant evidence supporting such a claim. Reply Brief

at 20-21. Petitioners also pointed out that temperatures in the Arctic have not exceeded levels reached in the 1930s and that the United States has not experienced unusual numbers of heat waves. *Id.* at 21-23. EPA moves to strike these arguments, from page 20, line 20, through page 23, line 2, of the Reply Brief, on the grounds that they do not “rebut any argument made by EPA in its response brief.” EPA Motion to Strike at 4.

2. But EPA’s Brief invited these arguments. Indeed, these points respond directly to one of EPA’s three principal “lines of evidence,” EPA Br. at 43, prominently discussed in its Brief. *See id.* at 15, 43, 48-52. First, at page 15 of its brief, EPA asserts that “[g]lobal mean surface temperature was higher during the last few decades of the 20th century than during any comparable period in the preceding four centuries.” EPA thus argues that the warming it finds unusual is “global.” Then, at page 43 of its brief, EPA argues that its attribution of “most of the past half-century of warming” to anthropogenic greenhouse gas emissions is “supported by three lines of evidence,” one of which is that “recent changes in global surface temperature are unusual.” Having thus staked out its view of the importance of temperatures that it characterizes as both unusual and global, EPA goes on to argue that “Petitioners offer nothing that contradicts the overwhelming weight of the administrative record, which demonstrates that each of these three lines of evidence” supports its Endangerment Rule. EPA Br. at 43.

3. Petitioners' Reply Brief responded to EPA by citing information in the record that counters EPA's claim of "overwhelming" record support for its conclusion of certainty regarding purported "unusual" warming on a "global" scale. As the Reply Brief discusses, that record information (i) reflects a limited degree of warming in the Northern Hemisphere, (ii) no trend in the tropics, (iii) cooling in Antarctica, and (iv) very slight warming in the Southern Hemisphere — all of which, when taken together, creates a global "average" that shows modest warming. Reply Brief at 21. Petitioners further demonstrated that even in the Northern Hemisphere, and in particular the Arctic, *id.* at 21-22, the slight warming that has occurred is not — contrary to EPA's assertion — "unusual" or "higher ... than during any comparable period in the preceding four centuries," EPA Br. at 15. Having asserted in its brief that Petitioners have nothing to offer from "the administrative record" that undercuts its categorical — and erroneous — position on the "global" data, *id.* at 43, EPA cannot now complain when Petitioners negate that assertion in their Reply Brief. The Endangerment Rule is, as EPA's brief argued, based on three lines of evidence, one of which is a claim of "unusual" "global" temperatures, *id.*, and so Petitioners properly replied by observing that this line of evidence is an artifact of averaging and is inconsistent with record information cited in the Reply Brief.

CONCLUSION

For the reasons set forth above, (1) EPA's Motion to Strike should be denied on both of its grounds and (2) EPA should be ordered to amend its certified index to the record to include a listing of all documents involving communications or other materials relating to the IG Report that predate EPA's denial of reconsideration of the Endangerment Rule.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed electronically with the Court by using the CM/ECF system on this 21st day of November 2011. Most participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system. The following counsel will be served via Federal Express:

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