

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

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BEYOND NUCLEAR, et al., Plaintiffs,  v.  U.S. DEPARTMENT OF ENERGY, <i>et al.</i> , Defendants	) ) ) ) ) ) ) ) ) ) ) ) )	No. 1:16-cv-01641 (TSC)
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**DEFENDANTS’ MOTION TO STRIKE EXTRA-RECORD MATERIALS  
AND PORTIONS OF PLAINTIFFS’ MEMORANDUM IN SUPPORT OF  
CROSS-MOTION FOR SUMMARY JUDGMENT THAT RELY UPON  
EXTRA-RECORD MATERIALS**

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and the Administrative Procedure Act, 5 U.S.C. § 706, Defendants respectfully move to strike: (1) the Declaration of Gordon Edwards, Ph.D. (ECF No. 16-1, as corrected ECF No. 19-2); (2) the Declaration of Marvin Resnikoff, Ph.D. (ECF No. 16-2); and (3) Atomic Energy Commission, “Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants” (December 1972) (proposed for submission in Plaintiffs’ Memorandum of Points and Authorities In Support of Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment and Plaintiffs’ Cross-Motion for Summary Judgment, at 8 n.11 (ECF No. 16, as corrected ECF No. 19-1) (“Memorandum”)). Defendants also move to strike all statements and arguments in the Memorandum relying upon the three extra-record documents referenced above, including but not limited to pages 10-11 and 17-20 of the Memorandum.

The grounds for the motion are that judicial review of Plaintiffs’ claims in this action are limited to the administrative record before Defendants at the time the decision under challenge was made; that the three documents referenced above are extra-record, either as litigation

declarations prepared after the decision under challenge was made or were not considered directly or indirectly by Defendants in making the decision under challenge; and that, in proffering the three documents referenced above, Plaintiffs have failed to rebut the presumption of regularity attached to the certified administrative record submitted by Defendants and have not shown that the proffered extra-record documents fall within the limited exceptions to the rule limiting judicial review to the administrative record in actions brought under the Administrative Procedure Act, 5, U.S.C. §§ 701-706.

The grounds for this motion to strike are set forth more fully in Defendants' Combined Reply in Support of their Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment, filed concurrently herewith (ECF No. 22, Part III.A).

Defendants reserve the right to renew this Motion to Strike or seek additional appropriate relief from further reliance on the extra-record documents by Plaintiffs in support of their Cross-Motion for Summary Judgment or their Opposition to Defendants' Motion for Summary Judgment, including but not limited to their anticipated reply memorandum.

Pursuant to Local Rule 7(m), counsel for Defendants and Plaintiffs met and conferred telephonically on December 5, 2016, but were unable to agree on a resolution that would eliminate the need to file the instant motion to strike or narrow the issues.

Respectfully submitted this 6th day of December 2016,

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/s/ Judith E. Coleman

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Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 2016, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Judith E. Coleman