ORAL ARGUMENT NOT YET SCHEDULED

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**
COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.** **Respondents.**	**No. 10-1092 (lead) and consolidated cases**
COALITION FOR RESPONSIBLE REGULATION, INC., ET AL. **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.** **Respondents.**	**No. 10-1073 (lead) and consolidated cases**

NON-STATE PETITIONERS' REQUEST FOR JUDICIAL NOTICE

This is a Request for Judicial Notice, which undersigned Petitioners ("Movants")[1] file in each of the three sets of greenhouse-gas cases out of an

[1] Coalition for Responsible Regulation, *et al.*, Southeastern Legal Foundation, *et al.*, Peabody Energy Company, American Farm Bureau Federation, National Mining Association, Chamber of Commerce of the United States of America,

abundance of caution. The Request principally relates to the endangerment cases, No. 09-1322 (lead).

In its submissions to this Court, EPA argues that the Administrator probed and weighed the science set forth in the record before exercising her own independent "judgment" in determining whether emissions of greenhouse gases from new motor vehicles "cause, or contribute to air pollution … reasonably anticipated to endanger public health or welfare." Clean Air Act Section 202(a)(1), 42 U.S.C. § 7521(a)(1). Yet just days ago, EPA's own Inspector General ("IG") reported that behind the scenes the Administrator took a very different position. In response to an internal investigation, EPA maintained that it did not weigh or make any independent assessment of the key reports it invoked in the endangerment determination's Technical Support Document ("TSD"). EPA instead told its IG that it merely took the third-party "assessment reports" off the shelf rather than make a "highly influential scientific assessment" of its own. This inconsistent assertion goes to the heart of the legal issues presented in these cases, since the statute at issue requires EPA to make its own "judgment" regarding the

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science consulted when making an endangerment determination.

The Movants file this Request for Judicial Notice so that this new development can be considered by the merits panel in these coordinated cases. In particular, pursuant to Federal Rule of Evidence 201,[2] Movants respectfully request that the Court take judicial notice of:

(1) Report No. 11-P-0702 of EPA's Office of Inspector General, entitled *Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes* (Sept. 26, 2011) [attached hereto as Exhibit A]; and

(2) *EPA's Response to Inspector General's Report on Endangerment Finding* (EPA Press Release) (Sept. 28, 2011) [attached hereto as Exhibit B].

Both documents are properly subject to judicial notice because they are directly relevant to whether the Administrator exercised independent judgment in formulating the Endangerment Rule, as Clean Air Act Section 202(a)(1) requires.[3] Both documents are public records of undisputed authenticity and thus of the type to which judicial notice is routinely given. Moreover, Movants seek their judicial

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[2] The Federal Rules of Evidence are applicable to proceedings before the Courts of Appeal. *See* Fed. R. Evid. 1101(a); *Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003) (citing Fed. R. Evid. 201 and taking judicial notice of information in EPA's database).

[3] *See* Joint Opening Br. of Non-State Pet'rs & Supporting Intervenors in No. 09-1322. at 33, 42-43 (May 30, 2011, ECF No. 1309215) [hereafter "Non-State Petitioners' Opening Br. at __"]; Respondents' Br. in No. 09-1322 at 22 n.9, 36-38 (Aug. 18, 2011, ECF No. 1324992) [hereafter "Respondents' Br. at __"].

notice not to establish any particular facts recited therein, but to establish the respective positions of the documents' authors as relevant to the consolidated endangerment cases and to the coordinated greenhouse gas cases more broadly.

Because merits briefing in these cases is more than two-thirds complete (i.e., only reply briefs remain yet to be filed), the Court may wish to refer this motion to the merits panel ultimately assigned to the cases in accord with the Court's Order of December 10, 2010 setting all three sets of cases — (i) Endangerment Rule, (ii) Auto Rule, and (iii) Tailoring/Triggering Rule — for argument before the same panel on the same day. [ECF No. 1282558].

ARGUMENT

1. Courts routinely take judicial notice of public records and reports. *See Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003) (taking judicial notice of information in EPA's database); *Cellco P'Ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (taking judicial notice of FCC's interpretation of a statute subsequent to the agency action under review); *Transmission Agency of N. Cal. v. Sierra Pacific Power Co.*, 287 F.3d 771 (9th Cir. 2002) (taking judicial notice of FERC decision); *Laborers' Pension Fund v. Blackmore Sewer Const., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) ("We may take judicial notice of matters of public record."); *Bebchick v. WMATA*, 485 F.2d 858, 880 n.176 (D.C. Cir. 1973) ("matters of public record and common knowledge" are "well within the range of judicial notice."); *Am.*

Fed'n of Gov't Empls. v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973) (taking judicial notice of a letter from the agency director to the petitioners, sent while the case was pending); *see also Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (taking judicial notice of Coast Guard records).

The IG's publicly disseminated report and EPA's publicly disseminated press release are properly subject to judicial notice because they are publicly available and posted on public websites.[4] In addition, as set forth below, both documents are directly relevant to several of the legal and record issues in this case, as well as to the soundness of representations made in EPA's briefs.

2. One of the issues raised both in the petitions challenging the Endangerment Rule and in the consolidated petitions challenging EPA's denial of petitions for reconsideration of that same Rule, is whether the Administrator exercised independent judgment in reaching the scientific conclusions on which her Endangerment Rule is based. That question is directly relevant to (1) whether the Administrator complied with Clean Air Act Section 202(a)(1), 42 U.S.C. § 7521(a)(1), which requires an exercise of independent judgment by the Administrator; and (2) whether the Administrator's conclusion is entitled to

[4] Exhibit A is available at http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf; Exhibit B is available at http://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/64a85204a88e46a785257919006fce32!OpenDocument.

deference. *Compare* Non-State Petitioners' Opening Br. at 33, 42-43 (arguing that Administrator did not exercise her own judgment) *with* Respondents' Br. at 22 n.9, 36-38 (arguing to the contrary).

3. In denying petitions for reconsideration, EPA asserted that the Administrator exercised 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. EPA applied this science to the legal criteria for determining endangerment, i.e., whether greenhouses gases cause, or contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare .... ***EPA properly and carefully exercised its own judgment in all matters related to the Endangerment Finding***.

Denial of Petitions for Reconsideration, 75 Fed. Reg. 49,556, 49, 581 (Aug. 13, 2010) (emphasis added).

Likewise, in its briefs to this Court, EPA argued that it did not abdicate its statutory responsibilities by relying uncritically on third-party literature or passively accepting analysis assembled by other bodies:

- "There can be no serious contention that EPA failed to consider any aspect of the complex scientific issues underlying the Endangerment Finding." Respondents' Br. at 22.

- EPA's decision to rely on third-party reports "was thus reached only after a careful and thorough review." *Id.* at 37.
- "Although the scientific assessments reviewed by EPA provided the principal source materials for the Endangerment Finding, the Administrator exercised her own judgment in making that Finding." *Id.* at 37.

3. The Report of the Office of Inspector General ("OIG"), however, establishes that EPA took the opposite tack when describing its Endangerment Rule decisionmaking process to the IG. The IG's inquiries to EPA result from his investigation into whether the Endangerment Rule and its TSD comport with OMB's peer review requirements for "highly influential scientific assessments."[5] Pursuant to its mandate under the Data Quality Act, OMB issues guidelines to agencies regarding the quality, objectivity, utility, and integrity of data relied upon by and disseminated by agencies. Ex. A at 5-6. A "highly influential scientific assessment" is one of two types of information for which OMB guidelines require peer review, and of the two it requires more rigorous peer review. *Id.* at 6. A "scientific assessment" is defined as "an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information." *Id.* at 6. And a scientific assessment is

[5] More specifically, the IG looked into "whether EPA followed key federal and Agency regulations and policies in obtaining, developing, and reviewing the technical data used to make and support its greenhouse gases endangerment finding." Ex. A at 1.

deemed "highly influential" if it "could have a potential impact of more than $500 million in any year" or "is novel, controversial, precedent setting, or has significant interagency interest." *Id.*

4. Instead of stating that its process passed muster under OMB's guidelines for "highly influential scientific assessments," EPA argued to the OIG — in comments on the OIG's draft report — that the TSD was not a scientific assessment because it did not reflect any "weighing" or the exercise of any judgment and thus that it was not subject to heightened peer review requirements:

> EPA responded that the TSD does not meet the OMB definition of a scientific assessment in that no *weighing* of information, data, and studies occurred in the TSD, EPA maintained that **this process had already occurred in the underlying assessments, where the scientific synthesis occurred and where the state of the science was assessed.** EPA stated that the TSD is not a scientific assessment, but rather a document that summarized in a straightforward manner the key findings of NRC [National Research Council], USGCRP [United States Global Change Research Program], and IPCC [Intergovernmental Panel on Climate Change].

Ex. A at 23; *Id.* at 54 (italics in original) (bold emphasis added).

The Inspector General concluded that, contrary to EPA's assertions, the Agency's Endangerment Rule and supporting TSD required heightened peer review and thus recommended that EPA "establish minimum review and documentation requirements for assessing and accepting data from other organizations." *Id.* at cover page. "[N]o supporting documentation was available to show what analyses the Agency conducted prior to disseminating the

information." *Id.*

5. Seeking to counter "news accounts" that purportedly "mischaracterized the report's findings," EPA quickly issued a press release stating that it "disagree[d] strongly with the Inspector General's findings and followed all the appropriate guidelines." Ex. B. EPA asserted therein that "the report does not question or even address the science used or the conclusions reached — by EPA under this and the previous administration — that greenhouse gas pollution poses a threat to the health and welfare of the American people. Instead, the report is focused on questions of process and procedure." *Id*. This is a *non sequitur*. The contradiction in EPA's statements over time stems from its acknowledgement before the IG that it had not weighed and sifted the science, but simply assembled a literature review compiled by others wherein such weighing and sifting had "already occurred." Ex. A at 23. But if EPA is correct that it did not weigh and sift data, as the Act requires, since that work had already been performed outside EPA, then what position is the Agency in to assert that the underlying science is substantively and procedurally sound? How could it know?

All of this is a close cousin to the shell game EPA has been playing with this integrated suite of greenhouse gas regulations.[6] In the Endangerment Rule

[6] *See* Motion for Coordination of Related Cases, at 16-19 (Aug. 26, 2010, ECF No. 1262770) (discussing the potential for a "shell game" designed to avoid review where EPA argues in one or more of the then-uncoordinated, separate cases that

litigation, the shell game to date has been trying to guess where EPA will say that particular decisions it made can be challenged amongst its artificially divided suite of greenhouse gas rules. With the IG, EPA played a similar game. Depending on whether it is communicating with the Court or the IG, EPA has taken diametrically opposing positions on whether the weighing and sifting of science was performed inside or outside the Agency and by the Administrator or by unaccountable domestic and foreign officials.

6. Although EPA has stated that the IG's Report is "focused on questions of process and procedure," *id.*, the "process and procedure" involved here is no small matter, because it goes to EPA's basic legal obligation to perform scientific peer review, which ensures the integrity of the science itself. *See* 42 U.S.C. § 4365(c)(1) (requiring EPA to submit the Endangerment Rule to its own Science Advisory Board for review); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) ("submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected"); Non-State Petitioners' Opening Br. at 59-61. Moreover, quite apart from whether the Administrator did

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Petitioners' core arguments are best addressed in some other proceeding than the one at hand); Combined Reply in Support of Motion for Coordination of Related Cases, at 2, 7-8 (Sept. 23, 2010, ECF No. 1262770) (explaining the potential for meritless justiciability arguments to distract the Court if challenges to the rules at issue were heard by separate panels).

or did not exercise her own judgment or instead "outsourced" that judgment (violating Clean Air Act Section 202(a)(1)), it is clear that EPA rushed its evaluation of the science bearing on the Endangerment Rule and did not subject it to adequate peer review. *See, e.g.*, Non-State Petitioners' Opening Br. at 33. As the IG noted, EPA's conclusion that the TSD did not amount to a "highly influential scientific assessment" was the basis for the Agency's decision to withhold from public scrutiny the comments of, and EPA's responses to, the 12-member peer panel that reviewed the TSD. Ex. A at 18.

7. It is hard to fathom how EPA might now try to explain why it told the Inspector General (as to the TSD or the Endangerment Rule as a whole) that it did not "weigh" or exercise any judgment with respect to the findings of the National Research Council ("NRC"), United States Global Change Research Program ("USGCRP"), or Intergovernmental Panel on Climate Change ("IPCC"), while simultaneously telling this Court that it issued the Endangerment Rule only "after a careful and thorough review" that embodied an exercise of the Administrator's individual judgment. That is a matter that should be considered by the merits panel. It is beyond dispute, however, that the attached exhibits are properly the subject of judicial notice given the legal and factual issues presented by this coordinated set of cases, and that the merits panel should be given the opportunity

to consider these two documents or to decide for itself whether to grant them judicial notice.

CONCLUSION

For the reasons set forth above, Movants respectfully request that the Court take judicial notice of (1) Report No. 11-P-0702 of EPA's Office of Inspector General, titled *Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes* (Sept. 26, 2011) [Exhibit A], and (2) *EPA's Response to Inspector General's Report on Endangerment Finding* (EPA Press Release) (Sept. 28, 2011) [Exhibit B].

September 30, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing with the Court by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ William H. Burgess
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