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**

REPLY IN SUPPORT OF NON-STATE PETITIONERS' REQUEST FOR JUDICIAL NOTICE

The Movants identified in the Non-State Petitioners' Motion for Judicial Notice (Doc. 1332846, at 1 n.1) hereby file this Reply in support of their Motion:

On September 28, 2011, at the height of this litigation, EPA's own IG revealed important contradictions in the positions EPA has taken about how it prepared the Endangerment Rule. Yet EPA's zeal to defend its greenhouse-gas ("GHG") rules from attack remains undaunted. Not only did EPA quickly move to minimize the criticism of the Endangerment Rule in the Inspector General's ("IG's") Report in a hasty agency press release, in its opposition to this Motion, EPA now strongly resists application of the established law of judicial notice to the IG's Report.

How EPA responds to the IG Report differs by forum. The tenor of EPA's opposition is that the IG's Report was a non-event that should be overlooked by the Court. *See* EPA Opp. at 3-4 (IG Report comes two years after EPA made the key decisions under review and involves a "narrow issue"). Yet EPA attacked the IG Report in a strongly worded press release issued on a same-day basis. All of this is part of the agency shell game of representing different things to different audiences. To the public EPA maintains the IG Report is dead wrong. But here in the Court, it is a "narrow" Report of little or no significance.

EPA's contradictory statements in the Endangerment Rule and to the IG during his investigation, like its contrasting strategies of handling the IG Report,

must be laid bare before the merits panel. Taking the procedural step necessary to expose those contradictions, and not arguing the merits of the underlying rulemaking challenges, is the only purpose of this Motion for Judicial Notice.

1. EPA offers three arguments why the Court should not take judicial notice of the IG Report (Exh. A to the Motion) and of EPA's related press release (Exh B to the Motion). The first of these arguments is that Movants seek to evade restrictions on record review. *See* EPA Opp. at 1, 6-7. But Movants are not seeking judicial notice because they wish to evade record-review limitations. Movants have made clear they are not seeking to introduce the Report (and certainly not EPA's press release) for the truth of the statements made therein but only to show that EPA made the relevant statements in response to inquiries from the IG. Motion at 3-4. EPA's objection that review is limited to the record is a *non sequitur*.

EPA tries to buttress its position by citing cases in which petitioners failed to put evidence before an agency. *See* EPA Opp. at 7 ("*Appalachian Power Co. v. EPA*, 135 F.3d 791, 799 n.14 (D.C. Cir. 1998) (declining to consider exhibits that were prepared four months after rule was issued and that were never submitted to EPA)."). But EPA never explains how Movants could have previously put before EPA or the Court statements EPA made to its IG when the public's first became aware of the IG investigation and EPA's statements just last month.

2. Courts can and do consider agency statements when evaluating positions an agency takes in a rulemaking limited to record review. Agency concessions and contradictions can occur in agency testimony to Congress or agency pronouncements in other proceedings. And the same is true of agency statements at oral argument. *See New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) ("EPA concedes that it never made the findings [required by statute]"). Consideration of such matters is a basic feature of judicial review and has never been seen as contradicting the record-review principle.

EPA asserts that judicial notice as described in Federal Rule of Evidence 201 is limited to presentation of "adjudicative facts," which EPA asserts are categorically nonexistent in administrative appeals. EPA Opp. at 8 ("In a record review case such as this one, however, ***there are no*** "adjudicative facts.") (emphasis added). But not every judicial notice case is like *Laborer's Pension Fund v. Blackmore Sewer Construction Co.,* 298 F.3d 600, 607 (7th Cir. 2002), which EPA reports "took judicial notice that one bank was branch office of another bank." *See* EPA Opp. at 9 n.2. EPA's categorical position does not account for the holdings in *Cellco P'Ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004), which took 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), which took judicial notice of FERC decision), or

American Federation of Government Employees v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973), which took judicial notice of a letter from the agency director to the petitioners, sent while the case was pending). EPA attempts to blend these cases with inapposite ones and bury all of them in a footnote asserting that the cases all involve facts "readily ascertainable and apparently undisputed." EPA Opp. at 9 n.2, But that argument contradicts EPA's initial argument for denying judicial notice — that FRE 201 does not apply to record-review cases at all. *See id.* at 8.[1]

And indeed, contrary to EPA's assertions, the relevant facts here are readily ascertainable and undisputed. EPA's disagreement with the conclusions reached in the IG Report does not alter the fact that what EPA told the IG about its process of issuing the Endangerment Rule is ***not*** in dispute. It is those statements themselves—and not necessarily their truth or falsity, Motion at 3-4,—that warrant the Court's attention and are fully judicially noticeable. *See, e.g., Bucci v. Essex Ins. Co.*, 393 F.3d 285, 296 n.5 (1st Cir. 2005); *Furnari v. Warden*, 218 F.3d 250, 255 (3d Cir. 2000); *Don Lee Distrib., Inc. (Warren) v. NLRB*, 145 F.3d 834, 841 n.5 (6th Cir. 1998) (Fed. R. Evid. 201 "adjudicative facts" embrace agency findings containing disputed statement of facts "as long as we take judicial notice

[1] Judicial notice doctrine is a creature of case law and not of Rule 201's text. *See* 21B Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 5103 n.36 (2d ed. 2005).

for some purpose other than to take a position on the disputed fact issue").

3. EPA emphasizes that the IG Report was released nearly two years after the Endangerment Rule. But this is not only legally irrelevant, it is misleadingly incomplete. It is true that the IG Report was released about 21 months after EPA issued the Endangerment Rule, but the intra- and inter-agency process leading to the Report began in ***April 2010***, less than four months after the Endangerment Rule's issuance and ***before*** the Agency completed reconsideration of that rule in August 2010. *See* 75 Fed. Reg. 49,556 (Aug. 13, 2010); Motion, Exh. A at 1 (citing Apr. 7, 2010 kickoff letter to the IG from the Ranking Member, Senate Committee on Environment and Public Works). The reconsideration process was still very much in play while EPA was saying one thing to the IG about its reliance on external scientific judgments, and drafting quite another thing in response to revelations about flaws in those external judgments.

EPA also never discloses whether it made any relevant statements to the IG before August 13, 2010, that bear on its decision on reconsideration, and if so, why those statements are not included in the reconsideration record. It is clear that the IG was engaged in its review of EPA's Endangerment Rule ***before*** EPA completed its reconsideration process. *See, e.g.*, Motion Exh. A. at 46 (Appendix D) (noting that the EPA IG sent questions to OMB on August 11, 2010 about its investigation of the Endangerment Rule). Tellingly, EPA's breakneck pace in denying

reconsideration was not slowed by the IG's investigation. Whatever EPA's reasons for failing to make its statements to the IG part of the record, the Court should not reward that omission by denying judicial notice here.

Moreover, EPA never attempts to distinguish the IG Report and EPA press release from what was judicially noticed in *Cellco Partnership* and *Acree*. As in those cases, the documents here were issued ***after*** the Endangerment Rule became final and involve reports of agency positions relevant to the action under review. The mere fact that documents post-date the agency decision under review is not dispositive to the judicial notice question.

4. EPA argues that, under CAA Section 307(d) it must be presented with the opportunity to pass on new information. *See* EPA Opp. at 6. But, again, Movants are not trying to place new substantive information ***in the agency record*** by means of this Motion. They are simply bringing to the Court's attention undisputed statements EPA made to the IG and to the public in its defensive press release, because those statements bear on positions EPA has taken in this litigation and in the rulemaking below. The purpose of Section 307(d) is to prevent reliance on new science, new economic analysis, new technical reports, or new legal arguments not presented to the Agency, so that it is not sandbagged on judicial review.

Here, EPA was fully aware of what it was telling its own IG behind the

scenes. And those statements vindicate the arguments Petitioners have made from the start of this case that EPA was not exercising independent judgment on the science of climate change, as Clean Air Act Section 202(a)(1) requires. If anything, it is the Petitioners who were sandbagged by hearing for the first time only now EPA's inconsistent statements on whether it independently weighed scientific determinations made by other foreign and domestic bodies, just before briefing on the Endangerment Rule concluded.

EPA contends that "Petitioners had ample opportunity to argue these points in their opening merits brief," EPA Opp. at 10, but it is hard to fathom how EPA makes that point with a straight face. How could Petitioners have referred in their May 2011 opening brief to statements EPA made to its IG never made public until September 28, 2011? Under EPA's reading of Section 307(d), if its counsel made a damaging new admission at the podium at oral argument next year, the Court could not take action based upon it. That is not the law. *See Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) ("well-established that executive and agency determinations are subject to judicial notice" and applying that principle to new agency pronouncements in an administrative law case).

5. EPA next claims that Movants mischaracterize what EPA told the IG. *See* EPA Opp. at 12. It is important to note that EPA begins by admitting that it is a "fact that EPA [stated that it] did not 'weigh[] and sift[] the science,' Pet. Mot. at

9, ***in the TSD*** – which is all that EPA said." EPA Opp. at 12 (emphasis added, brackets in original). Movants would also like for the Court to take judicial notice of this admittedly undisputed fact. *See Bucci*, 393 F.3d at 296 n.5 ("party admission [is] susceptible to judicial notice"); *cf. Owings v. Secretary of the Air Force*, 447 F.2d 1245, 1256 (D.C. Cir. 1971) (taking judicial notice of appellant's admission made in a written statement filed with the Court after argument). EPA's statement about what was said in the Technical Support Document ("TSD") is not only contrary to EPA's assertion elsewhere that there are no undisputed facts in the IG Report to take judicial notice of, *compare id.* at 9, but it is of great importance to the merits of these cases.

EPA now argues that this statement does not mean that the EPA Administrator did not herself weigh the scientific issues outside the TSD. But, if so, this creates a serious merits problem because it breaks the connection between the TSD, which is called the Technical ***Support*** Document for a reason, and the Endangerment Rule that purportedly relied on the TSD. *See* 74 Fed. Reg. 66,496, 66,510 (Dec. 15, 2009) (TSD is part of science on which rule was based). As Non-State Petitioners noted in their merits reply brief on the Endangerment Rule (Doc. 1336052, at 14-15), if there are undisclosed steps in the analysis that led to the Endangerment Rule or the TSD, then EPA has failed to explain the choices made in the TSD to exclude contrary science and rely only on supportive science. *See*

Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("agency must examine the relevant data and articulate ... a 'rational connection between the facts found and the choice made.'"). EPA's attempt to sidestep this problem by arguing that the TSD had a "narrow purpose" (and not its traditional purpose as ***the*** repository of a rule's technical grounding), EPA Opp. at 12, can also be considered by the merits panel.

6. Indeed, further judicially noticeable statements of which the merits panel should be aware continue in EPA's opposition. EPA argues that the "Report [does not] suggest that the TSD does not contain an accurate or balanced summary of the science on which the Endangerment Finding was based," *id.* at 13, while at the same time arguing that "the TSD was not, and was not intended to be, a new or additional assessment of the science," *id.* This is either splitting hairs (if it is a new summary, in what sense is it not a new science assessment?) or it is contradictory, because the IG Report makes clear that the TSD operated as an active science filter.

7. EPA also offers no real reason not to refer this Motion to the merits panel. It is clear that EPA's statements to the IG are judicially noticeable as an undisputed fact and that these statements tie closely into the merits of these consolidated endangerment cases. Now that briefing in the endangerment cases is complete, there is all the more reason to refer this disputed Motion to the merits

panel, where the procedural and substantive questions concerning the Endangerment Rule and what the IG Report reveals can be considered in tandem.

8. EPA's last argument is that Movants are seeking judicial review under the Data Quality Act or trying to enforce an Executive Order. *See* EPA Opp. at 13-15. Neither assertion is true. No such arguments were made in this Motion or in the Non-State Petitioners' endangerment merits briefs — easily verifiable facts of which the Court can take judicial notice and that should be undisputed by EPA.

CONCLUSION

For the foregoing reasons the Motion for Judicial Notice should be granted.

October 24, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 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.

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