ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1145

Consolidated with Cases No. 20-1167, -1168, -1169, -1173, -1174, -1176, -1177 & -1230

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

COMPETITIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

MOTION TO COMPLETE AND SUPPLEMENT THE RECORD

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INTRODUCTION AND REQUEST FOR RELIEF

On April 30, 2020, Respondents National Highway Traffic Safety Administration (NHTSA) and U.S. Environmental Protection Agency (EPA) (collectively, the Agencies) published *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Rollback). The Rollback weakens existing standards—and prescribes new, lax standards—for greenhouse gas emissions and corporate average fuel economy of new passenger cars and light trucks.

On July 6, 2020, the Agencies filed certified indexes of administrative record in this Court. ECF No. 1850358. Several categories of important materials were omitted from the indexes. The State and Municipal Petitioners (Case No. 20-1167) and Public Interest Petitioners (Cases No. 20-1168 and -1169) (collectively, Movants) negotiated with the Agencies to resolve most of their administrative-record disputes and obtain assurance that Movants will have timely access to the Agencies' complete administrative records as merits briefing proceeds. This motion addresses one category of documents on which Movants and the agencies have been unable to reach agreement.

The Agencies have taken the position that interagency-review materials missing from their indexes are not part of their administrative records. Movants request that this Court order the Agencies to add six documents to their administrative records:

- Two drafts of the final rulemaking notice that were submitted to the White House Office of Management and Budget (OMB) (Exs. A, B);

- Two sets of EPA comments to NHTSA on those drafts (Exs. C, D); and
- Two EPA documents that provide context for those comments (Exs. E, F).

All these documents were before one or both Agencies at the time of decision. Further, as explained herein, the "deliberative" privilege that ordinarily shields such documents from judicial review either does not apply here or it is overcome by showings of need by Movants and bad faith or improper behavior by the Agencies.

Petitioners in Cases No. 20-1173, -1174, -1176, and -1177 support this motion. Petitioners in Cases No. 20-1145 and 20-1230 have not stated a position on the motion. Respondents oppose the motion.

BACKGROUND

A thorough retelling of the regulatory and procedural background of these complex cases must await merits briefing. This abridged background shows why the inter-agency-review materials in question are properly part of the record for judicial review.

A. The Agencies' standards for new passenger cars and light trucks

The Clean Air Act mandates that "[t]he [EPA] Administrator shall by regulation prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles … which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). EPA has made such a judgment with respect to greenhouse gases emitted from passenger cars and light trucks, 74 Fed. Reg. 66,496 (Dec. 15, 2009),

and EPA has set greenhouse gas emission standards for those vehicles, including standards set in 2012 for model year 2017–2025 vehicles, 77 Fed. Reg. 62,624 (Oct. 15, 2012). At the same time, NHTSA prescribed corporate average fuel-economy standards for model year 2017–2021 passenger cars and light trucks pursuant to its "wholly independent" mandate under the Energy Policy and Conservation Act of 1975. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). While the Agencies endeavored to "harmoniz[e]" their model year 2017–2021 standards, 77 Fed. Reg. at 62,624, each conducted an independent analysis using its own model tailored to its statutory mandate, *see id.* at 62,666–67.

In 2016, as part of a required "mid-term evaluation" for EPA's model year 2022–2025 greenhouse gas standards, EPA, NHTSA, and the California Air Resources Board prepared "a 1,217-page Draft Technical Assessment Report" concluding that "a wider range of technologies exists for manufacturers to use to meet [those] standards, and at costs that are similar or lower, than those projected when the standards were established in 2012." *California v. EPA*, 940 F.3d 1342, 1347 (D.C. Cir. 2019) (brackets altered and quotation omitted). After considering "over 200,000 public comments" on the report, EPA solicited comments on a new "719-page Technical Support document" and "268-page Proposed Determination" finding that the model year 2022–2025 standards remained "feasible, practical and appropriate" and did not require revision. *Id.* After considering the further comments, EPA finalized that determination in January 2017. *Id.*

Two months later, the President declared "that he was 'going to cancel'" EPA's final determination. *California*, 940 F.3d at 1348. EPA then issued a "less definitive"

analysis of its model year 2022–2025 greenhouse gas emission standards: an 11-page, nonfinal, revised determination that the standards were "not appropriate." *Id.* That determination triggered a duty to "initiate a rulemaking to revise the standards, to be either more or less stringent as appropriate." *Id.* at 1347 (quoting 40 C.F.R. § 86.1818-12(h)).

B. Proposed Rollback

On August 24, 2018, EPA and NHTSA jointly published a notice of proposed rulemaking to freeze their respective standards for passenger cars and light trucks at model year 2020 levels through model year 2026. 83 Fed. Reg. 42,986. The proposal represented that "EPA will be making its own decisions regarding what [greenhouse gas] standards would be appropriate under the [Clean Air Act]." *Id.* at 43,002. Yet the proposal stated that EPA would not rely on its own analytical modeling capacity—which had been used to develop all prior greenhouse gas standards—but would instead rely solely on NHTSA's analytical model. *Id.* at 43,000.

During the interagency-review period for the notice of proposed rulemaking, however, EPA had "express[ed] serious concerns" to OMB "about the results produced by the NHTSA model." *NRDC v. EPA*, 954 F.3d 150, 154 n.2 (2d Cir. 2020); *see also* Exec. Order No. 12,866 § 6, 58 Fed. Reg. 51,735, 51,740–43 (Oct. 4, 1993) (providing for OMB to oversee interagency review).[1] EPA also had requested that its "name and

[1] *See* Comments of Center for Biological Diversity et al., Att. A, at 19, EPA-HQ-OAR-2018-0283-5070, Oct. 26, 2018 (quoting EPA-HQ-OAR-2018-0283-0453: Email 5 – Email from William Charmley to Chandana Achanta et al., June 18, 2018). EPA explained that the most recent version of its own analytical model *(cont'd on next page)*

logo … be removed from" the Preliminary Regulatory Impact Analysis because it was "a work product of DOT and NHTSA and was not authored by EPA."[2] This information, at odds with the Agencies' representation in their published proposal, was disclosed because the Clean Air Act "makes specific provision" for EPA to place in its public docket for the rulemaking "all 'written comments,' 'documents,' and 'written responses' resulting from [any] interagency review process." *Sierra Club v. Costle*, 657 F.2d 298, 404 (D.C. Cir. 1981) (quoting 42 U.S.C. § 7607(d)(4)(B)(ii)).

These interagency materials received widespread attention highlighting EPA's lack of involvement in developing the Agencies' proposal. *See* Letter from Senator Thomas Carper to EPA Inspector General Sean O'Donnell, at 2 & nn. 7–9 (Feb. 26, 2020) (Ex. G). According to information later shared with Senator Thomas Carper, Ranking Member of the Committee on Environment and Public Works, "EPA, OMB, and [Department of Transportation] political officials were angered by the very public airing of the inter-agency disagreement about this rule" at the proposal stage. *Id.* at 2.

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yielded results quite different than those generated by NHTSA's model with respect to automakers' cost to comply with EPA's standards. *See id.* at 21. During the public-comment period for the proposal, two of the Movants here filed a Freedom of Information Act request for the latest version of EPA's model and sued when the agency did not respond to the request. In litigation, EPA claimed that its model is deliberative material, but the Second Circuit disagreed: "EPA's argument stretches the deliberative process privilege too far" because "disclosure of its analytical tools cannot reasonably be anticipated to impair the quality of agency decisionmaking." *NRDC*, 954 F.3d at 157–58.

[2] *See* Comments of Center for Biological Diversity et al., Att. A, at 19, EPA-HQ-OAR-2018-0283-5070, Oct. 26, 2018 (quoting EPA comments on Preliminary Regulatory Impact Analysis sent to OMB, July 12, 2018, at pdf p.3).

C. Final Rollback

On January 14, 2020, OMB received a draft final rulemaking notice (Ex. A) to begin the interagency-review period for the final Rollback. OMB, "Conclusion of EO 12866 Regulatory Review" (Ex. H). Slides of an EPA presentation later obtained and disclosed by Senator Carper indicate that EPA's experts "had not previously had an opportunity to review" most of the draft notice before it went to OMB. EPA Office of Transportation and Air Quality Presentation to EPA Acting Assistant Administrator for Air and Radiation Anne Idsal, *SAFE Final Rule: OTAQ Review of the Preamble Submitted to OMB*, Jan. 30, 2020 (Ex. E), at 3. Nevertheless, NHTSA had written the notice in EPA's "voice," including on issues uniquely within EPA's expertise. *Id.* at 8.

On February 5, 2020, EPA transmitted a document (Ex. C) to NHTSA with extensive comments on the draft final rulemaking notice pointing out "new analytical flaws" and "false statements." Ex. E, at 3, 8. According to information shared with Senator Carper, EPA staff received an "unprecedented" instruction to send these comments to NHTSA only in hard copy and not to OMB. Ex. G, at 3; *cf.* Exec. Order No. 12,866 § 6(b)(4)(D), 58 Fed. Reg. at 51,743 (stating that OMB "shall make available to the public all documents [it] exchanged" with the agency).

On March 25, 2020, OMB received a substantially revised and expanded draft rulemaking notice (Ex. B). According to an email obtained by Senator Carper, NHTSA had not shared this draft with EPA until the eve of submission. Email from William Charmley, Director, Assessment and Standards Division, to Sarah Dunham, Director,

EPA Office of Transportation and Air Quality, at 1 (Mar. 26, 2020) (Ex. F). Upon receipt, EPA technical staff rapidly reviewed NHTSA's revised draft and learned that "more than 250 EPA comments" on the prior draft "ha[d] not been addressed." *Id.* at 2. Though "not able to completely review" the new draft notice, *id.* at 1, EPA did prepare further comments on March 26, 2020 (Ex. D) for transmission to NHTSA. There is no direct evidence that EPA's further comments were transmitted to NHTSA, but there are instances in which those comments were incorporated verbatim into the final notice. *E.g.*, Rollback, 85 Fed. Reg. at 25,206 (incorporating comments that EPA prepared on March 26, 2020, regarding natural gas vehicles (Ex. D, at 1561)).

Four days later, on March 30, 2020, NHTSA's Acting Administrator and EPA's Administrator signed the final rulemaking notice for the Rollback. The notice explains that "NHTSA and EPA are obligated by Congress to exercise their own independent judgment in fulfilling their statutory missions" and asserts that the Agencies "were continuing" to do so. 85 Fed. Reg. at 25,137.[3] The Rollback sets greenhouse gas emission and corporate average fuel-economy standards for model year 2021–2026 vehicles that

[3] *See also* Elaine L. Chao & Andrew R. Wheeler, Op-Ed, *New Fuel Economy, CO_2 Standards Mean More Affordable, Safer and Cleaner Vehicles*, Cleveland Plain Dealer Online, Apr. 3, 2020, https://www.cleveland.com/opinion/2020/04/new-fuel-economy-co2-standards-mean-more-affordable-safer-and-cleaner-vehicles-elaine-l-chao-and-andrew-r-wheeler.html (Secretary of Transportation and EPA Administrator stating that EPA's "team[ ] of experts … ha[d] worked hard" on the Rollback "for more than three years").

increase in stringency by approximately 1.5 percent annually, Rollback, 85 Fed. Reg. at 24,175, as compared to more than 5 percent annually under the prior standards.

Following publication, EPA docketed the two aforementioned drafts of the rule-making notice submitted to OMB (along with other drafts and pieces thereof), as well as several interagency comments and responses thereto. But EPA did not docket or otherwise disclose its own comments to NHTSA on the draft rulemaking notices. According to information received by Senator Carper, "although EPA career lawyers believed that these materials were legally required to be placed into the rulemaking docket, EPA's General Counsel Matt Leopold overruled them." Letter from Senator Thomas Carper to EPA Inspector General Sean O'Donnell, at 4 (May 18, 2020) (Ex. I). NHTSA did not disclose EPA's interagency comments either.

Senator Carper requested that EPA's Inspector General inquire into wrongdoing regarding the agency's conduct and role in the Rollback proceeding. Exs. G & I. The Inspector General has decided to evaluate "whether the EPA's actions on the [Rollback] were consistent with requirements, including those pertaining to transparency, record-keeping, and docketing, and followed the EPA's process for developing final regulatory actions." EPA Inspector General Notification of Evaluation, Project No. OA&E-FY20-0269, at 1 (July 27, 2020) (Ex. J). The Inspector General inquiry remains pending.

D. Administrative records

The Agencies filed certified indexes of administrative record in this Court on July 6, 2020. ECF No. 1850358. The indexes omit the interagency-review materials

discussed above and also omit hundreds of sources cited in the Federal Register notice, the regulatory impact analysis, or the environmental impact statement for the Rollback. On July 31, 2020, counsel for Petitioner State of California and Public Interest Petitioners wrote counsel for Respondents to request that the Agencies remedy these and other omissions. On August 12, 2020, the Agencies responded in part and took the position that any interagency-review materials not included in their indexes are not part of the administrative records.[4]

STANDARDS FOR COMPLETING AND SUPPLEMENTING AN ADMINISTRATIVE RECORD

The scope of NHTSA's administrative record is governed by the Administrative Procedure Act (APA), which calls for judicial review of "the whole record," 5 U.S.C. § 706, i.e., "the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The full administrative record "consists of: (1) the order involved; (2) any

[4] On August 20, 2020, the Agencies provided a further response confirming that their certified indexes are deficient. Among other things, although each source cited in a Federal Register notice or regulatory impact analysis for the proposed or final Rollback is part of both Agencies' administrative record, and each source cited in a draft or final environmental impact statement is part of NHTSA's administrative record, many of these sources are missing from the certified indexes. Many of these sources likewise are missing from the Agencies' public rulemaking dockets, and Movants are not in possession of some of the sources. On August 24, 2020, the Agencies agreed that, upon request of any petitioner, they will use best efforts to expeditiously produce any missing source. Movants reserve the right to seek relief from this Court, including urgent relief, if the Agencies do not produce the materials expeditiously. *See* Fed. R. App. P. 17(b)(3).

findings or reports on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a); *see also* 28 U.S.C. § 2112(b). The scope of EPA's administrative record is governed by Section 307(d) of the Clean Air Act, which calls for judicial review of specified components of the whole record, not including "drafts of the final rule submitted for [any interagency] review process," "documents accompanying such drafts," "written comments thereon" "by other agencies," or "written responses thereto." 42 U.S.C. § 7607(d)(4)(B)(ii); *see also id.* § 7607(d)(7)(A).

The Court may compel an agency to complete an administrative record that is incomplete and/or supplement the administrative record with additional, extra-record materials. *See* Fed. R. App. P. 16(b). Upon a showing that the agency's proffered record omits materials covered by the applicable statutory definition of the administrative record, the Court may order the agency to *complete* the administrative record with those materials. *See, e.g.*, *NRDC v. Train*, 519 F.2d 287, 291–92 (D.C. Cir. 1975). Upon a showing of need by a party or a showing of bad faith or improper behavior by the agency, in contrast, the Court may order the agency to *supplement* the administrative record with materials that ordinarily would be excluded from the administrative record. *See generally San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc); *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018) (differentiating completion and supplementation).

REASONS TO COMPLETE AND SUPPLEMENT THE AGENCIES' ADMINISTRATIVE RECORDS

The Agencies' proffered administrative records are deficient. This Court should order that the initial and revised drafts of the final Rollback submitted to OMB, along with the related materials (interagency comments and internal EPA documents) surfaced by Senator Carper, be added to the administrative records of both Agencies.[5]

First, NHTSA should *complete* its administrative record with the initial and revised draft rulemaking notice submitted to OMB and EPA's interagency comments thereon. These documents are part of the proceedings before NHTSA; no statute excludes them from NHTSA's record; and Congress' mandate that the documents be publicly released forecloses any argument that they are "deliberative" materials omitted from the record.

Second, EPA should *supplement* its administrative record with the initial and revised drafts of the rulemaking notice, interagency comments thereon, and internal EPA documents released by Senator Carper. The Clean Air Act normally excludes such materials from EPA's administrative record. But here, the materials are uniquely probative of Movants' claims that, contrary to the Agencies' representation in the notice accompanying the final Rollback, EPA failed to exercise its independent judgment or apply its technical expertise to the development of these greenhouse gas emission standards.

[5] To the extent other relevant material comes to light through the EPA Inspector General proceedings or otherwise, Movants reserve the right to seek completion or supplementation of the Agencies' administrative records with that material at that time.

Third, and in the alternative, both Agencies should *supplement* their records with the initial and revised drafts of the rulemaking notice, interagency comments thereon, and internal EPA documents released by Senator Carper because the Agencies acted improperly and in bad faith by misrepresenting EPA's involvement in the Rollback and subverting the interagency-review process to conceal the true nature of that involvement.

Movants respectfully request that this Court order the Agencies to complete and supplement their administrative records prior to merits briefing, so that the parties may brief all issues in these complex cases with the record for review properly defined.

I. NHTSA's administrative record should be completed with drafts of the notice of rulemaking and EPA's interagency comments on those drafts, which Congress required to be publicly released.

This Court should order NHTSA to complete its administrative record with the initial and revised drafts of the final rulemaking notice it submitted to OMB and comments on those drafts exchanged between NHTSA and EPA. These materials were "before" NHTSA "at the time [it] made [its] decision," *Overton Park*, 401 U.S. at 420, and thus comprise "parts of the proceedings before the agency," Fed. R. App. P. 16(a)(3). No statute authorizes NHTSA to exclude interagency-review materials from its record.

Nor are these materials "'deliberative' document[s] automatically excluded from the administrative record." *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 30 (D.D.C. 2013). "[T]he same exceptions exist to [deliberative] privilege … as against inclusion in the public record on appeal." *Nat'l Courier Ass'n v. Bd. of Gov'rs of Fed. Reserve Sys.*, 516 F.2d 1229, 1242 (D.C. Cir. 1975). Just as deliberative privilege is waived if an

agency deliberately releases a document, *see In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997), the usual exception to the whole-record rule for deliberative material does not apply if an agency is required to publicly release a document.

NHTSA's choice to conduct a joint proceeding with EPA triggered application of the Clean Air Act requirement that draft final rules and interagency comments and responses thereto be docketed and thus publicly disclosed. *See* 42 U.S.C. § 7607(d)(4). Congress's decision to require public disclosure of these materials means they cannot be excluded from the record on review of NHTSA's action. *See Lee Mem'l Hosp. v. Burwell*, 109 F. Supp. 3d 40, 48–49 (D.D.C. 2015) (reaching similar conclusion for Executive Order 12,866 materials); *Dist. Hosp. Partners*, 971 F. Supp. 2d at 30 (same). EPA's unlawful failure to docket comments and responses exchanged with an "other agenc[y]" on "drafts of the final rule submitted for [the interagency] review process prior to promulgation," 42 U.S.C. § 7607(d)(4)(B)(ii), cannot narrow the scope of NHTSA's administrative record. For present purposes, the salient question is whether the statute required public disclosure of the documents, not whether the government complied with the statute. *Cf. In re United States*, 138 S. Ct. 371, 374 (2017) (Breyer, J., dissenting from grant of a stay) ("[J]udicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record.").

II. EPA's administrative record should be supplemented because certain interagency-review materials are highly relevant to Movants' claims.

The Court should supplement EPA's record with the initial and revised drafts of the regulatory preamble to the final Rollback, comments EPA exchanged with NHTSA on those drafts, and the internal EPA documents surfaced by Senator Carper. As noted above, "drafts of the final rule submitted for [any interagency] review process," "documents accompanying such drafts," "written comments thereon" "by other agencies," and "written responses thereto" normally would not be part of the record on review of EPA's action. 42 U.S.C. § 7607(d)(4)(B)(ii). But here, these materials and the related intra-agency documents that shed light on them are uniquely probative of Movants' claims concerning EPA's involvement, or lack thereof, in the development of its own Clean Air Act rule.

Ordinarily, a court reviewing EPA action under Section 307(d) of the Clean Air Act does not "concern itself with who in the Executive Branch advised whom about which policies to pursue." *Sierra Club*, 657 F.2d at 404 n.519 (interpreting 42 U.S.C. § 7607(d)(7)(A)). But this case is an exception. "EPA [is] obligated by Congress to exercise [its] own independent judgment in fulfilling [its] statutory mission[ ]," Rollback, 85 Fed. Reg. at 25,137, and Movants claim the agency shirked that obligation, ECF No. 1849367 ¶ 1(c); ECF No. 1849417 ¶ 2; *see also* 42 U.S.C. § 7607(d)(9)(A), (D). The subject materials show that, although NHTSA submitted drafts of the final Rollback to OMB on behalf of both Agencies, EPA had no opportunity to review most of the initial draft and less than a day to review a substantially revised draft that was about to be

finalized. *See supra*, pp. 6–7. Instead, many EPA comments to NHTSA on critical issues within EPA's technical expertise were ignored, in some cases twice. *Cf. Kent County v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992) ("The documents relate to the position of the agency's own experts on the question central to this case. To deny their relevance would be inconsistent with rational decisionmaking by an administrative agency.").

Making matters worse, EPA represented that it *was* acting independently and applying its own technical expertise. *See supra*, pp. 4, 7; Rollback, 85 Fed. Reg. at 24,227 ("[T]he development process for [the Agencies'] standards inherently requires technical and policy examinations and deliberations between staff experts and decision-makers in both agencies. Such engagements are a healthy and important part of any rulemaking activity—and particularly so with joint rulemakings."). This Court cannot hold EPA to its duty to "offer genuine justifications for [an] important decision[]" without considering interagency-review materials that conflict with the agency's characterization of the rulemaking process. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019); *see also id.* at 2575 (vacating decision of agency whose asserted rationale was "incongruent with what the record," including evidence outside the standard administrative record, "reveals about the agency's priorities and decisionmaking process").

Moreover, this Court cannot "give an extreme degree of deference to the EPA's evaluation of scientific data within its technical expertise," *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015) (quotation omitted), if that expertise was not utilized. The interagency-review materials show that the Rollback largely discarded

the EPA expertise needed to develop *any* vehicular emission standards, let alone to explain the agency's decision to "disregard[] facts and circumstances that underlay or were engendered by the 2022–2025 model year standards when they were set in 2012 and the additional technical record developed" in 2016 and 2017. *California*, 940 F.3d at 1351 (quotation omitted).

Section 307(d) of the Clean Air Act does not bar consideration of these materials. A "challenge to the integrity of the rulemaking" process may call for review of materials outside the four corners of Section 307(d)(7)(A). *Sierra Club*, 657 F.2d at 389 n.450 ("examin[ing]" in a Clean Air Act Section 307(d) case "internal EPA communications" allegedly showing "the effect of … improper ex parte contacts on the evolution of the promulgated regulation"); *see also Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1183 (D.C. Cir. 1980) (finding that materials not referenced in Section 307(d)(7)(A) were nonetheless "properly before the [C]ourt" for purposes of ruling on a procedural challenge); *id.* at 1183 n.160 (suggesting that "internal agency documents" also might have been considered if parties had timely requested them under Freedom of Information Act);[6] *cf. Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (observing that, where "the procedural

[6] No Freedom of Information Act request proved necessary for the documents at issue here, which were publicly disclosed by either EPA or Senator Carper. In any event, Movant Environmental Defense Fund filed such requests with both Agencies after the Rollback was signed, but before it was published, seeking records related to the interagency-review process. The Agencies did not timely respond to those requests.

validity of the [agency's] action … remains in serious question," a court may "resort to extra-record information to enable judicial review to become effective").

III. Evidence of bad faith and improper behavior warrants supplementation of the Agencies' administrative records with interagency-review materials.

This Court should order the Agencies to supplement their administrative records with the preamble drafts, interagency comments, and internal EPA documents because Movants can make "a showing of bad faith or improper behavior." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). The requisite showing has been "variously described as a strong, substantial, or prima facie showing." *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting district court opinion as "clearly announc[ing] the correct legal standard" for discovery in record-review case).[7]

The available evidence shows that, from the proposal stage through finalization of the Rollback, not only was EPA cut out of the process of developing its own rule but also the Executive Branch took unprecedented and improper steps to hide that fact. *See supra*, pp. 4–8. In short, the government acted irresponsibly and tried to cover it up.

[7] Such a showing merits supplementation of the administrative record not only under the APA, *see Oceana*, 920 F.3d at 865, but also under the Clean Air Act. As this Court has noted, the "authoritative guide to congressional intent in enacting the record provisions of Section 307(d)" is a 1975 law review article by William Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38. *Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23 n.6 (D.C. Cir. 1979) (citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 319 (1977)). That article confirms that "bad faith," "improper behavior," and "irresponsible decisionmaking" warrant judicial review of materials not included in the record defined by Section 307(d)(7)(A). Pedersen, *supra*, at 50, 84, 87 (citing *Overton Park*, 401 U.S. at 420).

Most strikingly, EPA staff were ordered to send comments directly to NHTSA in hard copy, rather than sending them through OMB as part of the usual, public interagency-review process. EPA's comments highlighted several places where its input had not been (and never was) integrated into the Agencies' ostensibly joint work product and flagged many of the factual and analytical errors that riddle the Rollback.

In addition to behaving improperly, the Agencies acted in bad faith by asserting that EPA in fact was "exercis[ing] [its] own independent judgment in fulfilling [its] statutory mission[]." Rollback, 85 Fed. Reg. at 25,137. Here, that mission included explaining a departure from extraordinarily detailed technical findings to which EPA applied its independent judgment and considerable expertise in 2012 and again in 2017. *See California*, 940 F.3d at 1351 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). EPA could not plausibly have performed that task if its own experts "were not able to completely review" the rulemaking notice prior to finalization. Ex. F, at 1.

"[T]he public's interest in honest, effective government" outweighs any plausible interest of the Agencies in avoiding judicial scrutiny of the interagency-review materials. *In re Sealed Case*, 121 F.3d at 738 (quotation omitted) (explaining that deliberative privilege "is routinely denied" if there is evidence of "government misconduct"). The conduct described by Senator Carper already has prompted EPA's Inspector General to inquire into "potential irregularities in more depth." Ex. J, at 1. It likewise is more than sufficient reason for this Court to consider the interagency-review materials before passing upon the lawfulness of the Agencies' actions.

CONCLUSION

This Court should order the Agencies to complete and supplement their administrative records with Exhibits A–F prior to merits briefing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing motion was prepared in 14-point Garamond font using Microsoft Word 365 (July 2020 ed.), and it complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 27(d)(1)(E). The motion contains 4,843 words and complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A).

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CERTIFICATE OF SERVICE

On August 25, 2020, I served a copy of the foregoing motion, with exhibits, using this Court's CM/ECF system. All parties are represented by registered CM/ECF users that will be served by the CM/ECF system.

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