ORAL ARGUMENT NOT YET SCHEDULED

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

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| COMPETITIVE ENTERPRISE INSTITUTE, et al.,<br><br>Petitioners,<br><br>v.<br><br>NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,<br><br>Respondents. | No. 20-1145, and consolidated cases |

RESPONSE IN OPPOSITION TO MOTION TO COMPLETE THE RECORD

Competitive Enterprise Institute, Petitioner in Case No. 20-1145 ("Movant") seeks to complete the administrative record with three documents. Motion To Complete The Record ("Mot. to Complete"), ECF No. 1858924. Respondents do not contest that one of those documents, a final Integrated Science Assessment, is part of the agencies' administrative records for judicial review. However, neither EPA nor NHTSA considered the other two documents at issue, Movant's Exhibits A and B. Because neither document is part of the agencies' administrative records, the motion to complete the record with Exhibits A and B should be denied.

## BACKGROUND

These consolidated petitions challenge a joint rulemaking by EPA and NHTSA entitled *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020) ("SAFE II Rule").[1] The SAFE II Rule establishes two sets of vehicle regulations for passenger cars and light trucks: one, issued by NHTSA, establishes corporate average fuel economy standards under the Energy Policy and Conservation Act ("EPCA"); the other, issued by EPA, establishes vehicle greenhouse-gas emission standards under Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1). *Id.* at 24,174. NHTSA's action replaces a fuel economy standard set in 2012 for model year 2021 vehicles, and establishes such standards for the first time for model years 2022-2026. *Id.* at 24,181-82. EPA's action replaces EPA's existing vehicle greenhouse-gas emission standards for model years starting in 2021, which were originally set in 2012. *Id.*

EPA and NHTSA each timely filed a certified index of the administrative record for its decision. *See* ECF No. 1850358.

[1] Movants refer to the SAFE II Rule as the SAFE Rule. *See* Mot. to Complete at 3. Many of the same parties in this case are litigating a related rule, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019), in *Union of Concerned Scientists v. NHTSA*, No. 19-1230. To avoid confusion we refer to the rule at issue here as the SAFE II Rule.

Separate from EPA's authority to regulate air pollution from mobile sources such as vehicles, the Clean Air Act also requires EPA to periodically review and revise, as appropriate, National Ambient Air Quality Standards ("NAAQS") for six common air pollutants, including particulate matter. As part of that review process, EPA must also periodically review the science related to the health and welfare effects of these pollutants. 42 U.S.C. §§ 7408, 7409(d). To do so EPA develops several documents, including an Integrated Science Assessment ("ISA"), which reviews and synthesizes the available science, and a Policy Assessment, which helps to frame policy options for the EPA Administrator by ''bridging the gap'' between the scientific and technical information available in the ISA and the judgments EPA must ultimately make in deciding whether to retain or revise the NAAQS.

EPA initiated its most recent review of the particulate matter NAAQS in 2014, and issued a draft of the particulate matter ISA in October 2018 for public review and comment. 83 Fed. Reg. 53,471 (Oct. 23, 2018). EPA's Clean Air Scientific Advisory Committee reviewed the draft ISA and submitted its report to EPA in April 2019.[2] EPA issued a draft of the particulate matter Policy Assessment in September 2019. 84 Fed. Reg. 47,944 (Sept. 11, 2019). The Clean

[2] The Clean Air Science Advisory Committee is an independent body charged (among other things) with independent scientific review of the EPA's air quality criteria. *See* 42 U.S.C. § 7409(d)(2).

Air Scientific Advisory Committee reviewed the draft Policy Assessment and submitted its report to EPA on December 16, 2019. EPA issued the final ISA in December 2019. 85 Fed. Reg. 4,655 (Jan. 27, 2020). EPA anticipates completing its review of the particulate matter NAAQS in late 2020. 85 Fed. Reg. at 24,860/2 n.2239.

Movant seeks to complete the administrative records of the SAFE II Rule with three documents from EPA's review of the particulate matter NAAQS. Those documents are:

- the December 2019 final ISA;

- the Clean Air Scientific Advisory Committee's April 2019 report on the draft ISA (Movant's Ex. A); and

- the Clean Air Scientific Advisory Committee's December 2019 report on the draft Policy Assessment (Movant's Ex. B).

As Movant notes, the agencies agree that the December 2019 final ISA is part of the administrative records for the SAFE II rulemaking. *See* Mot. to Complete at 4 (noting that the agencies considered the December 2019 final ISA and quoting 85 Fed. Reg. at 24,860/1). This Response in Opposition is therefore limited to addressing Movant's argument that the two Clean Air Scientific Advisory Committee reports, Movant's Exhibits A and B, are part of the SAFE II administrative records.

The Clean Air Act governs the scope of judicial review of EPA's promulgation of vehicle greenhouse-gas emission standards as part of the SAFE II Rule. Section 307(d)(7) specifies the materials that comprise the record for judicial review. 42 U.S.C. § 7607(d)(7). Those materials include the factual data on which the rule is based; the methodology used in obtaining the data and in analyzing the data; the major legal interpretations and policy considerations underlying the rule; written comments received on the proposed rule; an explanation of the reasons for any major changes in the promulgated rule from the proposed rule; and a response to significant comments and new data received. *Id.* The record "shall consist exclusively of" the listed materials. *Id.*

When NHTSA promulgates fuel economy standards, EPCA directs NHTSA to file "a record of the proceeding in which the regulation was prescribed." 49 U.S.C. § 32909(b). NHTSA establishes a regulatory rulemaking docket, which forms the basis for compiling the administrative record for judicial review. That docket includes:

> Information and data deemed relevant by the Administrator relating to rulemaking actions, including notices of proposed rulemaking; comments received in response to notices; petitions for rulemaking and reconsideration; denials of petitions for rulemaking and reconsideration; records of additional rulemaking proceedings under § 553.25; and final rules….

49 C.F.R. § 553.5(a).

## ARGUMENT

With respect to the two Clean Air Scientific Advisory Committee reports, the Court should deny the motion because neither NHTSA nor EPA considered either of these reports as part of the SAFE II rulemaking.

Nothing in the Federal Register preamble accompanying the SAFE II Rule or in NHTSA's or EPA's administrative record indicates that either agency considered either of the two reports as part of the SAFE II rulemaking. As noted above, the agencies did consider the scientific conclusions in EPA's final ISA. 85 Fed. Reg. at 24,860/1. But the agencies' consideration of the final ISA does not mean the agencies considered all of the underlying reports, recommendations, and other information that led to its creation.

Movant does not assert that NHTSA considered either report in any way. Movant asserts that EPA considered the reports, but the only supporting evidence that Movant cites is a July 25, 2019, letter from the EPA Administrator. *See* Movant's Ex. C. In that letter, the EPA Administrator thanks the Clean Air Scientific Advisory Committee for its report and states that he and his staff are considering their recommendations. *Id.* Movants twist this statement into a commitment by the EPA Administrator to consider the reports in a completely separate rulemaking regarding the SAFE II Rule. *See* Mot. to Complete at 5-6.

But the context of the letter is unambiguous: the EPA Administrator was considering the reports in the context of *the particulate matter NAAQS review*. There is no indication at all that the EPA Administrator (much less the NHTSA Administrator) would consider these NAAQS-related Clean Air Scientific Advisory Committee reports when making a decision on the SAFE II Rule.

Movant's argument would essentially incorporate the entire docket from EPA's particulate matter NAAQS review into the SAFE II rulemaking. More than that, Movant's argument would apply equally to the entire docket of every other final agency action cited in the SAFE II rulemaking. That boundless view of the scope of the record is not the law. *See, e.g.*, *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1305-06 (D.C. Cir. 1991) (rejecting the notion that information is "before" the agency decisionmaker simply because the information was submitted to the agency as part of "an unrelated administrative" matter).

Movant's attempt to rely on *Styrene Information & Research Center, Inc. v. Sebelius*, 851 F. Supp. 2d 57 (D.D.C. 2012), does not save its argument. In that case the district court held that the reports at issue were indirectly considered by the agency, but there "the administrative record contain[ed] several references to omitted subgroup reports." *Id.* at 64. Not so here. The only reference in the

administrative record is to the final ISA itself. *That* document is part of the record. But documents that led to its creation, such as the reports at issue here, are not.

In short, Movant's request seeks to import two reports from EPA's entirely separate review of the particulate matter NAAQS into the administrative records of EPA's and NHTSA's actions in the SAFE II Rule, adopting motor vehicle emission and fuel economy standards. Because neither agency considered those reports in the SAFE II rulemaking, the motion should be denied.

Respectfully submitted,

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September 18, 2020

## CERTIFICATE OF COMPLIANCE

The foregoing response was prepared in 14-point Times New Roman font using Microsoft Word and it complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 27(d)(1)(E). The response contains 1522 words and complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A).

/s/ Daniel R. Dertke
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CERTIFICATE OF SERVICE

I certify that on this 18th day of September, 2020, the foregoing RESPONSE IN OPPOSITION TO MOTION TO COMPLETE THE RECORD was served electronically via the Court's CM/ECF system upon counsel of record for all parties except for the following who was served via electronic mail:

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