ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

UNION OF CONCERNED SCIENTISTS, et al., Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al., Respondents.	No. 19-1230, and consolidated cases

FEDERAL RESPONDENTS' OPPOSITION TO
MOTION TO COMPLETE ADMINISTRATIVE RECORD

Petitioners in these consolidated cases move to complete the Environmental Protection Agency's ("EPA") administrative record with documents that Petitioners concede were not considered by the agency. The administrative record consists of the materials that were "before" the agency at the time it made its decision. Materials like these, that were submitted to EPA after the close of the public comment period, but were never considered by the agency, are not part of the record.

This Court has often recited the governing principles of administrative law regarding the contents of the administrative record. Courts base their review of agency actions "on the materials that were before the agency at the time its decision

was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997).[1] The reviewing court applies the APA's standard of review to "the record the agency presents." *Id.* at 624, quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). The court "should have before it neither more nor less information than did the agency when it made its decision." *Id.* at 623, quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The record that the agency certifies is "entitled to a presumption of administrative regularity." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019), quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). Parties seeking to challenge the contents of the record must make a "substantial showing" that the agency "ha[s] not filed the entire administrative record with the court." *NRDC, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975).

Petitioners fail to meet that burden. Petitioners first assert that materials submitted to EPA "after the comment closing date" were before EPA. Pet. Mot. at 6. Just because a document is in an agency's possession does not mean the document is "before" the agency. Rather, "before the agency" means material that the agency actually considered, either directly or indirectly. *See, e.g.*, *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) (proper to exclude "agency

[1] In this context, the relevant agency is EPA. Although EPA and the National Highway Traffic Safety Administration ("NHTSA") coordinated their rulemaking efforts, each agency acted under its own statutory authority and therefore compiled its own docket and administrative record.

documents that were not used in making its decision"); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1306 (D.C. Cir. 1991) (material submitted to EPA, but to a regional office instead of to the office that made the challenged decision, was not before the agency); *Bar MK Ranches*, 994 F.2d at 739 ("the complete administrative record consists of all documents and materials directly or indirectly considered by the agency"). *See also Pac. Shores Subdivision, CA Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6-7 (D.D.C. 2006) (party seeking to add documents to the record must "identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency . . . [o]nly those documents that were directly or indirectly considered by the [agency's] decisionmaker(s) should be included in the administrative record"); *Stand Up for California! v. United States Department of Interior*, 315 F. Supp. 3d 289, 293 (D.D.C. 2018) (the "full administrative record that was before the [agency] at the time [it] made [its] decision . . . includes all information that the agency considered either directly or indirectly").

Furthermore, it is well-established that agencies generally are not required to consider materials and comments filed after the close of the comment period. *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 543 (D.C. Cir. 1995); *see also* Pet. Mot. at 6. Petitioners do not dispute that the materials they seek to add to the administrative record were submitted after the close of the comment period. Nor do Petitioners dispute that EPA did not in fact consider these late materials.

Instead, relying on *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 711 F.2d 370 (D.C. Cir. 1983), Petitioners argue that EPA granted them a "procedural right" to submit late comments. Pet. Mot. at 7. In the *UCC* case, the Nuclear Regulatory Commission promulgated regulations committing the Commission to publish a notice of proposed rulemaking whenever the Commission "proposes to adopt, amend, or repeal a regulation," without exception. 711 F.2d at 381. By promulgating these regulations, the agency had "divested itself" of its discretion to invoke the APA's "good cause" exception to the general rule requiring notice and comment. *Id.* The agency was thus "bound by its own rules" and must provide an opportunity for public comment. *Id.* EPA's statement in this case, that it would consider late comments to the extent practicable, is hardly on par with a regulatory requirement to take comments.

Petitioners next assert that because EPA did consider some developments that occurred after the close of the comment period, EPA must consider all late comments. Pet. Mot. at 4, 9. In particular, Petitioners point to EPA's discussion of a "December 2018 action and a July 2019 announcement by the State of California." *Id.* at 9. Although EPA did note these developments, EPA explicitly stated that neither the December 2018 action or the July 2019 announcement "constitute a necessary part of the basis for the waiver withdrawal and other actions that EPA finalizes in this document, and EPA would be taking the same actions that it takes in

this document even in their absence." 84 Fed. Reg. 51,310, 51,329/1-2 (Sept. 27, 2019).

Furthermore, EPA only indicated that it would endeavor to consider late comments "[t]o the extent practicable." 83 Fed. Reg. 42,986, 43,471 (Aug. 24, 2018). Consideration of late comments was not practicable here, given the volume of timely comments the Agency reviewed and addressed. Commenters submitted more than 500,000 timely comments on the proposal, which EPA has grouped and listed in the certified index to the administrative record as representing over seven thousand different comments – a considerable tally for a proposed action. 84 Fed. Reg. at 51,310.[2] These included many lengthy and detailed comments addressing both complex legal and technical matters. The *timely* comments submitted by Petitioners before the comment period closed are illustrative: the California Air Resource Board's submission alone included 415 pages of substantive comments.[3]

[2] While the One National Program Action acknowledged that the comments specifically addressing the matters finalized in this "step one" Action were "fewer in number and length," 84 Fed. Reg. at 51,310, EPA was still obligated to review *all* timely comments to determine which comments pertained to this Action and which should be considered in the context of EPA and NHTSA's forthcoming rulemaking to set fuel economy and greenhouse gas standards. Moreover, as the two parts of the SAFE Rule – this One National Program Action and the forthcoming standards – were in development simultaneously, EPA was obligated to divide its resources between both halves of this comprehensive rulemaking, constraining its ability to consider late comments on this first step.

[3] *See* Docket No. EPA-HQ-OAR-2018-0283-5054.

Nor did the Agency have eleven months, as Petitioners imply, in which to "practicably" address late comments. *See* Pet. Mot. at 1. The vast majority of Petitioners' untimely submissions were not submitted until June 2019 (or thereafter), with less than two months remaining before the final action was submitted to White House's Office of Management and Budget on August 2, 2019,[4] and only three months remaining before the final action was signed on September 19, 2019.[5] For example, the Union of Concerned Scientists and Public Citizen, Inc.[6], the California Air Resources Board[7], the California Association of Councils of Governments[8], the California Transportation Commission[9], the San Luis Obispo Council of Governments[10], the Butte County Association of Governments[11], and several NGOs[12] all submitted their untimely additional comments between June 13 and June 26, 2019.

---

[4] *See* The Hill, "EPA submits final controversial car emissions rule to the White House," Aug. 5, 2019, available at: https://thehill.com/policy/energy-environment/456206-epa-submits-final-controversial-car-emissions-rule-to-the-white.

[5] EPA Office of the Administrator, "Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards," Sept. 19, 2019, available at: https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel.

[6] *See* Docket No. EPA-HQ-OAR-2018-0283-7570.

[7] *See* Docket No. EPA-HQ-OAR-2018-0283-7573.

[8] *See* Docket No. EPA-HQ-OAR-2018-0283-7581.

[9] *See* Docket No. EPA-HQ-OAR-2018-0283-7585.

[10] *See* Docket No. EPA-HQ-OAR-2018-0283-7579.

[11] *See* Docket No. EPA-HQ-OAR-2018-0283-7580.

[12] *See* Docket No. EPA-HQ-OAR-2018-0283-7574.

The Attorneys General of twelve states submitted their untimely letter on July 23, 2019.[13] By the time Petitioners' late comments were received, EPA would have been well into finalizing the final action, the preamble text, and supporting documentation. This applies with even greater force to comments that came in only after the final action had already been submitted to the Office of Management and Budget for White House review, including a letter from NGOs (submitted August 14, 2019)[14], additional comments from the California Air Resources Board (submitted August 21, 2019)[15], and two letters from the Environmental Defense Fund (submitted August 7 and September 11, 2019).[16]

Likewise, the fact that NHTSA considered late comments does not establish that it was practicable for EPA to do so. *See* Pet. Mot. at 8-9. Even putting aside the fact that they are distinct agencies with distinct budgets, resources, and competing obligations, EPA and NHTSA were considering comments on different questions. Both agencies were obligated to address comments concerning the preemption of state greenhouse gas emission standards, but EPA was also responsible for addressing comments on the legal, factual, and scientific underpinnings of its determination that California does not need separate standards to "meet compelling and extraordinary

[13] *See* Docket No. EPA-HQ-OAR-2018-0283-7589.

[14] *See* Docket No. EPA-HQ-OAR-2018-0283-7591.

[15] *See* Docket No. EPA-HQ-OAR-2018-0283-7594.

[16] *See* Docket Nos. EPA-HQ-OAR-2018-0283-7592 & -7601.

conditions" within the meaning of Clean Air Act section 209(b)(1)(b). 42 U.S.C. § 7543(b)(1)(B). NHTSA had no such task.

Finally, EPA was not obligated to specifically assert in the final Action that untimely comments were not practicable to address, and Petitioners cite no authority for this proposition. *See* Pet. Mot. at 8. Rather, EPA's certification of the record provides the only necessary statement of what the Agency did and did not consider.

In any event, the fact remains that EPA was not obligated to and did not consider the untimely comments that Petitioners seek to add to the administrative record. Because those materials are not properly part of the administrative record, the Court should deny Petitioner's Motion to Complete Administrative Record.

DATED: March 9, 2020

Respectfully submitted,

/s/ Daniel R. Dertke

CHLOE H. KOLMAN
DANIEL R. DERTKE
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-9277 (Kolman)
(202) 514-0994 (Dertke)
chloe.kolman@usdoj.gov
daniel.dertke@usdoj.gov

OF COUNSEL:

MICHAEL KUPPERSMITH
Trial Attorney, Litigation and Enforcement
National Highway Traffic Safety Administration

1200 New Jersey Ave, S.E.
Washington, D.C. 20590

WINIFRED OKOYE
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that this document complies with the word limit of Fed. R. App. P. 27(d)(2) and 32(c)(1), excluding the parts of the document exempted by Fed. R. App. P. 32(f), because this document contains 1720 words.

I also hereby certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Garamond font.

/s/ Daniel R. Dertke
DANIEL R. DERTKE

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, a copy of the foregoing Federal Respondents' Opposition to Motion to Complete Administrative Record was served electronically through the Court's CM/ECF system on all counsel of record.

/s/ Daniel R. Dertke
DANIEL R. DERTKE