ORAL ARGUMENT NOT YET SCHEDULED

No. 10-1092 and consolidated cases (Complex)

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

COALITION FOR RESPONSIBLE REGULATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA P. JACKSON, ADMINISTRATOR, and THE NATIONAL HIGHWAY AND TRAFFIC SAFETY ADMINISTRATION,

Respondents.

On Consolidated Petitions for Review of Final Rules by the United States Environmental Protection Agency and National Highway and Traffic Safety Administration

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW In Support of *Respondents*

Richard L. Revesz
Michael A. Livermore
Jason A Schwartz
Jennifer S. Rosenberg
INSTITUTE FOR POLICY INTEGRITY AT
NEW YORK UNIVERSITY SCHOOL OF LAW
139 MacDougal Street, New York, NY 10012
(212) 998-6088, mlivermore@nyu.edu
Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for *Amicus Curiae* the Institute for Policy Integrity at New York University School of Law certify as follows:

PARTIES and AMICI:

With one exception, the parties, intervenors, and *amici* to this action are those set forth in the certificate filed with the Joint Opening Brief of Non-State Petitioners. The exception is that on August 5, 2011, the Court granted the Commonwealth of Pennsylvania's motion to withdraw as an Intervenor.

The Institute for Policy Integrity at New York University School of Law, a not-for-profit organization, filed a Corporate Disclosure Statement with its Motion to Participate as *Amicus Curiae* on July 2, 2010.

RULINGS UNDER REVIEW:

This case is a set of consolidated petitions for review of EPA and NHTSA's final rules entitled "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 75 Fed. Reg. 25,324 (May 7, 2010).

RELATED CASES:

All related cases are identified in the Joint Opening Brief of Non-State Petitioners.

/s/ Michael A. Livermore
Michael A. Livermore

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GLOSSARY OF ABBREVIATIONS

CAFE	Corporate Average Fuel Economy
EPA	Environmental Protection Agency
NHTSA	National Highway and Transportation Safety Administration

STATUTES AND REGULATIONS

All applicable statutes and regulatory materials are contained in the Initial Brief for Respondents.

STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(c)(3), counsel for *Amicus Curiae* the Institute for Policy Integrity at New York University School of Law ("Policy Integrity") certifies as follows:

Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity takes a special interest in the use of cost-benefit analysis and the promulgation of federal regulations that affect the environment and consumers. Policy Integrity seeks to ensure that federal agencies ground their regulations in scientific, economic, and rational decisionmaking.

Policy Integrity therefore has a significant interest in the outcome of this case and the legal issues presented in the Initial Briefs for Petitioners. Policy Integrity submits this brief to this Court in support of Respondents' contention that the United States Environmental Protection Agency's Vehicle Rule should be upheld, as based on a rational and complete cost-benefit analysis. Given the Petitioners' challenges to the sufficiency of the agency's economic analysis, Policy Integrity submits this brief in the hope that its expertise on administrative law and cost-benefit analysis will be of special assistance to this Court.

This Court granted Policy Integrity leave to participate as an *amicus* in an order dated July 16, 2010. Though Honeywell International, Inc. is also an *amicus*, Policy Integrity certifies that a separate *amicus* brief is necessary in this case due to divergent interests. Policy Integrity expects that Honeywell, a for-profit company, will focus its brief mostly on the technological feasibility of the rule. By contrast, as a not-for-profit center housed in an academic institution, Policy Integrity will focus on issues in administrative law and the appropriate scope of cost-benefit analysis. Given these divergent purposes, Policy Integrity certifies that filing a joint *amicus* brief with Honeywell would not be practicable, and therefore Policy Integrity must submit a separate brief. Policy Integrity and Honeywell have split the word limit allotted to *amici*.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel has authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The Institute for Policy Integrity at New York University School of Law, by and through its undersigned counsel, files this *amicus curiae* brief in the above-captioned case in support of the Initial Brief for Respondents filed by the United States Environmental Protection Agency ("EPA") and the National Highway and Traffic Safety Administration ("NHTSA"). EPA's emissions standards for light-duty motor vehicles (model years 2012-2016), 75 Fed. Reg. 25,324 (May 7, 2010) ("the Vehicle Rule") should be upheld as consistent with the Clean Air Act and the Administrative Procedure Act, and as based on a rational and complete cost-benefit analysis.

I. The Costs and Benefits of EPA's Vehicle Rule Count Independently of NHTSA's CAFE Standards

Petitioners assert that the Vehicle Rule accomplishes nothing that NHTSA's Corporate Average Fuel Economy ("CAFE") Standards do not already accomplish, and that EPA's regulatory action therefore lacks any rational basis. Ind. Br. at 33, 35-36; State Br. at 17. Petitioners are mistaken, on at least two counts. First, the Vehicle Rule will provide significant benefits in addition to those expected from the CAFE Standards alone. Second, even if the benefits of the two rulemakings completely overlap, it would be inappropriate to evaluate the Vehicle Rule against a baseline that already included the CAFE Standards, since the two together constitute a joint rulemaking.

A. The Vehicle Rule Provides Significant Benefits Beyond the CAFE Standards Alone

As Respondents note, the Vehicle Rule and CAFE Standards differ in their statutory authorities, compliance mechanisms, and projected effects. Resp'ts. Br. at 59-61. The Clean Air Act permits EPA to account for greenhouse gas reductions that can result from improvements to vehicle air-conditioning systems, while the Energy Policy and Conservation Act does not provide NHTSA with the same authority. The Energy Policy and Conservation Act permits vehicle manufacturers to pay penalties as an alternative to complying with CAFE standards, something that is not allowed under the Vehicle Rule (though the Clean Air Act does empower EPA to incorporate compliance flexibilities, including certain credits, in its regulation). 75 Fed. Reg. at 25,342. These differences are significant, and, as a result, the Vehicle Rule is projected to achieve nearly fifty percent greater greenhouse gas reductions over the lives of the regulated vehicles. *Compare id.* at 25,636, Table IV.G.1-4 *with id.* at 25,490, Table III.F.1-2. These additional benefits should not be ignored: they indicate that the Vehicle Rule is not redundant with the CAFE Standards, and that EPA's action was necessary and appropriate to further statutory purposes under the Clean Air Act.

B. The Benefits of the Vehicle Rule Should Not Be Evaluated Against a Baseline that Includes the CAFE Standards

Even if the two regulatory efforts provided substantially or completely overlapping benefits, EPA's analysis of regulatory benefits flowing from the Vehicle Rule would not be arbitrary and capricious. The benefits of either regulatory action only appear duplicative when compared against a baseline in which the other rule already exists. EPA and NHTSA, however, issued the Vehicle Rule and the CAFE Standards in a joint rulemaking. Together, the two efforts constitute "the National Program." 75 Fed. Reg. at 25,324. Indeed, unique benefits flow from consolidating the two regulatory actions, coordinated to harmonize with a third system of California-based regulation. The National Program allows vehicle manufacturers to comply with a single coherent set of federal standards, rather than three separate federal and state regulatory regimes, enabling those manufacturers to develop and sell a single fleet of vehicles nationally. *Id.* at 25,326. The value of this regulatory whole is significantly greater than the sum of its parts. Were EPA and NHTSA to issue separate rulemakings, this advantage would have been lost.

Petitioners' argument that the Vehicle Rule should be judged against a baseline that includes the CAFE Standards leads to absurd results. Petitioners contend that the Vehicle Rule should be invalidated because it provides no benefits beyond those already generated by the CAFE Standards. An identical argument, however, could be applied to the reverse situation, in which petitioners challenge

only the CAFE Standards. In that case, all benefits flowing from the CAFE Standards would be redundant with benefits generated by the Vehicle Rule.

Furthermore, were EPA to use a baseline *ex-post* of the new CAFE Standards, costs would also need to be calculated in that fashion. If the rules were truly separate and redundant, then the Vehicle Rule would not impose additional regulatory burdens, and thus there would be no costs associated with EPA's rulemaking. The same analysis, of course, could also be required of the CAFE Standards, with a baseline *ex-post* of the Vehicle Rule. Redundant and overlapping analyses of the independent effects of the two rules are not required by the arbitrary and capricious standard, and would not improve regulatory decisionmaking.

Rather than engage in that kind of fruitless analytical exercise, the agencies wisely conserved administrative resources and streamlined regulatory compliance by issuing a joint rulemaking. In this context, a baseline *ex-ante* of both rules is appropriate. The agencies made a finding, based on a detailed administrative record, that the advantages of a uniform, national program concerning fuel-efficiency outweigh the downsides of such coordinated action. Once the agencies made that choice, the decision to evaluate the joint costs and benefits of the rulemakings was reasonable and consistent with high standards of administrative rationality.

It is also worth noting that Congress has clearly tasked both EPA and NHTSA with the duty to formulate new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy. EPA has a nondiscretionary duty to promulgate vehicle greenhouse gas emissions standards under § 7521 of the Clean Air Act, regardless of NHTSA's authority to adopt fuel economy standards under the Energy Policy and Conservation Act. The viability and propriety of these concurrent actions were specifically recognized in *Massachusetts v. EPA*. The Supreme Court explained:

> [T]hat [NHTSA] sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," 42 U.S.C. § 7521(a), a statutory obligation wholly independent of [NHTSA's] mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

Massachusetts v. EPA, 549 U.S. 497, 532 (2007) (internal citations omitted); *see also Green Mt. Chrysler Plymouth-Dodge-Jeep v. Crombie*, 508 F. Supp. 2d 295, 309 (D. Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1163 (E.D. Cal. 2007) (citing *Massachusetts* and finding no conflict between the Vehicle Rule and CAFE Standards).

Finally, allowing the agencies independently to consider the full costs and benefits of the entire joint rulemaking comports with the best practices for economic analysis. EPA guidelines for conducting economic analysis, which were

adopted after an extensive peer review process, state that when analyzing policy instruments with overlapping, coordinating impacts, the baseline should reflect the *status quo* before either policy came into effect. *See* National Center for Environmental Economics, EPA, *Guidelines for Preparing Economic Analysis* 5-12 (2010) ("In some cases it is possible to consider multiple rules together as a set. For example, some regulatory actions have linked rules together that affect the same industrial category. . . . The optimal solution [to that situation] . . . is to include all of the rules in the same economic analysis. In this case, the multiple rules are analyzed as if they were one rule and *the baseline specification simplifies to one with none of the rules included*.") (emphasis added); *see also Quivira Mining Co. v. U.S. Nuclear Regulatory Commission*, 866 F.2d 1246, 1258 (10th Cir. 1989) (finding that the Nuclear Regulatory Commission, when duplicating EPA regulations as part of a coordinated regulatory program, could count the same costs and benefits for its duplicate regulations as EPA had for the original regulations).

II. EPA Considered the Required and Appropriate Impacts When Promulgating the Vehicle Rule

Petitioners argue that when promulgating vehicle greenhouse gas emissions standards under § 7521, EPA was required to analyze the impacts to stationary sources that might occur under the Prevention of Significant Deterioration and Title V provisions of the Clean Air Act. Petitioners further contend that EPA failed

to consider these impacts and that, consequently, the Agency acted arbitrarily and capriciously in promulgating the Vehicle Rule. State Br. at 15-18; Ind. Br. at 19. This is incorrect: according to both statutory authority and best economic practices, EPA should weigh only the costs and benefits that are affected by decisions under its discretion.

A. The Clean Air Act Limits Both EPA's Discretion and the Scope of the Necessary Cost Analysis

When Congress drafted the Clean Air Act, it placed certain decisions in EPA's discretion but made other policy choices for itself. The science of whether a particular pollutant emitted by motor vehicles endangers human health or welfare was left to EPA, 42 U.S.C. § 7521(a)(1) ("The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any . . . new motor vehicles . . . *which in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare") (emphasis added); yet once that scientific determination is made, EPA has no choice but to regulate that motor vehicle pollution, *id.* ("The Administrator *shall* by regulation prescribe . . . standards") (emphasis added). EPA does have discretion as to the *form* of the regulation, *id.* ("prescribe (and from time to time revise) in accordance with the provisions of this section, *standards applicable to* the emission") (emphasis added); yet once the vehicle regulations take effect, EPA has no choice but to also review the emissions of that pollutant from stationary

sources, *e.g.*, 42 U.S.C. § 7475 ("the proposed facility *is subject to* the best available control technology *for each pollutant subject to regulation* under this Act") (emphasis added).

To satisfy the Administrative Procedure Act's arbitrary and capricious standard, 5 U.S.C. § 706, an "agency must cogently explain why it has exercised *its discretion* in a given manner." *Owner-Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 203 (D.C. Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983)) (emphasis added). Under § 7521 of the Clean Air Act, EPA's discretion was limited to the *form* of motor vehicle regulation. EPA does not have discretion over the question of whether to issue regulations once an endangerment finding was made—that is a nondiscretionary duty committed to the agency by Congress.

Exactly the same potential impacts to stationary sources would occur once EPA issued motor vehicle regulations for greenhouse gases regardless of the form of those regulations. EPA could not affect those impacts through its exercise of discretion under § 7521. Both highly stringent standards and highly lax standards would have the same impact on stationary sources by triggering nondiscretionary duties under the Prevention of Significant Deterioration and Title V provisions of the Clean Air Act. Because EPA's discretion only extends to the form and stringency of the Vehicle Rule, and not whether to issue a rule at all, impacts to

stationary sources fall outside the scope of factors committed to EPA's discretion for the regulation of motor vehicles.

Impacts to stationary sources are important and are appropriately considered in the context of the regulation of stationary sources. Because EPA has discretion over the form of regulations under the Prevention of Significant Deterioration and Title V provisions, it is appropriate for the agency to consider the effects of the exercise of that discretion during those independent rulemakings. Indeed, as Respondents note, this is where EPA considered those effects. Resp'ts Br. at 34-37.

The Clean Air Act clearly states the factors that EPA may consider when promulgating standards for motor vehicles under § 7521, and the costs to stationary sources arising from other regulations arising under other statutory provisions are not included. The operative provision, § 7521(a)(2), states:

> Any regulation prescribed under paragraph (1) of this subsection . . . shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

This court has previously acknowledged that the "cost of compliance" describes the cost to vehicle manufacturers of compliance with § 7521 standards. This court has also agreed that "within such period" refers to the time required by those vehicle manufacturers to develop and apply the appropriate technology to achieve

§ 7521 standards. *See Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979). The costs to stationary sources stemming from other regulations implementing other statutory provisions simply have no bearing on the determination of the appropriate vehicle greenhouse gas emission standards, because EPA has a nondiscretionary duty to promulgate those standards and cannot affect those costs through the exercise of its discretion.

In *Massachusetts v. EPA*, the Supreme Court acknowledged that EPA retained some limited discretion with regards to issuance of new motor vehicle emissions standards:

> If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles. . . . EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.

Massachusetts v. EPA, 549 U.S. at 533 (internal citations omitted). EPA noted that it retained this limited discretion, and considered indirect stationary source costs when deciding whether or not to delay issuance of the Vehicle Rule. *See* 75 Fed. Reg. at 25,402. For the decisions within EPA's discretion, the agency did consider effects on stationary sources. But EPA is not required to examine the effects on stationary sources that arise from the Prevention of Significant Deterioration and Title V provisions of the Act when considering the form or stringency of the

standard in the Vehicle Rule, because it has no ability to influence those effects through any decision that was left in its discretion when formulating the rule.

B. The Proper Scope of Cost-Benefit Analysis Includes Only Impacts Relevant to the Decision At Hand

When Congress has already made the decision that an agency should regulate—as the Clean Air Act does here, by making EPA regulation mandatory following an endangerment finding, 42 U.S.C. § 7521(a)(1)—cost-benefit analysis plays a valuable but very specific role in the reasoned decisionmaking that agencies undertake when proposing the new regulations. Namely, cost-benefit analysis helps agencies choose the form or stringency of regulation, by assessing the potential effects of a range of alternate actions and selecting the most efficient policy option. *See Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1516 (2009) ("Cost-benefit analysis requires the Agency to first monetize the costs and benefits of a regulation, balance the results, and then choose the regulation with the greatest net benefits.").

The most efficient policy option is selected by comparing the costs and benefits of various alternatives. Best practices dictate that an agency should limit the scope of its analysis to those costs and benefits that will be affected by the decision at hand and which can impact the ranking and selection of alternatives. *See* A. Allan Schmid, *Benefit-Cost Analysis: A Political Economy Approach* 26 (1989) ("The guiding principle . . . is . . . to facilitate comparisons with other

projects."); White House Office of Management and Budget, Circular A-4 at 26 (2003) ("Analytic priority should be given to those ancillary benefits and countervailing risks that are important enough to potentially change the rank ordering of the main alternatives in the analysis."); National Center for Environmental Economics, EPA, *Guidelines for Preparing Economic Analysis* at 7-4 (2010) (discussing which benefits to include in analysis, and listing as the first criterion "[w]hich benefit categories are likely to differ across policy options"); *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1202 (9th Cir. 2008) (noting that the agency should have considered a benefit category that "would have affected the stringency of the CAFE standard"); U.K. Treasury, *The Green Book: Appraisal and Evaluation in Central Government* 19 (2003) ("relevant costs and benefits are those that can be affected by the decision at hand"); Richard L. Revesz & Michael A. Livermore, *Retaking Rationality* 63-65 (2008) (recommending that analysts prioritize consideration of costs and benefits likely to have a significant impact on the policy improvement).

The potential costs and benefits of regulating stationary sources cannot be affected by the *form or stringency* of the motor vehicle regulations under § 7521 of the Clean Air Act. Every possible policy alternative open to EPA would result in the same potential impact on stationary sources with the same costs and benefits. Therefore, best practices would not recommend that the agency consider the

impact to stationary sources when exercising its discretion on motor vehicle regulations, because no option within the delegated authority presented by Congress would have any effect on the costs associated with regulating stationary sources.

CONCLUSION

For the foregoing reasons, the Institute for Policy Integrity at New York University School of Law respectfully supports Respondents' request that this Court uphold the Vehicle Rule.

Date: September 8, 2011

Respectfully submitted,

/s/ Michael A. Livermore
Richard L. Revesz
Michael A. Livermore
Jason A Schwartz
Jennifer S. Rosenberg

INSTITUTE FOR POLICY INTEGRITY AT
NEW YORK UNIVERSITY SCHOOL OF LAW
Wilf Hall, Room 319
139 MacDougal Street, New York, NY 10012
(212) 998-6088 (p), mlivermore@nyu.edu
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for *Amicus Curiae* the Institute for Policy Integrity at New York University School of Law complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2007), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 3322 words.

/s/ Michael A. Livermore
Michael A. Livermore

CERTIFICATE OF SERVICE

I certify that on September 8, 2011, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Michael A. Livermore
Michael A. Livermore