ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, Respondents.	No. 18-1114, consolidated with 18-1118, 18-1139, 18-1162

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS PETITIONS FOR LACK OF JURISDICTION

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INTRODUCTION

This Court lacks jurisdiction to review EPA's decision to initiate rulemaking to revise emission standards for light-duty vehicles. 83 Fed. Reg. 16,077 (Apr. 13, 2018) ("the Evaluation"). In their three responses, Petitioners fail to demonstrate that the challenged preliminary Evaluation is justiciable. Doc. No. 1748102 ("State Opp."); Doc. No. 1748105 ("NGO Opp."); Doc No. 1748067 ("Industry Opp.").

The Evaluation does not meet either prong of the familiar finality test set forth in Bennett v. Spear, 520 U.S. 154 (1997). EPA's decision to initiate rulemaking did not consummate EPA's decision-making process. EPA is continuing to deliberate whether, and if so how, to amend standards through a pending rulemaking. The Evaluation also has no material legal consequences. It was followed by a rulemaking proposal, but that sequence only underscores the Evaluation's lack of legal finality. For similar reasons, the Evaluation is not ripe for review.

Petitioners also fail to demonstrate standing. Unless and until EPA actually takes action to amend emission standards, any claimed injuries flowing from the potential amendment of those standards are speculative. The asserted injuries are also not fairly traceable to the Evaluation and cannot be redressed here. Contrary to Petitioners' central premise, the Evaluation is *not* a condition precedent to revision of existing standards. EPA has statutory authority, and has exercised that authority, to issue a superseding Notice of Proposed Rulemaking based on a more developed record. EPA may take final action on that proposal regardless of any advisory

opinion this Court could issue concerning the merits of the Agency's earlier initial judgments within the Evaluation. Thus, Petitioners cannot meet any of the three elements of standing: i.e., injury, causation, and redressability.

For these reasons, and as discussed further below, this case plainly is not justiciable. Premature challenges to preliminary agency proceedings like this one should not proceed past the dispositive motion stage because they interrupt the orderly processes established by Congress and agencies, consume agency resources that should be devoted to completing the proceedings, and waste judicial resources. Prompt dismissal will discourage similar premature litigation and conserve judicial and agency resources.

EPA's RULEMAKING PROPOSAL

There has been a significant administrative development since EPA filed its motion to dismiss. In August 2018, EPA and the Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") (collectively, "the Agencies") jointly proposed the "Safer Affordable Fuel-Efficient Vehicles Rule" ("the Proposal"). 83 Fed. Reg. 42,986 (Aug. 24, 2018). Therein, EPA proposes to exercise its authority under Section 202 of the Clean Air Act ("CAA"), 42 U.S.C. § 7521, to amend greenhouse gas emission standards for light-duty vehicles for model years 2021 through 2026. In the same notice, NHTSA proposes to amend or otherwise establish consistent fuel economy standards for model years 2021 through 2026 pursuant to its separate authority under the Energy Policy and Conservation Act.

EPA's conclusions within the Proposal regarding potential CAA standard revisions supersede those within the Evaluation, although those within the Proposal are also still preliminary and subject to the notice-and-comment rulemaking process. The Proposal reflects new analysis by the Agencies, based on a more developed record. The Proposal sets forth a wide range of options, including eight different revised stringencies as well as the option of retaining existing standards. 83 Fed. Reg. at 42,988, 42,990 (Table I-4). The preferred alternative would keep standards at model year 2020 levels through model year 2026. Id. at 42,986. The Proposal spans 515 pages in the Federal Register, and it includes a preliminary regulatory impact analysis that is 1612 pages in length. *See* https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ld-cafe-co2-nhtsa-2127-al76-epa-pria-180823.pdf.

The Proposal stands on its own and is not dependent upon the earlier conclusions in the Evaluation. See 83 Fed. Reg. at 42,987 ("Consistent with both agencies' statutes, this proposal is entirely *de novo*, based on an entirely new analysis reflecting the best and most up-to-date information available to the agencies at the time of this rulemaking."). Pursuant to CAA Sections 202 and 307, 42 U.S.C. §§ 7521 and 7607, EPA has authority to take final action on the Proposal, regardless of whether the now superseded Evaluation had ever been issued or were to remain in place. Petitioners discuss this material administrative development only in passing in their responses, without grappling with its implications for their standing theories. See State Opp. at 14, n.15; NGO Opp. at 8; Industry Opp. at 7, 19.

ARGUMENT

I. The Evaluation Is Not Final Agency Action.

Petitioners fail to show that the Evaluation meets either prong of the familiar finality test set forth in Bennett v. Spear, 520 U.S. 154 (1997). Contrary to Petitioners' arguments, the Evaluation does not mark the consummation of the Agency's decision-making process. Nor does it have any material legal consequences.

A. EPA Has Not Consummated Its Decision-Making Process.

The Evaluation did not mark the end of EPA's deliberative process. The pertinent decision-making process here concerns whether and how EPA should revise greenhouse gas emission standards for light-duty vehicles. That decision-making process did not end with the Evaluation; it instead continued with a rulemaking process that is ongoing. See Proposal, 83 Fed. Reg. 42,986.

Petitioners point out that one *portion* of a decision-making process concluded with the Evaluation, State Opp. 11-12, but that does not mean the *entire* decision-making process has concluded. Any particular decision-making process may contain multiple components, each of which is not independently reviewable. The Evaluation settled nothing regarding whether and how emission standards will be revised. Thus, the Evaluation is not "definitive" or the consummation of EPA's entire decision-making process. See NGO Opp. at 11.

Petitioners' position renders the "consummation" prong meaningless: after all, *any* agency action marks the consummation of *some* aspect of decision-making. For

example, a notice of proposed rulemaking reflects the consummation of EPA's deliberations regarding the contents of the proposal. That does not mean a proposed rule is final. The same holds for the Evaluation: it may have marked the consummation of a decision to initiate rulemaking, but it did not mark the conclusion of the deliberative process regarding possible standard revision. That will occur at the conclusion of rulemaking. See In re Murray Energy Corp., 788 F.3d 330, 336 (D.C. Cir. 2015) ("Put simply, the consummation of the agency's decisionmaking process with respect to a rule occurs when the agency issues the rule.").

Petitioners, State Opp. 12, argue that something in the regulatory text makes the Evaluation final, but that argument is misplaced. To be sure, the regulation creates a "special" process, NGO Opp. at 11, and calls for EPA to make *some* "determination," but that does not mean this "special" "determination" ends EPA's deliberations. To the contrary, the regulation quite clearly specifies that a determination that standards are not "appropriate" will be followed by further deliberations in the form of a rulemaking to adjust the standards as may be "appropriate." 40 C.F.R. § 86.1818-12(h). Thus, a "not appropriate" determination is plainly *not* definitive under the regulation's plain terms.

Petitioners also place unwarranted significance on the fact that the regulation directs EPA to "set forth in detail the bases for the determination." State Opp. at 12. That EPA must "detail the bases" for a determination does not make it final. By analogy, CAA Section 307(d)(3) requires certain CAA proposed rules be accompanied

by a "statement of basis and purpose," including "the factual data on which the proposed rule is based." 42 U.S.C. § 7607(d)(3). Those fact-finding requirements, of course, do not make a proposed rule final.

EPA also made clear in the 2012 Rule preamble that it intended a "not appropriate" determination under § 86.1818-12(h) to be unreviewable. 77 Fed. Reg. 62,624, 62,784-85 (Oct. 15, 2012). While EPA's intent with respect to reviewability may not be necessarily controlling (see State Opp. at 16), it is nonetheless a relevant consideration that cuts against Petitioners. See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006) (agency's "own characterization of the action" should be considered in the finality analysis).

Petitioners go further astray in asserting that because a converse "appropriate" determination would be final, EPA's "not appropriate" determination also must be final. See NGO Opp. at 13-14; Industry Opp. at 12. This is a false corollary. A final determination that standards "are appropriate" would presumably mark the end of EPA's deliberations on whether standards should be retained. But an EPA determination that standards "are not appropriate" results directly in further deliberations through rulemaking. There is a clear distinction between the two paths.[1]

[1] This sort of dichotomy—i.e., where one agency decision may be final although the opposite is not—is not unusual. See, e.g., 42 U.S.C. § 7661d(b)(2) (authorizing judicial review of the Administrator's decision to *deny* a petition that objects to an operating permit, but not of the Administrator's decision to *grant* such a petition).

Petitioners' effort to rely on particular statements within the Evaluation also misses the mark. See State Opp. at 13-14. Petitioners concede, id. at 14, that numerous statements within the Evaluation underscore its preliminary nature. See, e.g., 83 Fed. Reg. at 16,079 ("the Administrator now determines that the MY 2022-2025 GHG emissions standards *may* not be feasible or practicable"); id. at 16,087 ("EPA, in partnership with NHTSA, will *further explore* the appropriate degree and form of changes to the program through a notice and comment rulemaking process") (emphases added). The bottom line here is that EPA has not reached any final decision on whether to amend the standards and, if so, in what manner.[2]

B. EPA's Evaluation Does Not Have Relevant Legal Consequences.

The Evaluation also does not meet the second Bennett prong because it does not "determine" any relevant rights or obligations. The Evaluation does not revise the existing vehicle emission standards promulgated in 2012. Therefore, it has no legal consequences for regulated parties or for states. The 2012 standards will remain in place unless and until EPA concludes the pending rulemaking and revises them.

State Petitioners, State Opp. at 17-18, argue that the Evaluation has consequences because they intend to take various actions in anticipation of the

[2] Underscoring the incoherence of their logic, State Petitioners dismiss EPA's stated intent to analyze further certain factors through rulemaking as possibly reflecting a "failure to complete" the Evaluation, which in their view would not alter the Evaluation's "definitive nature." State Opp. at 14. This is nonsensical. If the Evaluation were still in the process of being completed, as State Petitioners contemplate, how could it then also be final?

possible changes EPA could ultimately make to the Model Year 2022-2025 standards. But any such anticipatory actions are purely voluntary; they are not *legal* consequences.

Petitioners further argue, Industry Opp. at 12, that the second Bennett prong is satisfied inasmuch as EPA's "not appropriate" finding triggered a requirement for EPA to continue deliberations through rulemaking. But as Petitioners recognize, courts apply a "pragmatic" approach to the Bennett test. NGO Opp. at 11; State Opp. at 11. If the sole legal consequence of an action is that EPA must *continue* a deliberative process, that only underscores that the action is not final. The provisions of 42 U.S.C. § 7607(d)(7)(B) are instructive by way of analogy. Under that statute, if EPA determines that it was impracticable for a petitioner seeking reconsideration of a rule to raise an objection during the rule's public comment period and that the objection is of central relevance to the outcome of the rule, that determination triggers an obligation for EPA "to convene a proceeding for reconsideration of the rule." But even though such determinations have that legal consequence for EPA, those determinations are still non-final. See Clean Air Council v. Pruitt, 862 F.3d 1, 6 (D.C. Cir. 2017) (a decision to grant reconsideration under Section 307(d)(7)(B) is not reviewable final agency action). The Evaluation is likewise not final.[3]

[3] Environmental Petitioners, NGO Opp. at 14, argue that the Evaluation creates an obligation on EPA to identify the basis for its determination. But that does not mean any material legal consequences flow *from* the determination, which is the relevant inquiry for finality.

Petitioners additionally argue that the Evaluation has legal consequences because absent the "not appropriate" determination, EPA purportedly lacks legal authority to revise the standards. See NGO Opp. at 13-14. That argument is simply wrong: EPA's authority to revise the emission standards is not dependent upon the Evaluation. EPA has clear statutory authority to "from time to time revise" emission standards for vehicle air pollutants. 42 U.S.C. § 7521(a). The Evaluation regulation at 40 C.F.R. § 86.1818-12(h) does not amend or restrict this statutory authority in any manner. To be sure, that regulation assured regulated parties that EPA would take *at least* one hard look by April 2018 at potentially revising the model year 2022-2025 standards. EPA's authority is unfettered, however, to revise emission standards through standard rulemaking procedures regardless of any conclusions reached during that required Evaluation. See Clean Air Council v. Pruitt, 862 F.3d at 8-9 ("Agencies obviously have broad discretion to reconsider a regulation at any time."). Indeed, Petitioners point to no language whatsoever in 40 C.F.R. § 86.1818-12(h) that would preclude EPA from proceeding to revise standards through its ordinary rulemaking procedures, absent a "not appropriate" determination in the Evaluation.

That EPA retains its statutory authority to revise standards through usual rulemaking procedures does not render the Evaluation "meaningless." NGO Opp. at 14. EPA constructed the regulation governing the Evaluation so that regulated parties would have assurance that EPA would take at least one hard look at potentially revising the standards in view of unanticipated circumstances, and if EPA decided not

to revise the standards, regulated parties would have the opportunity to challenge that decision. The regulation has served that purpose, as evidenced by the pending Proposal. Furthermore, the Evaluation and its supporting record are public, and so Petitioners and other stakeholders are perfectly free to make use of that record, as they see fit, for purposes of commenting on the proposed standard revision.

Environmental Petitioners' arguments concerning EPA's burden of explanation also fall flat. NGO Opp. at 14-15. The standards governing review of any final EPA action are what they are. EPA has not amended those standards; nor could it. If EPA ultimately revises the emission standards in a final rule, then EPA must adequately explain its reasons for doing so, consistent with the CAA and precedent. Furthermore, the earlier January 2016 determination and technical support would not be "effectively erased" in later litigation. NGO Opp. at 15. In comments on the Proposal, Petitioners are free to direct EPA's attention to the January 2016 determination or the technical support for it.

EPA's Evaluation also does not provide "new and independent legal grounds" for a challenge to the existing standards. See Industry Opp. at 13. EPA has reached no final conclusions regarding the appropriateness of revising the existing standards. If EPA does so, Petitioners will then be able to challenge that final rulemaking outcome. But they cannot pursue untimely challenges to EPA's 2012 Rule.

In short, the Evaluation is not final.

II. The Issues Raised Are Not Ripe for Review.

Relatedly, the issues presented in this case concerning the appropriateness of the model year 2022-2025 emission standards are not ripe for review. The ripeness inquiry focuses on "the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" Am. Petroleum Inst. v. EPA ("API"), 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). With respect to fitness, key considerations include whether the agency's action is "sufficiently final," "whether judicial intervention would inappropriately interfere with further administrative action," and "whether the courts would benefit from further factual development of the issues presented." Id. at 387; accord Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998). Here, these considerations all weigh against review.

As discussed above, EPA has issued a Proposal to revise emission standards, and the conclusions reached in the Evaluation are subject to further deliberation as part of that rulemaking. Petitioners insist that this Court must review the conclusions reached in the Evaluation now based on a "closed administrative record." States Opp. at 21. But this position ignores the prudential interests protected by the ripeness doctrine. Petitioners seek to deprive EPA of the "full opportunity to apply its expertise and to correct errors or modify positions in the course of a proceeding." Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin., 740 F.2d 21, 31 (D.C. Cir. 1984). Even if the Agency finalizes the Proposal in substantially its current

form, "permitting the administrative process to reach its end" can allow "for more intelligent resolution of any remaining claims." API, 683 F.3d at 387. Premature review while rulemaking is pending would also waste the Court's resources. Util. Air Regulatory Grp. v. EPA, 320 F.3d 272, 279 (D.C. Cir. 2003).

The claims here also are not appropriately characterized as "purely legal" in nature. See State Opp. at 21; NGO Opp. at 18; Industry Opp. at 14. Whether vehicle emission standards should be revised or not, and if so how, involve consideration of highly technical and fact-intensive analyses. Underscoring this point, Petitioners themselves direct the Court's attention to two technical documents in the record that are 1,215 pages and 719 pages in length. NGO Opp. at 4-5. Accordingly, the issues presented in this matter invite precisely the sort of fact-intensive analysis where further factual development prior to judicial review would be beneficial. Allowing the rulemaking to be completed prior to judicial review will present a single, ripe set of issues for the Court to consider.

Withholding judicial review will also not cause any hardship to Petitioners. The Evaluation imposes no obligations or requirements upon them. To the extent that Petitioners have an interest in maintenance of the existing vehicle emission standards, the Evaluation did not alter those standards. If EPA were to revise the standards in a final action, then Petitioners will have a full and fair opportunity to contest that final action. At that point, Petitioners will be able to present all of the same arguments they wish to present now. The only practical difference would be that their claims will

be evaluated based upon a more developed record which includes EPA's responses to Petitioners' comments. Contrary to Petitioners' position, that fact weighs in favor of deferring review. Indeed, depriving EPA of any opportunity to correct errors runs counter to the principles underlying the ripeness doctrine. See API, 683 F.3d at 387.

III. Petitioners Lack Standing.

For related reasons, Petitioners also lack standing. The Evaluation commits EPA to initiate a rulemaking, but it does not itself change existing emission standards, dictate the outcome of further rulemaking, or otherwise change any pertinent rights or obligations. Thus, injury alleged to flow from the *possible* amendment of the standards through further rulemaking is inherently speculative and contingent on future events. See Util. Air Regulatory Grp. v. EPA, 320 F.3d at 278 (EPA's announcement of what it "hopes to implement in future rulemakings or adjudications" does not injure petitioner "in any imminent or redressable manner" (quoting Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974))).

Petitioners offer assorted theories as to why the *possibility* of standard amendment causes some actual, imminent, and particularized environmental, economic, or informational injury. State Opp. 22-26; NGO Opp. 19-23; Industry Opp. 16-23. But even if (for sake of argument) the possibility of standard revision could be fairly characterized as causing some actual, imminent, and particularized injury at this point in time, such injury would still not be fairly traceable to the Evaluation. It would instead be attributable to (1) EPA's statutory authority to revise

the standards whenever appropriate, 42 U.S.C. § 7521(a); and (2) EPA's superseding Proposal, reflecting EPA's conclusions based on a more developed record.

Likewise, any actual, imminent, and particularized injury would not be redressable. Regardless of whether the Evaluation remains in place, EPA still has clear statutory authority to take final action on the superseding Proposal. The Proposal is not dependent upon the validity of the Evaluation. Thus, regardless of any objections Petitioners may have to the Evaluation, EPA may take final action based on the Proposal and may amend (or leave unchanged) the standards as appropriate, based on the full administrative record before EPA at the time of final action. This Court, of course, cannot anticipate that record or opine on a final action that has not yet occurred. And anything the Court might conclude about the merits of the more preliminary, and now superseded, Evaluation would be purely advisory in nature. For these reasons, all of Petitioners' purported immediate injuries tied to the potential for standard revision would persist regardless of whether the Evaluation remains in place.

For example, State Petitioners allege that "they must now divert staff time and other resources to take administrative and regulatory actions" in response to the Evaluation. State Opp. at 25. But to the extent that States are voluntarily directing resources towards the possibility that standards will be amended, they would logically be doing so anyway because of the Proposal. For another example, Industry Petitioners contend that the Evaluation adversely affects the markets for tradeable

regulatory credits and adversely affects their investment interests. Industry Opp. at 18-20. But even if these allegations are credited, such alleged injuries cannot be divorced from the effects of the Proposal, which contains specific proposed regulatory amendments and relies on a more developed administrative record.

Petitioners also do not identify any cognizable "informational" injury that is redressable here. See State Opp. at 24; Industry Opp. at 20-21; NGO Opp. at 19-21. To begin with, EPA has already fully disclosed the information upon which it based the Evaluation. The Evaluation was published in the Federal Register, and the relevant administrative record is publicly available. Petitioners make clear they contest EPA's exercise of judgment based on that public record, but that is an attack on EPA's judgment, not an informational injury.[4] Moreover, even if this suit were to proceed, and even if Petitioners were to prevail on grounds that the Evaluation was inadequately supported or explained, then the only relief they could properly obtain would be vacatur of the Evaluation. There could be no injunction compelling EPA to provide particular additional information to Petitioners for their use in the rulemaking. And as discussed above, regardless of any judgment, EPA would retain its statutory authority to proceed to conclude the rulemaking. The Proposal stands on its own and comports with the procedural requirements set forth in the CAA, 42 U.S.C. § 7607(d). A valid and upheld Evaluation is not a condition precedent.

[4] Likewise, State Petitioners' argument that EPA "breached a commitment" to California amounts to nothing more than a merits argument that the Evaluation is inadequately supported. State Opp. at 23.

In short, Petitioners cannot meet any of the three prongs of a standing analysis, and they therefore lack standing.

CONCLUSION

For the reasons set forth above and in EPA's motion, this case is not justiciable. Prompt dismissal will conserve judicial resources as well as those of the parties.

Respectfully submitted,

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Dated: September 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondents' Reply in Support of Motion to Dismiss Petitions for Lack of Jurisdiction has been filed with the Clerk of the Court this 21st day of September, 2018, using the CM/ECF System, through which true and correct copies will be served electronically on all counsel of record that are registered to use CM/ECF.

/s/ Eric G. Hostetler
Eric G. Hostetler

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 3,839 words according to the count of Microsoft Word and therefore is within the word limit of 3,900 words specified in this Court's order dated September 19, 2018.

Dated: September 21, 2018

/s/ *Eric G. Hostetler*
Counsel for Respondent