UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLEAN AIR CAROLINA, NATURAL RESOURCES DEFENSE COUNCIL, INC., and U.S. PUBLIC INTEREST RESEARCH GROUP, INC.,	:	
Plaintiffs,	:	
-against-	:	
	:	17 Civ. 5779 (AT)
UNITED STATES DEPARTMENT OF TRANSPORTATION, ELAINE L. CHAO, in her official capacity as Secretary of Transportation, FEDERAL HIGHWAY ADMINISTRATION, and BRANDYE HENDRICKSON, in her official capacity as Deputy Administrator of the Federal Highway Administration,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AS MOOT

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PRELIMINARY STATEMENT

This case became moot on September 28, 2017, when the Federal Highway Administration ("FHWA") ended the suspension of the effective date of what Plaintiffs refer to as the "GHG Rule" and FHWA refers to as the "GHG measure." 82 Fed. Reg. 45179 (Sept. 28, 2017). As a result of FHWA's ending of that suspension, the GHG measure went into effect that day. There remains nothing left for this Court to decide.

Plaintiffs do not dispute that the effective date suspension has ended, nor that the GHG measure has gone into effect. Instead, they speculate that FHWA will act in the future to suspend the operation of the GHG measure without notice and comment, and argue that the "voluntary cessation" exception to mootness therefore applies. But FHWA's September 28, 2017 notice, and a related October 5, 2017 Federal Register notice, clearly demonstrate the agency's intent: To allow the GHG measure to remain in effect pending resolution of a notice-and-comment rulemaking on the subject. The Declaration of Brandye L. Hendrickson, who serves as the Acting Administrator of the Federal Highway Administration, dated October 13, 2017 ("Hendrickson Decl.") further confirms this intent. In light of this evidence of agency intent, Plaintiffs' speculation simply is insufficient to turn this moot case into a justiciable controversy. To the same effect is Plaintiffs' additional speculation that some future lawsuit by unknown parties could lead some other court to vacate the September 28, 2017 notice. Accordingly, Plaintiffs' complaint should be dismissed in its entirety as to all Defendants for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

On October 1, 2012, the Moving Ahead for Progress in the 21st Century Act went into effect. Pub. L. 112-141, 126 Stat. 405 (2012) ("MAP-21"). MAP-21 required the Secretary of Transportation, in consultation with states, metropolitan planning organizations, and other

stakeholders, to establish a series of performance measures applicable to recipients of federal-aid highway funds. 126 Stat. at 525. Areas subject to MAP-21 performance measures include highway performance, highway safety, congestion mitigation and air quality, and freight movement. *Id.* After promulgation of the MAP-21 performance measures by the Secretary of Transportation, state departments of transportation and metropolitan planning organizations are then required to establish their own "performance targets" that reflect these performance measures, as well as to make certain reports to the Department of Transportation. 126 Stat. at 526.[1]

On March 15, 2016 and January 18, 2017, FHWA published three related rules that implemented MAP-21 by establishing 12 national performance measures for state departments of transportation and metropolitan planning organizations. 81 Fed. Reg. 13882 (March 15, 2016); 82 Fed. Reg. 5886 (Jan. 18, 2017); 82 Fed. Reg. 5970 (Jan. 18, 2017). One of the performance measures contained in the third and final rule was the GHG measure, which is a measure of the percent change in carbon dioxide emissions from reference year 2017, generated by on-road mobile sources on the National Highway System. 82 Fed. Reg. 5970 (Jan. 18, 2017). State departments of transportation and metropolitan planning organizations are required to establish and report on targets for the GHG measure. *Id.*

In January 20, 2017, then-White House Chief of Staff Reince Priebus issued a memorandum ("Priebus Memorandum") directing all federal agencies to take certain steps to ensure that the President's appointees and designees have the opportunity to review new and pending regulations. On February 13, 2017, citing the Priebus Memorandum, FHWA published

[1] MAP-21 was subsequently modified, in ways not relevant here, by the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. 114-94, 129 Stat. 1312 (2015).

a notice postponing the GHG measure's effective date from February 17, 2017, to March 21, 2017, invoking the Administrative Procedure Act's exception to notice and comment rulemaking where "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 82 Fed. Reg. 10441 (Feb. 13, 2017); *see* 5 U.S.C. § 553(b)(3)(B). By subsequent notices again citing the good cause exception, FHWA further extended this effective date and then temporarily suspended it until completion of a rulemaking on the GHG Rule. 82 Fed. Reg. 14438 (Mar. 21, 2017); 82 Fed. Reg. 22879 (May 19, 2017).

On July 13, 2017, Plaintiffs filed this complaint, alleging that FHWA's extension and temporary suspension of the effective date without notice and comment violated the Administrative Procedure Act ("APA"). Compl. ¶ 54; *see* 5 U.S.C. § 553. The complaint sought declaratory judgment that the FHWA's action extending and suspending the GHG measure without notice and comment violated the APA, and asked the Court to vacate the FHWA's extension and suspension of the effective date of the GHG measure. *Id.*, Request for Relief, Paragraphs A and B.

On September 28, 2017, FHWA published a notice in the Federal Register that ended the extension and suspension of the effective date, making the GHG measure effective as of September 28, 2017 ("September 28 Notice"). 82 Fed. Reg. 45179 (Sept. 28, 2017). The September 28 Notice stated that the agency had initiated additional rulemaking procedures proposing to repeal the GHG measure. *Id.* One week later, on October 5, 2017, FHWA published a notice of proposed rulemaking ("October 5 Notice") that proposed to repeal the GHG measure but also sought additional public comments on whether to retain or revise the GHG measure. 82 Fed. Reg. 46427 (Oct. 5, 2017). The public comment period on the GHG

measure is scheduled to end on November 6, 2017. *Id.* Separately, FHWA has affirmed that it "intends to allow the GHG measure to remain in effect until the conclusion of the notice and comment rulemaking process initiated on October 5, 2017," and that it "has no intention of suspending or amending the GHG measure in this interim period." Hendrickson Decl. ¶ 8.

ARGUMENT

POINT I

THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION BECAUSE PLAINTIFFS' CHALLENGE TO THE SUSPENSION OF THE GHG RULE IS MOOT

A. Legal Standard for a Rule 12(b)(1) Motion to Dismiss

On a Rule 12(b)(1) motion to dismiss, Plaintiffs bear the burden of "proving subject matter jurisdiction by a preponderance of the evidence." *Mantena v. Johnson*, 809 F.3d 721, 727 (2d Cir. 2015) (quoting *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012)). In considering challenges to subject matter jurisdiction under Rule 12(b)(1), the court "must accept as true all material factual allegations in the complaint," but is "not to draw inferences from the complaint favorable to plaintiff." *Carver v. Bank of New York Mellon*, 15 Civ. 10180 (JPO), 2017 WL 1208598, at *2 (Mar. 31, 2017) (quoting *J.S. v. Attica Central Schools*, 386 F.3d 107, 110 (2d Cir. 2004)). The Court may also consider evidence extrinsic to the pleadings. *Phifer v. City of New York*, 289 F.3d 49, 55 (2d Cir. 2002).

B. Mootness Doctrine

Under Article III of the Constitution, federal courts are limited to "the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). As recognized by the Second Circuit, "[m]ootness is a jurisdictional matter" relating to Article III's mandate that "federal courts hear only 'cases' or 'controversies.'" *Blackwater v. Safnauer*, 866 F.2d 548, 550 (2d Cir. 1989) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401

(1975)). Federal courts cannot "give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Therefore, a claim should be dismissed as moot when, as a result of changed circumstances, "the parties have no 'legally cognizable interest' or practical 'personal stake' in the dispute, and the court is therefore incapable of granting a judgment that will affect the legal rights as between the parties." *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 485 F.3d 85, 94 (2d Cir. 2007).

C. This Action is Moot Because the GHG Rule Is in Effect

The GHG measure is now in effect, *see* 82 Fed. Reg. 45179, and Plaintiffs have been afforded the opportunity to comment on FHWA's proposal to repeal the GHG measure, *see* 82 Fed. Reg. 46427. Their alleged injuries have been redressed by voluntary agency action, and their APA claim is therefore moot.

As the D.C. Circuit noted in *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*, 680 F.2d 810 (D.C. Cir. 1982) ("*NRC*"), "[c]orrective action by an agency is one type of subsequent development that can moot a previously justiciable issue." *Id.* at 814; *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (the "[w]ithdrawal or alteration of administrative policies can moot an attack on those policies") (citing cases).

In this case, not only is the GHG measure in effect, but FHWA has gone one step further and commenced the public comment process on the future status of the rule that Plaintiffs claim they are entitled to. This only underscores the mootness of Plaintiffs' case. *See Coalition of Airline Pilots Associations v. Federal Aviation Administration*, 370 F.3d 1184, 1188-90 (D.C. Cir. 2004) (plaintiffs' APA challenge to federal agencies' promulgation of rules without notice and comment was moot, where agencies represented their intent to issue new permanent rules pursuant to notice

and comment rulemaking); *NRC*, 680 F.2d at 814-15 (plaintiff's APA challenge to rule previously promulgated without notice and comment was moot after agency repromulgated the same rule after a notice and comment process, because plaintiff "seeks a declaration from this court that the initial promulgation of the rule was unlawful, an advisory opinion which federal courts cannot provide"); *Aref v. Holder*, 774 F. Supp. 2d 147, 157, 171 (D.D.C. 2011) (holding that plaintiffs' APA challenge to communications management units established by the Federal Bureau of Prisons without notice and comment was moot, after agency commenced a notice-and-comment process for a proposed rule relating to the housing units); *National Association of Home Builders v. Salazar,* 827 F. Supp. 2d 1, 5-7 (D.D.C. 2011) (plaintiff's APA challenge to interpretive memorandum drafted by the Solicitor of the Department of Interior was moot, where agency withdrew the challenged memorandum and publicly stated its intent to "publish shortly, for notice and comment, a proposed joint policy regarding the interpretation and implementation" of the statutory phrase that was the subject of the withdrawn memorandum); *Moore v. Kempthorne*, 464 F. Supp. 2d 519, 522 n.3 (E.D. Va. 2006) ("any allegation that [U.S. Fish and Wildlife Service] did not go through proper notice-and-comment in 1998 as required by the APA is MOOT in light of the extensive notice-and-comment engaged in by the FWS prior to issuing the bear hunt regulations in October 2006") (emphasis in original).

D. The Voluntary Cessation Doctrine Does Not Apply

Although a defendant's "voluntary cessation" of a challenged practice may sometimes give rise to an exception to mootness, that exception does not apply here. *See generally City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Where a defendant ceases a challenged practice, the case is moot provided that the defendant demonstrates that (1) "there is no reasonable expectation that the alleged violation will recur" and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *American*

Freedom Defense Initiative v. Metropolitan Transportation Authority, 815 F.3d 105, 109 (2d Cir. 2016).

While a private party bears a "heavy burden" of showing that voluntarily ceased conduct will not recur, the government's burden is "lighter": cessation of conduct will be treated "with some solicitude . . . [because] government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009). *See also Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (for mootness analysis, "[w]e presume that a government entity is acting in good faith when it changes its policy"); *Beta Upsilon Chi Upsilon Chapter v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009) (where defendant is a government actor, "there is a rebuttable presumption that the objectionable behavior will *not* recur") (emphasis in original).

Under either burden, Defendants have satisfied both elements of the voluntary cessation test. First, intervening events—*i.e.,* the September 28, 2017 effective date of the GHG measure and the October 5, 2017 notice of proposed rulemaking to repeal the GHG measure after a 30-day notice and comment period—have completely ended Defendants' May 19, 2017 suspension of the GHG measure. Second, there is no reasonable expectation that Defendants will suspend the GHG measure without notice and comment, where Defendants' October 5 NPRM has taken the concrete step of soliciting public comment on whether the GHG measure should be repealed, retained or replaced. Defendants have also affirmed their intention to allow the GHG measure to remain in effect until the conclusion of the notice and comment rulemaking process initiated on October 5, 2017. Hendrickson Decl. ¶ 8. Defendants' actions and statements, which are entitled

to a presumption of good faith, have eliminated the very case and controversy that was originally before this Court.

Moreover, Plaintiffs cannot "reasonably expect" that FHWA may suspend the GHG measure without notice and comment while the notice and comment process to repeal, retain or revise the GHG measure commenced by the October 5 Notice is well underway. "Although voluntary cessation analysis applies where a challenge to government action is mooted by passage of legislation," or as applicable here, the promulgation of subsequent rules, "the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists." *National Black Police Association v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *see also Rio Grande Silvery Minnow*, 601 F.3d at 1116 ("[E]ven when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute"); *Alabama Hospital Association v. Beasley*, 702 F.2d 955, 961 (11th Cir. 1983) ("The mere possibility that the state might rescind its recent amendment does not, for purposes of mootness, enliven the controversy.").

To the extent Plaintiffs also assert that this case is not moot because the September 28 Notice could be subject to a future legal challenge and struck down, no one has commenced a legal challenge to the September 28 Notice, *see* Hendrickson Decl. ¶ 5, and there is no reason to believe one would be brought, let alone a meritorious one. Plaintiffs cannot establish a reasonable expectation of re-occurrence through hypothetical events—*e.g.*, an unfounded concern that FHWA will amend the effective date of the GHG measure despite initiating a formal notice and comment process on the same rule, or a speculative concern that a third-party legal challenge will somehow repeal the September 28 Notice—and this Court should dismiss

this case as moot. *See Ayyoubi v. Holder*, 712 F.3d 387, 391 (8th Cir. 2013) (dismissing appeal as moot after agency took intervening action, and plaintiff's allegations of recurring illegal conduct were "too conjectural or hypothetical to present an actual controversy"); *National Advertising Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005) (for mootness analysis, "[m]ere speculation that the [defendant] may return to its previous ways is no substitute for concrete evidence of secret intentions"); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510-11 (9th Cir. 1994) (affirming that plaintiff's challenge to regulations promulgated pursuant to discriminatory state statute was moot after statute was repealed; plaintiff's concern that the state could implement discriminatory regulations under new statute raised only a "possibility" of recurring injury); *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975) ("a case does cease to be a live controversy if the possibility of recurrence of the challenged conduct is only a 'speculative contingency'") (citations omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed as against the Defendants in its entirety.

Dated: New York, New York
October 13, 2017

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