

**Nos. 18-1114(L), 18-1118(Con.), 18-1139(Con.), 18-1162(Con.)**

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

STATE OF CALIFORNIA, et al.,  
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,  
*Respondents,*

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,  
*Amicus Curiae for Petitioners,*

ALLIANCE OF AUTOMOBILE MANUFACTURERS; ASSOCIATION OF  
GLOBAL AUTOMAKERS, INC.,  
*Movant-Intervenors.*

On Petition for Review of Agency Action by the  
United States Environmental Protection Agency  
No. EPA-83FR16077

**REPLY IN SUPPORT OF MOVANT-INTERVENORS' MOTION  
TO DISMISS FOR LACK OF JURISDICTION**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

GLOSSARY OF ABBREVIATIONS ..... iv

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. The Petitions Challenge Non-Final Agency Action ..... 2

    A. The Challenged Notice Is Not the End of EPA’s  
    Decisionmaking Process ..... 2

    B. The Challenged Notice Neither Determines Legal Rights and  
    Obligations nor Causes Legal Consequences ..... 5

II. The Petitions Are Unripe ..... 10

CONCLUSION .....11

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

### Cases

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	11
<i>Action on Smoking &amp; Health v. Dep’t of Labor</i> , 28 F.3d 162 (D.C. Cir. 1994) .....	6
<i>Arch Coal, Inc. v. Acosta</i> , 888 F.3d 493 (D.C. Cir. 2018) .....	7
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	2, 7
<i>City of Waukesha v. EPA</i> , 320 F.3d 228 (D.C. Cir. 2003) .....	7
<i>Clean Air Council v. Pruitt</i> , 862 F.3d 1 (D.C. Cir. 2017) .....	4, 5
<i>Ctr. for Auto Safety v. NHTSA</i> , 452 F.3d 798 (D.C. Cir. 2006) .....	8
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 (1980).....	7
<i>Holistic Candles &amp; Consumers Ass’n v. FDA</i> , 664 F.3d 940 (D.C. Cir. 2012) .....	10
<i>In re Murray Energy Corp.</i> , 788 F.3d 330 (D.C. Cir. 2015) .....	1, 3, 5, 6
<i>Mendoza v. Perez</i> , 754 F.3d 1002 (D.C. Cir. 2014) .....	7
<i>Nat’l Env’tl. Dev. Ass’ns Clean Air Project v. EPA</i> , 752 F.3d 999 (D.C. Cir. 2014) .....	8
<i>Nat’l Treasury Emps. Union v. FLRA</i> , 745 F.3d 1219 (D.C. Cir. 2014) .....	4

<i>NRDC v. EPA</i> , 643 F.3d 311 (D.C. Cir. 2011).....	10
<i>Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n</i> , 324 F.3d 726 (D.C. Cir. 2003) .....	2, 8
<i>Role Models Am. Inc. v. White</i> , 317 F.3d 327 (D.C. Cir. 2003) .....	4
<i>Sierra Club v. U.S. Army Corps of Eng’rs</i> , 446 F.3d 808 (8th Cir. 2006).....	7
<i>Soundboard Ass’n v. FTC</i> , 888 F.3d 1261 (D.C. Cir. 2018) .....	4
<i>Sw. Airlines Co. v. U.S. Dep’t of Transp.</i> , 832 F.3d 270 (D.C. Cir. 2016) .....	3
<i>Toilet Goods Ass’n v. Gardner</i> , 387 U.S. 158 (1967).....	10
<i>U.S. Army Corps of Eng’rs v. Hawkes Co.</i> , 136 S. Ct. 1807 (2016).....	8, 9
<i>Whitman v. Am. Trucking Ass’ns</i> , 531 U.S. 457 (2001).....	11
<b>Statute</b>	
5 U.S.C. § 553.....	7
<b>Regulations</b>	
40 C.F.R. § 86.1818-12 .....	6
83 Fed. Reg. 16,077 (Apr. 13, 2018) .....	1, 2, 6, 10
83 Fed. Reg. 42,986 (Aug. 24, 2018).....	1

**GLOSSARY OF ABBREVIATIONS**

Abbreviation	Definition
NPRM	Notice of proposed rulemaking
MTE	Mid-Term Evaluation
JD	Jurisdictional determination

## INTRODUCTION

The petitions for review are hopelessly premature. Petitioners do not dispute that the effect of the April 13 notice they challenge was to “initiate a rulemaking process” to revise the MYs 2022-2025 standards. 83 Fed. Reg. 16,077, 16,087 (Apr. 13, 2018). Nor do they dispute that EPA is now in the midst of that rulemaking process, issuing a notice of proposed rulemaking (“NPRM”) on August 24 and requesting public comment by October 23. 83 Fed. Reg. 42,986 (Aug. 24, 2018). Nor do petitioners dispute that there will be no change whatsoever in the existing MYs 2022-2025 standards unless and until the ongoing rulemaking is complete. 83 Fed. Reg. at 16,087. Nor do they dispute that they will have every opportunity to participate in that rulemaking process, and can challenge whatever revised standards EPA issues (if any) when that process is complete.

But petitioners refuse to wait for the agency to reach its final decision. Instead, “champing at the bit to challenge EPA’s anticipated rule,” *In re Murray Energy Corp.*, 788 F.3d 330, 333 (D.C. Cir. 2015), petitioners ask this Court to wade into the ongoing administrative process and review the agency decision to initiate the rulemaking in the first place. This Court has rejected such requests repeatedly, and it should do so again here. As the Court has recognized, allowing such premature review “improperly intrudes into the agency’s decisionmaking process,” and wastes both administrative and judicial resources. *Reliable Automatic Sprinkler*

*Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003). Because the challenged agency action is not final and the petitions are not ripe for review, this Court should grant the motions to dismiss.

## ARGUMENT

### I. The Petitions Challenge Non-Final Agency Action.

For this Court to have jurisdiction, the challenged agency action must meet two conditions: It must “mark the consummation of the agency’s decisionmaking process,” and it must be an action “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The April 13 notice meets neither condition.

#### A. The Challenged Notice Is Not the End of EPA’s Decisionmaking Process.

First, the April 13 notice plainly was not “the consummation of [EPA’s] decisionmaking process.” On the contrary, the April 13 notice *initiated* a new process to determine what the MYs 2022-2025 standards should be. *See* 83 Fed. Reg. at 16,087 (notice “initiate[d] a rulemaking process”). That rulemaking process is now well underway; EPA and NHTSA issued a joint NPRM on August 24, 2018, and they are in the midst of accepting public comments on their proposed revisions to the existing standards. The fact that EPA continues to actively “invest[] its time and resources in undertaking ... a final resolution” on the MYs 2022-2025 standards is indisputable proof that the April 13 notice did not end the agency decisionmaking

process. *Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 276 (D.C. Cir. 2016).

Petitioners do not and cannot dispute that EPA has not yet reached any final decision on the MYs 2022-2025 standards. Instead, they attempt to detach the Mid-Term Evaluation (“MTE”) of whether the standards should be revised from the overall process of setting the standards, arguing the April 13 notice is the agency’s final decision “with regard to the [MTE].” NCAT/Utilities Opp.11; *see* States Opp.11-13. But as explained, a party cannot artificially create final agency action by carving up the administrative process into separate stages and treating the end of each stage as a “final” decision. Mot.10-11. Otherwise, the first *Bennett* condition would be a dead letter, as an artful pleader could easily describe any agency action—no matter how preliminary—as the end of the decisionmaking process on the “binary question” of whether to take that particular action. NCAT/Utilities Opp.11-12.

If the “consummation of the agency’s decisionmaking process” on whether to initiate a rulemaking to revise the MYs 2022-2025 standards were enough to meet the first *Bennett* condition, then every NPRM would meet that condition, as every NPRM marks the “consummation of the agency’s decisionmaking process” on whether to initiate a rulemaking. *Contra, e.g., Murray Energy*, 788 F.3d at 334-35. Every decision to reconsider a regulation would likewise satisfy that condition, as such decisions can always be characterized as the “consummation of the agency’s

decisionmaking process” on whether to undertake reconsideration. *Contra Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017). Like an NPRM or a decision to reconsider an existing regulation, the April 13 notice “merely begins [the] process” of agency review and revision of the substantive standards at issue. *Id.* It does not itself change the standards for MYs 2022-2025 and provides no definitive answer on what the new standards will be, and so cannot constitute “the culmination of [the] agency’s consideration of [the] issue.” *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018).

Grasping at straws, petitioners argue that an agency action can be final even if it is not “the last administrative action contemplated by the statutory scheme.” States Opp.13; NGOs Opp.12. That is certainly true where—as in the cases petitioners cite—the challenged action finally decides the substantive issues, and leaves open only the act of implementing that decision or resolving distinct ancillary questions. *See Nat’l Treasury Emps. Union v. FLRA*, 745 F.3d 1219, 1222-23 (D.C. Cir. 2014) (FLRA decision was final despite remand on “collateral” attorney fees issue); *Role Models Am. Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003) (decision by Defense Department to sell decommissioned fort was final even before transfer occurred). But petitioners cite no case holding that a decision to initiate a rulemaking can be “final” agency action even though the rulemaking has not yet occurred and the central substantive issue it will address remains unresolved.

Petitioners suggest the April 13 notice must be final because it involved “re-opening and then reversing [a] prior final action” (the January 2017 determination to retain the existing MY2022-2025 standards). States Opp.16; *see* NGOs Opp.12. But as this Court has made clear, the finality of an earlier agency action does not somehow make the initiation of the reconsideration process final. *Clean Air Council*, 862 F.3d at 6. The earlier decision cannot lend its finality to the later non-final action. Similarly, withdrawing the prior decision not to revise the MYs 2022-2025 standards does not make the April 13 notice a final action, any more than withdrawing a prior decision to deny reconsideration would make a decision to grant reconsideration a final action. *Id.* In either case, “the consummation of the agency’s decisionmaking process” occurs not when the agency decides to revise the substantive rule, but “when the agency issues the [revised] rule.” *Murray Energy*, 788 F.3d at 336. Because EPA has not yet issued the revised MYs 2022-2025 standards—and indeed is in the very midst of revising those standards—the April 13 notice plainly does not mark the consummation of its decisionmaking process, and so is not final action.

**B. The Challenged Notice Neither Determines Legal Rights and Obligations nor Causes Legal Consequences.**

Even if the April 13 notice could be described as the consummation of the agency decisionmaking process, petitioners would still fail the second *Bennett* condition because that notice neither determines legal rights and obligations nor

causes legal consequences. Mot.13-17. It is undisputed that the April 13 notice makes no change to the existing MYs 2022-2025 standards; instead, until the EPA rulemaking is completed, “the current standards remain in effect and there is no change in the legal rights and obligations of any stakeholders.” 83 Fed. Reg. at 16,087. The agency’s mere announcement that it intends to initiate a rulemaking to revise those standards does not cause any cognizable substantive legal consequences, and so cannot meet the second *Bennett* requirement. *See Murray Energy*, 788 F.3d at 334-35; *Action on Smoking & Health v. Dep’t of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994).

Straining for a response, petitioners argue the April 13 notice “has triggered a binding requirement that [EPA] ‘shall’ initiate a rulemaking to revise the [MYs 2022-2025] standards.” States Opp.17 (quoting 40 C.F.R. § 86.1818-12(h)(1)); *see* NGOs Opp.12-13; NCAT/Utilities Opp.12. In other words, because the April 13 determination requires EPA to take further procedural steps to decide how to revise the existing standards, it purportedly has “binding effects” on EPA that constitute cognizable legal consequences.

That argument turns the second *Bennett* requirement on its head. To satisfy that requirement, the challenged action must do more than just require the agency to begin or continue its decisionmaking process; it must produce a “substantive change” in the existing legal regime, with substantive consequences for regulated

parties or the agency itself. *Mendoza v. Perez*, 754 F.3d 1002, 1018-19 (D.C. Cir. 2014); see *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) (final action must determine “substantive rights or obligations”). That is why, as both the Supreme Court and this Court have explained, a mere “threshold determination that further inquiry is warranted” is not final agency action, even if that threshold determination binds the agency to inquire further. *FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980); *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 503 (D.C. Cir. 2018).

Indeed, if actions that bound the agency to conduct further rulemaking were enough to satisfy the second *Bennett* condition, then every NPRM would meet that condition. Under the Administrative Procedure Act, issuing an NPRM obligates the agency to “give interested persons an opportunity to participate in the rule making” through public comments, 5 U.S.C. § 553(c), and to “respond in a reasoned manner” to any significant comments, *City of Waukesha v. EPA*, 320 F.3d 228, 257-58 (D.C. Cir. 2003). Such mandatory procedural requirements, however, have never been seen as the kind of legal “obligations” or “consequences” that can make an agency action final. *Bennett*, 520 U.S. at 178; Mot.15-16. That is why petitioners cite no case even remotely suggesting that an action that binds the agency *to conduct further rulemaking* somehow constitutes a final action. Instead, the cases petitioners cite—which ask whether the challenged action has *substantive* legal consequences, such

as binding changes in agency policy or enforcement practices—only illustrate how far petitioners are from showing finality. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016) (agency action that grants or denies binding five-year safe harbor from enforcement is final); *Nat'l Env'tl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014) (agency directive that “compel[led] agency officials to apply different permitting standards in different regions of the country” was final) (emphasis omitted).

Petitioners claim the April 13 notice and the ongoing rulemaking have had practical consequences, pointing to “staff time and resources” that some states have spent developing new emissions regulations. States Opp.18-19; *see* NGOs Opp.14-15. But every NPRM requires parties wishing to comment to expend “staff time and resources,” and may likewise prompt others to expend resources based on their expectations about the final rule that will eventually emerge. It is abundantly clear that such “practical consequences” do not satisfy the second *Bennett* requirement. Mot.14-15 (citing *Reliable Automatic Sprinkler*, 324 F.3d at 732); *see Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 811 (D.C. Cir. 2006).<sup>1</sup>

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<sup>1</sup> Petitioners also suggest the April 13 notice had legal consequences because it deprived them of information to which they were entitled, NGOs Opp.12, and provides additional support for challenges to the MYs 2022-2025 standards, NCAT/Utilities Opp.13. The former argument begs the question, and the latter would mean that almost any agency announcement could satisfy the second *Bennett* requirement, *contra Ctr. for Auto Safety*, 452 F.3d at 808 (agency guidelines stating

Citing *Hawkes*, petitioners argue the April 13 notice must have had legal consequences because it withdrew the January 2017 determination to retain the existing standards. NGOs Opp.13-14; NCAT/Utilities Opp.12-13. But *Hawkes* comes nowhere near supporting petitioners' argument that if one agency decision has legal consequences, then so must any "decision in the opposite direction." NGOs Opp.13-14; *see* NCAT/Utilities Opp.12-13. *Hawkes* dealt with a so-called jurisdictional determination ("JD") by the Army Corps of Engineers, which determines whether property contains waters regulated under the Clean Water Act. 136 S. Ct. at 1811-12. A negative JD provides a five-year safe harbor from civil enforcement proceedings under the Act; a positive JD denies that safe harbor. *Id.* at 1814. The Court held that just as granting the safe harbor had cognizable legal consequences, denying the safe harbor did as well; in either case, the agency was making a final decision on the scope of its enforcement authority. *Id.*

That does not remotely suggest, however, that because a decision to retain existing regulations has legal consequences, a decision to initiate a rulemaking to revise those regulations while still leaving them in place must somehow also have cognizable legal consequences. Unlike the JD in *Hawkes*, a decision to initiate a rulemaking makes no final determination regarding the substance or the enforcement

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"nothing more than a privileged viewpoint in the legal debate" have no legal consequences).

of agency regulations, and has no substantive effect on either the agency or the regulated party until the rulemaking is complete. It therefore cannot satisfy the second *Bennett* requirement. Mot.13-14; *see* 83 Fed. Reg. at 16,087 (explaining the April 13 notice makes “no change in the legal rights and obligations of any stakeholders”).

## II. The Petitions Are Unripe.

For much the same reasons, the petitions are not ripe, as the issues they purport to present are not fit for review. *Holistic Candles & Consumers Ass’n v. FDA*, 664 F.3d 940, 943 n.4 (D.C. Cir. 2012) (issue “is not fit [for review] if it does not involve final agency action”); *NRDC v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011) (finality is “a necessary feature of fitness for review”). And petitioners face no plausible hardship from delaying review until EPA has concluded its rulemaking process, given that the existing MYs 2022-2025 standards will remain in effect until that process concludes. Mot.20-21; *see Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 164-65 (1967) (no hardship where there were “no irremediable adverse consequences ... from requiring a later challenge”).<sup>2</sup> Moreover, many of the purported hardships petitioners claim—such as an eventual increase in greenhouse gas emissions, States Opp.24-25, or alleged economic hardships, NCAT/Utilities

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<sup>2</sup> Petitioners suggest they are not required to show hardship when the issues are “clearly fit for review.” States Opp.21-22. As demonstrated, however, the issues here are just the opposite.

Opp.15—depend on the assumption that the revised standards will be meaningfully less stringent than the current standards. That is exactly why petitioners must wait until any revised standards are issued before their challenge will be ripe. Mot.21.

This case is a perfect illustration of why the ripeness doctrine exists: to prevent courts from “entangling themselves in abstract disagreements over administrative policies” and “protect the agencies from judicial interference until an administrative decision has been formalized.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). EPA is in the midst of an administrative process to determine what the MYs 2022-2025 standards should be. Petitioners will have every opportunity to raise their views on those standards during that process, and to seek judicial review of the agency’s final decision once that process concludes. In the meantime, premature review of the decision to initiate the ongoing rulemaking would serve no purpose but to waste judicial resources and “inappropriately interfere with further administrative action.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 479 (2001).

## CONCLUSION

This Court should dismiss the petitions.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 2,599 words, excluding the parts of the reply exempted by Fed. R. App. P. 32(f).

2. This reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

September 21, 2018

s/Paul D. Clement  
Paul D. Clement

**CERTIFICATE OF SERVICE**

I hereby certify that on September 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement  
Paul D. Clement