ORAL ARGUMENT NOT YET SCHEDULED

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

COMPETITIVE ENTERPRISE INSTITUTE, ANTHONY KREUCHER, WALTER M. KREUCHER, JAMES LEEDY, and MARC SCRIBNER, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; JAMES C. OWENS, in his official capacity as Acting Administrator, National Highway Traffic Safety Administration; ENVIRONMENTAL PROTECTION AGENCY; ANDREW R. WHEELER, in his official capacity as Administrator of the Environmental Protection Agency Respondents.	No. 20-1145 and consolidated cases

MOTION TO COMPLETE THE RECORD

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INTRODUCTION

The environmental and health effects of vehicle emissions are a major issue in this rulemaking. *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 83 FR 42986, 43329-43350 (April 30, 2020). Movants seek to include in the record the following documents: (1) EPA's 2019 Integrated Science Assessment (ISA) for Particulate Matter, which the agencies explicitly relied upon in the rule, and (2) two evaluations of the scientific evidence regarding particulate matter harm by the Clean Air Scientific Advisory Committee (CASAC), a panel of independent experts requested by EPA to review its findings.

ARGUMENT

The Administrative Procedure Act requires the court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. This requires the court to review "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "This Court has interpreted the 'whole record' to include[s] all documents and materials that the agency directly or indirectly considered . . . [and nothing] more nor less." *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (internal citation omitted).

Pursuant to this court's local rules, a respondent agency must proffer "a certified list of the contents of the administrative record." D.C. Cir. R. 17(b). That certified list is presumed complete, see *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019), but the presumption can be rebutted by "a substantial showing" that the record was incomplete. *Id.* As shown below, in this case that presumption is rebutted by Respondents' concession that the 2019 EPA ISA was improperly excluded and that therefore the certified record was incomplete. It is further rebutted by direct statements from the agency decisionmaker that he considered the initial report that CASAC sent to him.

Movants need not show bad faith or improper behavior to justify including records actually considered by the agency. Where movants seek only to complete the administrative record with non-privileged "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), rather than expand the judicial record with other materials, see, e.g., *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc), a court need not find "bad faith or improper behavior" by the agency. See *Dep't of Commerce v. New York*, 139 S. Ct. 2574, 2573–74 (2019) (distinguishing between "extra-record discovery" and an "order to complete the administrative record"). Instead, movants need only "'put forth concrete evidence' and 'identify reasonable, non-speculative grounds for [their] belief that the

documents were considered by the agency and not included in the record.'" *Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 23 (D.D.C. 2016) (citation omitted); *see also*, *e.g., Univ. of Colorado Health at Mem'l Hosp. v. Burwell*, 151 F. Supp. 3d 1, 15 (D.D.C. 2015), *on reconsideration*, 164 F. Supp. 3d 56 (D.D.C. 2016); *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009).

Movants seek to include in the administrative record three documents that were not in the certified index submitted by Respondents: (1) the 2019 EPA Integrated Science Assessment (ISA) for Particulate Matter, (2) the April 11, 2019 report of CASAC peer-reviewing the ISA, Exhibit A, and (3) the December 16, 2019 report of CASAC peer-reviewing the National Ambient Air Quality Standards (NAAQS) policy assessment, Exhibit B.

I. The 2019 ISA Is A Part of the Record As It Was Explicitly Relied Upon in the Final Rule.

The public comment period for the agencies' action being reviewed in this case ended on October 26, 2018, but the agencies continued to accept comments even after the formal comment period ended. SAFE Rule, 85 FR 24174, 25153.

On October 23, 2018, EPA announced a new draft Integrated Science Assessment (ISA) for Particulate Matter. *Integrated Science Assessment for Particulate Matter (External Review Draft)*, 83 FR 53471 (2018). The ISA, when

final, would comprehensively analyze the effects of particulate matter including those emitted by vehicles as considered in this agency action.

EPA expressly relied upon the 2019 ISA in formulating the final SAFE Rule, according to the text of that rule:

> EPA's more recent Integrated Science Assessment for Particulate Matter (PM ISA), which was finalized in December 2019, summarizes the most recent health effects evidence for short- and long-term exposures to PM2.5, PM10–2.5, and ultrafine particles, characterizing the strength of the evidence and whether the relationship is likely to be causal nature in nature. The 2019 P.M. ISA reinforces the findings of the 2009 ISA, and supports the decision to continue monetizing the respiratory and cardiovascular health endpoints monetized in the current analysis.

SAFE Rule, 85 FR 24860.

In light of this, Respondents have, unsurprisingly, conceded that the ISA was improperly omitted from the certified record. Email from Chloe Kolman to Devin Watkins (July 23, 2020). However, even though more than a month has passed since that concession, Respondents have thus far failed to update the certified index of the record with the court. While it may be only a matter of time before Respondents do so, our motion to include the CASAC reports depends on the 2019 ISA being recognized as properly a part of the record for this rulemaking.

II. The CASAC Reports Are a Part of the Record Because the Primary Agency Decisionmaker Explicitly Stated that He Considered Them

EPA asked the Clean Air Scientific Advisory Committee (CASAC), a group of outside experts in this area selected by the agency as required by 42 U.S.C. 7409(d), to peer-review its draft ISA. CASAC found the agency did not do "a sufficiently comprehensive, systematic assessment of the available science" including "inadequate evidence" for its conclusions. Exhibit A, p. 1. EPA incorporated certain of CASAC's findings (the ones it agreed with) but excluded others from its final ISA, which it then relied upon for the SAFE rule.

Normally, an agency is not required to consider comments submitted by outside parties after the close of the public comment period. But "it is always within [an agency's] discretion" to "modify [that] procedural rule[] … when in a given case the ends of justice require it." *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (quotation omitted). EPA exercised that discretion when it asked CASAC to submit its report on the draft agency findings and chose to have agency decisionmakers consider the CASAC reports. See Exhibit C, discussed immediately below.

The CASAC reports reviewed the scientific evidence concerning the effects of particulate matter and include findings that are contrary to EPA's position. We seek to include these documents as part of the record as these reports were actually

considered by EPA's primary agency decisionmaker, Administrator Wheeler, under whose authority the regulation was issued.

EPA clearly did consider the first CASAC report, according to a letter sent by Administrator Wheeler to CASAC on July 25, 2019, Exhibit C, which specifically stated that "My staff and I are carefully considering your comments and recommendations …." It is reasonable that the second report by CASAC received similar consideration as its initial report.

The comments provided by CASAC were, according to Administrator Wheeler, incorporated in the ISA. Administrator Wheeler told CASAC that he had "directed my staff to do the following: … incorporate the CASAC's comments and recommendations, to the extent possible" in the final ISA. Exhibit C.

But instead of incorporating all of the changes suggested by CASAC, as suggested by Administrator Wheeler's letter, EPA included in the final ISA only those that supported its position. As this court has held, "To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'" *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (citing to the APA and the committee reports that formed the basis of the whole-record requirement: S.Rep. 752, 79th Cong., 1st Sess. 28 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one

party, since other evidence may weaken or even indisputably destroy that case."); H.R.Rep. No. 9180, 79th Cong., 2nd Sess. 46 (1946) (same)).

While the second CASAC report was a peer review of the policy assessment of the NAAQS standard, rather than of the ISA itself, it included an evaluation of the scientific evidence of particulate matter emission harms which are relevant to the current rulemaking. Based on the letter sent by Administrator Wheeler, stating that he considered the first CASAC report, it is likely that he similarly considered the second CASAC report.

A similar situation was presented in *Styrene Information & Research Center v. Sebelius*, in which a non-profit sought to block an HHS report on whether a chemical substance was a carcinogen. 851 F. Supp. 2d 57 (D.D.C. 2012). HHS relied upon a report created by an expert panel. *Id.* at 60. That expert panel, in turn, had broken into sub-groups of experts which each created their own subgroup reports. *Id.* The non-profit attempted to supplement the record with these sub-group reports, some of which had been rejected by the expert panel as a whole. *Id.* at 63. The court described the issue as follows: "[e]ssentially, the plaintiffs rely on a two-step theory of influence: the subgroup reports influenced the Expert Panel's recommendation to the [the agency], and in turn, the Expert Panel's recommendation influenced the [the agency]'s decision to list styrene." *Id.* at 64.

The court in *Styrene* concluded that the "fact that the subgroup drafts were not ultimately passed on to the final decisionmaker does not lead to the conclusion that they were not before the agency." *Id.* The court allowed the supplementation of the record with the sub-group reports. *Id.*

The evidence in this case is far stronger than in *Styrene.* Not only did the CASAC reports influence the final 2019 ISA (which was relied upon in the SAFE rulemaking before this court), but the CASAC reports themselves were actually considered by the ultimate agency decisionmaker, Administrator Wheeler.

The only explanation provided so far by Respondents on why the CASAC reports are not part of the record is that they "were not mentioned the final rule itself." Email from Chloe Kolman, attorney for Respondents, to Devin Watkins, attorney for Petitioners (July 23, 2020); reaffirmed in the email from Daniel Dertke, attorney for Respondents, to Devin Watkins (August 20, 2020). But the APA does not require that the CASAC reports be referenced in the final SAFE Rule in order to be included in the administrative record of that rule. EPA cannot hide the evidence its decisionmakers had before them—that the agency's conclusions were incorrect—by incorporating into the record only the evidence that was favorable to the agency and not even acknowledging the rest.

For that reason, we ask the court to order the Respondents to include in the record the 2019 Integrated Science Assessment of Particulate Matter and the

CASAC reports of April 11, 2019 and December 16, 2019, as they were actually considered by the agency decisionmakers in determining the harm from particulate matter emitted by vehicles produced under the SAFE Rule.

Dated: August 28, 2020

Respectfully submitted,

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