ORAL ARGUMENT NOT YET SCHEDULED

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

COMPETITIVE ENTERPRISE INSTITUTE, et al., Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al., Respondents.	No. 20-1145, and consolidated cases

RESPONSE IN OPPOSITION TO MOTION TO COMPLETE AND SUPPLEMENT THE RECORD

INTRODUCTION

The Court should deny the Motion To Complete And Supplement The Record ("Mot. to Suppl."), ECF No. 1858308, filed by State and Municipal Petitioners in Case No. 20-1167 and by Public Interest Petitioners in Cases No. 20-1168 and -1169 (collectively, "Movants"). Movants seek to add six documents to the administrative records. The proffered documents are deliberative materials and therefore not part of either agency's administrative record, so Movants' request to complete the record should be denied. Furthermore, the administrative records are

complete and wholly sufficient for this Court's review, and Movants have not demonstrated that any exception allowing supplementation applies, so Movants' request to supplement the record should be denied as well.

BACKGROUND

These consolidated petitions challenge a joint rulemaking by EPA and NHTSA entitled *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020) ("SAFE II Rule"). The SAFE II Rule establishes two sets of vehicle regulations for passenger cars and light trucks: one, issued by NHTSA, establishes corporate average fuel economy standards under the Energy Policy and Conservation Act ("EPCA"); the other, issued by EPA, establishes vehicle greenhouse-gas emission standards under the Clean Air Act. *Id.* at 24,174. NHTSA's action replaces a fuel economy standard set in 2012 for model year 2021 vehicles, and establishes such standards for the first time for model years 2022-2026. *Id.* at 24,181-82. EPA's action replaces EPA's existing vehicle greenhouse-gas emission standards for model years starting in 2021, which were originally set in 2012. *Id.*

The agencies each timely filed a certified index of the administrative record for their decision. *See* ECF No. 1850358. Movants seek to complete or to supplement the record with six documents. They are:

- a draft Federal Register preamble submitted to the Office of Management and Budget ("OMB") on January 14, 2020 (Movants' Ex. A);

- a revised draft Federal Register preamble submitted to OMB on March 25, 2020 (Movants' Ex. B);

- EPA's comments on the January draft preamble (Movants' Ex. C);

- EPA's comments on the March draft preamble (Movants' Ex. D);

- an internal EPA staff briefing presentation on the January draft preamble, (Movants' Ex. E); and

- an internal EPA email summarizing the responsiveness of the March draft preamble to EPA's prior comments (Movants' Ex. F).

The Clean Air Act governs the scope of judicial review of EPA's promulgation of vehicle greenhouse-gas emission standards as part of the SAFE II Rule. Section 307(d)(7) specifies the materials that comprise the record for judicial review. 42 U.S.C. § 7607(d)(7). Those materials include the factual data on which the rule is based; the methodology used in obtaining the data and in analyzing the data; the major legal interpretations and policy considerations underlying the rule; written comments received on the proposed rule; an explanation of the reasons for any major changes in the promulgated rule from the

proposed rule; and a response to significant comments and new data received. *Id.* The record "shall consist exclusively of" the listed materials. *Id.* Although other materials are excluded from the administrative record, EPA is required to place certain interagency review documents in the public docket. These materials placed in the docket but excluded from the administrative record for purposes of judicial review include "drafts of the final rule submitted [to the Office of Management and Budget] for [any interagency] review process prior to promulgation," "documents accompanying such drafts," "written comments thereon" "by other agencies," and "written responses thereto." *Id.* § 7607(d)(4)(B)(ii).

When NHTSA promulgates fuel economy standards, EPCA directs NHTSA to file "a record of the proceeding in which the regulation was prescribed." 49 U.S.C. § 32909(b). NHTSA establishes a regulatory rulemaking docket, which forms the basis for compiling the administrative record for judicial review. That docket includes:

> Information and data deemed relevant by the Administrator relating to rulemaking actions, including notices of proposed rulemaking; comments received in response to notices; petitions for rulemaking and reconsideration; denials of petitions for rulemaking and reconsideration; records of additional rulemaking proceedings under § 553.25; and final rules….

49 C.F.R. § 553.5(a).

ARGUMENT

The Court should deny the motion because Movants' proffered documents are deliberative and thus not part of the administrative record of either agency's action, and because Movants have failed to establish that supplementation is warranted.

I. Movants' Proffered Documents Are Not Part of the Administrative Record.

A. Deliberative materials are not part of the administrative record for judicial review.

It is well-settled that deliberative materials are not part of an agency's administrative record for judicial review. This Court long ago held that "internal memoranda made during the decisional process…are never included in a record." *Norris & Hirshberg, Inc. v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947). The Court in that case rejected an effort to expand the administrative record to include a "summary or digest of the evidence…prepared by employees simply to aid in the Commission's examination of the record," which the Court described as "part of the Commission's decisional procedure." *Id.* The Court left no doubt that the administrative record includes "only the pleadings and the evidence." *Id*. "Briefs, and memoranda made by the Commission or its staff, are not parts of the record." *Id.*; *see also United States v. Morgan*, 313 U.S. 409, 422 (1941) ("it was not the function of the court to probe the mental processes of the Secretary").

More recent case law confirms that "predecisional and deliberative documents are not part of the administrative record." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (internal quotation marks omitted); *accord National Security Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (protecting deliberative material is "as old as the Republic and ensures that agency officials are judged by what they decided, not for matters they considered before making up their minds") (citation omitted).

Although the administrative record contains all documents and materials "considered" by the agency decision-maker, a reviewing court's task is to assess the agency's stated reasons against the evidence the agency decision-maker considered in the course of the decision process. Documents reflecting internal deliberations are not themselves evidence, and are not themselves "considered," just as a bench memorandum for a trial judge is not evidence considered by a district court judge and thus forms no part of the record on appeal. *See General Electric Co. v. Jackson*, 595 F. Supp. 2d 8, 18 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010) (distinguishing between documents that are "considered" and "material that reflects internal deliberations," the latter of which is excluded from the administrative record) (quotations omitted); *accord San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 45 (D.C. Cir. 1986) (en banc) ("We think the

analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions.").

B. Movants' proffered documents are deliberative materials.

Deliberative materials are "intended to facilitate or assist development of the agency's final position on the relevant issue." *National Security Archive*, 752 F.3d at 463 (internal quotations omitted); *see also Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 190 (1975) (noting that the decisive point in analyzing whether a document is deliberative "is that the report [was] created for the purpose of discussion"). Applying those factors here is a straightforward exercise.

All six of the proffered documents were created to facilitate the agencies' deliberations on the SAFE II Rule. Exhibits A and B are non-final drafts of the Federal Register preamble submitted to OMB for interagency review. The Clean Air Act explicitly excludes both documents from the administrative record of EPA's action. 42 U.S.C. §§ 7607(d)(7)(A); (d)(4)(B)(ii). Exhibits C and D are non-final draft preambles with agency comments. It is unclear from the face of these documents whether or not they were submitted to OMB, and thus excluded by operation of the Clean Air Act. Regardless of any statutory exclusion, however, both documents, as well as Exhibits A and B, clearly were intended to develop

each agency's final position in the SAFE II Rule. Likewise, Exhibit E is an internal EPA staff briefing paper on the January 2020 draft of the SAFE II Rule's preamble, and Exhibit F is an internal EPA email summarizing unresolved issues relating to EPA's comments on the March 2020 draft Federal Register preamble. All are deliberative.

Movants do not seriously dispute that all six of the proffered documents are deliberative materials. Mot. to Suppl. at 10, 14. Instead, Movants argue that the six documents should be deemed part of the administrative record of NHTSA's action—but not EPA's—because "the usual exception to the whole-record rule for deliberative material does not apply if an agency is required to publicly release a document." *Id.* at 13.

Movants are incorrect. This Court has consistently held that deliberative materials are not part of the administrative record even if they have been publicly available to parties challenging agency action. For example, in *Deukmejian v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1326 (D.C. Cir. 1984), *vacated in part sub nom.*, 760 F.2d 1320 (D.C. Cir. 1985), the Court held that predecisional transcripts and related documents are not part of the administrative record. The Court recognized that while "public disclosure stifles debate to some extent, *judicial* disclosure would suppress candor still further since off-hand remarks

could turn out to have a *legal* significance they would not have if barred from the record on review." *Id.*; *see also Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (concluding that transcript of open meeting of the agency held pursuant to the Sunshine Act's requirement of public deliberations not part of the record for judicial review).

Movants cite two district court cases in support of their argument that the public disclosure of their proffered documents requires their inclusion in NHTSA's administrative record. Mot. to Suppl. at 13, citing *Lee Memorial Hospital v. Burwell*, 109 F. Supp. 3d 40, 48-49 (D.D.C. 2015) and *District Hospital Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 30 (D.D.C. 2013). Both cases rely on *Banner Health v. Sebelius*, 945 F. Supp. 2d 1 (D.D.C. 2013), *vacated in part on reconsideration*, 2013 WL 11241368 (D.D.C. July 30, 2013). But in *Banner* the district court *declined* to supplement the record with various documents obtained from OMB's public docket. *Id.* at 25. The district court in *Banner* did add one document to the agency's certified administrative record, but not because it was publicly available. The district court found that one document that "may have been adverse to" the agency's decision because it showed "significant alternatives, facts, other data and analyses that [the agency] considered in the rulemaking process, but that were directly contrary to its published regulations" was

"deliberately or negligently excluded." *Id.* at 25-26; *see also* 2013 WL 11241368 at *6 (noting on reconsideration that a document's public availability is only one "among several factors" that a court should consider when assessing whether or not a document is "a deliberative document outside of the scope of the administrative record"). That is a far cry from Movants' proposed principle that any type of deliberative material necessarily becomes part of the administrative record simply because it is available to the public. That is not the rule in this Circuit. *See Oceana*, 920 F.3d at 865 (explaining that an agency's ability to "assert the deliberative process privilege over such predecisional documents does not change the analysis" and does not make such documents part of the administrative record).

Because Movants' six proffered documents are deliberative, they are not part of either agency's administrative record for judicial review, and Movants' request to complete the administrative record with those documents should be denied because the record is complete.

II. Movants' Proffered Documents Should Not Be Added To The Administrative Record Of Either Agency's Action.

Movants next argue that the six proffered documents should be *added* to the administrative records. In contrast to a motion to complete the administrative record with documents that were omitted from an agency's certified index despite

having been considered by the decision-maker, a court may in limited circumstances review documents that are not in the administrative record. Supplementation with extra-record documents "decidedly is the exception not the rule." *Motor & Equipment Manufacturers Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1104 n.18 (D.C. Cir. 1979); *Oceana*, 920 F.3d at 865. The party advocating supplementation must show that one of the recognized narrow exceptions to the record-review doctrine applies. This Court has identified three such unusual circumstances: if the agency deliberately or negligently excluded documents that may have been adverse to its decision, if background information is needed to determine whether the agency considered all the relevant factors, or if the agency failed to explain administrative review so as to frustrate judicial review. *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (quotations omitted).

Instead of asserting that any of the *Kempthorne* exceptions apply, Movants argue that the six documents should be added to the administrative records because they are "uniquely probative" of Movants' allegations that EPA failed to exercise independent judgment and that EPA and NHTSA acted in bad faith. *Id.* Mot. to Suppl. at 11-12. Neither argument is persuasive.

Movants allege that EPA was "cut out of the process of developing its own rule," *id.* at 17, that EPA's input was not "integrated into the Agencies' ostensibly joint work product," *id.* at 18, and that EPA "could not plausibly have" exercised its own independent judgment because EPA's experts "were not able to completely review" the rulemaking notice prior to finalization. *Id.* These allegations are similar to the allegations rejected by this Court in *Air Transport Ass'n of America, Inc. v. National Mediation Board*, 663 F.3d 476 (D.C. Cir. 2011). In that case, a letter from a dissenting member of the agency's board reflected "serious intra-agency discord" and the impression that other board members had prejudged the merits. *Id.* at 488. This Court found those allegations insufficient to overcome the presumption that agency members act in good faith, and affirmed the district court's decision not to allow extra-record discovery. *Id.*

So too here. None of Movants' allegations amount to a significant—or any—showing of bad faith. Movants' allegations and their proffered documents merely represent the back and forth of agency decision-making.

The pre-decisional give-and-take among agency officials should not distract a reviewing court from the agency's ultimate considered judgment. The court's task in reviewing agency action is to determine whether the agency's final decision articulates a rational connection between its factual judgments and its ultimate

policy choice. *See, e.g., Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). That inquiry is not advanced by examination of deliberative materials in an effort to inquire into the minds of decion-makers or specific agency staff. *San Luis Obispo Mothers for Peace*, 789 F.2d at 33 (the differing positions "of an agency's staff, taken before the agency itself decided the point, does not invalidate" the agency's ultimate decision). Because a court's role is to review the agency's action in light of its stated reasons, the factual record, and public comments before the agency at the time it made its decision, "the actual subjective motivation of agency decision makers is immaterial as a matter of law." *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1280 (D.C. Cir. 1998).

Furthermore, deliberative materials typically reveal internal debates—positions advanced but abandoned, and text drafted but discarded. Taken to its logical conclusion, Movants' argument could allow the denial of any internal request for more time or the dismissal of any staff proposal to be spun as bad faith sufficient to supplement the administrative record. Movants' argument undermines the rule that deliberative materials are not part of the administrative record for judicial review and should be rejected. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975) (noting that agencies' work will commonly

"generate memoranda containing recommendations which do not ripen into agency decisions" and cautioning courts to "be wary of interfering with this process").

Movants also argue that supplementation is allowed under *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). *See* Mot. to Suppl. at 16. But in that case, the parties voluntarily agreed that various extra-record documents should be lodged with the Court for the purpose of assessing petitioner's procedural argument regarding ex parte contacts. 657 F.2d at 389 n.450. In light of that agreement, the Court did not need to address petitioner's motion to supplement. *Id.* Similarly, in *Department of Commerce v. New York*, the Supreme Court upheld a district court's decision to allow extra-record discovery, but noted that "the parties stipulated to the inclusion of more than 12,000 pages of internal deliberative materials as part of the administrative record." 139 S. Ct. 2551, 2574 (2019). There is no such agreement here.

Movants' request to supplement the administrative records of EPA's action and NHTSA's action should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing response was prepared in 14-point Times New Roman font using Microsoft Word and it complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 27(d)(1)(E). The response contains 2834 words and complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A).

/s/ Daniel R. Dertke
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CERTIFICATE OF SERVICE

I certify that on this 18th day of September, 2020, the foregoing RESPONSE IN OPPOSITION TO MOTION TO COMPLETE AND SUPPLEMENT THE RECORD was served electronically via the Court's CM/ECF system upon counsel of record for all parties except for the following who was served via electronic mail:

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