ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK TRAILER MANUFACTURERS ASS'N, INC., Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; ANDREW R. WHEELER, in his official capacity as Acting Administrator, U.S. Environmental Protection Agency; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; and HEIDI R. KING, in her official capacity as Deputy Administrator, National Highway Traffic Safety Administration, Respondents, and CALIFORNIA AIR RESOURCES BOARD, et al, Intervenors.	No. 16-1430 (consolidated with No. 16-1447)

Respondents' Opposition to Motion to Compel

Petitioner Truck Trailer Manufacturers Association invites this Court to use its limited resources to do something not only unusual, but improper. Having persuaded respondent agencies to rethink the challenged rule, and having won a

judicial stay of parts of that rule, Petitioner now claims dissatisfaction with the pace of ongoing administrative proceedings. So it filed a motion to compel the agencies to detail their deliberations in status reports and to commit to a timeline for making a decision. Petitioner apparently hopes that by forcing the Agencies to publicly report the details of their internal timelines and deliberations, it can pressure them to speed up their discretionary proceedings. But Petitioner gives no good reason why this Court should agree to such an extraordinary request. After all, the right forum to raise and resolve the timing concern is before the agencies—and recently Petitioner was invited to meet with the agencies' leadership to discuss this very issue. This Court should deny Petitioner's motion.

I. Background.

In December 2016 Petitioner challenged the "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2," promulgated under the Clean Air Act and the Energy Policy and Conservation Act by the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA, and with EPA, the Agencies). 81 Fed. Reg. 73,478 (Oct. 25, 2016) (the Rule). Four months later Petitioner asked the Agencies to review, reconsider, and, in the interim, stay the Rule's trailer provisions. In response to motions by the Agencies, the Court placed

the case in abeyance, and later extended the abeyance, to give them time to review Petitioner's request. *See* Orders (Mary 8, 2017; Aug. 1, 2017).

In August EPA expressed its intent to develop and issue a Federal Register notice of proposed rulemaking to revisit the Rule's trailer provisions and NHTSA granted Petitioner's request for rulemaking. *See* Respondents' Motion to Continue Abeyance (Aug. 17, 2017). A month later the Agencies moved to extend the abeyance pending completion of these administrative proceedings. *See* Respondents' Motion to Continue Abeyance (Sept. 18, 2017). That motion prompted Petitioner to move to stay EPA's portion of the Rule's trailer provisions (but not NHTSA's portion). *See* Motion for Stay (Sept. 25, 2017), at 3 n.1. Petitioner also stated that were the Court to grant the stay motion, it would have "no objection to holding the litigation in abeyance pending the Agencies' reconsideration of the . . . Rule." Conditional Opposition to Motion to Continue Abeyance (Sept. 18, 2017), at 3.

The Court granted Petitioner's motion, staying EPA's portion of the Rule "insofar as it purports to regulate trailers." Order (Oct. 27, 2017). As such, Petitioner did not object to the Agencies' abeyance request, and the Court held the case in abeyance pending further orders. *See id.* It also directed the parties to "file status reports at 90-day intervals beginning 90 days from the date of this order." *Id.* Since then, the Agencies have filed three reports, stating that "EPA is working

to develop a proposed rule to revisit the Rule's trailer provisions" and that "NHTSA continues to assess next steps after granting Trailer Petitioner's request for rulemaking." Respondents' Status Reports (Jan. 22, 2018; Apr. 25, 2018; July 24, 2018).

II. Petitioner's motion is meritless.

As a preliminary matter, the Agencies complied with the Court's order to file "status reports" every 90 days: Their timely reports informed the Court that administrative proceedings are ongoing. Importantly, though Petitioner shares that perhaps one day it might ask to lift the abeyance, its motion seeks no such relief; nor does Petitioner wish to curtail the Agencies' proceedings. *See generally* Motion to Compel Agencies to Submit Detailed Status Report and Timeline for Completion of Administrative Review (Aug. 6, 2018) (Mot.).

Instead, Petitioner wants a report "detailing the progress that [the Agencies] have made toward reconsidering the . . . Rule," along with a timeline for completion of the administrative process[1] and, in 90 days, the Agencies' proposed decision. *Id.* at 1-2. Petitioner notes that if no such proposal is made by then, it may move to revive the litigation. *See id*. The motion to compel, in short, is a bid

[1] It is unclear whether, in requesting detailed status reports and a timeline, Petitioner seeks injunctive relief. If so, it makes no effort to meet the stringent standard that justifies interim injunctive relief. *See* D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018).

to obtain the Agencies' internal timelines and deliberations with the goal of rearranging their regulatory priorities to suit Petitioner's own interests.

This Court should reject Petitioner's efforts to enlist its aid in that venture. First, the Agencies cannot provide the kind of detailed report to satisfy Petitioner's curiosity without revealing protected deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (discussing the deliberative-process privilege, which shields from disclosure information "that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (internal quotation marks omitted)).

Second, a litigant's mere dissatisfaction with the pace of a discretionary administrative proceeding is no reason for the Court to order relief. "'An agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities,' which means that [it] has discretion to determine the timing and priorities of its regulatory agenda." *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (quoting *Mass. v. EPA*, 549 U.S. 497, 527 (2007) (internal brackets and citations omitted)); *cf. City of San Antonio v. Civil Aeronautics Bd.*, 374 F.2d 326, 329 (D.C. Cir. 1967) ("No principle of administrative law is more firmly established than that of agency control of its own calendar."). Given that no statutory deadline governs these

administrative proceedings, the Agencies necessarily retain flexibility and discretion in setting their regulatory agendas.

Finally, the Agencies' leadership has agreed to meet with Petitioner so that it can explain the concerns that prompted this motion. The parties are currently working to schedule the meetings. Those meetings—not this Court—provide the forum for Petitioner to advocate a different pace in administrative proceedings.[2]

The relief Petitioner seeks is all the more improper given that it suffers no current or imminent harm: It faces no legal obligations to comply with EPA's portion of the Rule's trailer provisions, which has been stayed. And because Petitioner did not—and does not now—seek a judicial stay of the Rule's fuel-efficiency standards (promulgated by NHTSA), it cannot seriously suggest that those regulatory provisions pose any current or imminent harm to it or its members. *See* Mot. at 5-6. Indeed, the fuel-efficiency provisions do not even impose any mandatory obligations any earlier than January 2021, more than two years from now. *See* 81 Fed. Reg. at 74,238 (amending 49 C.F.R. § 535.3(d)(5)(iv)) (miscited in Mot. at 3, 5).

[2] Petitioner offers no on-point legal authority to support its request for the Court to order detailed status reports. It cites only an order and a concurring statement that deal with completely different circumstances than the one here. *See* Mot. at 4-5 (citing an order on a motion to delay oral argument in an actively litigated case and a concurring statement accompanying an order on a motion to continue abeyance).

Separately, Petitioner concedes that the Rule complies with the statutory scheme authorizing NHTSA's fuel-efficiency regulations, which states that the regulatory standard "shall provide not less than . . . 4 full model years of regulatory lead-time." 49 U.S.C. § 32902(k)(3)(A); *see* Mot. at 5-6. And Petitioner does not contend that it will suffer any harm from those regulations in the interim. *See* Mot. at 5 (suggesting only "the *potential* to prejudice [Petitioner's] members" (emphasis added)).

NHTSA is considering a range of regulatory options, which could include the possibility of extending the compliance date if deemed necessary or appropriate in the event NHTSA promulgates a new or amended rule. Petitioner seems concerned that NHTSA might not extend the compliance date. *See* Mot. at 6. But that concern is premature and speculative. Once NHTSA completes its proceedings, Petitioner can seek appropriate relief based on evidence of any likelihood of harm. It cannot, however, use the mere possibility of one regulatory outcome as a means to interfere in ongoing proceedings. *Cf. Aulenback, Inc. v. Fed. Hwy. Admin.*, 103 F.3d 156, 166 (D.C. Cir. 1997) (noting that the ripeness doctrine serves "'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a

concrete way by the challenging parties.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

III. Conclusion.

Petitioner's dissatisfaction with the pace of ongoing administrative proceedings is not reason enough for this Court to grant the extraordinary request for relief. The parties are scheduling meetings so that Petitioner can explain its concerns directly to the Agencies' leadership. This Court should leave the parties to sort out those issues for themselves and deny the motion to compel.

Dated: August 16, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ Sue Chen
SUE CHEN
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 305-0283
Sue.Chen@usdoj.gov

CHAD A. READLER
Acting Assistant Attorney General

H. THOMAS BYRON III
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Tel: (202) 616-5367
H.Thomas.Byron@usdoj.gov

Counsel for Respondents

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/s/ Sue Chen
SUE CHEN

Certificate of Service

I certify that on August 16, 2018, I filed the foregoing with the Court's CMS/ECF system, which will send notice to each party.

/s/ Sue Chen
SUE CHEN