ORAL ARGUMENT NOT YET SCHEDULED

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

No. 06-1023

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS and ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Final Action of the
United States Environmental Protection Agency

INITIAL REPLY BRIEF OF PETITIONER NATIONAL ASSOCIATION OF CLEAN AIR AGENCIES

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STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS and ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS,	)	Docket No. 06-1023
Petitioners,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioners State and Territorial Air Pollution Program Administrators ("STAPPA") and Association of Local Air Pollution Control Officials ("ALAPCO") have merged into a single trade association. The Petitioner in this action is now the National Association of Clean Air Agencies ("NACAA"). The United States Environmental Protection Agency ("EPA") is the Respondent. Amici curiae in support of Respondent are the Air Transport Association of America, Inc. and the Aerospace Industries Association.

B. Rulings Under Review

Petitioner seeks review of the following EPA action: Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 70 Fed. Reg. 69664 (Nov. 17, 2005) (codified at 40 C.F.R. Pt. 87).

C. Related Cases

Insofar as Petitioner is aware, there are no related cases to this petition for review.

Dated October 26, 2006

Respectfully submitted,

_____

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STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS and ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Docket No. 06-1023

REVISED DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Petitioners State and Territorial Air Pollution Program Administrators ("STAPPA") and Association of Local Air Pollution Control Officials ("ALAPCO") have merged into a single trade association by the name of National Association of Clean Air Agencies ("NACAA"). NACAA is a national trade association that represents state and local governmental agencies responsible for achieving and sustaining clean air across the United States. NACAA does not have parent corporations, and no other entity owns any percentage of this association.

Dated October 26, 2006

Respectfully submitted,

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GLOSSARY

ALAPCO	Association of Local Air Pollution Control Officials
CAA	Clean Air Act
CAEP	Committee on Aviation Environmental Protection
CAEP/4	a meeting held by the Committee on Aviation Environmental Protection in April 1998 that produced the CAEP/4 aircraft engine emission standards
CAEP/6	a meeting held by the Committee on Aviation Environmental Protection in February 2004 that produced the CAEP/6 aircraft engine emission standards
EPA	United States Environmental Protection Agency
ICAO	International Civil Aviation Organization
NAAQS	national ambient air quality standards
NACAA	National Association of Clean Air Agencies
NO_x	oxides of nitrogen
$PM_{2.5}$	"fine" particulate matter (i.e., particulate matter less than 2.5 micrometers in diameter)
SCAQMD	South Coast Air Quality Management District
SIP	state implementation plan
STAPPA	State and Territorial Air Pollution Program Administrators
TCEQ	Texas Commission on Environmental Quality

STATUTES AND REGULATIONS

Pertinent statutes, regulations, and declarations are included in the addenda to Petitioner's Initial Opening Brief and are incorporated herein by reference.

INTRODUCTION

The United States Environmental Protection Agency ("EPA") has issued a rule on aircraft engine emissions that is inconsistent with the Clean Air Act's ("CAA" or "Act") purpose of protecting public health and welfare and that will interfere with the ability of state and local government air pollution control agencies to comply with the Act's other provisions. Respondent attempts to dismiss Petitioner's claims on various procedural grounds that are without merit and defends the reasonableness of its decision by offering an interpretation of CAA section 231 that would grant more discretion to the agency than allowed by the statutory text and that does not take into account the nature of the Act as a whole. Respondent has not demonstrated that the rule is reasonable and in accordance with law. Therefore, Petitioner respectfully requests that this Court vacate the Aircraft Engine Emission Standards rule and order EPA to promulgate more stringent standards for aircraft engine emissions.

SUMMARY OF ARGUMENT

Petitioner's opening brief demonstrates that the National Association of Clean Air Agencies ("NACAA")[1] has standing to challenge the rule at issue in this petition and that EPA's rule is arbitrary, capricious, and not in accordance with CAA section 231, 42 U.S.C. § 7571. Respondent's argument that Petitioner does not have standing misconstrues this Circuit's relevant precedent and ignores NACAA member agencies' comments in the administrative record specifying a legally cognizable injury. Furthermore, Respondent's argument that the rule is in accordance with law and is not

[1] Petitioners State and Territorial Air Pollution Program Administrators ("STAPPA") and Association of Local Air Pollution Control Officials ("ALAPCO") have merged into a single trade association by the name of National Association of Clean Air Agencies ("NACAA"). Hereinafter, Petitioner will be referred to as NACAA.

arbitrary and capricious ignores the agency's findings that the new aircraft engine emission standards will hinder states in attaining or maintaining the national ambient air quality standards ("NAAQS") and disregards the forward-looking language in section 231 and the CAA as a whole. Additionally, Respondent misreads the text of section 231 as granting more discretion than the section's language permits in a failed attempt to justify its over-reliance on international standards and considerations of cost when developing the substance of the rule. Finally, EPA errs in asserting that Petitioner has waived its claims that EPA improperly relied on speculative safety concerns and improperly failed to establish a schedule for a follow-up rulemaking.

ARGUMENT

I. Petitioner NACAA Has Article III Standing to Bring This Petition

Respondent errs in claiming that Petitioner lacks Article III standing because, despite EPA's arguments to the contrary, NACAA member agencies have suffered a legally cognizable injury-in-fact that is traceable and redressable, and NACAA member agencies stated, in the administrative record, their concrete and particularized injury resulting from EPA's rule rendering further declarations in support of standing unnecessary. See Resp't Br. at 15-22.[2]

A. NACAA Member Agencies Have Suffered a Traceable, Redressable Injury-in-Fact

EPA's rule inflicts a managerial injury on NACAA member agencies that is legally cognizable for Article III standing purposes. Pet'r Br. at 14; see City of Sausalito

[2] As Respondent pointed out in its Brief, there was a small inconsistency as to whether Petitioner represents government agencies or officials because Petitioner stated, it its initial disclosure pursuant to Circuit Rule 26.1, that it represented government officials. Resp't Br. at 10 n.3, 17 n.5. Petitioner, throughout this litigation, has made clear that its members are state, territorial, regional, county, and city air pollution control *agencies*. See, e.g., Decl. S. William Becker at ¶ 1-3 (contained in addenda to Pet'r Br.) ; Pet'r Br. at 14; Revised Corporate Disclosure Statement Under Circuit Rule 26.1. Therefore, Respondent's characterization of NACAA's membership as limited to officials is incorrect. Resp't Br. at 10 n.3, 17 n.5.

v. O'Neill, 386 F.3d 1186, 1199 (9th Cir. 2004) (recognizing harm to municipal management as a cognizable injury for Article III standing). Under this rule, the emission of oxides of nitrogen ("NO_x") from aircraft will continue to rise and will contribute to increasing levels of ozone and particulate matter ("$PM_{2.5}$"). Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 70 Fed. Reg. 69664, 69670, 69677 (Nov. 17, 2005) (codified at 40 C.F.R. Pt. 87); Comment submitted by Nancy L. Seidman, STAPPA Chair, and Eric P. Skelton, ALAPCO Chair, Mobile Sources and Fuels Committee (OAR 2002-0030-0116) [JA___] ("[A]ircraft emissions are projected to approximately double by 2030 …."). These emissions will injure state and local air pollution control agencies by making it "more difficult and onerous" for them to devise and enforce state implementation plans ("SIPs"), which must demonstrate that the NAAQS for ozone and $PM_{2.5}$ will be attained and/or maintained. See West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004).

Respondent misreads relevant precedent from this Court in putting forward its argument that such a managerial injury is not sufficient for Article III standing. In West Virginia, this Court held that states were sufficiently injured for purposes of standing by an EPA rule that made "more difficult and onerous [their] task of devising an adequate SIP." Id. The Court's recognition of injury focused on the *effect* of EPA's rule, which made devising an adequate SIP "more difficult and onerous." That the rule in West Virginia directly imposed on states the duty to revise their SIPs is an immaterial distinction for purposes of standing.[3] Indeed, in New York v. EPA, 443 F.3d 880 (D.C.

[3] Respondent mistakenly attempts to distinguish the case at hand from the facts in West Virginia by saying that, in West Virginia, EPA directly imposed a new obligation on states while, here, it has simply passed a regulation that maintains the status quo. Resp't Br. at 16-18. Respondent's argument relies on an immaterial action/inaction distinction, which has not prevented this Court from accepting the standing of

Cir. 2006), this Court, without discussion, allowed states to contest an EPA rule that allegedly permitted increased emissions of pollutants and, therefore, made compliance with the NAAQS more difficult. Id. at 883-84; Final Opening Brief of Government Petitioners at 2 n.1, New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) (No. 03-1380) (citing West Virginia, 362 F.3d at 868). Thus, NACAA member agencies' have clearly alleged a cognizable injury by showing that, because of the laxity of the rule, NACAA members will have a more onerous managerial task in devising and implementing SIPs than they would under a more stringent aircraft emission standard. E.g. Pet'r Br. at 14; 70 Fed. Reg. at 69677 (noting that, "[a]s activity increases, aircraft would emit increasing amounts of NO_x in many nonattainment areas, and thus, aircraft NO_x emissions would further aggravate the problems in these areas . . . . [A]ttainment or maintenance of the NAAQS may depend upon aircraft engines being subject to a program of control compatible with their significance as pollution sources.").

EPA's attempt to contest that Petitioner has suffered a legally cognizable injury is further undermined by NACAA's limited burden in establishing its standing. NACAA need not prove direct harm as a result of the rule, but only demonstrate a "substantial probability" that its member agencies will experience a managerial injury. Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002) ("[A]n organization need not prove the merits of its case"; it must only demonstrate a "substantial probability" that injury will occur); cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 184 (2000) (holding

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petitioners who have asserted injury resulting from EPA's failure to act. See, e.g., Bluewater Network v. EPA, 372 F.3d 404, 410 (D.C. Cir. 2004) (without discussion, this Court found that an environmental organization had standing to object to an EPA rule, regulating marine engine emissions, which it felt was "simply an iteration of the status quo . . . ."); Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 280 (D.C. Cir. 1988) (granting standing to a national trade organization that claimed that "EPA's regulations are not comprehensive and strict enough to comply fully with the controlling statute . . . .").

that, in a citizen enforcement suit, plaintiff need only show "'[t]he reasonableness of [the] fear'" of injury (quoting Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983))). Thus, despite differences in the substance of EPA's rules at issue here and in West Virginia, petitioners in both cases allege the "substantial probability" of an identical managerial injury.

Further, if state and local agencies cannot comply with their SIPs, their states face potential federal sanctions, which include enforcement remedies and offset emissions from existing sources before a permit can be issued for a new or modified source. CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2); CAA § 179(b), 42 U.S.C. § 7509(b); see Davis v. EPA, 348 F.3d 772, 778 (9th Cir. 2003) (holding that California had standing to challenge an EPA decision under the CAA because "California faces remedial and proprietary consequences . . . ."). Thus, EPA's rule imposes a managerial injury on NACAA members that, in turn, poses a risk of further injury in the form of federal sanctions (enforcement remedies and increased emissions offsets) that can further injure state and local air pollution control agencies.[4]

Finally, Respondent's objection to traceability and redressability is tied to its erroneous argument that Petitioner has not asserted a legally cognizable injury. Resp't Br. at 21 n.8. The injury that NACAA members will suffer is directly traceable to EPA's rule because state and local air pollution control agencies are not permitted to "adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof . . . ." CAA § 233, 42 U.S.C. § 7573. Indeed, EPA, in issuing its rule, conceded that NACAA members' injury is redressable: "[m]ore stringent aircraft

[4] Respondent's argument that federal sanctions are immaterial because they "cannot personally apply" to air pollution control officials, Resp't Br. at 17 n.5, is irrelevant. NACAA represents state air pollution control *agencies*, which can be harmed by federal sanctions. See supra note 2.

engine NO_x standards may assist in alleviating . . . problems in nonattainment areas . . . ." 70 Fed. Reg. at 69677. Thus, Petitioner's injury can be redressed by a remand of this rule to EPA instructing the agency to impose more stringent standards.

B. The Administrative Record Demonstrates That NACAA Member Agencies Will Suffer Injury As a Result of EPA's Rule

Contrary to Respondent's contention, NACAA member agencies clearly asserted a concrete and particularized injury. Resp't Br. at 19. Pursuant to this Court's holding in Sierra Club, Petitioner need not submit additional affidavits on standing; NACAA has satisfied its burden because it can "identify in [the] record evidence sufficient to support its standing . . . ." Sierra Club, 292 F.3d at 899. NACAA members Texas Commission on Environmental Quality ("TCEQ") and South Coast Air Quality Management District ("SCAQMD") govern regions in nonattainment for ozone. 70 Fed. Reg. at 69668-69; Decl. S. William Becker at ¶ 11, 13 (contained in addenda to Pet'r Br.) (noting that TCEQ and SCAQMD are members of NACAA). Both agencies alleged that EPA's rule will harm their ability to develop and implement SIPs to meet the ozone NAAQS. TCEQ specifically stated that the rule's failure to sufficiently curb emissions "substantially increases the challenge that states face in developing 8-hour ozone implementation plans." Comments submitted by Margaret Hoffman, Executive Director, Texas Commission on Environmental Quality (OAR-2002-0030-0120) [JA___]. SCAQMD specified an identical managerial injury in its comments. Comment submitted by Barry R. Wallerstein, D. Env., Executive Officer, South Coast Air Quality Management District (OAR-2002-0030-0104) [JA___] ("[SCAQMD] has a difficult challenge to reach attainment of the [ozone NAAQS]. In order to reach this goal, it will be necessary to seek emission reductions from all sources including those under federal jurisdiction such

as aircraft."). Thus, both member agencies clearly noted, in the administrative record, that EPA's failure to control or reduce aircraft emissions through this rulemaking makes "more difficult and onerous" their managerial duty to attain the ozone NAAQS.

NACAA member agencies have met the three Constitutional prerequisites to bring this case in their own right by demonstrating, in the administrative record, injury-in-fact, traceability, and redressability. Therefore, as EPA concedes that Petitioner meets the other two requirements for associational standing (the interests NACAA seeks to protect are germane to its associational purpose and neither the claim asserted nor the relief requested requires individual participation by NACAA members), Resp't Br. at 16, NACAA has Article III standing to contest this rulemaking. See Sierra Club, 292 F.3d at 898 (stating the requirements for associational standing under Article III).

II. EPA's Rule Is Not in Accordance with the Statutory Framework of the CAA

Respondent's contention that its rule complies with the CAA's framework, because it helps states meet the NAAQS, Resp't Br. at 28, is plainly refuted by the administrative record. Under the second step of Chevron,[5] a court may only defer to an agency's interpretation in issuing a rule if it is reasonable and consistent in light of "'the design of the statute as a whole.'" United States ex rel. Findley v. FPC-Boron Employee's Club, 105 F.3d 675, 681 (D.C. Cir. 1997) (quoting Crandon v. United States, 494 U.S. 152, 158 (1990)) ; see also Hill v. Norton, 275 F.3d 98, 105 (D.C. Cir. 2001) (citing Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1049 (D.C. Cir. 1997)). A core aspect of the CAA framework "is the requirement that each State formulate, subject to EPA approval, an implementation plan designed to achieve national primary ambient air

[5] Chevron Step II refers to the standard of review for an agency's interpretation of its statutory authority set forth in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See Pet'r Br. at 16.

quality standards[,] those necessary to protect the public health . . . ." Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976); see CAA §§ 107-10, 42 U.S.C. §§ 7407-10. EPA's rule upsets this statutory scheme by permitting an increase in NO_x emissions that interferes with the states' ability to attain or maintain the NAAQS for ozone and $PM_{2.5}$. 70 Fed. Reg. at 69677 ("[A]ttainment or maintenance of the NAAQS may depend upon aircraft engines being subject to a program of control compatible with their significance as pollution sources . . . . EPA, therefore, is considering . . . more stringent future standards, beyond today's standards."). State and local regulators have no ability to protect against this deviation from the statutory scheme because the CAA gives EPA sole authority to regulate aircraft emissions. CAA § 233, 42 U.S.C. § 7573.

Respondent ignores its own administrative record when it argues that the rule represents a reduction in allowable emission levels for newly designed and certified aircraft engines and, thus, "can only help States in their efforts to develop SIPs to meet the NAAQs [sic]." Resp't Br. at 28. In the preamble, EPA conceded that the rule "results in no actual emissions reduction" beyond what has already been accomplished by market forces. 70 Fed. Reg. at 69676, 69680. Further, EPA's assessment that attainment or maintenance of the NAAQS will require a more stringent rule,[6] id. at 69677, demonstrates that the current rule conflicts with the statutory framework.

Amici, Air Transport Association of America, Inc. and Aerospace Industries Association, in their attempt to defend the aircraft emissions rule, misconstrue

[6] Though EPA stated that "aircraft *would* emit increasing amounts on NO_x in many nonattainment areas" so that "attainment or maintenance of the NAAQS *may* depend upon" more stringent regulation, 70 Fed. Reg. at 69677 (emphasis added), EPA elsewhere stated that aircraft NO_x emissions are expected to grow, id.; id. at 69669 ("[A]ircraft activity *will* now increase . . . 22 percent in the period 2000-2015.") (emphasis added). Thus, despite EPA's attempt to use conditional language when describing its rule's impact on "attainment or maintenance of the NAAQS," the record shows that this negative impact will be actual.

Petitioner's position as implying that state agencies can use SIPs to "constrain EPA to adopt specific emissions standards for aircraft or compel EPA to cede its exclusive regulatory authority [under section 233] to set such standards." Amici Br. at 11; CAA § 233, 42 U.S.C. § 7573. Petitioner does not, could not, and need not, make such broad claims. Petitioner merely relies upon the accepted proposition that EPA cannot, in accordance with the CAA, issue a rule under Title II of the statute that interferes with the statutory scheme set out in Title I. Findley, 105 F.3d at 681 ("'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" (quoting Crandon, 494 U.S. at 158)). This rule, by EPA's own account, does just that. See 70 Fed. Reg. at 69677 (noting that, because of increased aircraft NO_x emissions, attainment or maintenance of the NAAQS will require a more stringent regulation).

Further, EPA and Amici mischaracterize Petitioner's argument that section 231 is technology-forcing, Resp't Br. at 22-27; Amici Br. at 5-10, 16-17, in their attempt to justify the issuance of a rule that is not in accordance with both the forward-looking language of section 231 and the design and purpose of the CAA. See Pet'r Br. at 17 (asserting that EPA's rule "is not a reasonable interpretation of the forward-looking language in CAA section 231 and is inconsistent with the Act's overall purpose and legislative history"). It is beyond dispute that the CAA is forward-looking. See Natural Res. Def. Council, Inc. v. EPA, 655 F.2d 318, 328 (D.C. Cir. 1981) ("The legislative history of both the 1970 and the 1977 amendments demonstrates that Congress intended the agency to project future advances in pollution control capability."). The disconnect between this rule and the framework and purpose of the CAA is highlighted by EPA's

own inability to reconcile the two—i.e., on the one hand, EPA admitted that section 231 includes "forward-looking language," 70 Fed. Reg. at 69676, while, on the other hand, it issued a regulation that merely ensures new engines "will not perform worse than today's current engines," id. at 69675.

III. Respondent's Brief Misinterprets Section 231 As Giving More Discretion to EPA Than the Text Allows

Respondent misreads section 231(a)(3) as granting the EPA Administrator the power to "adopt final aircraft emission rules 'as he deems appropriate'" by taking the statutory language out of context. See Resp't Br. at 24 (quoting CAA § 231(a)(3), 42 U.S.C. § 7571(a)(3)) . Section 231(a)(3) does not relate to the content of rules, but rather directs the Administrator to hold public hearings on proposed rules and "issue such regulations with such *modifications as he deems appropriate*." CAA § 231(a)(3), 42 U.S.C. § 7571(a)(3) (emphasis added). Under the well-accepted rules of statutory interpretation, the phrase "deems appropriate" must be construed as only referring to "modifications" to proposed rules suggested during the comment period, and cannot be extended to the separate provision governing the content of regulations. See United States v. Pritchett, 470 F.2d 455, 459 (D.C. Cir. 1972) ("[Q]ualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote."). The Administrator must base the *substance* of EPA's regulations on the criteria laid out in 231(a)(2)(A), which does not authorize the Administrator to adopt rules "deem[ed] appropriate." CAA § 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A). Rather, it directs the Administrator to regulate aircraft emissions "which may reasonably be anticipated to endanger public health or welfare." Id.

Consequently, Respondent's reliance on the "deems appropriate" language to justify promulgating a rule that mirrors international standards is also misplaced. Resp't Br. at 24. Compliance with the CAEP/4 international standard constituted the basis for the proposed rule. Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 68 Fed. Reg. 56226, 56226 (proposed Sept. 30, 2003) ("Today's proposed amendments . . . are those recommended by ICAO . . . . Thus, today's action would establish consistency between U.S. and international standards, requirements, and test procedures."). However, consistency with international standards is not a statutory consideration for issuing proposed regulations under section 231(a)(2)(A). CAA § 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A). Thus, EPA's reliance on the "deems appropriate" language to justify adoption of the CAEP/4 standards in toto, without ensuring that such standards will also protect the "public health or welfare," is an arbitrary and capricious interpretation of section 231 and not in accordance with the CAA.[7]

IV. EPA's Delay in Issuing This Rule Is Arbitrary and Capricious and Its Excuse of Lack of Cost of Compliance Data Is Not in Accordance with the CAA

EPA's delay in issuing this rule, justified on the ground that the rule simply restates what market forces have already accomplished, is not a reasonable excuse for failing to pass a regulation that adequately protects the "public health or welfare." CAA § 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A). Throughout the preamble to the rule, EPA

[7] Amici argue at length that Petitioner fails to appreciate the importance of complying with international standards. Amici Br. at 17-23. Petitioner does not dispute that the international standards are important in ensuring "public health or welfare" and, thus, provide a useful *minimum* level of emissions regulation. But, Amici's insistence that EPA not adopt more stringent standards than ICAO because of the potential commercial impact, id. at 22, improperly asks EPA to consider matters well beyond the scope of section 231(a)(2)(A). Therefore, the ICAO standards cannot be viewed as both an upper and lower limit on acceptable regulations. Indeed, EPA concedes that, under the Chicago Convention, "it is anticipated that some states may adopt standards that are more stringent than those agreed upon by ICAO." 70 Fed. Reg. at 69667.

blamed the rule's lack of more stringent emission standards on insufficient time. For example, EPA asserted, "We did not propose more stringent NO_x standards primarily because we needed more time to better understand the cost of compliance of such standards." 70 Fed. Reg. at 69678. EPA also asserted that the purpose of the rule is to align U.S. and international standards, and that there was insufficient time, in this rulemaking, to investigate more stringent standards. Id. ("[W]e need to first adopt the standards equivalent to CAEP/4 today since we have already gone past the CAEP/4 implementation date."). Despite the agency's repeated reliance on urgency, EPA delayed the rulemaking's effective date to two years past the CAEP/4 implementation date. The inconsistency between EPA's professed need for haste in issuing this rule and its delay in commencing this rulemaking and promulgating the final regulation is not sufficiently explained in the rule's preamble and renders the rulemaking arbitrary and capricious.[8]

EPA assertion in its brief that its timing for this rulemaking "was particularly reasonable because international market forces provided strong incentives for manufacturers to design new engines that achieve significant reductions in emissions even absent domestically enforceable standards," Resp't Br. at 33, is absurd. Essentially, EPA is saying that its delay was reasonable because the rule has no actual impact on emissions standards. This makes no sense and simply emphasizes Petitioner's position that this is a "do-nothing" rule. Furthermore, EPA's reliance on the supposed reasonableness of its delay to justify why a rule that would actually effect emissions in

[8] Respondent's argument that Petitioner criticized EPA's "rulemaking pace," but did not raise objections in the record "'with reasonable specificity'" to EPA's decision to adopt near-term standards, and, therefore, Petitioner waived *all* arguments as to the timing of the rule, Resp't Br. at 31 (quoting CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B)), does not make sense. As conceded by EPA, Petitioner and its member agencies specifically complained about EPA's delay in promulgating this rule. Id. Thus, Petitioner has certainly not waived its right to contest the issue of delay in relation to the rule's timing.

the interest of the public health was not passed, 70 Fed. Reg. at 69678; Resp't Br. at 33-34, is circular and does not adequately explain the dichotomy between the agency's urgency to align with international standards and its delay in finalizing this rule.

EPA's reliance on the fact that it had inadequate data regarding cost of compliance as further justification for lack of time to issue standards more stringent than those imposed by CAEP/4, 70 Fed. Reg. at 69678; Resp't Br. at 34, is also untenable. The statute directs the agency to consider cost only when determining the effective date of the regulations, not the substance of the rule. The factors EPA must take into account when determining the substance of its regulations are governed by section 231(a)(2)(A), which does not mention cost as a consideration. CAA § 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A). EPA attempts to read into this provision the "cost of compliance" language from section 231(b), which pointedly only addresses the timeframe between promulgation of a rule and the rule taking effect. CAA § 231(b), 42 U.S.C. § 7571(b) ("Any regulation prescribed under this section (and any revision thereof) shall take effect after such period as the Administrator finds necessary (after consultation with the Secretary of Transportation) to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period."). The Supreme Court has "refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 467 (2001) (citing Union Elec. Co. v. EPA, 427 U.S. 246, 257 n.5 (1976)). Thus, EPA's reliance on cost is impermissible in the absence of specific statutory authority.

EPA's justification that it did not have sufficient time to issue more stringent standards based on inadequate data on cost of compliance is improper, misreads the statute, and renders its rule arbitrary and capricious. Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (stating that a rule is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider . . . ."). Although EPA is not required to place this rulemaking ahead of other agency priorities, Resp't Br. at 34 (citing Associated Gas Distribs. v. FERC, 824 F.2d 981, 1039 (D.C. Cir. 1987)), it is required to give a reasoned explanation for its course of action, State Farm, 463 U.S. at 43, and it has not done so here.

V. EPA Improperly Relied on Speculative Safety Concerns and Petitioner Is Not Barred From Raising This Claim

Respondent's assertion that Petitioner waived its claim regarding EPA's reliance on speculative safety concerns because Petitioner did not object to this during the public comment period, Resp't Br. at 35 (citing CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B)), is without merit. Petitioner did not have an opportunity to object to EPA's reliance on safety concerns during the comment period because EPA did not mention it in the proposed rule and discussed it only in the preamble to the final rule.[9] Therefore, this Petition for Review was NACCA's first occasion to object to the agency's over-reliance on safety in the final rule.

EPA's assertion that its rule did not rely on considerations of safety, Resp't Br. at 35, is belied by the final rule's preamble. In the preamble, EPA spent considerable time noting industry's concerns about the effect of a more stringent standard on safety,

[9] In the proposed rule, EPA's sole justification for the lack of more stringent standards was its stated intent to adopt the CAEP/4 standards by January 2004, and to defer the issuance of more stringent standards until more data on cost of compliance was available from the CAEP/6 meeting in February 2004. 68 Fed. Reg. at 56240.

emphasizing that EPA ought to give greater weight to considerations of safety, and indicating that safety factored into its final decision. 70 Fed. Reg. at 69676.

Despite the assertions in the Amici brief, NACAA does not seek to write "safety" out of this section of the statute. Amici Br. at 15-16. Petitioner agrees that any regulation that would compromise the safety of aircraft should not be issued. However, the primary purpose of the CAA as a whole, and this section in particular, is to prevent air pollution that is harmful to public health and welfare, not to ensure airline safety. As Amici point out, aircraft safety is the primary objective of the Federal Aviation Act. Id. at 15. Petitioner's position that EPA must first identify emission standards that adequately protect public health and welfare, and, only then, ensure that the selected standards will not adversely affect aircraft safety parallels the language of section 231. CAA § 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A) ("The Administrator shall . . . issue proposed emission standards applicable to the emission of any air pollutant from . . . aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare."); CAA § 231(a)(2)(B)(ii), 42 U.S.C. § 7571(a)(2)(B)(ii) ("The Administrator shall not change the aircraft engine emission standards if such change would significantly increase noise and adversely affect safety.") Here, however, EPA, without support, noted that more stringent standards would likely implicate safety concerns before ever determining that its rule would protect public health and welfare. Thus, EPA used an unsubstantiated conclusion about aircraft safety to trump the primary directive of section 231 as laid out in subsection (a)(2)(A). CAA § 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A).

VI. Petitioner Has Not Waived Its Claim That EPA Improperly Failed to Establish a Schedule for a Follow-Up Rulemaking

Respondent's assertion that NACAA waived its claim regarding EPA's failure to establish a schedule for a follow-up rulemaking because Petitioner did not assert this with "reasonable specificity" during the public comment period, Resp't Br. at 41 (citing CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B)), is meritless. Petitioner clearly asserted in its comments that it "firmly believe[s] that EPA has an obligation to immediately follow this rulemaking with further, more aggressive regulatory action . . . to control emissions from aircraft . . . ." Comment submitted by Nancy L. Seidman, STAPPA Chair, and Eric P. Skelton, ALAPCO Chair, Mobile Sources and Fuels Committee (OAR 2002-0030-0116) [JA___].

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court vacate the Aircraft Engine Emission Standards rule and order EPA to promulgate more stringent standards for aircraft engine emissions.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD VOLUME LIMITATIONS

I hereby certify that the foregoing brief of Petitioner complies with Fed. R. App. P 32(a)(7). The word count function of the word processing system used to prepare this brief indicates that it contains 5,075 words (inclusive of footnotes, headings, and citations, but exclusive as to certificates as to parties, rulings and related cases, tables of contents and authorities, glossary, attorney's certificates, and addenda).

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Hope M. Babcock

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October 2006, I caused a true copy of the foregoing "Initial Reply Brief of Petitioner National Association of Clean Air Agencies" to be served, postage pre-paid, via the U.S. Postal Service, on Steven E. Rusak, Counsel for Respondent, at the United States Department of Justice, Environment and Natural Resources Division, 1961 Stout Street, 8th Floor, Denver, CO 80294; Thomas Richichi, Counsel for amici curiae Aerospace Industries Association and Air Transport Association of America, Inc., Beveridge and Diamond, P.C., 1350 I Street, N.W., Suite 700, Washington, D.C. 20005-3311; and Mac. S. Dunaway, Counsel for amicus curiae Aerospace Industries Association, Dunaway & Cross, 1100 Connecticut Ave., N.W., Suite 410, Washington, D.C. 20036.

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