ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1268

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

STATE OF KANSAS, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review from the Environmental Protection Agency

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*
API	American Petroleum Institute
Aromatics	Chemicals used in gasoline to increase octane levels that increase emissions of particulate matter, volatile organic compounds, nitrogen oxides, and other air toxics.
Blendstock	The base gasoline fuel to which ethanol is added in an ethanol-gasoline blend
CO	Carbon monoxide
Conformity analysis	A State's required demonstration that its federally funded activities, including transportation projects, "conform to" an applicable SIP and will not delay compliance with the applicable NAAQS. 42 U.S.C. § 7506(c)(1).
Distillation temperature	The temperature at which a given percentage of a fuel's volume vaporizes
DOT	Department of Transportation
E15	Gasoline with 15% ethanol
EPA	Environmental Protection Agency
EPAct	The Energy Policy Act of 2005, Pub. L. 109-58, 42 U.S.C. § 15801 et seq.
EPAct study	A study of the effects of several fuel components on air pollution, on which the MOVES2014 model's emissions factors are based
Ethanol	A clean, high-octane biofuel additive for gasoline, commonly made from corn

Match blending	The formulation of ethanol-blend test fuels using pre-adjusted gasoline blendstocks to maintain select fuel parameters with the addition of ethanol
MOBILE4.1	EPA's first vehicular emissions model promulgated in response to the Clean Air Act Amendments of 1990
MOBILE5	EPA's 1993 major update to the MOBILE4.1 model
MOBILE5b	EPA's 1996 interim update to MOBILE5a
MOBILE6	EPA's 2002 major update to the MOBILE5 model
MOVES2010	EPA's first official Motor Vehicle Emission Simulator (MOVES) model, adopted in 2010 to replace MOBILE6.2
MOVES2010b	EPA's 2012 minor update to MOVES2010a
MOVES2014	EPA's 2014 "major revision" of its vehicular emissions model for use in SIPs, conformity analysis, and hot-spot analysis, incorporating the EPAct study's results
NAAQS	National Ambient Air Quality Standards for pollutants, including ozone, particulate matter, and sulfur dioxide, promulgated by EPA pursuant to 42 U.S.C. § 7409(a)(1)
Nonattainment area	A metropolitan statistical area within a State that is not in compliance with a NAAQS
SIP	State Implementation Plan, describing a State's proposed policies for bringing its nonattainment areas into compliance with a NAAQS

T50	Temperature at which 50% of a fuel's volume vaporizes
T90	Temperature at which 90% of a fuel's volume vaporizes

SUMMARY OF ARGUMENT

The States have standing because their injuries were imminent when they filed their petition. The challenged Official Release of the MOVES2014 model compels States like Kansas and Nebraska that are in nonattainment with the new Ozone NAAQS to use the model in developing their SIPs, and the Administrator had proposed the NAAQS ten days before the States filed their petition. App. 521.

By contrast, EPA's conjecture that EPA might voluntarily fix the model's problems or approve an alternative model before the States' nonattainment areas are designated is pure speculation, and does not defeat standing. *See Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 190 (D.C. Cir. 2014) (*Oklahoma*).

EPA silently concedes that the Official Release is not an interpretive rule or a procedural rule. But that pronouncement is not a policy statement either, because it "appears on its face to be binding." *EPIC v. DHS*, 653 F.3d 1, 7 (D.C. Cir. 2011). It is of no moment that the general requirement to use EPA's latest model is found in a properly promulgated rule. This Court has demanded notice-and-comment rulemaking for other air pollution models that are required by the Clean Air Act and its implementing rules. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 383–84 (D.C. Cir. 1979). EPA's self-serving

characterization of its pre-1990 model as a "flexible tool" has no bearing on the status of MOVES2014. *Cf. McLouth Steel Prods. Corp. v Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). This Court has already rejected EPA's argument that its authority to approve alternative models renders the prescribed model a policy statement. *See Alabama Power*, 636 F.2d at 384. And EPA's allegedly "flexible" approach to the model is inconsistent with history.

EPA should have provided MOVES2014 to the Science Advisory Board, because it consulted with the Department of Transportation about the model as EPA's rules require. *See* 40 C.F.R. § 93.111(b). Indeed, DOT participated in EPA's MOVES Review Work Group, App. 110, and "coordinated closely" on EPA's MOVES2014 guidance document, App. 310.

This Court should review Petitioners' extra-record evidence, because "the procedural validity of the agency's action remains in serious question." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). To hold otherwise would allow EPA's failure to invite comment to defeat this Court's power of judicial review. *See Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

The harmless error doctrine does not apply where, as here, EPA "evad[ed] altogether the notice and comment requirements." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014). In any event, Petitioners have demonstrated prejudice by showing that they "would have

more thoroughly presented [their] arguments" in a rulemaking proceeding. *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003).

ARGUMENT

I. THE STATES HAVE STANDING.

On October 1, 2015, as expected, EPA finalized its new National Ambient Air Quality Standard (NAAQS) for Ozone, setting a standard of 70 parts per billion, that will inevitably put Kansas and Nebraska into nonattainment. App. 527; *cf.* Opening Br. 24–25. Under current law, therefore, the States will be required to submit State Implementation Plans (SIPs) based on the MOVES2014 model. *See id.* at 25. The Official Release of the model thus directly regulates the States, constraining their policy choices and imposing compliance costs, as well as dirtying their air and diminishing their tax revenues. *See* Opening Br. 24–30.

A. The States Are Directly Regulated by the Official Release, Because They Must Use MOVES2014 in SIPs.

1. The States' Nonattainment Designations Are—and Were—Imminent Under the New Ozone Standard.

EPA's attack on the States' standing to challenge the Official Release is based on its observation that when the States filed their petition (on the day before it was due) the new Ozone NAAQS had not yet been published in the

Federal Register. According to EPA, this means the States' injury was speculative. But Administrator Gina McCarthy had already signed the proposed rule on November 25, 2014. App. 521. And that proposed rule is consistent with the standard EPA has since finalized. App. 527.

To be sure, the proposed rule had only been published on the Agency's website and submitted for publication when the States filed their petition. *See* App. 521. But that detail has no bearing on the concreteness or imminence of the States' injury. "[G]overnment-produced documents" like the pre-publication version of the proposed Ozone Rule are entitled to a "presumption of regularity." *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012).

True to form, the proposed rule was published in the Federal Register on December 17, 2014, 79 Fed. Reg. 75234, and the final rule was announced on October 1, 2015, App. 527, as required by a court order that was in place when the petition was filed in this case, App. 530. There was nothing speculative about Petitioners' accurate anticipation of the Ozone NAAQS.

2. EPA's Speculation Does Not Defeat Standing.

In an effort to cast doubt on the imminence of the States' injuries, EPA speculates that it might replace MOVES2014 with a new model in the ordinary course of business before Kansas and Nebraska begin work on their SIPs in response to EPA's formal nonattainment designations. EPA Br. 36.

But unless EPA concedes that a new model is necessary (or this Court vacates the current model), MOVES2014 will remain in place indefinitely. Although EPA must "review" its model every three years, it need only "revise" the model when it deems revision "necessary." 42 U.S.C. § 7430. The States are not deprived of standing by the mere possibility that EPA *might* rescind and replace MOVES2014 in the future. "[A]ll laws are subject to change…. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (*Appalachian I*).

It is unlikely that EPA will voluntarily replace MOVES2014 before EPA approves Kansas and Nebraska's initial ozone nonattainment designations—most likely by October 1, 2017—and the obligation to develop SIPs attaches. *See* App. 528. MOVES2014 was released four and a half years after MOVES2010, the last major revision to EPA's vehicular emissions model. App. 421 (75 Fed. Reg. 9411). And MOVES2010 was released eight years after MOBILE6, App. 386 (67 Fed. Reg. 4254), which came nine years after MOBILE5, App. 371 (58 Fed. Reg. 7780).

It is therefore substantially likely that MOVES2014 will remain in effect when Kansas and Nebraska develop and submit their SIPs. That is sufficient for standing. *See Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir.

1990) ("[S]ubstantial likelihood of the alleged causality meets the test."). And even if EPA decides to revise MOVES2014 sooner than that, there is no reason to believe EPA will voluntarily abandon the controversial EPAct study results that are the source of the States' injury.

Next, EPA speculates that EPA might approve an alternative model for Kansas and Nebraska to use instead of MOVES2014. EPA Br. 58. This scenario would require Kansas and Nebraska both to submit an alternative model that corrects MOVES2014's mistakes, and it would require EPA to grant both States' requests, thereby remedying their injuries. Even if it were possible for Kansas or Nebraska to produce its own model, EPA would still have to approve the model before any State would be allowed to use it. 42 U.S.C. § 7430. Before it could do so, EPA would have to determine that the proposed model embodies "improved emissions estimating techniques" as compared to MOVES2014. *Id.*

That is unlikely. EPA is generally ill disposed to States' alternative air pollution models, and the courts are deferential to EPA's preference for its own model. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1052–53 (D.C. Cir. 2001) (*Appalachian II*). EPA is especially unlikely to find that a rival model—especially one that corrects the defects Kansas and Nebraska have identified in MOVES2014—offers "improved emissions estimating techniques": In EPA's

view, MOVES2014's reliance on the EPAct study data gives the model an "enhanced ability to estimate emissions." EPA Br. 71. EPA offers no reason to believe it would approve an alternative model that jettisons that data.

Even if there were some remote possibility that EPA might approve a hypothetical alternative model that corrects MOVES2014's defects, "[t]he possibility of an alternative remedy, of uncertain availability and effect," would not defeat standing. *Oklahoma*, 740 F.3d at 190 (Oklahoma had standing to challenge EPA's Federal Implementation Plan for Indian country, even though a statute provided that Oklahoma could simply ask EPA to approve a SIP for that area).

As in *Oklahoma*, the alternative remedies suggested here (EPA's promulgation of a hypothetical corrected model or approval of an alternative model) are "[un]certain," *id.* at 190 n.4, "[in]complete," *id.*, and contingent on the actions of EPA itself, *id.*, which has "stopped short" of stating that it would actually take these discretionary actions, *id.* Therefore they do not deprive this Court of jurisdiction.

Finally, even if EPA's hypothetical alternative remedies came to pass, that would not redress the environmental and financial injuries that Kansas and Nebraska incur from *other* States' use of MOVES2014 in the meantime. *See* Opening Br. 26–28.

B. Increased Air Pollution and the Resulting Delay in NAAQS Attainment Are Injuries to the States as States.

EPA mischaracterizes the States' air quality injury as an injury to "the health and welfare of their citizens" that the States seek to vindicate as *parens patriae.* EPA Br. 37 (quoting Opening Br. 26). The States allege that the model's erroneous predictions about ethanol's emissions effects and resulting air pollution will "delay[] NAAQS attainment." Opening Br. 27; *see id.* at 39; *see* Brunetti Declaration, at A-3, ¶ 17. That is a regulatory harm that applies only to the States as States, and not to their residents.

The Supreme Court has held that States seeking to vindicate such "quasi-sovereign interests" under the Clean Air Act are "entitled to special solicitude in [the Court's] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Rather than distinguishing the States' case from *Massachusetts*, EPA mischaracterizes their claims as "allegations of universal harm on behalf of the States' residents." EPA Br. 38–39.

The use of the words "could" and "may" in the Brunetti Declaration does not undermine Petitioners' standing. Brunetti's evidence establishes that Kansas "*will*" be in nonattainment with the Ozone NAAQS; that Kansas "*will*" have to submit a SIP; and that Kansas "*will*" have to pay for training on MOVES2014. Brunetti Declaration, at A-1, A-2, ¶¶ 6, 7, 12. In addition, Petitioners' other evidence establishes (1) the design flaws in the EPAct study,

see Opening Br. 47–55 & Addenda C–E; App. 587 (Anderson); (2) the inconsistency between the MOVES2014 model's default fuel parameters and real-world fuel, *see* Opening Br. 57–60 & Addendum F; (3) the emissions estimates generated by MOVES2014, *see* Wilkinson Declaration, A-28 to A-29, ¶¶ 32, 34; and (4) the inconsistency between those estimates and real-world measurements, *see* Opening Br. 55–57.

C. The States' Air Quality and Tax Revenue Injuries Do Not Depend on the Actions of Third Parties.

If EPA's vehicular emissions model were corrected to accurately estimate ethanol's emissions effect, then Kansas and Nebraska, each by its own policy choices, could achieve cleaner air and support domestic industry by using tax policy or other regulatory mechanisms to "encourage gasoline retailers to market E15"—an EPA-approved fuel—more aggressively than gasoline containing lower levels of ethanol. *See* Brunetti Declaration at A-3, ¶ 16. This would not require any action by other States or complex causal chains. It would require retailers and drivers only to respond to basic economic incentives, which the standing doctrine assumes they will do. *See Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 248 (D.C. Cir. 2013).

D. The States' Policy-Constraint Injury Would Be Remedied if the Model Were Corrected.

EPA does not deny that if the model were corrected to accurately reflect ethanol's emissions benefits, a SIP of the sort Kansas wants to implement could promote ethanol use in fuel. *Cf.* Opening Br. 28–29. But EPA implies (without description or explanation) that such a SIP might not "comply with a restrictive cap on the number of" so-called "boutique fuels" that may be approved in SIPs. EPA Br. 43.

The statute and rule EPA cites concern only SIPs that "control or prohibit … the use of a fuel or fuel additive." 42 U.S.C. § 7545(c)(4)(C)(i). The boutique fuel provisions place no limitation on SIPs like the one Kansas desires that simply "*encourage* gasoline retailers to market E15" and any higher ethanol blends sanctioned by EPA in the future. Brunetti Declaration at A-3, ¶ 16. And they place no limitation whatsoever on E15—a fuel that EPA has already approved under its § 7545(f) waiver authority and that is registered under § 7545(b)); *see* 42 U.S.C. §§ 7545(c)(4)(C)(v)(I); 7545(c)(4)(C)(v)(VI); *cf.* 71 Fed. Reg. 78192, 78198 (characterizing "biofuels" and "oxygenated gasoline" as "unlisted fuels" that are "not on the boutique fuels list").

Even if the boutique fuel cap were relevant here, it does not prohibit states from adopting new boutique fuels but only limits each State to the

number of boutique fuels that its SIPs required as of September 1, 2004. 71 Fed. Reg. at 78198.

The hurdles EPA hints at are illusory, but even if they were real, additional regulatory requirements governing SIPs would not defeat standing. Redressability can be assumed when petitioners assert a procedural violation like EPA's failure to give notice and accept comments. *See* Opening Br. 30. Moreover, the redressability requirement does not require petitioners to "show that they are *certain*, ultimately, to receive" the regulatory benefit sought. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

E. Kansas's Compliance Costs Are Not Speculative.

Kansas demonstrated that it will incur compliance costs as a result of MOVES2014, including, *inter alia*, the cost of training modelers in its Department of Health and Environment on the new model. Opening Br. 29–30. These costs are not "speculative." EPA Br. 44.

The Director of Kansas's Air Bureau declared that the State's compliance costs for training are "certain," albeit "in an unknown amount." Brunetti Declaration at A-2, ¶ 12. A financial injury creates standing even when its magnitude is unknown. *See, e.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 100 (D.C. Cir. 2004) (petitioner had self-evident standing, articulated for the first

time in a reply brief, based on unspecified "costs of complying" with challenged regulations).

Even the "threat of relatively small financial injury [is] sufficient to confer Article III standing." *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 454 (D.C. Cir. 2004).

Kansas demonstrated that its MOVE2014-related training costs will exceed the State's ordinary expenses. Director Brunetti explained that the Kansas Department of Health and Environment "presently has two (2) modelers" who "are already trained and experienced in using MOVES2010b," the predecessor of the new model. Brunetti Declaration at A-2, ¶ 12. As EPA admitted, *see* App. 437, those two modelers "will have to acquire additional training in order to effectively run and oversee the MOVES2014 model." Brunetti Declaration at A-2, ¶ 12.

II. THE OFFICIAL RELEASE IS FINAL AGENCY ACTION, AND THE STATES CANNOT REDRESS THEIR INJURIES IN A FUTURE SIP PROCEEDING OR BY REQUESTING APPROVAL FOR AN ALTERNATIVE MODEL.

EPA's finality argument boils down to its contention, addressed below, that the Official Release is not a rule but a policy statement. EPA Br. 47. EPA does not explicitly argue that Petitioners' claim is unripe, but it does contend that the States should have waited to raise their challenge to MOVES2014 in the context of a SIP approval proceeding.

The time to challenge a model like MOVES2014, however, is when the model is finalized, not in each of its myriad regulatory applications. Thus, in *Eagle-Picher Indus., Inc. v. EPA*, this Court held that a challenge to EPA's Hazardous Ranking System—a model used to prioritize contaminated sites for remediation—was "barred as untimely" when petitioners raised it in a subsequent listing decision, rather than within the statutory review period for challenging the model itself. 759 F.2d 905, 909 (D.C. Cir. 1985).

This Court held that "the challenge to the [model] was ripe during the statutory review period," *id.*, even though the model did not by itself determine whether any given site would ultimately be subject to remediation, *id.* at 911. The Court noted that requiring a challenge to the model to be brought within the statutory review period "serve[s] 'the important purpose of imparting finality into the administrative process, thereby conserving administrative resources.'" *Id.* Those purposes would be undermined if interested parties had to challenge EPA's generally applicable vehicular emissions model in each individual SIP, conformity determination, and other regulatory application, rather than all at once within the judicial review period following the model's release.

As the Court—and EPA—noted in *Eagle-Picher*, "[i]f … the [model] could be challenged by different petitioners each time [it is used to list new

hazardous waste sites], the EPA would be forced, contrary to the will of Congress, to defend the HRS repeatedly, wasting both time and funds that would be better spent cleaning up hazardous wastes that threaten human health and the environment." *Id.* at 916-17. So too here.

If the parties had taken EPA's suggestion and challenged MOVES2014 in the context of individual SIP approvals, EPA would have argued, *as it has in the past*, that the States should have challenged EPA's model within the statutory judicial review period following its official release, *see id* at 912; *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1032 (D.C. Cir. 2001) (*Appalachian III*), and that individual challenges to an air pollution model must bow to the Agency's interest in maintaining a single, consistent model for use by multiple states, *see Appalachian II*, 249 F.3d at 1052.

Under EPA's theory of the case, no one may challenge the MOVES2014 model unless it has an alternative model to propose. *See* EPA Br. 57–58. That is an unreasonable burden to impose on the States, which are not in a position to develop their own models, and it would flip on its head the APA's presumption of reviewability. *See generally Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014).

If a State were to use an alternative emissions model in its SIP, the consequence of EPA rejecting it would be the imposition of a federal

implementation plan. That is a risk States would prudently avoid. *See* 42 U.S.C. § 7410(c). The impracticability of EPA's suggestion demonstrates why the Official Release must be reviewable final agency action.

III. THE OFFICIAL RELEASE IS NOT A POLICY STATEMENT.

A. The Official Release Is Binding on its Face.

EPA admits that the Official Release "contains language that sounds compulsory." EPA Br. 61. That admission forecloses EPA's contention that the Official Release is a mere policy statement. For, as EPA also admits, a rule is deemed to have a "present binding effect" and therefore requires notice-and-comment procedure "when the agency pronouncement 'appears on its face to be binding.'" EPA Br. 60 (quoting *EPIC*, 653 F.3d at 7). EPA dismisses the Official Release's mandatory language as "little more than generic statements … that states and local agencies 'should' or 'must' use the Model." *Id.* But these are the very kind of statements that led this Court to hold in *McLouth* that EPA's model was a rule and not a policy statement, despite contrary indications—not present in the Official Release—that EPA "retained discretion to deviate from its use." 838 F.2d at 1320–21.

In addition to its mandatory language, the Official Release's "substantial impact" indicates that it is not a mere policy statement. *Batterton v. Marshall*,

648 F.2d 694, 708 n.83 (D.C. Cir. 1980); *Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982); *see* Opening Br. 26–28.

B. The Preexisting Rule that States Must Use the Latest Model Does Not Render the Official Release a Policy Statement.

EPA tries to avoid the implications of the Official Release's compulsory language by arguing that it merely "paraphrase[es]" requirements (to use EPA's designated model in SIPs and conformity analysis) that are found in the Clean Air Act and preexisting regulations.

First, those provisions do not prescribe any particular model; nor do they dictate the length of the grace period after which the model must be used for conformity analysis. 40 C.F.R. §§ 51.114(a), 93.111(a). Only the Official Release does that.

Second, EPA's argument is foreclosed by precedent.

In *Alabama Power*, 636 F.2d 323, this Court observed that petitioners' obligation to use EPA's air quality model came from the Act and EPA's implementing regulations. *See* 636 F.2d at 382–83 & nn.65, 72 (citing 42 U.S.C. § 7475(e)(3)(D); 40 C.F.R. § 51.24(m)). Nevertheless, the Court held that EPA was required to promulgate the model through notice-and-comment rulemaking. *Id.* at 384–85, 387–88; *see also McLouth*, 838 F.2d at 1322 (model was a rule despite EPA's claim that it "merely implements" a preexisting duty to use previously specified criteria).

If this Court were to adopt EPA's position, the Agency would be able to avoid notice and comment on all its scientific judgments, simply by promulgating broad placeholder rules and then filling in the operative contents later through "policy statements" that are immune to public comment and judicial review. That is not the law.

C. EPA's Self-Serving Characterization of a Prior Model, Issued under a Prior Legal Regime Is Irrelevant to MOVES2014's Status as a Rule.

EPA's best evidence for the proposition that its vehicular emissions model is a "flexible policy" and not—as the Official Release indicates—a binding requirement is that the Agency said so about a prior model developed and used under very different circumstances. EPA Br. 13–14. But MOBILE4 and EPA's self-serving statement in 1990 that that model was a "flexible policy" both preceded the 1990 Clean Air Act Amendments, which—in response to concerns about the lack of public participation in EPA's model development—required EPA to review and revise its emissions factors. Pub. L. 101-549, § 804 (codified at 42 U.S.C. § 7430).

Even as to the status of MOBILE4 itself, the legislative history does not support EPA's position. EPA's letter was prompted by a General Accounting Office (GAO) study on the application of the notice-and-comment requirement to MOBILE4. The Chairman of the House Committee on Energy and

Commerce had commissioned the study because the American Petroleum Institute (API) complained that EPA had failed respond to comments in developing MOBILE4. The GAO study ultimately concluded that it "[could] not predict the weight EPA will accord MOBILE 4." App. 353. But the study noted that EPA itself "implies that MOBILE 4 will be relied on as an important factor in subsequent regulatory proceedings." *Id.*

Indeed, the study strongly suggests that the GAO believed EPA was treating MOBILE4 as a rule: "Thus, EPA had the duty to respond to comments in issuing MOBILE 4." App. 354. And GAO correctly observed that under *McLouth*, a court's judgment about whether notice-and-comment procedure is required would depend on "EPA's actual practice"—whether it "treats MOBILE 4 as a regulation" or "as a flexible policy"—not the Agency's statements asserting "discretion to deviate from the use of the model." App. 353, 354.

It was in response to this study that EPA issued its self-serving statement that "we view the model as a flexible policy." App. 358. Such a *post hoc* justification for its model development procedure "is obviously of little weight." *McLouth*, 838 F.2d at 1320.

Far from endorsing or ratifying EPA's defensive characterization of MOBILE4 as a policy statement, the Committee Report immediately followed

the long quotations from the GAO study and EPA's letter with this statement: "While the bill does not resolve all concerns, clearly the study will be very helpful." App. 361. The relevant "concerns" were spelled out in the study: API had alleged that EPA, in developing MOBILE4, had "used a very closed process that did not elicit or use widespread input from all available public sources." App. 352.

In context, the Committee apparently found that the Clean Air Act Amendments' new review requirement—that EPA "review and, where necessary, revise" its models within six months—and the statute's reference to "appropriate public participation" did "not resolve all concerns" about EPA's development of MOBILE4. App. 357 (H.R. Rep. 101-490, at 397). But the Committee concluded that GAO's study on the notice-and-comment requirement "will be very helpful" in holding EPA to account in the future. App. 361 (*Id.* at 401).

In the face of all this contextual evidence to the contrary, EPA asserts that Congress somehow ratified EPA's characterization of MOBILE4 as a "flexible policy" through a savings clause in § 7430 that preserved "the validity of emission factors established by the Administrator before November 15, 1990." EPA Br. 49.

That is not right. The savings clause cannot fairly be read to imply that MOBILE4—much less any future model or its official release—is merely a policy statement. To the contrary, the savings clause suggests that Congress shared API's reservations about the legitimacy of EPA's "very closed process" in developing MOBILE4 and considered a savings clause necessary to preserve the suspect model from legal challenge until a revision could be promulgated "after appropriate public participation." 42 U.S.C. § 7430. Otherwise, the savings clause was superfluous.

EPA itself seems to have interpreted this legislative history to favor more public participation in the development of its vehicular emissions model. In response to the passage of § 7430, MOBILE4.1 was promulgated only after EPA had invited "[w]ritten comments" and promised "full consideration" of timely submissions. App. 363 (56 Fed. Reg. 11745, 11746 (Mar. 20, 1991)).

In any event, EPA's 1990 defense against accusations that it had failed to properly consider public comments does not dictate whether the 2014 Official Release of a *new* model promulgated in response to *new* statute and *new* rules is itself a rule deserving of ordinary administrative procedure. *Cf. McLouth*, 838 F.2d at 1320 (rejecting EPA's *post hoc* claim that "it does not consider itself bound by the [challenged] model" (alteration omitted)).

The Agency's other discussions of "flexibility" do not concern which models States may use, but rather EPA's ability to revise the required model (including by minor updates), *see* EPA Br. 52–53, and to dictate when States must begin to use the designated model, *see* EPA Br. 50, 53 (citing *Sierra Club v. EPA*, 356 F.3d 296, 308 (D.C. Cir. 2004). Enforcing the APA's notice-and-comment requirement for major, substantive revisions to the model need not impinge on administrative flexibility of this sort. Agencies commonly make technical corrections to rules after publication without triggering a new notice-and-comment proceeding. *See Int'l Union v. OSHA*, 938 F.2d 1310, 1325 (D.C. Cir. 1991). And agencies generally enjoy flexibility in setting the effective dates of their regulations. *See Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 2 F.3d 408, 420 (D.C. Cir. 1993).

EPA also asserts without explanation that prior MOBILE and MOVES models were promulgated outside the APA rulemaking process. To be sure, EPA used the labels "Notice of Public Workshop" and "Notice of Model Availability" instead of "Notice of Proposed Rule" and "Final Rule," but EPA admits that the Agency's characterization of the rule is not dispositive. EPA Br. 49. EPA does not identify anything in its past Federal Register notices that made them defective under § 553. More to the point, EPA has treated all of those models as presumptively required for use in SIPs and conformity

analysis. The Agency's past practice therefore supports treating the Official Release as a rule.

D. EPA's Authority to Waive the Required Model and Approve a Hypothetical Alternative Does Not Make the Official Release a Policy Statement.

EPA argues that because § 7430 and § 7502(c)(8) allow EPA to approve an alternative model under certain circumstances, MOVES2014 is not truly mandatory, and the Official Release is therefore merely a policy statement. EPA Br. 51–52. This Court has already squarely rejected that argument.

In *Alabama Power*, 636 F.2d 323, the petitioners challenged EPA's Guideline on Air Quality Models, which "recommended" specific air quality models but allowed an EPA Regional Administrator to approve an alternative when "a better model or analytical procedure is available and applicable." 636 F.2d at 384.

The Court began its consideration of the notice-and-comment requirement by articulating the very argument that EPA rests on here: "[T]he models prescribed in the guideline are presumptively, not conclusively, appropriate, and EPA welcomes use of more accurate models." *Id.* On that account, the Court observed, "it could be argued that the modeling regulations are 'general statements of policy' exempt … from notice and comment procedures." *Id.*

But the Court unequivocally rejected that argument. The possibility that EPA might approve an alternative model did not change the fundamentally mandatory nature of the "recommended" models: The Guideline "require[d] that 'deviations (from the specified models) be fully supported and documented.'" *Id.* Specifically, any State seeking relief from the recommended model would have to demonstrate that it was "not appropriate for a particular application" or that "a better model or analytical procedure is available." *Id.* Therefore, the Court held, the Guideline's "recommended" models were "granted sufficient weight in subsequent proceedings to remove the regulations from the ambit of policy statements and the exemption therefor." *Id.*; *cf. McLouth*, 838 F.2d at 1321 (finding provision for including additional factors when the petitioner makes a "compelling case … does not push [the notice of model availability] much in the direction of a policy statement").

The requirements for alternative models under § 7430 and § 7502(c)(8) are no less demanding. Any person seeking approval for an alternative vehicular emissions model must demonstrate "improved emissions estimating techniques" to EPA's satisfaction. 42 U.S.C. § 7430. And a State will not be allowed to use its own model in SIP development if EPA, in its discretion, finds it to be "in the aggregate, less effective" than EPA's model. 42 U.S.C. § 7502(c)(8).

This is an easier case than *Alabama Power*, because in *Alabama Power*, the challenged Guideline *itself* allowed for alternative models, lending some plausibility to the notion that EPA might approve an alternative. Indeed, the Guideline cautioned that "even though specific recommendations are made, they should not be considered rigid requirements." 636 F.2d at 384. Nevertheless, this Court held that the Guideline was a regulation and not a mere policy statement. *Id.*; *see also McLouth*, 838 F.2d at 1320 (finding statement in notice of model availability that EPA "retained discretion to deviate" from the model was belied by "other language in the notice strongly suggest[ing] that EPA will treat the model as a binding norm"). Notice and comment procedure is required *a fortiori* where, as here, the rule mandating the challenged model makes no allowance whatsoever for alternatives. *See* 79 Fed. Reg. at 60344–45.

E. States Have Not Been Free To Opt Out of Past Models.

As evidence of its allegedly "flexible" approach to the presumptively required model, EPA cites its 2002 approval of Alaska's carbon monoxide (CO) SIP, in which EPA also "approve[d] the use of the 'CO Emissions Model' for SIP development purposes" in certain areas. App. 403 (67 Fed. Reg. 5064, 5067). But in that action, EPA merely replaced one EPA-generated model with another temporary EPA-generated model until EPA

could finalize its next major revision. The temporary model in question was "an interim update to MOBILE5b developed to take advantage of the best information currently available on CO emissions, particularly for cold climates." *Id.* at 5067. EPA only allowed its use "prior to the official release of MOBILE6." *Id.*

EPA's brief asserts without support that this interim model was "Alaska's modification of the MOBILE model." EPA Br. 50. But it seems that EPA *itself* developed the "CO emissions model." App. 455 (Venkatesh Rao, U.S. EPA, *Development of an Exhaust Carbon Monoxide Emissions Model*, SAE No. 961214 (1996)). Alaska used the interim model in its SIP only because EPA had already "preliminarily approved" its use in that State. 67 Fed. Reg. at 5067. Petitioners can find no evidence that Alaska had so much as requested the interim model, which was used not only in Alaska but also in Oregon. *See id.* at 5068.

This episode certainly does not imply, as EPA suggests, that the Agency is likely to approve an alternative model developed by a State on its own initiative. At best, this episode indicates that on one occasion in 2002, EPA gave certain areas a choice between two different EPA-developed emissions models pending the release of EPA's next major revision to the mandatory model. This episode does not support the Agency's argument that it treats

MOVES2014 or any prior model as a "flexible tool." That an agency occasionally allows exceptions to the ordinary use of a presumptively appropriate model does not detract from its character as a binding rule. *See McLouth*, 838 F.2d at 1321.

As in *McLouth*, despite the Agency's "claim that it is open to 'new approaches' … EPA has evidenced almost no readiness to reexamine the basic propositions that make up the [challenged] model." *McLouth*, 838 F.2d at 1321. Because EPA treats MOVES2014 as a presumptively binding model, the Official Release is a rule, and EPA should have subjected it to notice and comment.

IV. EPA WAS REQUIRED TO INFORM THE SCIENCE ADVISORY BOARD.

EPA argues that it was under no obligation to share the model with the Science Advisory Board because its admittedly "require[d]" consultation with the Department of Transportation does not rise to the level of "formal review and comment" under 42 U.S.C. § 4365(c)(1). EPA Br. 67. EPA argues that 40 C.F.R. § 93.111(b) "only requires consultation on the grace period, not on the Model." *Id.* EPA neglects the part of the rule that requires EPA and DOT to base its decision "on the degree of change *in the model*." 40 C.F.R. § 93.111(b)(2) (emphasis added).

The Administrative Record belies the suggestion that EPA did not consult with DOT on the model. A DOT representative sat on the MOVES Review Work Group. *See* App. 110. In addition, "EPA coordinated closely with [DOT] in the development of" the pre-publication "Policy Guidance on the Use of MOVES2014 for State Implementation Plan Development, Transportation Conformity, and Other Purposes." App. 310. And a letter from former DOT Associate Deputy Secretary John Horsley mentions that EPA has been engaged in "[c]ollaborative [r]esearch [e]fforts with DOT" on "the interface between the MOVES model and current travel models." App. 4.

Petitioners seek to enforce only § 4365(c)(1)'s procedural requirement that EPA provide its model to the Science Advisory Board. Petitioners are not asking this Court to review the Board's proceedings or to allow Petitioners to participate in those proceedings. *Contra* EPA Br. 67.

V. EPA HAS FAILED TO DEFEND ITS SUBSTANTIVELY FLAWED MODEL.

EPA has no answer to the States' detailed and well-substantiated criticism of the fuel effects study on which MOVES2014's emissions estimates are based, Opening Br. 47–55; the States' demonstration of the model's erroneous results, *id.* at 55–57; or the States' demonstration of the unrealistic fuel inputs EPA requires States to use when they run the model, *id.* at 57–60. EPA has therefore failed in its admitted obligation to "remain[] open to all

challenges to the use of the … model." *McLouth*, 838 F.2d at 1324, *quoted in* EPA Br. 50. That duty applies even if the model is merely a tool and the Official Release a policy statement rather than a rule. *Id.* And it applies to facial "challenges" to the model like the present case, "as well as" critiques of its application in individual regulatory contexts. *Id.*

Instead of responding to the States' arguments through public notice and comment *or* in response to this litigation, EPA takes the view that because air pollution models are complicated, the Court should defer to the Agency's expertise unencumbered by *any* duty to justify its policy choices. EPA Br. 71. This Court has decisively rejected that view: "[T]he lack of scientific certitude about modeling techniques increases rather than reduces the need for the agency to critically examine all substantial questions of fact and science emerging from the commenting process." *Alabama Power Co.*, 636 F.2d at 387–88; *accord Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

A. No Harmless Error Rule Excuses EPA's Failure to Conduct Notice-and-Comment Rulemaking.

1. The States Do Not Have to Show Prejudice from EPA's Abject Failure to Invite and Respond to Public Comments.

This Court "ha[s] not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir.

2014). In the "most egregious" cases, like this one, "in which a government agency seeks to promulgate a rule by another name—evading altogether the notice and comment requirements," this Court "[d]ecline[s] to even consider whether a petitioner would be successful if it had had the benefit of" the requisite procedure. *Id.* at 1109 (citing *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002)).

Thus, in *McLouth*, where EPA failed to subject its model to notice-and-comment procedure, this Court held that the model's challenger would prevail "[e]ven if the challenger presents no bases for invalidating the rule on substantive grounds." 838 F.2d at 1324.

Even if the prejudicial error rule did apply, it would be satisfied by "a colorable claim that [the petitioner] would have more thoroughly presented its arguments" in a rulemaking proceeding. *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003). Petitioners have amply satisfied that standard. *See* Opening Br. 62.

2. EPA Did Not Respond to the States' Criticisms.

In its misguided effort to prove its error harmless, EPA points to one letter that the Agency sent in response to Todd Sneller. EPA Br. 75 (citing App. 271). Neither Mr. Sneller's letter, nor the attached white paper, nor EPA's response were directly related to the Official Release or to the

MOVES2014 model at issue in this case. Indeed, none of them even mentions the MOVES2014 model.

Sneller had raised three concerns about the EPAct study in a letter primarily concerned with a forthcoming report from EPA about ethanol's air quality impacts. App. 266. Specifically Sneller expressed concern that the EPAct study "does not represent real-world gasoline blends"; that the EPAct study's designers "inexplicably added more toxic aromatics" to higher ethanol blends, which is inconsistent with expected marketplace practices; and that the EPAct study reported the erroneous conclusion "that more ethanol causes more emissions." *Id.*

EPA's response did not address these concerns or the related issues in the white paper Sneller had included with his letter. Instead, as it had before, EPA defended in general terms the practice of "match-blending" as a device for isolating the emissions effects of individual fuel components. App. 271; *cf.* Opening Br. 18; App. 150. Petitioners' complaint, however, is not with match blending in the abstract but with EPA's decision to imperfectly match arbitrary parameters that refiners do not match in the real world. *See* Opening Br. 49–52. EPA did not attempt to justify, for example, the EPAct study's focus on T50 and T90 distillation temperatures to the exclusion of octane—the parameter

that EPA admits refiners actually do match in the real world. *See* Opening Br. 19 n.7, 53–54; App. 518, 267.

Neither letter addressed any of the other issues that Petitioners would have commented on in a MOVES2014 rulemaking proceeding, including the model's demonstrably erroneous default fuel parameters, which the States are required to use. *See* Opening Br. 57–59.

The same is true of EPA's allegedly "extensive dialogue" about the EPAct study with Mr. Vander Griend. EPA cites this "dialogue" generally without identifying a single response from the Agency. EPA Br. 76. That is because the EPA personnel Mr. Vander Griend wrote to did not substantively respond to his emails, which addressed only some of the concerns that Petitioners would have raised in a rulemaking proceeding. *See* App. 267–69.

B. EPA's Unlawful Refusal To Create a Record Does Not Prevent this Court from Considering the States' Evidence.

Rather than respond to Petitioners' technical arguments, EPA would have this Court ignore them altogether by excluding the evidence and analysis on which they are based.

Although this Court's review of final agency action is generally confined to the administrative record, "'it may sometimes be appropriate to resort to extra-record information' to determine whether an administrative record is deficient." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514

(D.C. Cir. 2010) (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). Consideration of extra-record evidence is warranted in cases like this one, "where 'the procedural validity of the agency's action remains in serious question.'" *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (quoting *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013)).

The only reason Petitioners' evidence is not in the record is that EPA prevented the creation of a record by denying Petitioners an opportunity for comment. *See* Opening Br. 46. In such cases, resort to extra-record evidence is necessary "to enable judicial review to become effective." *Esch*, 876 F.2d at 991.

This Court may consider Petitioners' evidence for the additional reasons that the evidence responds to EPA's attack on Petitioners' standing and EPA's assertion of harmless error. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) ("[T]he petitioner must supplement the record to the extent necessary" to establish its standing); *Sprint*, 315 F.3d at 377 (Petitioners prove prejudice by claiming that they "would have more thoroughly presented [their] arguments" in comments).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for review and vacate the Official Release.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Calisto MT 14-point font.

/s/ Adam R.F. Gustafson
October 28, 2015 Adam R.F. Gustafson

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

October 28, 2015

/s/ Adam R.F. Gustafson
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