UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY, et al.,	)	
	)	Case No. 04-0392 (ESH)
Plaintiffs,	)	
	)	
v.	)	
	)	
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,	)	
	)	
Defendant.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The National Highway Traffic Safety Administration ("NHTSA") has issued a rule that permits vehicle manufacturers to violate the Safety Act by excluding a substantial number of defective vehicles from recalls implemented to correct serious safety defects. That rule is both contrary to the Act and arbitrary and capricious, and was issued without notice-and-comment rulemaking, in violation of the Administrative Procedure Act.

In its opposition to plaintiffs' motion for summary judgment, NHTSA repeats many of the arguments advanced in its motion to dismiss. For example, NHTSA mischaracterizes plaintiffs' lawsuit alternately as an "abstract" challenge to the agency's generalized enforcement authority and as an attempt to compel the agency to take specific actions with respect to various particular regional recalls. In fact, however, plaintiffs challenge one, concrete, generally applicable action: NHTSA's issuance of a legislative rule authorizing regional recalls. Neither NHTSA's unsupported reading of the Safety Act nor its attempts to obfuscate the merits by raising inapplicable procedural issues can save a rule that is flatly at odds with the Act. And,

notably, NHTSA does not offer any substantive defense to plaintiffs' argument that its rule is arbitrary and capricious.

ARGUMENT

I. THE SAFETY ACT DOES NOT PERMIT REGIONAL RECALLS.

The agency concedes by its silence that the defects addressed by regional recalls are safety-related and that each owner of a defective vehicle is entitled to notice of the defect and a free remedy under 49 U.S.C. §§ 30119 and 30120. NHTSA argues, however, that an identical vehicle with the same flaw is defective in Oklahoma, for example, but *not* across the border in Missouri. This reading of the Safety Act is untenable.

A. Regional Recalls are Inconsistent With the Plain Language of the Statute.

The Safety Act mandates that when a manufacturer discovers that a group of its vehicles contain a safety-related defect, it must "notify . . . the owners, purchasers, and dealers of the vehicle or equipment," 49 U.S.C. § 30118(b)(2)(A) & (c), (c)(1), including "*each person* registered under State law as the owner and whose name and address are reasonably ascertainable by the manufacturer," or, failing that, "the most recent purchaser known to the manufacturer." 49 U.S.C. § 30119(d)(1)(A) & (B) (emphasis added). As to each person entitled to notice, the manufacturer must also remedy the defect without charge, 49 U.S.C. § 30120(a), provided the owner seeks to obtain the remedy within ten years of the initial purchase of the vehicle. 49 U.S.C. § 30120(g). This definition, which speaks in categorical terms about identical vehicles, does not allow for regional recalls, in which manufacturers give notice and a free remedy only to those vehicles deemed most likely to manifest the safety defect.

The Safety Act defines "defect" as "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment." 49 U.S.C.

§ 30102(a)(2). NHTSA points out that a defect finding can be based on a vehicle's performance and then misleadingly claims that "a vehicle with a component may be defective in terms of performance while another vehicle with the same component may not be defective." Def. SJ Opp. 9. However, as the D.C. Circuit explained in *United States v. General Motors*, a defect relating to performance must be determined with reference to the "expected range of actual operation" of the vehicles. 518 F.2d 420, 439 n.88 (D.C. Cir. 1975) ("*Wheels*").[1] Manufacturers are excused from recalling vehicles when the manufacturer can "establish, as an affirmative defense, that the failures were attributable to gross and *unforeseeable* owner *abuse* or unforeseeable neglect of vehicle maintenance." *Id*. at 438 (emphasis added). Thus, for example, police cars might foreseeably be subject to use or abuse under much harsher conditions than regular passenger vehicles. *Id*. at 439 n.88. Therefore, a component that failed when repeatedly subjected to extreme maneuvers might be deemed defective in police cars, but not in identical passenger cars. *Id*. This situation is a far cry from that in which a vehicle is placed at risk simply by being exposed to a climate that is common in at least parts of the United States. Surely no manufacturer could claim that it was abusive, let alone unforeseeably abusive, that a vehicle might travel between states with different climates.

Wheels dealt with a performance defect and addressed how courts can distinguish between vehicle failures that are indicative of a defect and those that are due to age and wear, which are expected in any vehicle. Here, however, the issue is not whether the vehicles subject to regional recalls have performance defects. *See Clarke v. TRW, Inc.*, 921 F. Supp. 927, 933-34 (N.D.N.Y. 1996) (distinguishing defects in performance from those in the construction,

[1] A "performance" related defect is characterized by a "non-de minimus number of failures" of a particular component, even if the cause of the vehicle's malfunction is undetermined. *Wheels*, 518 F.2d at 438 n.84. Thus, the *Wheels* decision permitted NHTSA to make a defect finding without knowing the precise cause of the defect.

components, or materials of a motor vehicle). When a manufacturer commences a regional recall by filing a notice with NHTSA pursuant to 49 C.F.R. Part 573, it has already identified a defect in the construction process or the materials used that poses a safety problem in the vehicles affected by the defect. For example, in Recall No. 99V-309, Ford notified NHTSA that its use of short fuel tank straps were the cause of fuel tank cracks in its 1995 Windstars. White Decl., Exh. 8, at 1. At that point, Ford could identify all the "defective" vehicles, that is, those that were manufactured with the short straps. Similarly, when Chrysler initiated Recall No. 98V-005, it notified NHTSA that reduced brake effectiveness was caused by a corrosion-prone brake rotor and identified all the vehicles that contained the compromised rotors. *Id*., Exh. 5, at 3. In neither of these cases, nor in any regional recall, were the vehicles with the components that had been identified as defective by manufacturers sold *only* in the included states. Rather, Ford Windstars with short tank straps and Chryslers with corrosion-prone brake rotors were sold throughout the country. A rule authorizing manufacturers to recall defective vehicles in some states but not to recall identical vehicles registered in other states is unsupported by either the Safety Act or *Wheels*.

Moreover, outside of this litigation, NHTSA has recognized that vehicles excluded from regional recalls are defective and that the manufacturer had simply limited the scope of the *remedy* to be applied to these defective vehicles. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). For example, in its 1998 letter to Ford Motor Co., NHTSA analyzed several of Ford's previous regional recalls and advised the manufacturer to expand five of them. In closing, the agency wrote: "If Ford does not [expand the recalls], the agency may commence a proceeding under 49 U.S.C. §§ 30118(e) and 30120(e),

and 49 CFR Part 557." Ditlow Decl., Exh. 11, at 5. Notably, these sections all relate to the adequacy of the *scope of the remedy* to correct an *established defect*. *See* 49 U.S.C. § 30118(e) ("Secretary may conduct a hearing to decide whether the manufacturer has reasonably met the notification requirements under this section"); *id*. § 30120(e) (same with respect to "the remedy requirements under this section"); 49 C.F.R. § 557.2 ("purpose of this part is to enable the National Highway Traffic Safety Administration to identify and respond . . . to petitions for hearings on whether a manufacturer has reasonably met his obligation to notify or remedy"). If the agency's position had been that the manufacturer had determined that only those vehicles registered in included states were defective, it would have threatened action under 49 U.S.C. § 30118(a) & (b), which authorizes NHTSA to commence a proceeding to determine whether a vehicle contains a safety defect in the first place. *See also* Ditlow Decl., Exh. 2 (1998 letter) ("as a general matter, safety-related defects must be *remedied* on a nationwide basis, unless the manufacturer can justify a limited geographic scope") (emphasis added); White Decl., Exh. 2, at 1 (NHTSA opening investigation into "alleged *remedy* failure") (emphasis added).

Finally, when manufacturers propose regional recalls by filing 573 reports, they, too, often admit that the defect is not limited to the list of states included in the regional recall. Pursuant to 49 C.F.R. § 573.6, manufacturers are required to include very specific information in the 573 reports that are submitted to NHTSA upon discovery of a vehicle safety defect. In these reports, manufacturers do not suggest that vehicles registered and purchased outside of the proposed covered states are not defective. Indeed, automakers frequently concede exactly the opposite—that excluded vehicles contain and may manifest the defect, but that the manufacturer has decided to limit the recall remedy to those states in which it expects the greatest number of malfunctions to occur. *See, e.g.,* White Decl., Exh. 3, at 4 ("the pattern of spring fractures will

be limited *virtually* to the high corrosion regions of the United States") (emphasis added); *id.*, Exh. 5, at 5 ("in the event a *non-recall* vehicle . . . exhibits separation of the front brake rotors from the hub due to corrosion," dealers should contact zone district manager) (emphasis in original).[2]

B. NHTSA's Interpretation of the Safety Act Would Produce Absurd Results.

"[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). For this reason alone, a reading of the Safety Act that classifies identical vehicles as defective or non-defective depending on their state of registration or purchase is impermissible. There is no shortage of examples of the absurd results that would flow from NHTSA's reading of the Safety Act to permit regional recalls.

Most egregiously, regional recalls ignore vehicles' mobility. Vehicles deemed non-defective by NHTSA because of their state of registration could travel anywhere in the country and be subject to the relevant climate for prolonged periods of time. This issue was extensively briefed in Part II of Plaintiffs' Summary Judgment Memorandum. There is no way in which this problem could be eliminated. It would obviously be impossible for manufacturers to closely monitor the movements of each vehicle they sell and make available a free remedy whenever a vehicle encounters a particular climate.

Similarly, even accepting NHTSA's incorrect assertion that vehicles excluded from regional recalls are not defective, regional recalls nonetheless also deprive owners of *concededly*

[2] Even in this litigation, NHTSA concedes that owners of excluded vehicles have complained of failures: "Both before and after the 1998 Kenneth Weinstein letters on regional recalls, NHTSA reviewed regional recalls on the facts . . . We examined the data and, *at times*, there were not substantial numbers of complaints outside the regional recall area." White Decl. ¶ 14 (emphasis added). NHTSA thus suggests both that it has received complaints from excluded consumers and that it sometimes receives "substantial numbers" of complaints from excluded consumers.

defective vehicles of advance notice of the defect and free remedy. Vehicle owners who move to and register their vehicles in a state included in a regional recall after the recall has already begun should be covered by the recall because, in NHTSA's view, when their states of registration change, their vehicles become defective. Yet such owners will likely not receive timely notice of the recall because manufacturers have no mechanism for notifying vehicle owners of defects as soon as they change their state of registration. NHTSA has not disputed that its current solution—requiring manufacturers to issue follow-up notices two to three years after commencing a regional recall—may leave consumers unprotected for years and will omit altogether consumers who move to an included state after the second notice is mailed.[3] Likewise, NHTSA has not contested plaintiffs' assertion that it cannot guarantee notice and a free remedy to all owners of used vehicles, where the problem of vehicle mobility is especially acute. *See* Pltfs SJ Mem. 28.

Regional recalls also lead to bizarre results when viewed in the context of the rest of the Safety Act. For example, the Safety Act requires that if, after a vehicle has been sold to a dealer, the manufacturer determines that the vehicle contains a safety defect, it must either repurchase the vehicle or give the dealer the equipment necessary to correct the defect. 49 U.S.C. § 30116(a). In the case of a vehicle that is subject to a regional recall, however, this process would be untenable, particularly for dealers who operate near the border of the included area and sell vehicles to residents of both "included" and "excluded" states. Thus, a dealer in Northern Virginia who sells vehicles affected by a corrosion-related defect may not even be aware of the

[3] NHTSA claims it is "disputed" that the agency never requested any follow-up notifications. Nonetheless, the Declaration of Jonathan White, on which NHTSA relies in support of this statement, says nothing about follow-up notifications. Defendant's Response to Plaintiffs' Statement of Material Facts ¶ 9 (citing White Decl. ¶ 9).

defect, much less remedy these vehicles, because Virginia is generally excluded from such recalls. However, the vehicles would be deemed defective once sold to consumers in the District of Columbia. Furthermore, NHTSA's rules prohibit dealers from selling defective new vehicles before these vehicles have obtained the recall remedy, 49 C.F.R. § 573.11, raising the question whether dealers in included states can avoid this potentially expensive requirement by selling vehicles only to buyers living in excluded states.

These anomalies are avoided if the Safety Act is correctly interpreted to require national safety recalls.

II. NHTSA'S REGIONAL RECALLS RULE WAS UNLAWFULLY PROMULGATED WITHOUT NOTICE-AND-COMMENT PROCEDURES.

NHTSA continues to insist that its 1998 letter is a policy statement, not a legislative rule, Def. SJ Opp. 15-18, but its arguments are refuted by the text and effect of the 1998 letter.

A. Legislative or substantive rules are "ones which 'grant rights, impose obligations, or produce other significant effects on private interests,' . . . or which 'effect a change in existing law or policy.'" *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (citations omitted). Policy statements, by contrast, are "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Panhandle Eastern Pipeline Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) (quoting *Pacific Gas & Elec. Co. v. Federal Power Comm*'n, 506 F.2d 33, 38 (D.C. Cir. 1974)).

Under the D.C. Circuit's two-part test, announced in *Community Nutrition Inst. v. Young,* 818 F.2d 943, 946 (D.C. Cir. 1987), "An agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)

(citations omitted). One need look no further than the mandatory language of the letter to see that this prong of the test is met here. The 1998 letter repeatedly uses mandatory, unequivocal language to describe what NHTSA requires of manufacturers conducting regional recalls. *See*, *e.g.*, Ditlow Decl., Exh. 2, at 2 ("manufacturer *will* be required," "the following states *must* be included," "NHTSA *will approve* a regional recall," "the manufacturer *will only have* to provide") (emphasis added). Furthermore, in contrast to the agency's position in this litigation, NHTSA itself has previously characterized the letter as setting forth binding requirements. *See* Pltfs SJ Mem. 35-36; Pltfs MTD Opp. 36-37; *see also Bowen*, 488 U.S. at 213.

NHTSA skirts the issue of whether its 1998 letter established a regional recalls rule by focusing on its decision not to publish it in the Federal Register or the Code of Federal Regulations and by characterizing it as a "policy guideline." Def. SJ Opp. 15. As the D.C. Circuit has recognized, the ultimate determinant of whether an agency pronouncement is a legislative rule or a policy statement is whether it purports to bind the agency and the regulated community. *E.g., General Elec. Co.*, 290 F.3d at 383; *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). Here, as previously discussed, the mandatory language of the 1998 letter binds manufacturers and NHTSA, and thus the APA required the agency to use notice-and-comment procedures to promulgate it. Pltfs SJ Mem. 35-35; Pltfs MTD Opp. 35-39.

NHTSA claims that plaintiffs have not shown that manufacturers regard the 1998 letter as binding, Def. SJ Opp. 15, but the agency's files are replete with indications that manufacturers and the agency alike have treated the letter as a binding rule. For example, in 1999, Volkswagen ("VW") filed a 573 report indicating that it intended to begin a recall of vehicles in 17 states to correct a cold-related defect. The agency responded by informing VW that "NHTSA's policy is to require manufacturers to discuss the possibility of limiting a recall's geographic scope with the

agency before the manufacturer files a defect information report under 49 CFR 573.5. . . . Apparently, VW was not aware of this policy." White Decl., Exh. 6, at 3. Eleven days later, NHTSA sent to VW a copy of its 1998 letter. *Id*., Exh. 1, at 10. VW quickly conformed its conduct to the 1998 letter. According to NHTSA's report, VW met with the agency the following month and agreed to send one letter to owners of vehicles registered in cold-weather states and a different letter to owners of vehicles registered in all other states. *Id*., Exh. 6, at 14. The first letter was a typical consumer notification letter that contained the elements mandated by 49 C.F.R. Part 577, whereas the second letter informed owners simply that if they planned to spend time in one of a list of cold states, they should visit their VW dealer to obtain a remedy.[4] Notably, this procedure complied with all of the requirements applicable to short-term exposure defects that were discussed in the 1998 letter.

Similarly, in July 2000, General Motors ("GM") submitted to NHTSA a 573 report indicating that GM had discovered a corrosion-related defect, for which it initially planned to conduct a recall in 15 states—fewer than required by NHTSA in its 1998 letter. White Decl., Exh. 7, at 1-2. Later that month, GM sent to NHTSA another letter in which the company claimed to have complied with NHTSA's 1998 letter, stating that "GM has determined that the consequences of the defect occur only after long-term exposure to environmental conditions. As requested in that letter, GM has previously discussed its intent to limit the geographic scope of the subject recall to fewer than the 20 states and the District of Columbia specified in Mr. Weinstein's letter." *Id*. at 4 (July 26, 2000 letter). However, NHTSA apparently rejected GM's proposed recall scope, and the company sent a third letter which stated that "*[t]he campaign will*

[4] These letters can be viewed through the search function on NHTSA's website at www-odi.nhtsa.dot.gov/cars/problems/recalls/recallsearch.cfm (search for Recall No. 99V131001, then click on "Document Search," and choose "Manufacturer Reply").

include vehicles in twenty states and the District of Columbia." *Id*. at 14 (Sept. 22, 2000 letter) (emphasis in original). Thus, although GM may have initially resisted interpreting the 1998 letter as setting forth binding rules, the company conformed its recall to the letter's mandate.

NHTSA (at 15) quotes a DaimlerChrysler ("Chrysler") letter in which the company limited a corrosion-related recall to 15 states plus D.C., in violation of the requirements of the 1998 letter. This quotation is misleading. The recall that NHTSA cites, which began in 1999 in response to a NHTSA investigation, was one in which Chrysler expanded a pre-1998 letter recall to include additional models and years of vehicles. Significantly, the quote cited by the agency was a response to NHTSA's own statement that, according to its 1998 letter, Chrysler would "*need* to include" the additional five states. White Decl., Exh. 5, at 21 (Dec. 23, 1999 letter). In response, Chrysler noted that the 1999 recall was an expansion of the pre-1998 letter recall, apparently attempting to piggy-back on the earlier recall to avoid the agency's new requirements: "While we acknowledge NHTSA's more recent policy with regard to regional salt belt recalls, we do not believe that the evidence in this investigation supports altering the region from that of the original recall." *Id*. at 22.[5] In fact, in subsequent Chrysler corrosion-related regional recalls, arising *after* the issuance of the 1998 letter, the company clearly acknowledged and complied with the requirements of that letter. *See* Second Ditlow Decl., Exh. 2, at 2 ("DaimlerChrysler will institute the recall consistent with NHTSA's published list of states within the salt belt . . . .").

Finally, NHTSA tries to avoid the issue altogether by repeating that it does not "approve" recalls and in fact plays no role in manufacturer-initiated recalls unless the agency decides to

[5] Because agencies cannot promulgate rules retroactively absent a specific legislative grant, NHTSA could not have enforced the requirements of the 1998 letter against a manufacturer conducting an earlier recall. *Bowen*, 488 U.S. at 208.

exercise its enforcement discretion. *E.g.,* Def. SJ Opp. 6. Not only is the agency's contention merely semantic, but it is directly refuted by NHTSA's own statements. *E.g.,* Ditlow Decl., Exh. 2, at 2 (1998 letter, stating "NHTSA will approve a regional recall"); *id*., Exh. 24 (NHTSA Nov. 2002 letter to Center for Auto Safety ("CAS"), stating that the 1998 letter "set[] forth certain requirements that would apply to all future regional recalls" and that when a manufacturer proposes a regional recall, NHTSA "reviews the nature of the defect, the proposed scope of the recall and the problem experience[d] to assure that such a recall is appropriate under the particular circumstances"); White Decl., Exh. 6 (NHTSA letter to VW noting that agency "has authorized" limited recalls); *id.*, Exh. 9 (after reviewing GM's submissions, NHTSA "is accepting" a regional recall). Moreover, NHTSA has been resolute in its demand that manufacturers contemplating conducting a regional recall consult with the agency beforehand. *See, e.g.,* Ditlow Decl., Exh. 10 (NHTSA's 1997 letter to manufacturers); White Decl., Exh. 1, at 10 (NHTSA's 1998 letter to VW). It is simply unbelievable that during these consultations, NHTSA does nothing more than passively accept manufacturers' plans without informing them whether or not the proposed recall is unacceptable. *See also* Pltfs MTD Opp. 30-32.[6]

B. Notice-and-comment procedures are also required when an agency amends an existing regulation. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C.

[6] Moreover, the 1998 letter constrains NHTSA's own ability to use the full panoply of available enforcement mechanisms against those manufacturers that conduct regional recalls in accordance with the terms of the letter. *See* 49 U.S.C. §§ 30121(b), 30165. For example, the Safety Act allows NHTSA to levy civil penalties against manufacturers who fail to comply with the Act's notifications provisions. Enforcement of an order assessing civil penalties may be enjoined, however, if the court "decides that the failure to notify is reasonable and that the manufacturer has demonstrated the likelihood of prevailing on the merits." § 30121(b)(1). NHTSA would be "hard pressed" to convince a court that a manufacturer that complied with the terms of NHTSA's 1998 letter acted unreasonably in conducting a regional recall. *Community Nutrition Inst. v. Young,* 818 F.2d 943, 948 (D.C. Cir. 1987).

Cir. 1997). Here, the portion of the 1998 letter that permits manufacturers to "modify" owner notification letters "to include language in the letter to owners of vehicles in low-risk states (or portions of states) that indicates that the defect is unlikely to cause a safety problem if the vehicle is not exposed to the meteorological condition at issue" effects such an amendment.

The agency claims that its language is consistent with 49 C.F.R. § 577.5(d), which states that "[w]hen the manufacturer determines that the defect . . . may not exist in each such vehicle . . . he may include an additional statement to that effect." Def. SJ Opp. 17. However, the terms of the 1998 letter flatly contradict this provision. Pursuant to the 1998 letter, NHTSA has forbidden manufacturers from conducting regional (as opposed to national) recalls to correct short-term exposure related defects (defects that are likely to manifest themselves after a brief exposure to a particular weather condition) and required that manufacturers notify all consumers nationwide that they are eligible to receive a free recall remedy. Thus, even under the agency's view, *all* vehicles subject to a short-term exposure related recall are defective. As such, it is simply impossible that a regulation permitting manufacturers to indicate that some owners who, despite receiving a defect notification letter, own vehicles that *are not defective* also applies to situations in which *all* owners receiving notification letters actually own defective vehicles.

Furthermore, given that NHTSA offers no other justification for this portion of the 1998 letter, its 1998 letter violates 49 C.F.R. § 577.8, which requires that owner notification letters "shall not, except as explicitly provided in this part, contain any statement or implication that there is no defect, that the defect does not relate to motor vehicle safety, or that the defect is not present in the owner's or lessee's vehicle." As such, even if the 1998 letter is a policy statement, it marks a significant departure from the agency's own regulations and therefore required notice-and-comment rulemaking. *See Paralyzed Veterans*, 117 F.3d at 586; *see also* Pltfs SJ Mem. 36.

III. NHTSA'S REGIONAL RECALLS RULE IS ARBITRARY AND CAPRICIOUS.

NHTSA's regional recalls rule is arbitrary and capricious for a variety of reasons, as discussed in Part II of plaintiffs' opening memorandum. In short, NHTSA's rule does not account for the mobility of vehicles, is based on factual premises contradicted by the agency's own documents and statistical information of which the agency should have been aware, and necessarily results in many vehicles that qualify for notice and a free repair—even under NHTSA's own reasoning—not receiving either.

NHTSA's opposition does not address, much less refute, any of these deficiencies in its rule. Instead, NHTSA mischaracterizes plaintiffs' lawsuit, essentially setting up straw men that it then proceeds to knock down. None of the agency's arguments has merit.

A. As an initial matter, NHTSA repeatedly asserts that plaintiffs are attempting to compel NHTSA to exercise its enforcement discretion. *E.g.,* Def. SJ Opp. 5, 12-13. As discussed in plaintiffs' opposition to NHTSA's motion to dismiss (at 13), this suit challenges the validity of NHTSA's generally applicable legislative rule embodied in its 1998 letter, not the agency's failure to act with respect to any individual recall. To the extent that the lawsuit addresses NHTSA's enforcement discretion, it is challenging an enforcement rule (or, in NHTSA's view, policy), not an application of that rule (or policy). Whereas specific *application* of enforcement discretion (*i.e.*, a decision not to take enforcement action with respect to a particular regional recall) would not ordinarily be reviewable, "an agency's statement of general enforcement policy may be reviewable for legal sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process or has otherwise articulated it in some form of universal policy statement." *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (citing *Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993), and

National Wildlife Fed'n v. EPA, 980 F.2d 765 (D.C. Cir. 1992)); *accord OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998). Thus, NHTSA's challenged action is reviewable by this Court.[7]

B. NHTSA also claims that the substance of its 1998 letter can be reviewed only "on the basis of the record before the agency, not a new record comprised of litigation affidavits or other materials" and suggests that the relevant administrative records in this case are those created during individual recalls. Again, this argument lacks merit because plaintiffs do not challenge individual recalls; they challenge the rule set forth in the 1998 letter.

Although NHTSA has not conducted an adjudication or a notice-and-comment rulemaking, it seeks to limit this Court to a non-existent administrative record. However, the rationale for evaluating an agency's actions based only on an administrative record does not apply to this case. Generally, an administrative record is compiled when the agency follows the fact-finding procedure dictated by the APA, which ensures that the agency has weighed competing interests before making its decision. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (notice-and-comment procedures help ensure that rule has received due deliberation by the agency). Here, although manufacturers may have been informally aware of NHTSA's intention to promulgate a rule limiting regional recalls, plaintiffs and other consumer groups were not. Thus, not only is there no administrative record, there is no guarantee that

[7] NHSTA also argues briefly that this lawsuit should have been brought as an action for mandamus relief. Def. SJ Opp. 5, 12-13. However, plaintiffs are not seeking to compel NHTSA to take any action, and accordingly, a mandamus action would not have been an appropriate means to bring this challenge. In addition, NHTSA is incorrect to suggest that plaintiffs were required to file a petition with the agency seeking an expansion of any regional recall as a prerequisite to seeking relief in this Court. 5 U.S.C. § 704; *Darby v. Cisneros,* 509 U.S. 137, 146 (1993) (no need to exhaust administrative remedies where neither underlying statute nor agency rules require it); *see also* Pltfs MTD Opp. 33-35 (discussing additional reasons that plaintiffs were not required to exhaust administrative remedies before filing suit).

NHTSA considered all relevant issues when drafting the 1998 letter, nor any efficiency interest in limiting plaintiffs to issues considered by the agency.

In any event, the documents on which plaintiffs rely to show that the 1998 letter is arbitrary and capricious are those that would comprise the administrative record, if one existed. In fact, plaintiffs rely primarily on the text of the 1998 letter itself, which not only underscores many of the problems associated with regional recalls, but shows that NHTSA itself was aware of at least some of them—for example, the difficulty of providing notice to vehicle owners who move from an excluded to an included state and also that some excluded vehicles would manifest safety defects. *See* Ditlow Decl., Exh. 2, at 2.

Plaintiffs also cite documents that CAS received from NHTSA in response to a Freedom of Information Act ("FOIA") request for "all records relating to the formation and application of NHTSA's so-called 'Regional Recall Policy.'" Ditlow Decl. ¶ 12 & Exh. 6. Presumably, NHTSA complied with FOIA by including in its response all of the records that NHTSA considered in creating its regional recalls rule. In responding to CAS's FOIA request, NHTSA did not indicate that it was withholding any responsive documents. Thus, all relevant documents are presently before this Court, and remand would serve no conceivable purpose.

Plaintiffs have also cited documents created after NHTSA distributed its 1998 letter to explain how the rule works in practice and to show its effect on vehicle owners. Even if this case were one in which a traditional administrative record existed, it would be permissible to supplement the record for these purposes. *Dr. Pepper/Seven-Up Cos., Inc. v. FTC*, 991 F.2d 859, 846 (D.C. Cir. 1993) (agency decision must be based on all relevant factors to survive arbitrary and capricious review); *Beach Comm., Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992) ("It may sometimes be appropriate to resort to extra-record information to enable judicial review [of

agency action] to become effective.") (brackets in original); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) (permitting plaintiffs to introduce post-rule congressional testimony that "bears directly upon the plausibility of certain predictions made by the Administrator in promulgating the regulations" and noting that "contrary rule would convert the reviewing process into an artificial game"); *Sierra Club v. Marsh*, 976 F.2d 763, 772 (1st Cir. 1992) (court can supplement administrative record with materials that show agency decision-making); *Asarco v. EPA*, 616 F.2d 1153, 1196 (9th Cir. 1980) (court can go outside record to "determine whether the agency took into consideration all relevant factors").

For example, to show the bizarre results of NHTSA's regional recalls policy, plaintiffs have used a NHTSA-generated document entitled "Regional Recalls," as well as NHTSA's own summaries of regional recalls and manufacturers' 573 reports submitted to the agency. Among others, these documents show heat-related recalls that exclude Death Valley and snow-related recalls that exclude New York. Ditlow Decl., Exh. 3; *see* Pltfs SJ Mem. 30. To the same end, plaintiffs have cited NHTSA's own complaint database, which includes countless complaints from consumers who have been excluded from regional recalls only to have their vehicles apparently manifest the relevant safety defects. Ditlow Decl., Exh. 19. Additionally, plaintiffs have cited publicly available factual information to show the extent to which NHTSA's regional recalls policy puts consumers at risk. For example, plaintiffs cite data from the 2000 U.S. Census to show the number of people who move between different regions in the United States and who are therefore at risk of moving into an area in which their previously-excluded vehicle is placed at heightened risk of manifesting a defect. And plaintiffs cite a study showing the number of commuters who travel between Virginia, which is generally excluded from corrosion-related regional recalls, and Washington D.C. and Maryland, which are both included. Pltfs SJ

Mem. 22-23. These commuters are placed at risk because they encounter on a frequent basis weather conditions that NHTSA itself has found place vehicles at risk for failure. In addition, in the context of various illustrative regional recalls, plaintiffs cite information from the National Climatic Data Center about the climatic similarities that many excluded states share with many included states. *Id*. at 31. Finally, plaintiffs have cited a section of Ford Motor Co.'s Warranty & Policy Manual. *Id*. at 6; Ditlow Decl. ¶ 21 & Exh. 22. Although not a public record, NHTSA does not contest its contents. Plaintiffs cite this document to give the Court background information about how regional recalls are actually conducted, and NHTSA does not claim ignorance of this information.

None of this information—virtually all of which came from NHTSA's own files—should have come as a surprise to NHTSA as it was drafting the 1998 letter. Although plaintiffs have generally cited statistical data from recent years, there is no reason to believe that, prior to 1998, vehicle owners did not move to different regions of the country with great frequency or that Tennessee and New Mexico were significantly cooler states than they are today. In fact, as discussed above (at 16), in the 1998 letter, NHTSA anticipated many of the problems that regional recalls could cause. Thus, NHTSA should have been on notice that people frequently move from one state to another, that many residents of excluded states (such as Virginia) commute to included states (such as the District of Columbia or Maryland) for work, and of the various climatic information mentioned in plaintiffs' memorandum. NHTSA cannot evade review based on this generally accepted, publicly available information by claiming that it was not placed directly in the agency's hands in 1998 by an interested party.

In any event, NHTSA's 1998 letter and the agency's own documents show that the regional recalls policy is arbitrary and capricious as a matter of law. Because there is no set of

facts regarding the implementation of the rule that could demonstrate a "rational connection between the facts found and the choice made," this issue is appropriate for summary judgment. *Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also University Med. Ctr. of S. NV v. Shalala*, 173 F.3d 438, 441 n.3 (D.C. Cir. 1999) (arbitrary and capricious review of agency action presents legal question appropriate for resolution on summary judgment). Furthermore, because this Court has every document on which NHTSA supposedly relied in developing its policy, it is unnecessary to remand this case to the agency for a more complete explanation of its rationale in developing the policy.[8]

IV. NHTSA'S CHALLENGES TO PLAINTIFFS' DECLARATIONS ARE MERITLESS.

Without challenging the accuracy of any factual statements in the declarations of Clarence Ditlow and Joan Claybrook, NHTSA asserts that this Court should disregard the bulk of both declarations unless it finds that Mr. Ditlow and Ms. Claybrook are qualified experts on a host of subjects. NHTSA's tactic is purely a diversionary one. Victory on plaintiffs' substantive claims does not depend on these affidavits, which were submitted to demonstrate plaintiffs' standing to bring suit. Rather, plaintiffs' challenge to NHTSA's regional recalls rule rests on documents either obtained directly from NHTSA or readily available in the public domain. These documents from NHTSA were submitted as authenticated exhibits to the Declaration of Clarence M. Ditlow. Notably, NHTSA does not contest the authenticity of any of these

[8] NHTSA claims that, should this Court find NHTSA's regional recalls rule unlawful, the only available remedy is a remand to the agency. Although remand to the agency is the proper course to correct procedural or fact-finding errors, this court may vacate or enjoin the regional recalls rule if it is contrary to law. *See Atlantic States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) ("Claims that an agency's action is arbitrary and capricious or contrary to law present purely legal questions."); *see also* 5 U.S.C. § 706(2) & (2)(A) (reviewing court shall "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

documents. Instead, NHTSA attacks the qualifications of Mr. Ditlow, Executive Director of plaintiff CAS, and Joan Claybrook, president of plaintiff Public Citizen, to comment on the implementation of regional recalls and the effects of these recalls on the plaintiff organizations' members, in the hope of distracting this Court from the fact that NHTSA's own 1998 letter and other records establish plaintiffs' entitlement to relief. This Court should reject NHTSA's attack as both unfounded and irrelevant.

A. To begin with, NHTSA challenges Mr. Ditlow's account of a series of complaints about regional recalls that CAS received from consumers because Mr. Ditlow did not travel around the country inspecting these consumers' vehicles. Def. SJ Mem. 26-27. In so arguing, NHTSA seeks to divert attention from the fact that the statute itself makes consumer complaints a factor in determining whether a vehicle is defective. *See* 49 U.S.C. § 30118(a) (citing consumer communications under § 30166(f)). Moreover, NHTSA itself implicitly admits that it has received numerous complaints from consumers who have been excluded from regional recalls. White Decl. ¶ 14. In fact, the agency anticipated in its 1998 letter that some excluded vehicles would manifest the relevant defect. Ditlow Decl., Exh. 2, at 2. Second, Mr. Ditlow does not claim to have expert knowledge about the vehicles of consumers who complained to CAS, but is simply stating that a number of consumers, including CAS members, reported to CAS that they owned vehicles that experienced the same malfunctions as those remedied by regional recalls from which these individuals were excluded. The Declaration of Mary Ann Morgan, a CAS member, describing her exclusion from a regional recall is illustrative and ignored by NTHSA.

NHTSA quotes, out of context, a series of paragraphs in which Mr. Ditlow states that the agency has approved or authorized regional recalls and claims that these statements are

impermissible because they are not based on personal knowledge or documentary evidence, and are hearsay, speculative, and conclusory. Def. SJ Opp. 25. Yet again, the agency's claims do not survive scrutiny. None of the paragraphs attacked by NHTSA had as their main ideas the notion that NHTSA approves regional recalls. For that proposition, the Court need look no further than the agency's own statements, such as its 1998 letter and November 2002 letter to CAS. Ditlow Decl., Exhs. 2 & 24; s*ee* 28 U.S.C. § 801(d)(2) (admission of party opponent exception to hearsay rule). Instead, the challenged paragraphs describe the problems with various regional recalls.

NHTSA then complains that Mr. Ditlow offers information about the effects of corrosion on vehicles and the length of time it takes for a vehicle with a cold-related defect to be put at risk without complying with the *Daubert* test for assessing expert testimony. Def SJ Opp. 26 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). Not only is Mr. Ditlow, a chemical engineer with thirty years' experience on auto safety, an expert on the causes of motor vehicle failures, including those attributable to corrosion and cold, *see* Third Ditlow Decl. ¶¶ 2-3, but NHTSA appears to concede that Mr. Ditlow is *correct* in virtually all of his statements. White Decl., ¶¶ 24 & 25. For example, Mr. Ditlow states that vehicles corrode at different rates, that corrosion can be initiated by exposure to materials other than road salt, and that corrosion can progress even after a vehicle leaves the corrosive environment. Ditlow Decl. ¶ 17. NHTSA agrees. White Decl. ¶ 24 (NHTSA spreadsheet showing corrosion complaints "include all corrosion reports, including corrosion problems not resulting from road salt, such as those resulting from ocean spray") & ¶ 25 ("The impact of road salt on a vehicle varies . . . . A short-term exposure to road salt would not present a problem *if the part is not particularly susceptible to corrosion*," and corrosion "*may* stop or slow down *when the corrosion process is exhausted*,

or when moisture is eliminated or reduced") (emphasis added). Thus, it is apparently *moisture* that must be eliminated to stop corrosion from progressing, and not just salt or other corrosive agent.[9] *See also* Third Ditlow Decl. ¶ 2.

Likewise, Mr. Ditlow's assertion that cold- and snow-related defects can manifest themselves after exposure to the relevant condition for just a few days or weeks is not only based on his expertise, but is backed up by NHTSA's own statements. For example, in cold-related Recall No. 99V-131, NHTSA apparently convinced Volkswagen to give notice of the defect to all owners nationwide (although only owners in cold states automatically received the free repair) because of the risk that a short-term exposure could cause the defect to manifest. White Decl., Exh. 6, at 14. Similarly, in NHTSA's 1998 letter to Ford, the agency referred to cold-related defects as short-term exposure defects. Ditlow Decl., Exh. 11, at 3.

Finally, NHTSA challenges Ditlow's explanation of how vehicle manufacturers communicate with dealers about safety recalls. As NHTSA grudgingly admits, Ditlow attached an excerpt from Ford's Warranty & Policy Manual that explains how, in addition to the dealer bulletins contemplated by NHTSA's own regulations, 49 C.F.R. § 579.5, Ford uses a computer database to determine whether any particular vehicle is subject to any safety recalls. *See Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981) (at summary judgment stage, affiant competent to testify to his own observations upon review of documents). As Grady Stone has

[9] In his declaration, Jonathan White attempts to justify NHTSA's choice of states that the 1998 letter requires to be included in corrosion-related recalls. He asserts that he created the list by determining which 15 states used the most road salt and then selecting 5 adjacent "border states" plus the District of Columbia. He also attempts to downplay NHTSA's own corrosion complaint database by bizarrely stating that it includes failures attributable to corrosive agents other than road salt. White did not explain, however, why 15 states was the cut-off, or why he excluded states in which corrosion occurred primarily because of factors such as ocean spray. White Decl. ¶ 24. Significantly, NHTSA does not contest that some included states use less road salt than some excluded states. *See* Pltfs SJ Mem. 28-29.

discovered firsthand (*see* Stone Decl. ¶ 6), the use of this system means that when a Ford dealer—in any state—enters into its computer system the Vehicle Identification Number of a vehicle that has been excluded from a regional recall because the state in which the car is registered has been excluded, the dealer will not be alerted to the existence of the recall. Because Ford has conducted more regional recalls than any other manufacturer, *see* Ditlow Decl., Exh. 3 (NHTSA's regional recalls list), large numbers of consumers will not learn of regional recalls even after their vehicles fail. Furthermore, Mr. Ditlow has previously reviewed and is familiar with comparable manuals of other manufacturers and has been in contact with NHTSA, manufacturers, and consumers for over thirty years regarding safety defects and recalls. Third Ditlow Decl. ¶¶ 4 & 5.

NHTSA belittles Mr. Ditlow's knowledge by noting that he is an attorney and consumer advocate, but not an employee of NHTSA or a manufacturer. Def. SJ Opp. 24-25. Yet, in addition to his law degree, Ditlow holds a degree in chemical engineering and has co-authored multiple books about vehicle defects and manufacturers' recall and warranty practices. Third Ditlow Decl. ¶¶ 2, 9 & 10. Furthermore, Ditlow has been qualified as an expert on defect investigations, safety recalls, and NHTSA's safety standards in several cases related to auto safety, has testified before Congress, and has successfully petitioned NHTSA regarding defective vehicle components leading to numerous safety recalls. *Id*. ¶¶ 7, 9, & 12. Thus, NHTSA's challenge to Mr. Ditlow's declaration should be seen for what it is—an unwarranted attack on an individual who has often exposed lapses in NHTSA's safety programs in his decades researching auto safety, testifying before Congress about auto safety, writing about auto safety, and communicating with the public about auto safety—and not an effort to defend its regional recalls rule on its merits.

Furthermore, the type of information that Mr. Ditlow offers is not amenable to a *Daubert* analysis. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (*Daubert* applies only when its flexible analysis can benefit court). *Daubert* applies when an expert offers an opinion on the application of general principles to the facts of a particular case, such as, for example, whether a particular tire is defective or whether silicone breast implants are at fault for a plaintiff's illness. In this case, NHTSA asks the Court to apply *Daubert* to general *factual* statements with which it does not even disagree, such as the principle that different vehicles corrode at different rates. For this reason, factors that *Daubert* suggested might be helpful to courts evaluating expert testimony (such as whether the theory or technique has been tested or subjected to peer review) do not apply. In any event, the *Daubert* safeguards are less important when a judge, not a jury, is deciding both whether to admit the expert testimony and the outcome of the underlying action because judges are well equipped to determine how much weight to give various pieces of evidence. *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000); *see also Seaboard Lumber v. U.S.*, 308 F.3d 1283, 1302 (Fed. Cir. 2002).

B. NHTSA levies similar arguments against Joan Claybrook's declaration, asserting that Ms. Claybrook is not qualified to assess the risk that regional recalls pose to Public Citizen's membership. Ms. Claybrook's declaration was not submitted to provide expert opinion, but to establish the reasons that Public Citizen brought this suit on behalf of its members and to describe the nature of the injury to the organization's members. Furthermore, Ms. Claybrook explained that Public Citizen has conducted a Web-based survey of its members, seeking basic information about the member's vehicle and state of registration, as well as whether the member has experienced a vehicle malfunction that was addressed through a regional recall. Claybrook Decl. ¶ 8; Second Claybrook Decl. ¶ 2. Public Citizen used these responses to determine

whether survey respondents had been excluded from regional recalls. Second Claybrook Decl. ¶¶ 3-4. The survey and responses, which are attached to the Second Claybrook Declaration as Exhibits 1-3, offer background information about Public Citizen's concern about regional recalls and its standing to bring this action based on the impact of NHTSA's regional recalls rule on Public Citizen's members, as further confirmed by the declaration of member Grady Stone.

Finally, Ms. Claybrook offers her assessment of regional recalls' failure to account for vehicles' mobility. This assessment is based as much on common sense as it is on her tenure as the Administrator of NHTSA. It explains that Public Citizen is participating in this lawsuit in order to compel NHTSA to provide all the consumer protections guaranteed by the Safety Act, but is not offered as proof of plaintiffs' substantive claims.

Therefore, Ms. Claybrook and Mr. Ditlow are qualified to make each of the statements that NHTSA challenges.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully Submitted,

_____/s/_____

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