

Nos. 06-71891, 06-72317, 06-72641, 06-72694, 06-73807, 06-73826

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*,

Respondents.

**On Petition for Review of a Final Rule Issued by the Department of
Transportation National Highway Traffic Safety Administration**

**BRIEF OF NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

Erika Z. Jones

Counsel of Record

Kenneth N. Weinstein

Nickolai G. Levin

MAYER, BROWN, ROWE & MAW LLP

1909 K Street, NW

Washington, DC 20006

(202) 263-3000 (phone)

(202) 263-3300 (fax)

Counsel for Amicus Curiae

March 5, 2007

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, amicus states as follows:

The National Automobile Dealers Association (“NADA”) is a national I.R.C. 501(c)(6) trade association incorporated in Delaware. NADA does not have parent companies, subsidiaries or affiliates that have outstanding securities in the hands of the public. While members of NADA have outstanding securities in the hands of the public, these members are not parent companies, subsidiaries or affiliates of NADA.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. IT IS APPROPRIATE FOR AGENCIES TO CONDUCT COST-BENEFIT ANALYSES WHEN ADOPTING RULES UNLESS EXPRESSLY PRECLUDED BY STATUTE	9
A. Courts Have Upheld Agencies’ Use Of A Cost-Benefit Analysis Except Where The Statute Clearly Prohibits It.....	9
B. Executive Order 12866 Directs Agencies To Compare Costs And Benefits Unless A Statute Expressly Requires Another Approach.....	13
C. Cost-Benefit Analysis Helps Inform Agency Decision- making.....	15
II. NHTSA HAS CONSISTENTLY CONDUCTED COST- BENEFIT ANALYSES IN FORMULATING CAFE STANDARDS THAT HAVE BEEN UPHELD BY THE COURTS	18
III. THIS COURT SHOULD UPHOLD THE REFORMED LIGHT TRUCK CAFE STANDARDS	20
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>American Pilots’ Ass’n, Inc. v. Gracey</i> , 631 F. Supp. 827 (D.D.C. 1986).....	14
<i>Baltimore Gas & Elec. Co. v. NRDC, Inc.</i> , 462 U.S. 87 (1983).....	23
<i>Center for Auto Safety v. NHTSA</i> , 793 F.2d 1322 (D.C. Cir. 1986).....	2, 18, 19
<i>Central Ariz. Water Conservation Dist. v. EPA</i> , 990 F.2d 1531 (9th Cir. 1993)	8, 22
<i>Chevron U.S.A., Inc. v. NRDC, Inc.</i> , 467 U.S. 837 (1984).....	7, 17
<i>Competitive Enter. Inst. v. NHTSA</i> , 901 F.2d 107 (D.C. Cir. 1990)	17
<i>George E. Warren Corp. v. EPA</i> , 159 F.3d 616 (D.C. Cir. 1998).....	11, 12, 16
<i>Grand Canyon Air Tour Coalition v. FAA</i> , 154 F.3d 455 (D.C. Cir. 1998), <i>cert. denied</i> , 526 U.S. 1158 (1999).....	12
<i>Industrial Union Dept., AFL-CIO v. American Petroleum Inst.</i> , 448 U.S. 607 (1980).....	9, 10
<i>International Union v. OSHA</i> , 37 F.3d 665 (D.C. Cir. 1994).....	10
<i>Irvine Med. Ctr. v. Thompson</i> , 275 F.3d 823 (9th Cir. 2002).....	15
<i>Irving v. United States</i> , 162 F.3d 154 (1st Cir. 1998), <i>cert. denied</i> , 528 U.S. 812 (1999).....	12
<i>J&G Sales Ltd. v. Truscott</i> , 473 F.3d 1043 (9th Cir. 2007).....	15, 22
<i>Lead Indus. Ass’n, Inc. v. EPA</i> , 647 F.2d 1130 (D.C. Cir. 1980).....	16
<i>Michigan v. EPA</i> , 213 F.3d 663 (D.C. Cir. 2000)	11, 16
<i>Motor Vehicles Mfrs. Ass’n v. State Farm Ins. Co.</i> , 463 U.S. 29 (1983)	<i>passim</i>
<i>NLRB Union v. Federal Labor Relations Auth.</i> , 834 F.2d 191 (D.C. Cir. 1987).....	15
<i>NRDC, Inc. v. EPA</i> , 824 F.2d 1146 (D.C. Cir. 1987).....	11, 16

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council</i> , 35 F.3d 1371 (9th Cir. 1994)	8
<i>Public Citizen v. NHTSA</i> , 848 F.2d 256 (D.C. Cir. 1988)	17, 19
<i>Sierra Club v. EPA</i> , 314 F.3d 735 (5th Cir. 2002)	11
<i>Whitman v. American Trucking Ass’ns, Inc.</i> , 531 U.S. 457 (2001).....	15, 16
 Statutes:	
5 U.S.C. § 706(2)(A).....	15
29 U.S.C. § 652(8)	10
42 U.S.C. § 7502(c)(1).....	11
49 U.S.C. § 3703	14
49 U.S.C. Chapter 301	10
49 U.S.C. § 32901	1
49 U.S.C. § 32902(a)	2, 3, 8
49 U.S.C. § 32902(f).....	3, 8
 Regulations and Executive Orders:	
49 C.F.R § 1.50(f)	2
42 Fed. Reg. 13807 <i>et seq.</i> (Mar. 14, 1977)	19
43 Fed. Reg. 11995 <i>et seq.</i> (Mar. 23, 1978)	19
45 Fed. Reg. 20871 <i>et seq.</i> (Mar. 31, 1980)	19
49 Fed. Reg. 41250 <i>et seq.</i> (Oct. 22, 1984)	19
53 Fed. Reg. 11074 <i>et seq.</i> (Apr. 5, 1988).....	19
68 Fed. Reg. 16868 <i>et seq.</i> (Apr. 7, 2003).....	20

TABLE OF AUTHORITIES
(continued)

	Page(s)
70 Fed. Reg. 51414 <i>et seq.</i> (Aug. 30, 2005)	3
71 Fed. Reg. 17566 <i>et seq.</i> (Apr. 6, 2006).....	<i>passim</i>
Executive Order 12044, 43 Fed. Reg. 12261 (Mar. 23, 1978)	13
Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).....	13, 14
Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).....	6, 13, 14, 20
Miscellaneous:	
Kenneth J. Arrow et al., <i>Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles</i> (American Enterprise Institute 1996)	17
STEPHEN BREYER, <i>BREAKING THE VICIOUS CIRCLE</i> (1993)	12
CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, <i>RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING</i> (1993)	16
Robert H. Frank & Cass R. Sunstein, <i>Cost-Benefit Analysis and Relative Position</i> , 68 U. CHI. L. REV. 323 (2001)	12
John D. Graham, <i>Legislative Approaches to Achieving More Protection at Less Cost</i> , 1997 U. CHI. LEGAL F. 13	17
Robert W. Hahn & Cass R. Sunstein, <i>A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis</i> , 150 U. PA. L. REV. 1489 (2002)	16
Harvard Group on Risk Management Reform, <i>Reform of Risk Regulation: Achieving More Protection at Less Cost</i> , 1 HUM. & ECOLOGICAL RISK ASSESSMENT 183 (1995)	16
NHTSA Docket No. 02-11419, Entry No. 18358	20
President’s Council on Sustainable Development, <i>Eco-Efficiency Task Force Report</i> ch. 2 (1995), available at	

TABLE OF AUTHORITIES
(continued)

	Page(s)
http://clinton2.nara.gov/PCSD/Publications/TF_Reports/eco-chap2.html	16
Cass R. Sunstein, <i>Cost-Benefit Default Principles</i> , 99 MICH. L. REV. 1651 (2001).....	17
Tammy O. Tengs & John D. Graham, <i>The Opportunity Costs of Haphazard Social Investments in Lifesaving</i> , in RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 167 (Oxford 1996)	17
Edward W. Warren & Gary E. Marchant, “ <i>More Good Than Harm</i> ”: <i>A First Principle for Environmental Agencies and Reviewing Courts</i> , 20 ECOLOGY L.Q. 379 (1993).....	12

INTEREST OF THE AMICUS CURIAE

NADA is a national trade association that represents nearly 20,000 franchised automobile and truck dealers who are primarily engaged in the retail sale of new and used motor vehicles, both foreign and domestically produced. NADA members are also engaged in automotive service, repair and parts sales. The overwhelming majority of the franchises that NADA's members represent sell light trucks (*i.e.*, SUVs, vans and pickup trucks).

NADA appears frequently as amicus curiae in cases that raise important issues to its members or their customers, primarily in federal courts across the country. NADA's involvement in monitoring the development, enactment, amendment, implementation, enforcement, and interpretation of federal statutes that affect its members provides it with tangible experience and a unique perspective from which to assist a court regarding the application of these statutes. The Energy Policy and Conservation Act of 1975 ("EPCA"), 49 U.S.C. § 32901 *et seq.*, which is the subject of this lawsuit, is one such statute.

The issues in this case directly affect NADA's dealer members, since the fuel-economy standards set by the National Highway Traffic Safety Administration ("NHTSA") pursuant to EPCA directly govern the new vehicles dealers sell and could adversely affect sales of those vehicles. Thus, NADA has an obvious and vital interest in the outcome of this case.

Though this case raises many issues that affect NADA's members, this amicus brief will address only one set of issues: those involving NHTSA's use of a cost-benefit analysis in formulating reformed CAFE standards for light trucks. These issues are particularly important to NADA and its members because the use of cost-benefit analysis in devising fuel economy standards is imperative to protect the economic viability of the light truck industry, including the thousands of motor vehicle dealers who sell light trucks and their over one million employees. As NHTSA expressly recognized in its rule-making, a fuel economy standard that does not consider costs could potentially have "harsh economic consequences for the auto industry [and would therefore] represent an unreasonable balancing of EPCA's policies." 71 Fed. Reg. 17566, 17592 (Apr. 6, 2006) (ER 1399) (quoting *Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1341 (D.C. Cir. 1986)). NADA obviously has a strong interest in avoiding this result.

All parties have consented to the filing of this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to EPCA, NHTSA must establish corporate "average fuel economy standards" (CAFE standards) for "[n]on-passenger" automobiles, including light trucks. 49 U.S.C. § 32902(a).¹ EPCA requires that a CAFE standard represent

¹ EPCA grants the authority to establish CAFE standards to the Secretary of Transportation, but the Secretary has delegated his authority under EPCA to the NHTSA Administrator. 49 C.F.R §1.50(f).

“the maximum feasible average fuel economy level that [NHTSA] decides the manufacturers can achieve in that model year” and directs NHTSA to consider “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.” *Id.* § 32902(a), (f). EPCA does not state how these considerations are to be weighed, prohibit the consideration of other relevant factors, or provide further guidance on what methodology NHTSA may or may not utilize. *Id.*

Even before proposing standards for the model years (“MY”) at issue here (MY 2008-2011), NHTSA announced its intent to reform the light truck CAFE program to increase energy savings, enhance motor vehicle safety, and provide a more equitable regulatory framework, responding in part to a 2002 study prepared by the National Academy of Sciences (“NAS”) (ER 88-264). NHTSA subsequently issued a Notice of Proposed Rulemaking (“NPRM”) covering MYs 2008-2011. 70 Fed. Reg. 51414 (Aug. 30, 2005) (ER 28-81). After considering the extensive comments on that NPRM, NHTSA promulgated a Final Rule in which it adopted CAFE standards for MY 2008-2011 light trucks. 71 Fed. Reg. at 17566-679 (ER 1372-486). That Final Rule announced “Unreformed” CAFE standards for MYs 2008-2010, utilizing the methodology the agency had applied

for the past 30 years, and announced a new methodology for calculating “Reformed” CAFE standards for MYs 2008-2011.

In formulating the Reformed CAFE standards, NHTSA understood that improving fuel economy would create substantial savings for vehicle buyers, as well as “generate[] benefits to society * * *, including reduced emissions of some criteria pollutants that occur during fuel refining.” 71 Fed. Reg. at 17589 n.64 (ER 1396). However, NHTSA also “recognized the financial challenges facing the motor vehicle industry and that a substantial number of job losses had been announced by large full-line manufacturers.” *Id.* at 17587 (ER 1394). It therefore devised standards that “enhance overall fuel savings while providing manufacturers the flexibility they need to respond to changing market conditions.” *Id.* A balance was necessary because requiring manufacturers to utilize certain theoretically feasible technologies “would impose cost burdens on certain manufacturers that are not economically practicable,” and vice-versa—standards that were too economically lenient would undermine EPCA’s objective of encouraging energy conservation. *Id.* at 17592 (ER 1399) (citation omitted).

In ascertaining the appropriate balance between technological feasibility and economic practicability, NHTSA employed “an incremental cost-benefit analysis (as implemented within the Volpe [computer] model) to establish standards.” *Id.* at 17588, 17592 (ER 1395, 1399). This cost-benefit analysis “carefully considers

and weighs all of the benefits of improved fuel savings,” including the value of “fuel savings experienced by consumers” and “the value of increased energy security.” *Id.* at 17592 (ER 1399). NHTSA also considered “the effect that the CAFE standards will have on safety.” *Id.* at 17594 (ER 1401). And it considered additional factors in assessing economic practicability, including the effect of the standards on sales and employment. *Id.* at 17591 (ER 1398).

In their opening brief, the Public Interest Petitioners on Environmental Policy Conservation Act Issues (“EPCA Petitioners”) argue that NHTSA should not have relied on the Volpe model’s cost-benefit analysis in determining Reformed CAFE standards. EPCA Petitioners Br. 23. They assert that, “[i]f Congress had intended for NHTSA to use maximized benefits as [the primary] methodology, it would have said so, as it has in other provisions.” *Id.*²

However, that is not the law and never has been. While clear congressional direction to consider costs and benefits may be required to *compel* an agency to perform a cost-benefit analysis, the absence of explicit authorization does not bar an agency from utilizing such an analysis to inform its decision-making process,

² The EPCA Petitioners later claim (at 26) that they do not “challenge NHTSA’s decision to assess costs and benefits,” instead stating that NHTSA may do so only when quantifying different possible fuel economy standards. But there is no way to reconcile this position with their challenge to NHTSA’s use of the Volpe model to assist it in determining the “maximum feasible” fuel economy level. The Volpe model is just a tool that NHTSA used to conduct its cost-benefit analysis in this proceeding.

particularly where there are conflicting statutory objectives, as is the case here. Indeed, the general rule is that an agency is *permitted* to perform a cost-benefit analysis, unless it is expressly precluded from doing so by statute. This rule is in accord with section 1 of Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), which states that “agencies should select those approaches that maximize net benefits” “in choosing among alternative regulatory approaches * * * unless a statute requires another regulatory approach”—which EPCA does not. And it directly follows from the deference that courts are required to give to administrative agencies when reviewing agency rulemaking under *Motor Vehicles Manufacturers Ass’n v. State Farm Ins. Co.*, 463 U.S. 29 (1983).

In fact, NHTSA has applied some form of cost-benefit analysis in formulating maximum feasible CAFE standards for light trucks as part of the Unreformed CAFE methodology it has used for approximately 30 years, and that methodology has been consistently upheld by the courts. While the EPCA Petitioners challenge the Reformed CAFE methodology on the ground that it does not achieve sufficient fuel savings, NHTSA has estimated that the Reformed CAFE standards will save hundreds of millions of gallons of gasoline compared to the fuel savings under Unreformed CAFE standards. *See* 71 Fed. Reg. at 17619-20 & Tables 7, 8 (ER 1426-1427). Thus, if the EPCA Petitioners’ succeed in their

challenge to the Reformed CAFE standard, the likely result, ironically, would be a reduction in energy savings.

While EPCA does not compel NHTSA to adopt the Reformed CAFE standards—NHTSA could lawfully have retained the Unreformed CAFE methodology—the Reformed CAFE methodology clearly reflects an appropriate balancing of EPCA’s statutory criteria by the agency with expertise in the subject matter, and is based upon an interpretation of statutory terms that is entitled to deference under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). NHTSA provided extensive reasons for the methodology it used and the results it reached. To overturn NHTSA’s Reformed CAFE standards would sanction the very sort of judicial micromanaging of administrative decisions that the Supreme Court has condemned.

ARGUMENT

The EPCA Petitioners do not challenge the concept of Reformed CAFE for light trucks, only some of the specific details. But formulating Reformed CAFE standards for light trucks was no easy task. During the rulemaking proceeding, interested persons submitted a wide variety of conflicting suggestions and comments. The only statutory guidance to resolve these conflicting suggestions are that NHTSA must set standards at the “maximum feasible average fuel economy level that [NHTSA] decides the manufacturers can achieve in that model

year,” which is to be determined by “consider[ing]” four competing criteria: “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.” 49 U.S.C. § 32902(a), (f). EPCA neither specifies nor precludes anything further, and it certainly does not—as the EPCA Petitioners would have it—compel NHTSA to focus primarily upon what is technologically achievable. In considering the statutory factors, and other appropriate factors, such as safety, NHTSA properly considered costs and benefits, as it has consistently done when formulating CAFE standards in the past.

The EPCA Petitioners criticize the specific type of cost-benefit analysis chosen by NHTSA, claiming that Congress did not expressly authorize in EPCA any reliance on a cost-benefit methodology that maximizes net benefits. EPCA Petitioners Br. 23. But the EPCA Petitioners appear to confuse when an agency may be *required* to use a cost-benefit analysis with when an agency is *permitted* to use one. An agency can be compelled to perform a cost-benefit analysis only if there is a clear congressional directive to do so. *See Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1394 n.35 (9th Cir. 1994); *Central Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1542 n.10 (9th Cir. 1993). However, as the cases cited below (at 9-12) demonstrate, an agency entrusted with reconciling competing statutory factors is permitted to use cost-

benefit analysis to inform its decision-making in a broader set of circumstances: whenever the statute does not clearly prohibit it.

Here, EPCA does not explicitly mandate or prohibit a cost-benefit analysis or dictate what kind of cost-benefit analysis is permissible. However, consideration of the economic consequences of any prospective CAFE standard is an inherent part of determining what is “economic[ally] practicab[le].” *See* 71 Fed. Reg. at 17590 (ER 1397). Given that there is nothing in EPCA that expressly precludes use of a cost-benefit analysis, NHTSA elected to use the Volpe model as a tool to inform its decision-making in applying fuel-saving technologies and to set the Reformed CAFE standards at “a fuel economy level at which net benefits are maximized.” *See id.* at 17591 (ER 1398). This result comports with common sense, falls within the agency’s discretion, and is entitled to judicial deference.

I. IT IS APPROPRIATE FOR AGENCIES TO CONDUCT COST-BENEFIT ANALYSES WHEN ADOPTING RULES UNLESS EXPRESSLY PRECLUDED BY STATUTE.

A. Courts Have Upheld Agencies’ Use Of A Cost-Benefit Analysis Except Where The Statute Clearly Prohibits It.

There is a long history of judicial decisions upholding agencies’ consideration of the costs and benefits of prospective rules in circumstances in which there is no express statutory preclusion of such analyses. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (“Benzene”), 448

U.S. 607, 655 (1980), for instance, a plurality of the Supreme Court refused to hold that the phrase “significant risk” in § 3(8) of the Occupational Health and Safety Act, 29 U.S.C. § 652(8), precluded consideration of cost. The plurality understood that whether a risk was “significant” was “not a mathematical straitjacket,” and held that “some risks are plainly acceptable and others are plainly unacceptable.” *Id.* at 655. Thus, the term “significant” allowed consideration of costs.³

Likewise, in *State Farm*, the Court addressed the appropriate methodology for formulating safety standards under the National Traffic and Motor Vehicle Safety Act of 1966, currently codified at 49 U.S.C. Chapter 301. The Act stated that, in issuing safety standards, NHTSA had to consider whether a proposed standard “is reasonable, practicable and appropriate for the particular type of motor vehicle, and the extent to which such standards will contribute to carrying out the purposes of the Act.” *State Farm*, 463 U.S. at 33-34 (internal quotation marks omitted). Though the Act itself said nothing about an analysis of costs and benefits, the Supreme Court squarely held that NHTSA was “correct to look at the costs as well as the benefits of Standard 208.” *Id.* at 54.

³ The plurality withheld judgment on whether the Act required a “reasonable correlation between costs and benefits.” *See id.* at 615. But OSHA subsequently interpreted § 3(8) and regulation of “significant risk” to require “cost-effective protective measures” and set standards with an eye toward “the costs of safety standards [being] reasonably related to their benefits,” an interpretation that the D.C. Circuit upheld. *See International Union v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994).

Thus, as the D.C. Circuit observed, precedent makes clear that “[i]t is *only where there is ‘clear congressional intent to preclude consideration of cost’ that we find agencies barred from considering costs.*” *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (quoting *NRDC, Inc. v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc)) (emphasis added). Courts have applied this general rule in numerous cases where the statute at issue did not expressly preclude cost-benefit analysis.

For example, in *Sierra Club v. EPA*, 314 F.3d 735 (5th Cir. 2002), the Fifth Circuit addressed the statutory requirement for implementation of Reasonably Available Control Measures (“RACM”) under the Clean Air Act, 42 U.S.C. § 7502(c)(1) (“CAA”). The court held that “the EPA properly concluded that potential measures requiring intensive and costly implementation were not RACMs because they could not be readily implemented due to excessive administrative burden or local conditions such as high costs. Such determinations based on a cost/benefit analysis are within the EPA’s discretion unless the statutory scheme precludes such a determination.” 314 F.3d at 744.

Similarly, in *George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), the D.C. Circuit interpreted the statutory scheme for a reformulated gasoline program, which had the “overall goal” of improving air quality and “reducing air pollution.” *Id.* at 622. Even though the relevant statutory provision contained no

reference to cost, the court held that the effect of a proposed rule on the price and supply of gasoline were relevant factors for EPA to consider. *Id.* at 623.

And in *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999), the statute required the FAA to devise a plan for “substantial restoration of the natural quiet” in the Grand Canyon area. The D.C. Circuit held that the statute did not preclude the FAA’s consideration of costs to the air tourism industry in deciding how “substantial” that restoration must be. *Id.* at 475; *cf. Irving v. United States*, 162 F.3d 154, 168 n.13 (1st Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) (“[Plaintiff] espouses the logic of zero tolerance for any kind of risk. The indiscriminate application of this logic as a guide for policy has met with considerable criticism. *See, e.g.*, STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 11-19 (1993). * * * [C]ourts must be hesitant to impose such a gloss in the absence of an explicit congressional command or proper grant of agency discretion.”).

In short, “[f]ederal law now reflects a kind of default principle: Agencies [may] consider costs, and thus undertake cost-benefit analysis, unless Congress has unambiguously said that they cannot.” Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 330 (2001); *see also* Edward W. Warren & Gary E. Marchant, “*More Good Than Harm*”: A First Principle for Environmental Agencies and Reviewing Courts, 20 *ECOLOGY L.Q.*

379, 421 (1993) (“The need to compare benefits and costs has long played a role in judicial review of agency actions regulating health and safety risks.”).

B. Executive Order 12866 Directs Agencies To Compare Costs And Benefits Unless A Statute Expressly Requires Another Approach.

Executive Order 12866 also supports the use of a cost-benefit analysis in formulating Reformed CAFE Standards. That order provides that, “[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives. * * * Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits * * * unless a statute requires another regulatory approach.” Executive Order 12866, 58 Fed. Reg. 51735, at § 1 (Sept. 30, 1993).⁴

Thus, under Executive Order 12866, agencies are encouraged to rely on a cost-benefit analysis to maximize net benefits as long as there is no congressional mandate to the contrary. That is what NHTSA did here. Finding that EPCA “neither requires nor prohibits” NHTSA to adopt an approach that maximizes net benefits, NHTSA relied on “the regulatory philosophy set forth in Executive Order

⁴ Prior administrations have adopted similar executive orders. *See* Executive Order 12291, 46 Fed. Reg. 13193, at § 2 (Feb. 17, 1981) (“Regulatory action shall not be taken unless the potential benefits to society from the regulation outweigh the potential costs to society. * * * Regulatory objectives shall be chosen to maximize the net benefits to society.”); Executive Order 12044, 43 Fed. Reg. 12261, at § 3(b)(1) (Mar. 23, 1978) (requiring for significant regulations “an analysis of the economic consequences of each of [the potential regulatory] alternatives and a detailed explanation of the reasons for choosing one alternative over the others”).

12866” as support for its decision to set “the fuel economy level at which net benefits are maximized.” 71 Fed. Reg. at 17591 (ER 1398).

Courts have previously upheld efforts to rely on similar executive orders. As the court observed in *American Pilots’ Ass’n, Inc. v. Gracey*, 631 F. Supp. 827 (D.D.C. 1986), a case involving a Coast Guard regulation licensing requirements for certain positions on ships:

[49 U.S.C. § 3703] requires that the Coast Guard enact such rules as may be necessary to further certain safety and antipollution goals. It does not limit the Coast Guard’s rulemaking authority to only those concerns.

Not only may the Coast Guard properly consider goals other than those specified in § 3703, it is required by Executive Order 12291 to consider precisely the type of cost/benefit analysis the Final Rule was intended to address. * * *.

Through implementation of the Final Rule, the Coast Guard seeks to reduce regulatory costs to the tank barge industry while maintaining safety in tank barge operations. The Court finds this rulemaking to be within the statutory authority delegated to the Coast Guard and to be mandated by Executive Order 12291.⁵

Id. at 831; *see also NLRB Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 202 (D.C. Cir. 1987) (upholding NLRB regulation unconditionally precluding an exclusive union representative from obtaining unfair labor practice remedies for agency’s good-faith refusal to bargain over a non-negotiable proposal “in light of Executive Order practices that were consistent” with the regulation).

⁵ Executive Order 12291 preceded Executive Order 12866. *See* note 4, *supra*.

C. Cost-Benefit Analysis Helps Inform Agency Decision-making.

Finally, it is important to note that *State Farm* requires that courts give agencies “ample latitude to adapt their rules and policies to the demands of changing circumstances.” 463 U.S. at 42 (internal quotation marks omitted). Hence, in reviewing agency rulemaking, a court must look not to whether it would have adopted the rule at issue, but solely to whether the agency’s decision is “arbitrary and capricious.” *Id.* at 41; *see also* Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This is a “‘highly deferential’” standard of review, “‘presuming the agency action to be valid.’” *J&G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1051 (9th Cir. 2007) (quoting *Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 830-31 (9th Cir. 2002)). As the Court explained: “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (citation and internal quotation marks omitted).

Cost-benefit analysis is one of the many tools that agencies use to demonstrate a “rational connection between the facts found and the choice made” and to provide a reasoned analysis for the regulations that they adopt. As Justice Breyer explained in his concurrence in *Whitman v. American Trucking Ass’ns, Inc.*,

531 U.S. 457 (2001), cost-benefit analysis helps regulators “better to achieve regulatory goals—for example, to allocate resources so that they save more lives or produce a cleaner environment.” *Id.* at 490.⁶

Contemporary studies of the regulatory process firmly support the consideration of costs and benefits to potential regulation. *See, e.g.*, Harvard Group on Risk Management Reform, *Reform of Risk Regulation: Achieving More Protection at Less Cost*, 1 HUM. & ECOLOGICAL RISK ASSESSMENT 183 (1995); President’s Council on Sustainable Development, *Eco-Efficiency Task Force Report* ch. 2 (1995), available at http://clinton2.nara.gov/PCSD/Publications/TF_Reports/eco-chap2.html; CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT, *RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING* (1993). Prominent scholars who have studied the subject concur. *See, e.g.*, Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*,

⁶ The majority opinion in *Whitman* read the specific Clean Air Act provision at issue to preclude the consideration of costs, in conformity with long-standing D.C. Circuit precedent construing that provision (*Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980)), noting that “[o]ther provisions [of the CAA] explicitly permitted or required economic costs to be taken into account in implementing the air quality standards.” *Id.* at 463-64, 467. The Court cited approvingly the *Michigan v. EPA*, *George E. Warren Corp. v. EPA*, and *NRDC, Inc. v. EPA* cases (discussed above at 11-12), in which the D.C. Circuit found that the EPA could consider costs in applying other sections of the CAA because those sections did not expressly preclude the consideration of costs. 531 U.S. at 469 n.1.

150 U. PA. L. REV. 1489, 1494 (2002) (advocating a “deeper and wider commitment to cost-benefit analysis”) (capitalization altered); John D. Graham, *Legislative Approaches to Achieving More Protection at Less Cost*, 1997 U. CHI. LEGAL F. 13, 49-50 (supporting use of a “benefits must justify costs” test); Kenneth J. Arrow et al., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles*, at 1 (American Enterprise Institute 1996) (cost-benefit analysis is a useful way of organizing a comparison of the favorable and unfavorable effects of proposed polices and should be used to inform decision-makers).⁷

Indeed, it is well-established that “Congress did not prescribe a precise formula by which NHTSA should determine the maximally-feasible fuel economy standard, but instead gave it broad guidelines within which to exercise its discretion.” *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 120-21 (D.C. Cir. 1990). Thus, as the courts have repeatedly held, NHTSA’s decision on how to construe the relevant factors and statutory terms is entitled to judicial deference under *Chevron*. See, e.g., *Public Citizen v. NHTSA*, 848 F.2d 256, 265 (D.C. Cir. 1988) (deferring to NHTSA’s decision to lower the passenger car CAFE standard

⁷ See also Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Lifesaving*, in RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 167, 172 (Oxford 1996); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

to 26.0 mpg, because that decision “represented a ‘reasonable accommodation of conflicting principles that were committed to the agency’s care by the statute’”) (quoting *Chevron*, 467 U.S. at 845); *Center for Auto Safety*, 793 F.2d at 1338 (“The agency’s interpretation of the statutory requirements is due considerable deference and must be found adequate if it falls within the range of permissible constructions.”); *see also Competitive Enter. Inst.*, 901 F.2d at 121-22.⁸

Here, after deciding that it was appropriate to “reform” its long-standing approach to setting light truck CAFE standards, NHTSA explained why it chose to use a cost-benefit analysis that maximized net benefits as part of its analysis leading to the establishment of the “maximum feasible” CAFE standards. This was an eminently reasonable choice that is entitled to deference by this Court.

II. NHTSA HAS CONSISTENTLY CONDUCTED COST-BENEFIT ANALYSES IN FORMULATING CAFE STANDARDS THAT HAVE BEEN UPHeld BY THE COURTS.

Petitioners suggest that NHTSA’s use of a cost-benefit analysis in deriving the light truck CAFE standards under Reformed CAFE is a departure from its past practices. However, NHTSA has considered costs and benefits in setting CAFE

⁸ The courts have consistently upheld the authority of the agency to weigh factors that are not expressly set forth in EPCA, such as consumer demand and safety. *See, e.g., Center for Auto Safety*, 793 F.2d at 1338 (“Consumer demand is not specifically designated as a factor, but neither is it excluded from consideration; the factors of ‘technological feasibility’ and ‘economic practicability’ are each broad enough to encompass the concept.”); *Competitive Enter. Inst.*, 901 F.2d at 120 n.11 (NHTSA may consider safety though not specifically enumerated in EPCA).

standards under EPCA from the outset.

In the preamble to the final rule establishing the initial light truck CAFE standard (for MY 1979), NHTSA included a separate section entitled “*Cost and benefit analysis.*” 42 Fed. Reg. 13807, 13815-16 (Mar. 14, 1977). The agency also considered costs and benefits in the preamble to its next set of light truck CAFE standards (for MY 1980-1981). 43 Fed. Reg. 11995, 12013 (Mar. 23, 1978). Thereafter, the agency conducted its analyses of the costs and benefits of its CAFE standards pursuant to a series of executive orders. *See, e.g.*, 45 Fed. Reg. 20871, 20877-78 (Mar. 31, 1980) (MY 1982) (referring to a “Regulatory Analysis” conducted pursuant to Executive Order 12044); 53 Fed. Reg. 11074, 11090 (Apr. 5, 1988) (MY 1990-1991) (referring to a “Final Regulatory Impact Analysis” conducted pursuant to Executive Order 12291).

When NHTSA lowered the MY 1985 light truck CAFE standard following a major shift in market demand due to a reduction in gasoline prices, it did so primarily on the basis of a detailed economic analysis. *See* 49 Fed. Reg. 41250, 41252, 41256 (Oct. 22, 1984). The conclusions derived from that analysis were squarely upheld by the D.C. Circuit. *Center for Auto Safety*, 793 F.2d at 1340. Analyzing the four statutory considerations, the court stated that “a standard with harsh economic consequences for the auto industry would represent an unreasonable balancing of EPCA’s policies.” *Id.*; *see also Public Citizen*, 848 F.2d

at 264-65 (deferring to NHTSA’s decision to set the CAFE standard for passenger cars at 26.0 mpg in large part because a more stringent standard would potentially cause substantial economic hardship for the auto industry).

More recently, in setting light truck CAFE standards for MY 2005-2007, NHTSA applied an earlier version of the Volpe model it utilized for the rulemaking at issue here to assess the marginal costs of the technologies needed to comply with those standards and to assess the “societal benefits” resulting from those standards. 68 Fed. Reg. 16868, 16885-93 (Apr. 7, 2003).⁹ The agency then compared the costs and benefits, and concluded that those standards would lead to net benefits of \$249 million. *Id.* at 16892 (*see* Table).

III. THIS COURT SHOULD UPHOLD THE REFORMED LIGHT TRUCK CAFE STANDARDS.

NHTSA did modify its prior methodology in formulating the Reformed CAFE standards, particularly with respect to its assessment of “economic practicability.” However, these methodological changes are both well-reasoned and permitted by EPCA. As discussed above, the Supreme Court has emphasized that agencies “must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.” *State Farm*, 463 U.S. at 42 (internal

⁹ Pursuant to Executive Order 12866, NHTSA prepared a 200-page “Final Economic Assessment” for this rule, which contained over 50 pages assessing and comparing the costs and benefits of the new standards. *See* NHTSA Docket No. 02-11419, Entry No. 18358.

quotation marks omitted). NHTSA is permitted to change the manner in which it implements a statute, as long as it acknowledges that it is changing its position and provides “a reasoned analysis for the change.” *Id.* at 42.

NHTSA satisfied both requirements here. It clearly acknowledged its methodological change. *See, e.g.*, 71 Fed. Reg. at 17588 (ER 1395). And NHTSA provided “a reasoned analysis for the change” in methodology, noting that “Reformed CAFE increases energy savings” (*id.* at 17569 (ER 1376)); “offers enhanced safety” (*id.*); “provides a more equitable framework” (*id.*); and “is more market oriented because it fully respects economic conditions and consumer choice” (*id.* at 17570 (ER 1377)). With respect to the last point, NHTSA observed that because the Reformed CAFE standards are “responsive to changes in fleet mix that result from changes in the market” (*id.* at 17591 (ER 1398)), they will allow the agency to avoid the resource-intensive process of amending the CAFE standard to respond to unanticipated market changes. *See generally id.* (explaining that NHTSA previously had to reduce the passenger car and light truck CAFE standards when it found, among other things, that projected market demand for more fuel-efficient vehicles had not materialized).

Of course, the EPCA Petitioners do not really dispute NHTSA’s authority to change its methodology in formulating CAFE standards. Indeed, how could they? During the rulemaking proceeding that led to the adoption of the Reformed CAFE

standards, several public interest groups advocated changes to NHTSA's traditional methodology for establishing the "maximum feasible average fuel economy," and, in particular, the "economic practicability" of the proposed standards: the Union of Concerned Scientists argued for a "break-even" analysis, which it described as setting the standard at the point at which total costs equal total benefits (*id.*); the American Council for an Energy-Efficient Economy argued that NHTSA must set the CAFE standard "at the highest value within the intersection of" the range of fuel economy values that are technologically feasible and the range of values that are economically practicable (*id.*); and NRDC argued that NHTSA should abandon any consideration of costs and benefits because the key benefits are "impossible to reduce to monetized quantities" (*id.*).

NHTSA thoroughly explained why it rejected each of these methodological alternatives, noting that they would result in CAFE standards that exceed the maximum feasible level. *See id.* at 17591-93 (ER 1398-400). This more than sufficed to satisfy "[a]rbitrary and capricious" review, which is "highly deferential." *J&G Sales*, 473 F.3d at 1051.

This Court's decision in *Central Arizona Water Conservation District* is particularly instructive. In that case, petitioners challenged an EPA rule. This Court explained:

Petitioners' essential argument does not claim that EPA failed to consider the relevant factors, but instead

contends that EPA erred in its consideration of those factors. *This court is not to substitute Petitioners' judgment, or its own, for that of EPA, as long as the agency's interpretation is reasonable. In fact, this is just the type of case in which the Supreme Court has stated that judicial review should "be at its most deferential," because the agency is "making predictions[] within its area of special expertise * * *."*

990 F.2d at 1543 (quoting *Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983)) (emphasis added). That is exactly the situation here: NHTSA formulated standards based on "predictions[] within its area of special expertise."

The EPCA Petitioners claim that NHTSA relied on maximized net societal benefits as a "largely dispositive, unmediated standard-setting methodology." EPCA Br. 23. But that is clearly wrong. As NHTSA explained, cost-benefit analysis was not "the sole factor in the agency's consideration of economic practicability" or its overall determination, but was one factor among several. 71 Fed. Reg. at 17590 (ER 1397). The agency also conducted an analysis of the effect of the standard on vehicle sales and employment, and concluded that the maximum sales loss would be less than 11,000 vehicles per year, with only a "minor" impact on employment. *Id.* at 17591 (ER 1398). It looked to other factors, such as safety. *Id.* at 17594 (ER 1401). And NHTSA explained repeatedly that its approach considered and satisfied *all* of the statutory criteria. *See, e.g., id.* at 17568 (ER 1375) ("The target values reflect the technological and economic capabilities of the industry."); *id.* at 17569 (ER 1376) ("we have balanced the

express statutory factors and other relevant considerations, such as safety concerns, effects on employment, and the need for flexibility”); *id.* at 17598 (ER 1405) (explaining that the standard was set at a level that satisfied the statutory criteria of technological feasibility and the need of the nation to conserve energy); *see also id.* at 17623 (ER 1430).

The EPCA Petitioners also claim (at 25) that they “are not challenging a NHTSA ‘economic practicability’ determination.” But that is precisely what they are doing: They want standards that would not be economically practicable for the light truck industry. As NHTSA explained when responding to comments: “[T]he agency establishes the standard at the maximum feasible fuel economy level that is economically practicable. The agency is not permitted to establish higher standards simply because they might be technologically feasible.” 71 Fed. Reg. at 17592 (ER 1399).

The EPCA Petitioners’ brief seeks to leave the impression that CAFE standards could be made more stringent with little if any downside. But nothing is further from the truth. If NHTSA increased the CAFE standards above the “maximum feasible” level identified by the agency, there would be severe negative impacts on sales and employment for manufacturers, for suppliers, for dealers, and for others. Moreover, as NADA members are keenly aware, many consumers would elect to hold onto the light trucks they currently own longer in lieu of

purchasing new replacements with unduly compromised performance attributes resulting from overly strict CAFE standards. In short, NHTSA correctly prescribed reasonable light truck CAFE standards that are consistent with EPCA's statutory criteria and with the interests of consumers, vehicle dealers, manufacturers, suppliers, and others. These Reformed CAFE standards merit judicial deference and should be upheld.

CONCLUSION

This Court should uphold NHTSA's Reformed CAFE standards for MY 2008-2011 light trucks.

Respectfully submitted.

Erika Z. Jones
Counsel of Record
Kenneth N. Weinstein
Nickolai G. Levin
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000 (phone)
(202) 263-3300 (fax)

Counsel for Amicus Curiae

March 5, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

Case Nos. 06-71891, 06-72317, 06-72641, 06-72694, 06-73807, 06-73826

I certify that:

Amicus Briefs:

 X Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7000 words or less,

or is

 Monospaced, has 10.5 characters or fewer per inch and contains not more than 7000 words or 650 lines of text

or is

 Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

Erika Z. Jones

March 5, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2007, I sent an original and fifteen copies of the foregoing Brief of National Automobile Dealers Association as Amicus Curiae in Support of Respondents to the Clerk of the Court of the Ninth Circuit by UPS Next Day Air, and served two copies of the Brief by overnight delivery to each of the following addresses:

H. Thomas Byron III
U. S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, Room 7260
Washington, D.C. 20530-0001

Sean H. Donohue, Esq.
Environmental Defense
2000 L Street, NW, Suite 808
Washington, DC 20036-4913

Patrick Gallagher, Esq.
Sierra Club
85 Second Street, Second Floor
San Francisco, California 94105-3456

Kassia R. Siegel
Center for Biological Diversity
P.O. Box 549
Joshua Tree, California 92252-0549

Lloyd Guerci
Assistant Chief Counsel for Litigation
National Highway Traffic Safety
Administration
400 Seventh St., SW, Room 5319
Washington, DC 20590

Ronald Gitek
Attorney General of Minnesota
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2131

Jerry Brown, Attorney General
Ken Alex, Supervising Deputy
Attorney General
Susan S. Fiering, Deputy Attorney
General
1515 Clay Street, 20th Floor
P. O. Box 70550
Oakland, California 94612-0550

David D. Doniger, Esq.
Natural Resources Defense Council
1200 New York Avenue, N.W.
Washington, D.C. 20005-3928

Deborah A. Sivas, Esq.
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305

Erika Z. Jones