

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PUBLIC CITIZEN, INC., NEW YORK)
PUBLIC INTEREST RESEARCH)
GROUP, and THE CENTER FOR) No. 02-4237
AUTO SAFETY,)
Petitioners,)
)
v.)
)
NORMAN MINETA, Secretary of)
Transportation,)
Respondent.)

MOTION TO ENFORCE THE JUDGMENT

INTRODUCTION

Public Citizen, New York Public Interest Research Group, and the Center for Auto Safety move this Court for an order enforcing the Court’s August 6, 2003, judgment in this case. More specifically, petitioners request that the Court order Respondent Norman Mineta, Secretary of Transportation, to issue a final rule in compliance with this Court’s order of August 6, 2003, and section 13 of the Transportation, Recall Enhancement, Accountability, and Documentation Act (“TREAD Act”), Pub. L. No. 106-414, § 13 (2000), 49 U.S.C. § 30123 note, within 30 days of the Court’s order.

Congress instructed Respondent to complete by November 1, 2001, a rulemaking requiring automobile manufacturers to equip new vehicles with a tire

pressure monitoring system (TPMS) to warn the driver when “a tire is significantly underinflated.” *Id.* Respondent purported to complete its rulemaking on June 5, 2002. *See* 67 Fed. Reg. 38704 (2002). However, on August 6, 2003, this Court struck down the rule on the ground that it both violated the TREAD Act and was arbitrary and capricious. 340 F.3d 39 (2d Cir. 2003) (attached as Exh. 1 to Zieve Decl.). The Court’s ruling required Respondent to make only one change: to require use of a TPMS that can detect when any or all of a vehicle’s tires are significantly underinflated. The Court remanded the matter to the agency “for further rulemaking proceedings consistent with this opinion.” *Id.* at 62. In the more than 11 months since the Court’s August 2003 decision, Respondent has failed to issue a new rule. Although the change required by this Court’s August 6, 2003 opinion was straightforward, the agency has indicated that its delay will continue for the foreseeable future.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Driving on underinflated tires is both dangerous and common. More than one third of the passenger cars and light trucks on the road have at least one tire underinflated by 20 percent; more than one quarter have at least one tire underinflated by 25 percent, and one fifth have at least one tire underinflated by 30 percent. 340 F.3d at 44. Underinflated tires make handling a vehicle more difficult and contribute

to crashes resulting from tire blow-outs, flat tires, increased stopping distance, skidding and/or loss of control of the vehicle on a curve or during a lane change, and hydroplaning on wet surfaces. 67 Fed. Reg. 38713-14, 38739. The National Highway Traffic Safety Administration (“NHTSA”) estimates that alerting drivers when their tires are underinflated could prevent many fatalities and thousands of injuries each year. *Id.* at 38739.

To address this problem, Congress in the TREAD Act directed the Secretary of Transportation to promulgate a rule requiring a warning system in new vehicles to alert the driver when a tire is significantly underinflated. 340 F.3d at 43-44. During the course of the rulemaking, NHTSA, to which the Secretary delegated this task, identified two types of available TPMSs to detect underinflated tires. The “direct” system warns a driver when any one tire or any combination of tires is significantly underinflated, as compared to the auto manufacturer’s recommended tire pressure. It functions as soon as the vehicle is turned on, operates effectively on any type of road surface, and can be installed in any vehicle. The “indirect” system, which works with a vehicle’s anti-lock braking system on those vehicles with anti-lock brakes, warns a driver when any single tire is or when three tires are 30 percent or more underinflated as compared to the other tires. It cannot detect when all four tires or when two tires on the same side or the same axle are underinflated. It does not function until the vehicle

has been driven for up to ten minutes; it does not function at speeds above 70 miles per hour, and it does not function on bumpy or gravel roads. The system cannot detect 30 percent underinflation in half of the instances in which it occurs. *Id.* at 45, 46. According to NHTSA’s estimates, if installed in all light vehicles, the direct system would prevent many more deaths and prevent or reduce the severity of thousands more injuries each year than would the indirect system. *Id.* at 52.

Notwithstanding NHTSA’s express recognition that the direct system is more reliable and effective and, therefore, that it would better fulfill the purposes of the statute, NHTSA decided to accommodate the weaknesses of the indirect system by allowing automakers to satisfy either one of two performance standards: a four-tire standard or a one-tire standard. *Id.* at 51. NHTSA issued a final rule on June 5, 2002.

On August 6, 2003, this Court vacated NHTSA’s rule. *Id.* at 55, 56. The Court first looked to the plain language of the statute and held that NHTSA was “clearly wrong” to argue that the statute permitted the one-tire standard. *Id.* at 54. The Court held that the language of the TREAD Act plainly means “one tire, two tires, three tires, or all four tires.” *Id.* The Court further held that it was “unreasonable” for NHTSA to adopt a standard that allowed automakers to install systems that would fail to detect significantly underinflated tires “about 50 percent” of the time. *Id.* at 56 (quoting 67 Fed. Reg. 38718). Having struck down the rule, this Court remanded the

matter to the agency “for further rulemaking proceedings consistent with this opinion.” *Id.* at 62.

This Court’s analysis made clear that the rule’s four-tire standard was lawful but that the one-tire standard was not. *Id.* at 54, 55, 56. The decision did not require a change in any of the rule’s other substantive requirements. However, omission of the one-tire standard necessitated a new phase-in schedule because automakers who had planned to comply with the rule by producing vehicles that met the lower standard would need to alter their production plans to accommodate the substantive change in the rule. Accordingly, on September 9, 2003, one month after this Court issued its decision, NHTSA sent to automakers and TPMS suppliers “special orders” requiring submission to the agency of certain information about their plans and capacity for production of TPMSs. *See Zieve Decl.*, ¶ 10 & Exh. 2. Because the only open question after this Court’s decision was (and is) an appropriate phase-in period, NHTSA’s September 9 special orders to automakers and TPMS suppliers sought information to help it set a phase-in schedule, and no other information.

By mid-October, 2003, NHTSA had received the automakers’ and TPMS suppliers’ responses to the special orders. *See id.* ¶ 10. At that point, NHTSA had only to analyze the information and set a new phase-in schedule. Because NHTSA had provided a full opportunity for public comment prior to issuing the June 2002

rule, and because this Court's August 6 decision did not require the agency to address new issues, NHTSA could properly issue a revised final rule without first publishing a proposed rule for notice and comment. *See infra* p. 9. Accordingly, at that time, the agency indicated that it planned to issue a new final rule by May 1, 2004. *See Zieve Decl.*, ¶ 10 & Exh. 3.

Later, the agency changed course and decided instead to issue a new proposed rule and to allow for public comment before issuing a final rule. NHTSA set internal deadlines that would have culminated in a proposed rule to be published in July 2004, but suggested no date for a final rule. *See id.* ¶ 11 & Exh. 4. The agency then missed each of the internal deadlines for actions to be completed prior to issuing the proposal. In early June, NHTSA projected publication of a proposed rule on August 13, 2004, *id.* ¶ 12 & Exh. 5. On June 28, 2004, the agency issued a semi-annual Unified Agenda, which stated September 2004 as the target date for issuing a proposed rule. 69 Fed. Reg. 37917, 37902 (2004). Then, only one week later, the agency revised its plans yet again, now projecting that a proposed rule will be issued in October, 2004. *Zieve Decl.*, ¶ 13 & Exh. 6. The agency currently suggests that it will provide a two-month comment period, but does not offer any projection of when it might issue a final rule. *Id.*

Because the date for issuing a proposed rule seems to be a constantly moving target, one can have no faith that NHTSA will meet the October publication date either. Only one thing about the timetable is certain: One full year after this Court's decision, NHTSA will not have issued even a *proposed* rule, much less a *final* rule.

Meanwhile, Congress's November 1, 2001 deadline for issuance of a final rule to implement the TPMS requirement has long since passed. Congress's November 1, 2003 deadline for the effective date of the TPMS requirement has passed as well. Moreover, because manufacturers generally need about 18 months of lead time to plan equipment for a new model year, a TPMS requirement issued toward the end of this summer—the earliest conceivable date, and one that will not happen without this Court's intervention—would not become effective until the fall of 2006 (the 2007 model year) at the earliest. Even then, the agency is undoubtedly going to phase in the requirement, as it did in the now-vacated rule and as suggested by the “special orders” sent to the automakers and suppliers last fall.

DISCUSSION

This Court's August 6, 2003, decision left the agency with only one task: to revise the TPMS rule (including the phase-in schedule) to require that all affected vehicles be equipped with a TPMS that meets the four-tire standard. *See* 69 Fed. Reg. 37902 (recognizing that agency's task is to issue rule "in a manner consistent with the court's decision, and provide a new phase-in period"). Given Congress's determination that TPMSs would save lives, and given NHTSA's estimate of the number of fatalities and injuries that the devices would prevent, NHTSA's failure to issue a new rule nearly a full year later and its plan to delay issuance of a final rule even further by first publishing a proposed rule for comment are unjustified. *See Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) ("When the public health may be at stake, the agency must move expeditiously to consider and resolve the issue before it."); *accord Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) ("When lives are at stake, as they assuredly are here, OSHA must press forward with energy and perseverance") ("*PCHRG v. Brock*"). Despite section 13's specific deadlines and the straightforward nature of the change by this Court's August 6, 2003 decision, the agency has refused to act expeditiously to fulfill Congress's mandate. Meanwhile, if the agency is correct, underinflated tires are causing preventable fatalities and several thousand

preventable serious injuries each year, and they will continue do so as long as the agency flouts this Court's ruling.

As NHTSA initially recognized, it need not initiate a new notice-and-comment rulemaking before issuing a final rule to implement the TPMS standard. Additional notice-and-comment rulemaking would be redundant of the rulemaking that NHTSA completed in June 2002. *See also* 5 U.S.C. § 553(b)(3)(B) (issuance of rule without notice and opportunity for comment permitted when notice and comment are “unnecessary, or contrary to the public interest”); *NRDC v. Abraham*, 355 F.3d 179, 204 (2d Cir. 2004). Again, the only open issue is the phase-in schedule. And even then, there is no question whether there will be a phase-in, *see* 340 F.3d at 61 (upholding NHTSA's decision to phase in TPMS requirement), but only the pace at which it will proceed. Notice-and-comment rulemaking is unnecessary on this question because, nine months ago, NHTSA collected from automakers and TPMS suppliers the information needed to set the schedule. Moreover, because Congress intended section 13, and thus the rule, to save lives, initiating a second round of notice-and-comment rulemaking at this time would be “contrary to the public interest.”

Congress's mandate is clear, and the substance of the TPMS rule has already been litigated. The only unknown is the cause of NHTSA's continued delay. It is

time for the Court to let the agency know that “enough is enough.” *PCHRG v. Brock*, 823 F.2d at 627 (“[W]e have seen it happen time and time again, that agency action Congress has ordered for the protection of the public health all too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special interest politics. At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.”). Accordingly, Petitioners ask the Court to direct Respondent to issue a final rule within 30 days of the Court’s order. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (“The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay.”).

CONCLUSION

For the foregoing reasons, the Court should compel Respondent, to issue, within 30 days of the Court’s order, a final rule in compliance with section 13 of the TREAD Act and this Court’s August 6, 2003 opinion and order. In addition, the Court should retain jurisdiction to ensure compliance with its order.

Dated: July 14, 2004

Allison M. Zieve
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PUBLIC CITIZEN, INC., NEW YORK)
PUBLIC INTEREST RESEARCH)
GROUP, and THE CENTER FOR) No. 02-4237
AUTO SAFETY,)
Petitioners,)
)
v.)
)
NORMAN MINETA, Secretary of)
Transportation,)
Respondent.)

DECLARATION OF ALLISON M. ZIEVE
IN SUPPORT OF MOTION TO ENFORCE THE JUDGMENT

I, Allison M. Zieve, declare as follows:

1. I am a senior attorney at Public Citizen Litigation Group and counsel for the petitioners in this case. This declaration is based on my own knowledge, the record in this case, this Court's August 6, 2003 decision in this case, and information publicly available on NHTSA's website.

2. Driving on underinflated tires is both dangerous and common. More than one third of the passenger cars and light trucks on the road have at least one tire underinflated by 20 percent; more than one quarter have at least one tire underinflated by 25 percent, and one fifth have at least one tire underinflated by 30 percent. *Public Citizen v. Mineta*, 340 F.3d 39, 44 (2d Cir. 2003).

3. Underinflated tires make handling more difficult and contribute to crashes resulting from tire blow-outs, flat tires, increased stopping distance, skidding and/or loss of control of the vehicle on a curve or during a lane change, and hydroplaning on wet surfaces. 67 Fed. Reg. 38713-14, 38739 (2002).

4. The National Highway Traffic Safety Administration (“NHTSA”) estimates that alerting drivers to the fact that their tires are underinflated could prevent many fatalities and thousands of injuries each year. *Id.* at 38739.

5. To address this problem, Congress enacted the Transportation, Recall Enhancement, Accountability, and Documentation Act (“TREAD Act”), Pub. L. No. 106-414, § 13 (2000), 49 U.S.C. § 30123 note, in which it directed the Secretary of Transportation to promulgate a rule requiring a warning system in new light vehicles to alert the driver when a tire is significantly underinflated. 340 F.3d at 43-44. The Secretary delegated this task to NHTSA.

6. During the course of its rulemaking, NHTSA identified two types of available tire pressure monitoring systems (TPMSs) that could detect underinflated tires. The “direct” system warns a driver when any one tire or any combination of tires is significantly underinflated, as compared to the auto manufacturer’s recommended tire pressure. It functions as soon as the vehicle is turned on, operates effectively on any type of road surface, and can be installed in any vehicle. The

“indirect” system, which works with a vehicle’s anti-lock braking system, warns a driver when any single tire is or when three tires are 30 percent or more underinflated as compared to the other tires. It cannot detect when all four tires or when two tires on the same side or the same axle are underinflated. It does not function until the vehicle has been driven for up to ten minutes; it does not function at speeds above 70 miles per hour, and it does not function on bumpy or gravel roads. The system cannot detect 30 percent underinflation in half of the instances in which it occurs. *Id.* at 45, 46. According to NHTSA’s estimates, if installed in all light vehicles, the direct system would prevent many more deaths and prevent or reduce the severity of thousands more injuries each year than would the indirect system. *Id.* at 52.

7. Notwithstanding NHTSA’s express recognition that the first system was more reliable and effective and, therefore, that it would better fulfill the purposes of the statute, on June 5, 2003, NHTSA issued a rule to implement section 13 of the TREAD Act that accommodated the weaknesses of the indirect system by allowing automakers to satisfy either one of two performance standards, a four-tire standard and a one-tire standard. *Id.* at 51.

8. On August 6, 2003, this Court vacated NHTSA’s rule. *Id.* at 55, 56. The Court first looked to the plain language of the statute and held that NHTSA was “clearly wrong” to argue that the statute permitted the one-tire standard. *Id.* at 54.

The Court held that the language of the TREAD Act plainly means “one tire, two tires, three tires, or all four tires.” *Id.* The Court further held that it was “unreasonable” for NHTSA to adopt a standard that allowed automakers to install systems that would fail to detect significantly underinflated tires “about 50 percent” of the time. *Id.* at 56 (quoting NHTSA’s final rule). Having struck down the rule, this Court remanded the matter to the agency “for further rulemaking proceedings consistent with this opinion.” *Id.* at 62.

9. This Court’s analysis made clear that the rule’s four-tire standard was lawful but that the one-tire standard was not. *Id.* at 54, 55, 56. The decision did not require a change in any of the rule’s other substantive requirements. However, omission of the one-tire standard necessitated a new phase-in schedule because automakers who had planned to comply with the rule by producing vehicles with indirect TPMSs that met the lower standard would need to alter their production plans to accommodate the substantive change in the rule.

10. On September 9, 2003, one month after this Court issued its decision, NHTSA sent to automakers and TPMS suppliers “special orders” requiring submission to the agency of certain information about their plans and capacity for production of TPMSs. Attached hereto as Exhibit 2 are true and correct copies of

these special orders, retrieved from NHTSA's website. *See* DOT Docket No. NHTSA 2000-8572, <http://dms.dot.gov/search/searchResultsSimple.cfm> (Nos. 309-310).

11. By mid-October, 2003, NHTSA had received the automakers' and TPMS suppliers' responses to the special orders. *See id.* (Nos. 291-307, 311-317, 319,320); *but see id.* (No. 322). At that point, NHTSA indicated that it planned to issue a new final rule by May 1, 2004. Attached hereto as Exhibit 3 is a true and correct copy of the relevant pages of Department of Transportation's November 2003 status report to Congress, entitled "Report on DOT Significant Rulemakings," which shows its schedule as of November 2003 for issuing a new TPMS rule. I retrieved this report from the agency's website, <http://regs.dot/rulemakings/200311/nhtsa.htm>.

11. Later, NHTSA changed course and decided instead to issue a new proposed rule for public comment before issuing a final rule. NHTSA set internal deadlines that would have culminated in a proposed rule to be published in July 2004, but suggested no date for a final rule. Attached hereto as Exhibit 4 is a true and correct copy of the relevant pages of Department of Transportation's February 2004 "Report on DOT Significant Rulemakings," which shows its schedule as of February 2004 for issuing a new TPMS rule. I retrieved this report from the agency's website, <http://regs.dot.gov/rulemakings/200402/nhtsa.htm>.

12. The agency's later monthly reports show that it has missed each of the internal deadlines set in February for actions to be completed prior to issuing a proposed rule. Its June monthly report projected publication of a proposed rule on August 13, 2004, but showed that the agency had already missed deadlines for actions that must precede publication. Attached hereto as Exhibit 5 is a true and correct copy of the relevant pages of Department of Transportation's June 2004 "Report on DOT Significant Rulemakings," which shows these facts. I retrieved the report from the agency's website, <http://regs.dot.gov/rulemakings/200406/nhtsa.htm>.

13. On June 28, 2004, the agency issued a semi-annual "Unified Agenda," which stated September 2004 as the target date for issuing a proposed rule. 69 Fed. Reg. 37917, 37902 (2004).

14. On July 6, 2004, the agency revised its plans yet again, now projecting that a proposed rule will be issued in October, 2004. The agency indicates that it will provide a two-month comment period, but does not offer any projection of when it might issue a final rule. Attached hereto as Exhibit 6 is a true and correct copy of the relevant pages of Department of Transportation's July 2004 "Report on DOT Significant Rulemakings." I retrieved the report from the agency's website, <http://regs.dot.gov/rulemakings/200407/nhtsa.htm>.

Executed this 14th day of July, 2004.

I declare under penalty of perjury that the foregoing is true and correct.

Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2004, I served the foregoing MOTION TO ENFORCE THE JUDGMENT on the parties listed below, by causing true and correct copies thereof to be hand-served on counsel at the following addresses:

H. Thomas Byron, III
Civil Division, Appellate Staff
U.S. Department of Justice
601 D Street, NW
PHB Room 9145
Washington, DC 20530-0001

Erika Z. Jones
Adam Sloane
Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006-1101

Allison M. Zieve