UPDATE: regarding the standard of judicial review of any on-the-record hearing (discussed below), see the comments: commenter Steve Taber disagrees with my initial analysis, and he may be right (though I don't have time to look into it further today).

ORIGINAL POST:

Holly has written a thoughtful post discussing the meritlessness and cynicism of the U.S. Chamber of Commerce's petition asking that the EPA engage in a hearing "on the record" to determine whether carbon dioxide from automobiles presents an endangerment to public health and/or welfare. (And as a trained scientist as well as a legal scholar, Holly is well-positioned to comment on the ways in which a trial-style adversarial hearing is especially ill-suited to review of science-based policy decisions.) Joe Romm at Climate Progress has also weighed in with rather hard-hitting (and correct) criticism of the Chamber's tactic. I'll add a bit of legal background on this. Not only, as Holly points out, is the Chamber asking here for something unnecessary and counterproductive, but it's also asking for something quite extraordinary, and even bizarre, from a legal point of view.

The process of engaging in a hearing on the record, called "formal rulemaking" in the arcane world of administrative law, stands in contrast to "informal" or "notice and comment" rulemaking, in which an administrative agency publishes a draft rule, receives written comments and reviews scientific data, and is required to consider those comments and data when it publishes its final rule. Notice and comment rulemaking, as the EPA is using in this case, is the standard procedure for virtually all agency rules outside of some very specific contexts in which formal rulemaking has been required, such as the government's ratemaking procedures in industries such as rail travel, trucking, and telephone service (many of which are now obsolete), in which hearings were thought by Congress to ensure fairness and due process to all stakeholders.

On the other hand, literally tens of thousands of rules about everything from homeland security to management of public lands to – yes, you guessed it – environmental protection have been enacted through the notice and comment process. While I don't know the exact numbers, I would be surprised if more than a handful of EPA rules, if any, have been issued after a hearing on the record, and certainly none involving endangerment findings under the Clean Air Act. (Readers, please let me know if you have specific information about any EPA formal rulemaking proceedings.) This is because in order for a federal agency to have to engage in formal rulemaking, Congress must have expressed, in the statute authorizing the rulemaking, a specific intent to require the agency to do so.

Administrative Procedure Act section 553 describes the general requirements for federal

rulemaking, making the default procedure the informal notice-and-comment procedure. According to Administrative Procedure Act section 553(c), "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." Those sections set forth the procedures that the Chamber is seeking to invoke here.

There aren't many statutes that require the agency to conduct an on-the-record hearing to develop a rule, and the Clean Air Act certainly isn't one of them. In picking out this particular rulemaking and demanding an "on the record" hearing, the Chamber is clearly engaging in some political theater; there's simply no legal basis for asking the agency to engage in this extraordinary proceeding rather the conduct the rulemaking according to the same procedures that have governed all its other Clean Air Act endangerment findings.

Moreover, EPA would be undercutting its own authority by granting this request. Under APA section 706(2)(E), a court might be more likely to substitute its judgment for that of an administrative agency when reviewing on-the-record rulemaking proceedings, compared to review of informal rulemaking proceedings. Agencies are typically given wide latitude to use their judgment in crafting rules, with courts generally empowered to overturn agency action only where the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The idea is that where Congress delegates its authority to administrative agencies, those agencies are presumed to be empowered to exercise lawful authority within the bounds delineated by Congress., and courts defer to agencies' exercise of that authority.

The rare exception to this, under section 706 of the APA, is – you guessed it! – where an agency conducts a hearing on the record. In those cases, "substantial evidence" must support the agency's finding. While this may seem like hair-splitting to non-lawyers, it could be important in practical terms. Under the usual "arbitrary and capricious" standard of review, courts generally are reluctant to examine the agency's evidentiary findings except to determine they are not absurd or without any basis at all. Although the "substantial evidence" standard of review is still deferential to agencies, many courts applying it have seen it as requiring a reviewing court to look more closely into the record and second-guess an agency's factfinding.

In short, it would be absurd for the EPA to agree to this procedure, from a legal point of view as well as from a practical one. Unfortunately, the way the Chamber has stepped up its rhetoric, the petition is sure to attract followers, charging that EPA has somehow not done its job properly here. But it's hard to view this as anything other than a tactical stunt, designed to delay and to place the EPA on the defensive.