ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF CALIFORNIA, *et al.*, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*, ALLIANCE OF AUTOMOBILE MANUFACTURERS, *et al.*, *Movant-Respondent-Intervenors.*	No. 18-1114 (consol. with Nos. 18-1118, 18-1139 & 18-1162)

BRIEF OF PUBLIC INTEREST ORGANIZATION PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners Center for Biological Diversity, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, Union of Concerned Scientists state as follows:

A. Parties and Amici

Petitioners: State of California, by and through its Governor Gavin Newsom, Attorney General Xavier Becerra and California Air Resources Board; State of Connecticut; State of Delaware; District of Columbia; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of Minnesota, by and through its Minnesota Pollution Control Agency and Minnesota Department of Transportation; State of New Jersey; State of New York; State of Oregon; Commonwealth of Pennsylvania, by and through its Department of Environmental Protection and Attorney General Josh Shapiro; State of Rhode Island; State of Vermont; Commonwealth of Virginia; State of Washington; National Coalition for Advanced Transportation; Center for Biological Diversity; Conservation Law Foundation; Environmental Defense Fund; Natural Resources Defense Council; Public Citizen, Inc.; Sierra Club; the Union of Concerned Scientists; Consolidated Edison Company of New York, Inc.; National Grid USA;

New York Power Authority; and The City of Seattle, by and through its City Light Department.

Respondents: Environmental Protection Agency and Andrew Wheeler, as Acting Administrator of the United States Environmental Protection Agency ("EPA").

Intervenors: Alliance of Automobile Manufacturers and the Association of Global Automakers, Inc.

Amici: South Coast Air Quality Management District; National League of Cities; U.S. Conference of Mayors; City of New York, NY; Los Angeles, CA; Chicago, IL; King County, WA; County of Santa Clara, CA; San Francisco, CA; Mayor and City Council of Baltimore, MD; Oakland, CA; Minneapolis, MN; Board of County Commissioners of Boulder County, CO; Pittsburgh, PA; Ann Arbor, MI; West Palm Beach, FL; Santa Monica, CA; Coral Gables, FL; and Clarkston, GA; Consumer Federation of America, and Advanced Energy Economy.

B. Ruling Under Review

This case involves a challenge to a final action by EPA entitled, "Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles," published at 83 Fed. Reg. 16,077 on April 13, 2018.

C. Related Cases

This case was not previously before this Court or any other court. By Orders on May 18, 2018 and June 15, 2018, this Court consolidated the cases filed by the petitioners listed above in No. 18-1114, 18-1118, 18-1139, and 18-1162 into this proceeding. Petitioners are not aware of any other related cases.

Respectfully submitted,

Dated: February 7, 2019 */s/ Sean H. Donahue*

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GLOSSARY

ACEEE	American Council for an Energy-Efficient Economy
APA	Administrative Procedure Act
Section 12(h)	40 C.F.R. § 86.1818-12(h)
CARB	California Air Resources Board
CBD	Center for Biological Diversity
EDF	Environmental Defense Fund
EPA	Environmental Protection Agency
ICCT	International Council on Clean Transportation
MY	Model Year
NRDC	Natural Resources Defense Council
NHTSA	National Highway Traffic Safety Administration
OD	Original Determination
PD	Proposed Determination
RD	Revised Determination
RTC	Response to Comments
TAR	Technical Assessment Report
TSD	Technical Support Document
UCS	Union of Concerned Scientists

Petitioners—public health, environmental, scientific and consumer non-profit organizations—challenge the Environmental Protection Agency's determination under 40 C.F.R. § 86.1818-12(h) ("Section 12(h)") that existing EPA standards for greenhouse-gas emissions from light-duty vehicles of model years (MY) 2022-25 are not "appropriate," and EPA's simultaneous withdrawal of its determination a year earlier that the standards are "appropriate." 83 Fed. Reg. 16,077 (Apr. 13, 2018) (JA __) (withdrawing EPA-420-R-17-001 (Jan. 2017)) (JA __).[1] In his zeal to "roll back" some of the Nation's most important protections against pollution that causes dangerous climate change, the Administrator flouted EPA regulations guaranteeing all stakeholders—including Petitioners—a robust, transparent public process supporting a detailed, record-based "appropriateness" determination. The Administrator provided no reasoned explanation for reversing past agency findings firmly grounded in a massive record. These unlawful actions must be set aside.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition, timely filed on May 15, 2018, to review "final action" of the EPA Administrator under the Clean Air Act. 42

[1] We refer to the 2018 and 2017 determinations as the "Revised Determination" and "Original Determination," and cite them as "RD" and "OD," respectively.

U.S.C. § 7607(b)(1). *See also* State Petitioners' Br., Argument, Sec. I (explaining that the Revised Determination is final and ripe for review).

STATEMENT OF THE ISSUES

1. Whether the Revised Determination violates Section 12(h) by failing to set forth for public review and comment the technical information and analysis on which EPA based its decision, or to "set forth in detail" an "assessment of each of" eight factors in light of a record that includes an exhaustive draft Technical Assessment Report ("TAR") and "[p]ublic comment" thereon.

2. Whether the Revised Determination is arbitrary and capricious because it is neither reasonable nor adequately explained, and arbitrarily disregards the findings and record supporting EPA's Original Determination.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the Addendum bound with this brief.

STATEMENT OF THE CASE

Petitioners adopt State Petitioners' Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When EPA established MY 2022-25 greenhouse-gas emission standards for light-duty vehicles, 77 Fed. Reg. 62,624 (Oct. 15, 2012), the agency bound itself by regulation to review those standards by April 1, 2018, and to determine, based

upon a defined, agency-compiled record and public comments, whether the existing standards remained appropriate. Section 12(h) establishes a "collaborative, robust and transparent process, including public notice and comment," 77 Fed. Reg. at 62,633, 62,652—a process as "robust and comprehensive" as the original rulemaking and supported by peer-reviewed technical analyses, *id.* at 62,784, 62,786, which would generate a "record for judicial review" as extensive as the record for the 2012 rulemaking, *id*. at 62,784. Section 12(h) binds EPA to assemble the evidence underlying the appropriateness determination in the Technical Assessment Report, allow public comment on that report and on the appropriateness of the standards, and provide a "detail[ed]" public explanation of the basis for the Administrator's ultimate determination as to "each" of eight specified factors.

The Revised Determination purported to follow Section 12(h), but mocked its requirements. EPA ignored its own extensively documented prior findings and predicated its about-face on a supposedly new "record" that, contrary to core Section 12(h) requirements, had not been made available for public comment. EPA provided scant to no record-based findings on the enumerated factors and no coherent explanation for reversing course.

EPA's cursory Revised Determination violated the clear terms of Section 12(h). EPA changed position based on purportedly "new" information it had not

identified or sought public comment upon, thereby depriving Petitioners of their rights to evaluate and critique the technical basis for EPA's new determination. EPA also violated Section 12(h)'s requirement to provide a detailed assessment of each of eight enumerated factors based on the record then before the agency. In this Court, EPA has defended the Revised Determination's bypass of Section 12(h)'s requirements on the faulty premise that Section 12(h) protects only "regulated parties" (*i.e.*, automobile manufacturers) and imposes no enforceable constraints if EPA determines that existing standards are too stringent. Reply in Supp. Mtn. to Dismiss 9-10 (ECF No. 1751968). That post hoc reasoning contradicts Section 12(h), which is not so limited.

The 11-page Revised Determination is devoid of supporting analysis and ignores EPA's own prior findings on the relevant factors. It uncritically quotes auto industry comments 14 times and cites those comments over 60 times without responding to public comments supporting the existing standards. Its lack of record support and analytical work contrasts starkly with the Original Determination, which was supported by reams of technical data and analysis, voluminous public comments on that record and EPA's preceding Proposed Determination, and detailed responses to those comments.[2]

[2] Key documents supporting the 33-page Original Determination included the 1217-page Technical Assessment Report and its 118-page Appendix, EPA-HQ-OAR-2015-0827-0926; the 268-page Proposed Determination ("PD"), EPA-HQ-

The Revised Determination is neither reasonable nor reasonably explained. In it, EPA ignored the extensive Technical Assessment Report, the vast record and its own detailed findings demonstrating that the existing standards are feasible, cost-effective and appropriate. EPA assembled no Technical Assessment Report to support and explain its about-face, relying instead on unelaborated references to industry comments and promises to conduct analyses later. The Court should set aside this quintessentially unlawful agency action.

STANDING

The Revised Determination causes Petitioners two types of injury-in-fact. First, it deprives Petitioners and their members of specific and detailed information that Section 12(h) requires to be made public before any rulemaking to revise the MY 2022-2025 standards may commence. Second, the Revised Determination declares vital protections for Petitioners' members "inappropriately" stringent and commits EPA to revise them.

1. Section 12(h) creates a legal right to information, the deprivation of which confers standing. *See FEC v. Akins*, 524 U.S. 11, 24-25 (1998). EPA's violation of

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OAR-2015-0827-5942; the PD's 719-page Technical Support Document ("TSD") (including responses to public comment on Technical Assessment Report), EPA-HQ-OAR-2015-0827-5941; and a 174-page Response to Comments ("RTC") on the PD, EPA-HQ-OAR-2015-0827-6271, and scores of supporting studies, reports, and articles, *e.g.*, Certified Index of Record, at 47-48 (listing certain EPA technical reports underlying the PD) (ECF 1736370).

Section 12(h) deprived Petitioners of detailed information about the bases for its decision, including the ostensibly "new" information EPA cited as grounds for overturning its prior determination. Such information is "concrete and specific to the work in which [Petitioners] are engaged." *Action All. of Senior Citizens v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986).

Section 12(h) guaranteed Petitioners and their members detailed information to inform their comments on EPA's determination on the appropriateness of the standards and any subsequent rulemaking proceedings relating to greenhouse-gas emissions standards. EPA's wholesale disregard of the regulation's informational requirements harmed Petitioners and their members. *See* Mathers Decl. ¶¶8-9, 22-28.[3] Section 12(h) demands that EPA show its technical inputs and analytical work *before* determining whether to commence a rulemaking to revise the standards, thereby allowing Petitioners to consider that information and work (and rebut it, as appropriate) in their comments. Automobile manufacturers themselves emphasized the Technical Assessment Report's critical role as "the basis on which the proposed determination and [notice of proposed rulemaking] will rely,"[4] and the

[3] All declarations cited herein are reproduced in the separate Addendum filed with this brief ("Add.").

[4] Alliance of Automobile Manufacturers, Comments on Draft Technical Assessment Report, at i (Sept. 26, 2016), EPA-HQ-OAR-2015-0827-4089 (JA __).

"foundation for the policy decisions to come when the EPA issues its final determination and NHTSA promulgates a rulemaking."[5]

Independent of the ongoing rulemaking process, Petitioners have a legally protected interest in obtaining and analyzing the specific, detailed information required by Section 12(h). *See* Whitefoot Decl. ¶¶9-13 & Michalek Decl. ¶¶13-17 (member declarations discussing their use of this information in academic research); Mathers Decl. ¶¶13-28 & Tonachel Decl. ¶¶8-9 (discussing organizations' dissemination of this information). Petitioners and their members are harmed by EPA's ongoing failure to disclose the required information. Arredondo Decl. ¶¶10-13; DietzKamei Decl. ¶ 9; Siegel Decl. ¶¶12-15; Mahoney Decl. ¶¶15-17; Robinson Decl. ¶¶11-12.

Petitioners' informational injury is traceable to EPA's violation of Section 12(h) and was not redressed by issuance of a proposed rule, 83 Fed. Reg. 42,986 (Aug. 24, 2018). Contrary to Section 12(h)'s mandate, that proposal *followed* EPA's final determination that the standards are "not appropriate" and omitted the required detailed assessment. *Compare* 42 U.S.C. § 7607(d)(3) (disclosure requirements for EPA's proposed rule), *with* 40 C.F.R. § 86.1818-12(h) (disclosure

[5] Global Automakers, Comments on the 2016 Draft Technical Assessment Report, at 2 (Sept. 26, 2016), EPA-HQ-OAR-2015-0827-4009 (JA __).

requirements for mid-term evaluation). Indeed, the August 2018 proposed rule rests on an analysis so unfamiliar and opaque that many stakeholders—including auto manufacturers—unsuccessfully sought at least a 60-day extension of the comment period. *See* 83 Fed. Reg. 48,578 (Sept. 26, 2018) (enumerating and denying extension requests). Section 12(h) requires a full and transparent *ex ante* analysis of whether the existing rules should be changed, laying out in detail the technical basis for any asserted need for changes. The Revised Determination defaulted on this basic obligation, depriving Petitioners of information to which they were and are entitled.

2. The Revised Determination declares inappropriately stringent, and requires EPA to revisit, greenhouse-gas emissions standards applicable to the largest segment (light-duty vehicles) of the highest-emitting sector of the economy (transportation). It imperils the health and welfare of Petitioners' members, *e.g.*, Arredondo Decl. ¶¶8-11; DietzKamei Decl. ¶¶5-9; Greenwood Decl. ¶¶13-15; Hildreth Decl. ¶¶10-11; Ausman Decl. ¶¶7-18; Cooley Decl. ¶¶7-11; Fort Decl. ¶¶6-14; Leonard Decl. ¶¶11-14; Blake Decl. ¶¶7-8; Linhardt Decl. ¶14; Ginestra Decl. ¶¶10-11, and limits their future options to purchase low-emitting vehicles, Zalzal Decl. ¶¶6-9, Fleming Decl. ¶¶3-5, Kempf Decl. ¶¶13-17; Claybrook Decl. ¶¶6-7. Petitioners have "concrete interests," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992), in maintaining the more protective standards—standards

that, under Section 12(h), can be dislodged only if specified procedural preconditions are satisfied. EPA's Revised Determination breezed past those constraints, imperiling Petitioners' concrete health, environmental, and consumer interests.

As EPA's leadership confirmed,[6] the Revised Determination is a final, substantive decision that the MY 2022-25 standards are "not appropriate" because they are too stringent. *See, e.g.*, 83 Fed. Reg. at 16,087 (standards present "difficult challenges for auto manufacturers and adverse impacts on consumers" and are "not appropriate"), 16,081 ("Administrator believes" compliance not "practicable"). Accordingly, the preferred alternative in EPA's August 2018 proposed rule would flatline standards at 2020 levels, and all eight action alternatives would substantially weaken current standards. *See* 83 Fed. Reg. 42,986.

To establish standing, Petitioners need not demonstrate the "precise extent" by which EPA will weaken the standards, *see Lujan*, 504 U.S. at 564; and they may challenge procedural violations "even though [they] cannot establish with any certainty" that proper procedures would yield a favorable result, *id.* at 572 n.7; *see also Am. Rivers v. FERC*, 895 F.3d 32, 42 (D.C. Cir. 2018).

[6] Administrator Pruitt heralded the Revised Determination as a decision to "roll back" the MY 2022-25 standards, because they were "too high." Add. A177-A180.

ARGUMENT

I. THE REVISED DETERMINATION VIOLATES SECTION 12(h)

An agency "is bound by its own regulations." *Nat'l Envtl. Dev. Ass'n v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (citations omitted); *see Kreis v. Sec'y*, 406 F.3d 684, 685-87 (D.C. Cir. 2005); *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005).

As State Petitioners show, State Pet. Br., Argument, Sec. II, the Revised Determination violates Section 12(h) in multiple respects. EPA flouted the requirement that its determination be "based upon" a technical record published for public review and comment *before* the final determination on "appropriateness." The Section 12(h) process ensures that "assumptions and modeling underlying the TAR will be available to the public, to the extent consistent with law," 77 Fed. Reg. at 62,784, a guarantee that the Revised Determination totally disregarded. EPA sought comment on the reconsideration of the Original Determination, but that three-page notice did not include any proposed determination and provided no new information or analysis; indeed, EPA stated that it "is primarily interested in comments relevant to the reconsideration of the Final Determination, rather than the Technical Assessment Report (TAR), which is not being reopened for comment in this document." 82 Fed. Reg. 39,551, 39,553 (Aug. 21, 2017) (JA __). The Revised Determination rested not on the Technical Assessment Report, but on

what EPA described as "new information and data," 83 Fed. Reg. at 16,078-79, that EPA never clearly identified, let alone assembled in a report and published for public review and comment, as Section 12(h) requires.

As State Petitioners explain in detail, EPA also defied Section 12(h)'s explicit requirement that the Administrator provide a "detail[ed]" explanation of the basis for his determination as to "each of the factors" set forth in the regulation. And EPA ignored public comments demanding that any change in the Original Determination comply with Section 12(h)'s requirements. EDF et al. Comments, at 14-17 (Oct. 5, 2017), EPA-HQ-OAR-2015-0827-9203 (JA __-__).

That EPA was "reconsidering" an earlier determination in no way authorized it to ignore regulations governing its action. A reconsidered decision, no less than an initial one, must comply with applicable law. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) ("mere fact of reconsideration" did not authorize EPA to change a rule promulgated "on the basis of public input and reasoned explanation"). Moreover, Section 12(h) required EPA to make a *final* "determination" by April 1, 2018, "in light of the record then before the Administrator"; it did not allow the agency to make a placeholder determination premised on evidence and explanations to be developed later.

II. THE REVISED DETERMINATION IS ARBITRARY AND CAPRICIOUS.

The Revised Determination contravened reasoned decisionmaking requirements. *See* 5 U.S.C. § 706(2)(A). It did not begin to justify withdrawing EPA's prior determination, 83 Fed. Reg. at 16,087, which was based on detailed, record-based analysis and culminated an exhaustive process that complied fully with Section 12(h).

Where an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Nat'l Lifeline Ass'n v. FCC*, 2019 WL 405020, *5–*6 (D.C. Cir. Feb. 1, 2019). The Revised Determination fails that basic test.

The Revised Determination is a 180-degree reversal of an Original Determination that was based on a complete, up-to-date record, thoroughly documented findings, and detailed responses to public comments. *E.g.*, OD, at 9-11 (JA __-__); TAR, at 2-2 to 2-10 (JA __-__); TSD, at 1-2 to 1-3, 2-268 to 2-271, 2-289 to 2-321 (JA __-__, __-__, __-__). The Original Determination found that the MY 2022-25 standards were readily achievable, at lower cost than originally forecast; that their benefits would vastly exceed their costs; and that the record

supported *strengthening* the standards, an option EPA rejected solely to promote regulatory stability. *See, e.g.*, OD, at 29-30 (JA __, __-__). The Revised Determination makes only "passing reference" to relevant factors, *see Missouri Pub. Serv. Co. v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000), but provides no substantive analysis and no reasoned explanation for abandoning EPA's prior findings on each. It relies instead on scattered, unanalyzed quotations from industry comments and suggestions that EPA would conduct studies *after* a "not appropriate" finding, upending Section 12(h)'s requirements.[7]

The Revised Determination's treatment of issue after issue was deficient:

Practicability. The Revised Determination declares that "it would not be practicable" for manufacturers "to meet the MY 2022-2025 emission standards without significant vehicle electrification," which would ostensibly be too costly or contrary to consumer preferences. 83 Fed. Reg. at 16,081. These claims contradict EPA's prior findings that "the standards can be met largely through utilization of a suite of advanced gasoline vehicle technologies," OD, at 18 (JA __), and can be achieved through "application of technologies already in commercial production" through multiple cost-effective pathways, *id.* at 3-4 (JA __-__). This factfinding

[7] *See, e.g.*, 83 Fed. Reg. at 16,084 ("affordability concerns and their impact on new vehicle sales should be more thoroughly assessed"), 16,086 (citing need for "more rigorous analysis of job gains and losses" and need to "further assess the scope of [EPA's] safety analysis").

was supported by robust agency analysis, including extensive discussions in the Technical Assessment Report and Proposed Determination.[8] A National Academy of Sciences study similarly found "that the 2025 standards would be achieved largely through improvements to a range of technologies that can be applied to a gasoline vehicle without the use of strong hybrids or [electric vehicles]." *Id.* at 18 (citing National Research Council of the National Academies, *Cost, Effectiveness, and Deployment of Fuel Economy Technologies for Light-Duty Vehicles*, Finding 2.1 (June 2015)) (JA __).

The only reason EPA cited for its change in position was that *automobile manufacturer trade associations* had asserted "that EPA's modeling overestimates the role conventional technologies can play in meeting future standards." 83 Fed. Reg. at 16,081. EPA quoted industry comments and uncritically declared that "it would not be practicable" for manufacturers to meet the MY 2022-25 standards, *id.* at 16,080-81, even though EPA's prior findings included comprehensive technical responses fully rebutting identical industry assertions, *see, e.g.*, TSD Apps. A, B. EPA thereby violated its obligations to base its determination on the full record and

[8] The record demonstrates *each* manufacturer's ability to comply with MY 2022-25 standards using one of several non-electrified pathways at reasonable cost. RTC, at 17-24 (JA __-__); TSD, at 2-231 to 2-242, 2-293 to 2-325 (JA __-__, __-__); PD, at A-7 to A-8 (JA __-__); TAR, at ES-2, 2-9 (JA __, __).

explain why its prior findings were wrong. *See Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446-48 (D.C. Cir. 2017); s*ee also Public Citizen v. Steed*, 733 F.2d 93, 99-101 (D.C. Cir. 1984) (overturning agency decision that arbitrarily reversed prior position, parroted industry concerns, and disregarded prior findings).

Fuel Prices. The Revised Determination misleadingly pointed to EPA's fuel-price estimates in the 2012 rulemaking, and asserted that they "are very different from recent [Energy Information Administration] forecasts" and that "the projections for fuel cost savings in the 2012 rule may have been optimistic." 83 Fed. Reg. at 16,078, 16,084. But EPA's Original Determination acknowledged changes in fuel prices since 2012 and examined a wide range of price scenarios for the 2020s. EPA there found that the standards were "working even at low fuel prices," OD, at 8 (JA __); *see* PD, App. C, at A-185 to A-186 (JA __-__), and would remain highly cost-beneficial and "appropriate" were fuel prices to decline substantially, OD, at 6-8 (JA __-__).[9] *Compare* OD, at 6 (Table ES-2) (JA __), *with* 83 Fed. Reg. at 16,085, Figure 3. The Revised Determination briefly acknowledged that the Original Determination had used similar fuel-price projections, 83 Fed. Reg. at 16,084, but failed to mention—much less rebut—

[9] Fuel-price impacts were the subject of extensive analysis in the Technical Assessment Report and Proposed Determination. *E.g.*, TAR, at 12-71 to 12-74 (JA __-__); RTC, at 128 (JA __); PD, at 35, A-113.

EPA's analysis showing that the standards remained cost-beneficial at lower fuel prices.

Costs. EPA's Original Determination found that the MY 2022-25 standards would increase prices by a fleetwide average of $875 per new vehicle, significantly *lower* than the approximately $1,100 projected in 2012. *See* OD, at 4-5 (Table ES-1), 20 (JA __-__, __). The Original Determination also found that, using a 3% discount rate, "[o]n average for a MY2025 vehicle (compared to a vehicle meeting the MY2021 standards), consumers will save more than $2,800 in total fuel costs over that vehicle's lifetime, with a net savings of $1,650 after taking into consideration the upfront increased vehicle costs." OD, at 24 (JA __).

The Revised Determination ignored these findings. EPA stated that manufacturers "believe[d]" and "asserted" that the Original Determination had "underestimated costs," 83 Fed. Reg. at 16,084, without confronting its own prior analysis. Instead of relying on the record assembled *during the midterm evaluation*, as Section 12(h) mandates, EPA rested its determination on hypothetical *future* studies that would "more thoroughly assess[]" what EPA called "affordability concerns." *Id*.

Other Factors. The Revised Determination invariably failed to engage with EPA's own prior analysis. EPA professed a need to "fully consider" the "rebound effect" that more efficient vehicles may have on vehicle miles travelled, 83 Fed.

Reg. at 16,085, without acknowledging its prior comprehensive analysis and findings on this issue, *see* TSD, at 3-8 to 3-21 (JA __-__); TAR, at 10-9 to 10-20 (JA __-__). Similarly, EPA's summary assertion that the Original Determination "did not give appropriate consideration to the effect on low-income consumers," 83 Fed. Reg. at 16,084, disregards EPA's own well-supported findings that existing standards would benefit low-income consumers, OD, at 7 (JA __); TSD, at 4-38 to 4-56 (JA __-__), PD, at A-66 to A-79 (JA __-__); TAR, at 6-16 to 6-19, 6-23 (JA __-__, __). Likewise, the Revised Determination asserts that more information on safety is required, *see* 83 Fed. Reg. at 16,086, ignoring the Technical Assessment Report's entire chapter on the subject (TAR Ch. 8) and EPA's findings that the standards do not adversely affect safety. *See also* OD, at 26-27 (JA __-__); PD, at A-95 to A-98 (JA __-__).

Ignoring Public Comment. The Revised Determination ignores public comments on EPA's reconsideration notice. While making a few scattered references to the *existence* of comments supporting the standards, the Revised Determination does not *respond* to the comments, which addressed the factors enumerated in Section 12(h) in detail and highlighted the robust evidence supporting the Original Determination. *See, e.g.*, ICCT Comments, at 2-13 (Oct. 5, 2017), EPA-HQ-OAR-2015-0827-9187 (JA __-__); EDF et al. Comments, at 15-17, 20-31 (Oct. 5, 2017), EPA-HQ-OAR-2015-0827-9203 (JA __-__, __-__); CBD

Comments, at 3-6 (Oct. 5, 2017), EPA-HQ-OAR-2015-0827-9579 (JA __-__;. NRDC Comments, at 5 (Oct. 5, 2017), EPA-HQ-OAR-2015-0827-9826 (JA __); UCS Comments, at 3-41(Oct. 5, 2018), EPA-HQ-OAR-2015-0827-9200 (JA __-__).

The Original Determination included extensive responses to public comments submitted on the Technical Assessment Report and the 2016 Proposed Determination. *See* TSD, Chs. 1-5 & Apps. A & B; RTC, at 1-174.[10] By contrast, EPA's "reconsideration" process included no proposed determination and no responses to the voluminous public comments. Indeed, the Revised Determination even ignored comments pointing to studies and modeling that EPA staff conducted *after* the Original Determination that evaluate technologies and costs directly relevant to the existing standards, *see* EDF et al. Comments, at 25-27 (JA __-__).

[10] Respondent-Intervenor Alliance explained: "EPA must … provide public notice of the Proposed and Final Determinations, open the Proposed Determination to public comment, and respond to those comments in the final decision." Comments on Proposed Determination, at 12 (Dec. 30, 2016), EPA-HQ-OAR-2015-0827-6156 (JA __).

CONCLUSION

This Court should declare the Revised Determination unlawful and vacate it.

Respectfully submitted,

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ADDENDUM OF STATUTES AND REGULATIONS

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5 U.S.C. § 706 (Administrative Procedure Act, §10(e))

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 7521(a) (Clean Air Act Section 202(a))

(a) AUTHORITY OF ADMINISTRATOR TO PRESCRIBE BY REGULATION

Except as otherwise provided in subsection (b)—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

[* * * * *]

42 U.S.C. §7607(b) (Clean Air Act, Section 307(b))

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. * * * * *

40 C.F.R. § 86.1818–12

Greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles.

[* * * * *]

(h) **Mid-term evaluation of standards**. No later than April 1, 2018, the Administrator shall determine whether the standards established in paragraph (c) of this section for the 2022 through 2025 model years are appropriate under section 202(a) of the Clean Air Act, in light of the record then before the Administrator. An opportunity for public comment shall be provided before making such determination. If the Administrator determines they are not appropriate, the Administrator shall initiate a rulemaking to revise the standards, to be either more or less stringent as appropriate.

(1) In making the determination required by this paragraph (h), the Administrator shall consider the information available on the factors relevant to setting greenhouse gas emission standards under section 202(a) of the Clean Air Act for model years 2022 through 2025, including but not limited to:

(i) The availability and effectiveness of technology, and the appropriate lead time for introduction of technology;

(ii) The cost on the producers or purchasers of new motor vehicles or new motor vehicle engines;

(iii) The feasibility and practicability of the standards;

(iv) The impact of the standards on reduction of emissions, oil conservation, energy security, and fuel savings by consumers;

(v) The impact of the standards on the automobile industry;

(vi) The impacts of the standards on automobile safety;

(vii) The impact of the greenhouse gas emission standards on the Corporate Average Fuel Economy standards and a national harmonized program; and

(viii) The impact of the standards on other relevant factors.

(2) The Administrator shall make the determination required by this paragraph (h) based upon a record that includes the following:

(i) A draft Technical Assessment Report addressing issues relevant to the standard for the 2022 through 2025 model years;

(ii) Public comment on the draft Technical Assessment Report;

(iii) Public comment on whether the standards established for the 2022 through 2025 model years are appropriate under section 202(a) of the Clean Air Act; and

(iv) Such other materials the Administrator deems appropriate.

(3) No later than November 15, 2017, the Administrator shall issue a draft Technical Assessment Report addressing issues relevant to the standards for the 2022 through 2025 model years.

(4) The Administrator will set forth in detail the bases for the determination required by this paragraph (h), including the Administrator's assessment of each of the factors listed in paragraph (h)(1) of this section.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word limit prescribed in Fed. R. App. P. 32(a)(7)(B) and this Court's order of January 11, 2019 (ECF 1768141). According to Microsoft Word, the portions of the brief that are subject to the word limit contain 3798 words.

/s/ *Sean H. Donahue*

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2019, the foregoing Brief was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ *Sean H. Donahue*