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June 29, 2020

Via Electronic Delivery[1]

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RE: Petition for Reconsideration of the Safer, Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks , 85 Fed. Reg. 21,174 (April 30, 2020)

Dear Administrator Wheeler and Principal Deputy Assistant Administrator Idsal:

Please find attached a Petition for Reconsideration submitted on behalf of the States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Colorado, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Vermont, Washington, and Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, the City and County of Denver, and the Cities of Los Angeles and San Jose with respect to the above referenced action(s), Docket ID EPA-HQ-OAR-2018-0283.

Sincerely,

MEREDITH J. HANKINS
Deputy Attorney General

cc: Chris Lieske, Office of Transportation and Air Quality

(Attachment)

[1] This Petition is submitted electronically in light of the COVID-19 pandemic and EPA's guidance with respect to hard copy submissions while Agency staff is teleworking. *Notice Regarding "Hard Copy" Submissions to EPA During the COVID-19 National Emergency* (May 12, 2020), https://www.epa.gov/aboutepa/notice-regarding-hard-copy-submissions-epa-during-covid-19-national-emergency.

BEFORE THE HONORABLE ANDREW WHEELER, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE PETITION FOR RECONSIDERATION OF THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEARS 2021-2026 PASSENGER CARS AND LIGHT TRUCKS, 85 FED. REG. 24,174 (APRIL 30, 2020)

Submitted by:

The States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Colorado, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Vermont, Washington, and Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, the City and County of Denver, and the Cities of Los Angeles and San Jose.

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INTRODUCTION

On April 30, 2020, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) jointly published the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks ("Final Rule"). 85 Fed. Reg. 24,174. In the Final Rule, EPA and NHTSA adopted final rules setting greenhouse gas emission and fuel economy standards, respectively, for light duty vehicles for model years 2021 through 2026. By doing so, EPA amended its greenhouse gas standards for model years 2021 through 2025 and finalized new standards for model year 2026.

Pursuant to Clean Air Act Section 307(b), and for the reasons set forth below, the States of California (by and through Attorney General Xavier Becerra and the California Air Resources Board), Colorado, Illinois, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Vermont, Washington, and Wisconsin; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the District of Columbia; the City and County of Denver; and the Cities of Los Angeles and San Jose (collectively, "States and Cities") hereby petition EPA for reconsideration of its Final Rule.

Between the proposed and final rules, EPA changed many aspects of its rationale and the assumptions and analyses upon which it relies. One of these changes is discussed below and others are discussed in the Petition for Reconsideration submitted by Center for Biological Diversity, Chesapeake Bay Foundation, Conservation Law Foundation, Consumer Federation of America, Environmental Defense Fund, Environmental Law & Policy Center, Environment America, Natural Resources Defense Council, Public Citizen, Sierra Club, and Union of Concerned Scientists ("UCS *et al.*" or "UCS Petition"), which the undersigned States and Cities join. In short, EPA's final rule: (a) includes an entirely new interpretation with respect to the lead time requirement in Clean Air Act 202(a)(2); (b) carries forward and introduces new technical

errors, improper assumptions, and flawed modeling; and (c) fails to consider and respond to significant comments filed during the eighteen month gap between the premature close of the comment period and the publication of the Final Rule. Reopening the proceeding for reconsideration of these issues would provide the appropriate opportunity to comment on these changes. Many of the issues are consequential on their own, and collectively they require reconsideration and withdrawal of EPA's new greenhouse gas emission standards. Reopening the proceeding thus would facilitate a fully informed decision by EPA.

The States and Cities intend to raise some, if not all, of these procedural and substantive flaws in litigation pursuant to their recently filed petition for review (D.C. Cir. Case No. 20-1167). Petitioners do not concede that any of the issues discussed in this petition or in the UCS *et al.* Petition require exhaustion or have not been exhausted. These submissions do not and cannot diminish the availability of any issues, facts, and objections to be raised in judicial challenges to the Final Rule. To the extent EPA believes the issues discussed in these petitions have not been exhausted, it should immediately grant this petition and the UCS *et al.* Petition to avoid unnecessarily wasting judicial and party resources, as the issues are "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Out of an abundance of caution, the States and Cities protectively submit this Petition to bring one of these issues to EPA's attention before proceeding to brief the merits of its petition for review, and to join the analysis of the remaining issues expressed in the Petition for Reconsideration submitted by UCS *et al*.

For these reasons, the States and Cities respectfully request that EPA reconsider its Final Rule.

BACKGROUND AND PROCEDURAL HISTORY

On August 24, 2018, EPA and NHTSA jointly proposed multiple actions to weaken federal greenhouse gas emission and fuel economy standards for light-duty vehicles. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("Proposed Rule"). Both agencies also proposed actions invalidating states' greenhouse gas and zero-emission vehicle standards.

The California Air Resources Board (CARB), a coalition of 26 states and cities, a number of non-governmental organizations, and many other stakeholders all submitted comments on the Proposed Rule by the close of the comment period on October 26, 2018. A number of developments arising after the close of the noticed comment period prompted stakeholders to submit supplemental comments addressing issues of central relevance to the Proposed Rule.

On September 27, 2019, EPA and NHTSA jointly published the One National Program Final Action. 84 Fed. Reg. 51,310 ("2019 Final Action"). In the 2019 Final Action, the agencies finalized only their actions targeted at invalidating state greenhouse gas and zero-emission vehicle standards. Neither agency adopted or revised any federal standards at that time.

On April 30, 2020, EPA and NHTSA jointly published the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks ("Final Rule"). 85 Fed. Reg. 24,174. In the Final Rule, EPA and NHTSA adopted final rules setting greenhouse gas emissions and fuel economy standards, respectively, for light duty vehicles for model years 2021 through 2026.

In its Final Rule, EPA relies on multiple new assumptions, analyses, and positions. In addition, the Final Rule presents multiple arguments or positions that are facially unclear and require clarification.

LEGAL STANDARD

EPA must convene a reconsideration proceeding if a person raising an objection shows: (1) it was "impracticable" to raise the objection during the public comment period, or grounds for the objection arose after the public comment period; and (2) the objection "is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Impracticability turns on whether the notice of proposed rulemaking provided "adequate notice" of the final rule. *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2018). An objection is "of central relevance" if it provides "substantial support for the argument that the regulation should be revised." *Chesapeake Climate Action Network, et al. v. EPA*, 952 F.3d 310, 322 (D.C. Circ. 2020).

ARGUMENT

I. EPA HAS IMPERMISSIBLY PRESENTED A NEW CLEAN AIR ACT INTERPRETATION IN THE FINAL RULE

In the Final Rule, EPA impermissibly presented a new statutory interpretation of the requirements of Clean Air Act section 202(a)(2), 42 U.S.C. § 7521(a)(2), for the first time. Specifically, without providing notice, EPA based its revised emission standards on a new statutory interpretation: that the lead time requirement in Section 202(a)(2) includes consideration of uncertainty about consumer acceptance of available technology. The States and Cities respectfully request that, pursuant to 42 U.S.C. § 7607(d)(7)(B), the Administrator withdraw the Final Rule and convene a proceeding for reconsideration of the Final Rule that affords the interested public the procedural rights due them under 42 U.S.C. § 7607(d)(3)-(5). As explained below, because EPA did not include its new interpretation of Section 202(a)(2)'s lead time requirement in the Proposed Rule, it was impracticable for the public to comment on EPA's

new position.[1] EPA's new interpretation is "of central relevance" to the rule's adoption because EPA relied on it to justify its revision of vehicle emission standards in the Final Rule.

Clean Air Act section 202(a)(2) requires that any motor vehicle emission standard (including revisions to a standard) "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. § 7521(a)(2). Decades ago, the D.C. Circuit interpreted this command to mean that when issuing or revising vehicle emission standards, EPA must take into account the "lead time" needed by manufacturers to comply with those standards:

> Section 202's "cost of compliance" concern, juxtaposed as it is with the requirement that the Administrator provide the requisite *lead time to allow technological developments*, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures. . . . It relates to the timing of a particular emission control regulation rather than to its social implications. Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers. It therefore requires that emission regulations be technologically feasible within economic parameters. Therein lies the intent of the "cost of compliance" requirement.

Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1118 (D.C. Cir. 1979) (*MEMA I*) (emphasis added).

[1] The States and Cities protectively request reconsideration of EPA's new statutory interpretation to preserve their right to challenge this basis of the Final Rule in the event that EPA or other party contends that under 42 U.S.C. § 7607(d)(7)(B) the States and Cities should be prohibited from challenging the new statutory interpretation during judicial review of the Final Rule. The States and Cities note, however, that their comments (and those of others) included objections to other aspects of EPA's reliance on, and approach to, consumer acceptance under Section 202(a). Thus, EPA cannot take the position in litigation that the States and Cites are precluded from raising those issues. By submitting this petition for reconsideration, the States and Cities do not concede that they did not object to the inadequacy, impropriety, or lack of any lead time determination under Section 202(a)(2) with reasonable specificity during the public comment period.

In the Proposed Rule, EPA evidenced its understanding that the lead time requirement of Section 202(a)(2) is based on the time manufacturers need to develop and apply the technology required to meet the standards, given the costs of doing so. 83 Fed. Reg. at 43,227 ("Under Section 202(a) and relevant case law . . . EPA considers such issues as technology effectiveness, its cost . . . , *the lead time necessary to implement the technology*, and based on this the feasibility and practicability of potential standards . . . ." (emphasis added)). EPA further acknowledged that "'the [s]ection 202(a)(2) reference to compliance costs encompasses only the cost to the motor-vehicle industry to come into compliance with the new emissions standards.'" *Id.* (quoting *Coal. for Responsible Regulation*, 684 F.3d at 128).

Despite the requirements of Section 202(a)(2), in the Proposed Rule EPA did not propose to make the required lead time finding that revised emission standards were "necessary to permit the development and application of the requisite technology." Indeed, EPA conceded in the Proposed Rule that it could not make the lead time finding under its usual legal interpretation. *See* 83 Fed. Reg. at 43,229 ("In light of the wide range of existing technologies that have already been developed, have been commercialized, and are in-use on vehicles today, including those developed since the 2012 rule, technology availability, development and application, if it were considered in isolation, is not necessarily a limiting factor in the Administrator's selection of which standards are appropriate."); *id.* ("The majority of these technologies have already been developed, have been commercialized, and are in-use on vehicles today.") In their comments on the Proposed Rule, the States and Cities pointed out EPA's failure to propose a lead time finding to justify revising the emission standards and its failure to supply any factual basis for making such a finding.

In the Final Rule, EPA justified making a lead time finding on an entirely new interpretation of Section 202(a)(2) that it had not previously proposed and on which the public had no opportunity to comment. Under EPA's new interpretation of Section 202(a)(2), even when technology to achieve emission standards is currently available and in production, purported "uncertainty about consumer acceptance" of the technology is a sufficient basis for EPA to determine that more lead time is necessary. In the Final Rule EPA explained its new interpretation as follows:

> [T]he technologies projected to be used to meet the GHG standards, including the alternatives in the proposal as well as the final standards, are currently available and in production. If the appropriateness of the standards were based solely on an assessment of technology availability, and lead time considerations were limited to the development of such technology, EPA might consider more stringent CO2 standards to be potentially appropriate. . . . As in 2012, manufacturers today are capable of building vehicles that can meet the standards that any of the regulatory alternatives evaluated in the final rule would require. However, greater uncertainty about consumer acceptance of those technologies (as compared to what EPA believed was likely in 2012) means that providing more lead time is appropriate.

85 Fed. Reg. at 25,108. *See also id.* at 25,114 ("While manufacturer difficulty in complying due to lack of consumer demand may not be the deciding factor in determining the appropriate levels of stringency for standards, it is relevant to understanding lead time difficulties, which EPA is required to consider under Section 202(a)(2)."); *id.* at 25,116 ("EPA now concludes that it is appropriate to account for the shift in consumer preference in concluding that the standards set in 2012 did not provide sufficient lead time for manufacturers to achieve the standards set at that time.").

The Clean Air Act requires EPA to publish in its notice of proposed rulemaking a "statement of basis and purpose" that includes "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(C). Because EPA had never proposed its new "uncertainty about consumer acceptance" interpretation of Section

202(a)(2)'s lead time requirement, it was impracticable for the public to comment on the incorrectness of that new position. EPA's new interpretation of Section 202(a)(2)'s lead time requirement is "of central relevance" to the rule's adoption because that finding is required by Section 202(a). Therefore, EPA must reopen public comment and reconsider the Final Rule.

II. EPA'S FINAL ANALYSIS IS RIDDLED WITH TECHNICAL ERRORS, IMPROPER ASSUMPTIONS, AND FLAWED MODELING

As documented in the Petition for Reconsideration submitted by UCS *et al*. on June 29, 2020, EPA made a number of errors in its technical analysis supporting the Final Rule, including computational mistakes and unfounded assumptions that render its modeling unreliable. *See* UCS Petition at 5. Many of these errors were introduced in the Final Rule, some in response to comments on the Proposed Rule's flawed analysis. Moreover, given the length and detail of the Proposed Rule and EPA's lack of transparency, it was impractical to raise detailed objections to all technical errors present in the Proposed Rule—many of which have only become clear upon EPA's disclosure of additional information in the Final Rule—in the insufficient comment period provided.

The California Air Resources Board, the agency responsible for developing and enforcing California's mobile source emissions program, has independently evaluated the technical errors raised by UCS *et al.* in their Petition for Reconsideration and concurs with the analysis therein. In the interest of avoiding duplicative submissions, the undersigned States and Cities join the UCS *et al.* Petition for Reconsideration's discussion of EPA's technical analysis, UCS Petition at 5-107, and urge EPA to grant reconsideration based on those issues.

III. EPA Failed to Adequately Respond to Relevant Comments Submitted In the Year and a Half between the Proposed Rule and the Final Rule

As documented in the Petition for Reconsideration submitted by UCS *et al.* on June 29, 2020, EPA has failed to adequately consider relevant comments submitted in the eighteen months between the close of the comment period for its Proposed Rule and issuance of the Final Rule. *See* UCS Petition at 107-151. EPA committed to consider comments submitted after the close of the formal comment period "to the extent practicable," 83 Fed. Reg. at 43,471, yet the agency has failed to justify its failure to consider comments submitted after the formal comment period and well before issuance of the Final Rule. The many substantive comments submitted to EPA after close of the inadequate comment period are of "central relevance" to this rulemaking. As UCS *et al.* argue in their Petition for Reconsideration, the failure to consider these comments was unlawful and arbitrary. UCS Petition at 107.

RELIEF REQUESTED

For the foregoing reasons, the States and Cities respectfully request that the Administrator withdraw the Final Rule, immediately convene a proceeding for reconsideration of the Final Rule, and afford the interested public the procedural rights due them.

Dated: June 29, 2020

Respectfully Submitted,

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