

ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1114 (consolidated with 18-1118, 18-1139, 18-1162)

**United States Court of Appeals
for the District of Columbia Circuit**

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ALLIANCE OF AUTOMOBILE MANUFACTURERS; ASSOCIATION OF
GLOBAL AUTOMAKERS, INC.,
Intervenors for Respondent.

On Petition for Review of Agency Action by the United States
Environmental Protection Agency, No. EPA-83FR16077

**BRIEF OF PETITIONERS NATIONAL COALITION FOR ADVANCED
TRANSPORTATION, 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**

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February 7, 2019

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners National Coalition for Advanced Transportation, 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, 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 Curiae: 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; 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 in the Federal Register 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.

Dated: February 7, 2019

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**RULE 26.1 CORPORATE DISCLOSURE STATEMENT FOR
PETITIONER NATIONAL COALITION FOR ADVANCED
TRANSPORTATION**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner National Coalition for Advanced Transportation (“NCAT”) states:

NCAT is a coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation technologies and related infrastructure, including business leaders engaged in energy supply, transmission and distribution; vehicle and component design and manufacturing; and charging infrastructure production and implementation, among other activities. NCAT is an unincorporated association and does not have a parent corporation. No publicly-held entity owns 10% or more of NCAT.

NCAT currently has the following members:

- Ampaire
- Atlantic City Electric
- Baltimore Gas & Electric
- ChargePoint
- Commonwealth Edison Company
- Delmarva Power
- Edison International
- EVgo

- Exelon Corporation
- Los Angeles Department of Water & Power
- Pacific Gas and Electric Company
- PECO
- PEPCO
- Plug In America
- Portland General Electric
- Rivian Automotive
- Sacramento Municipal Utility District
- Tesla, Inc.

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**RULE 26.1 DISCLOSURE STATEMENT FOR PETITIONERS
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. AND
NATIONAL GRID USA**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioners Consolidated Edison Company of New York, Inc. (“Con Edison”) and National Grid USA provide the following disclosure statements.

Con Edison states that it is a regulated public utility, incorporated in the State of New York, engaged in the generation, transmission, distribution and the wholesale and retail sale of electric power throughout the five boroughs of New York City and in the County of Westchester and the retail sale of steam and gas in parts of New York City and the County of Westchester. Con Edison has outstanding debt securities held by the public and may issue additional securities to the public. Con Edison is a subsidiary of Consolidated Edison, Inc., which has outstanding shares and debt held by the public and may issue additional securities to the public. Con Edison is also affiliated with Orange & Rockland Utilities, Inc., a subsidiary of Consolidated Edison, Inc., which also has outstanding debt securities and may issue additional securities. Orange & Rockland Utilities, Inc. has a subsidiary, Rockland Electric Company, which may issue debt securities. No other publicly held companies have a 10% or greater ownership interest in Con Edison.

National Grid USA states that it is a holding company with regulated direct and indirect subsidiaries engaged in the transmission, distribution and sale of

electricity and natural gas and the generation of electricity. It is the direct or indirect corporate parent of several subsidiary electric distribution companies, including Massachusetts Electric Company, Nantucket Electric Company, Niagara Mohawk Power Corporation and The Narragansett Electric Company, each of which is and will be investing in electric vehicle infrastructure as part of its service to customers. All of the outstanding shares of common stock of National Grid USA are owned by National Grid North America Inc. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales, with ordinary shares listed on the London Stock Exchange, and American Depositary Shares listed on the New York Stock Exchange.

Dated: February 7, 2019

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GLOSSARY

2017 Determination	EPA, Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (Jan. 2017)
APA	Administrative Procedure Act
CAA	Clean Air Act
Con Edison	Consolidated Edison Company of New York, Inc.
EVs	Electric vehicles
EPA	United States Environmental Protection Agency
GHG	Greenhouse gas
Industry Petitioners	National Coalition for Advanced Transportation, 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
MTE	Mid-Term Evaluation
MY	Model year
Nat'l Grid Decl.	Declaration of Terrence Sobolewski
NCAT	National Coalition for Advanced Transportation
NCAT Comments	Comments of the National Coalition for Advanced Transportation, EPA-HQ-OAR-2015-0827-9101 (Oct. 5, 2017)
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SCE Decl.	Declaration of Caroline Choi
Section 12(h)	40 C.F.R. § 1818-12(h)
SMUD Decl.	Declaration of Paul Lau
TAR	Technical Assessment Report
Tesla Comments	Comments of Tesla, Inc., EPA-HQ-OAR-2015-0827-9201 (Oct. 5, 2017)
Tesla Decl.	Declaration of Joseph Mendelson, III
TSD	Technical Support Document
Utility Petitioner Comments	Joint Comments on Vehicle GHG Standards by Electric Power Companies and Utilities, EPA-HQ-OAR-2015-0827-9175 (Oct. 5, 2017)
Utility Petitioners	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

STATEMENT OF JURISDICTION

In April 2018, the U.S. Environmental Protection Agency (“EPA”) issued a nationally applicable final agency action entitled “Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles,” 83 Fed. Reg. 16,077 (Apr. 13, 2018) (“Revised Determination”) (JA ___ - ___). Petitioner National Coalition for Advanced Transportation (“NCAT”) timely filed a petition for review on May 4, 2018, and Petitioners 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,¹ timely filed a petition for review on June 12, 2018.² This Court has jurisdiction under Clean Air Act (“CAA”) Section 307(b)(1). 42 U.S.C. § 7607(b)(1).

STATEMENT OF THE ISSUES

1. Whether the Revised Determination violated EPA regulations, 40 C.F.R. § 86.1818-12(h), which require EPA to determine whether—based on assessment of eight specified factors in light of the entire record before the agency—its light-duty

¹ 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, filed a joint petition for review and are referred to collectively as “Utility Petitioners.” NCAT’s membership also includes electric utilities.

² NCAT Petition for Review, No. 18-1118 (D.C. Cir. filed May 4, 2018); Utility Petitioners Petition for Review, No. 18-1162 (D.C. Cir. filed June 12, 2018). This Court consolidated these petitions for review with those filed by a group of States and a coalition of environmental, public health and science groups.

vehicle greenhouse gas (“GHG”) standards for Model Years (“MY”) 2022-2025 remain appropriate under CAA Section 202(a), and to explain in detail the rationale for its determination.

2. Whether the Revised Determination is arbitrary and capricious, in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), because it fails to provide a reasoned explanation for EPA’s reversal of its prior final determination, lacks record support, is based on undisclosed information not offered for public comment, and fails to respond to public comment.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF THE CASE

Petitioners NCAT and Utility Petitioners (collectively “Industry Petitioners”) adopt State Petitioners’ Statement of the Case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When EPA finalized the existing light-duty vehicle GHG emissions standards for MY 2017-2025, the agency adopted regulations requiring it to conduct a Mid-Term Evaluation (“MTE”) of the MY 2022-2025 standards. These regulations require EPA to determine, not later than April 1, 2018, whether these standards continued to be appropriate under CAA Section 202(a), “in light of the record then before” EPA. 40 C.F.R. § 86.1818-12(h) (“Section 12(h)"). EPA must consider

eight specified factors, make its determination based on a record including a draft Technical Assessment Report (“TAR”) and public comments, and “set forth in detail the bases for the determination.” *Id.*

EPA completed the MTE in January 2017. EPA, Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (Jan. 2017) (“2017 Determination”). Based on extensive technical analyses—including the 1217-page TAR with a 118-page appendix, a 719-page Technical Support Document (“TSD”), and a response to public comments³—EPA concluded that that the existing standards were appropriate and would remain in place. 2017 Determination at 1-3 (JA___ - ___).

In March 2017, however, newly inaugurated President Trump announced that “we are going to cancel” the MTE Determination.⁴ After requesting and receiving public comment on EPA’s reconsideration of the 2017 Determination without providing supporting technical analyses, EPA published an 11-page Revised Determination on April 13, 2018. The agency concluded that the MY 2022-2025

³ TAR and TSD are available at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas>.

⁴ Remarks by President Trump at American Center for Mobility, Detroit Michigan (Mar. 15, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-american-center-mobility-detroit-mi/>.

standards are not appropriate and withdrew the 2017 Determination, thus requiring EPA to undertake a new rulemaking to weaken the standards. 83 Fed. Reg. at 16,087 (JA___). In stark contrast to the 2017 Determination, the Revised Determination consists primarily of a summary of certain stakeholder comments, and does not reflect meaningful independent analysis on EPA's part. In violation of Section 12(h), the Revised Determination does not purport to be based on the TAR, was not accompanied by any technical analysis, and does not address the extensive record evidence supporting the 2017 Determination. EPA purported to base its reversal on "the significant record that has been developed since the January 2017 Determination," *id.* at 16,078 (JA___), but has not disclosed what that record is, nor provided an opportunity for public comment on it. In an effort to evade this Court's review, EPA now argues that its action is not final and Petitioners lack standing.

As set forth in State Petitioners' brief, States Br., Argument, Sec. I.B, the Revised Determination plainly is a final agency action; it represents the conclusion of EPA's MTE decision process and has clear legal consequences. Under Section 12(h), the Revised Determination *requires* EPA to revise the existing standards for MY 2022-2025. It is a key legal predicate for EPA's August 2018 Notice of Proposed Rulemaking, which proposes to scrap the MY 2021-2025 standards and freeze GHG emission requirements at MY 2020 levels through MY 2026.

By undermining existing performance standards that are a key driver for the deployment of electric vehicles (“EVs”), the Revised Determination directly and adversely affects Industry Petitioners’ economic interests. NCAT is a coalition of companies and non-profit organizations that support EV technologies and related infrastructure. NCAT’s members include companies that manufacture EVs and are directly subject to regulation under EPA’s standards;⁵ companies engaged in electricity generation, transmission and distribution; and companies involved in manufacturing, deploying, and operating EV charging infrastructure. Utility Petitioners include investor-owned utilities, the nation’s largest state power authority and one of the nation’s largest municipal utilities. Industry Petitioners collectively have invested and committed to investing hundreds of millions of dollars to build infrastructure to support increased EV deployment and are establishing rate structures and programs to maximize the benefits and minimize the costs of integrating EV load to the electric grid. Industry Petitioners participated in the proceedings leading to EPA’s Revised Determination, including filing comments opposing revision of the MY 2022-2025 standards.⁶ Declaration of Terrence

⁵ NCAT member Tesla manufactures all-electric light-duty vehicles subject to the standards, Declaration of Joseph Mendelson, III ¶¶ 5, 7 (“Tesla Decl.”) (ADD12-13).

⁶ Comments of the National Coalition for Advanced Transportation, EPA-HQ-OAR-2015-0827-9101 (Oct. 5, 2017) (“NCAT Comments”) (JA ___-___); Comments of Tesla, Inc., EPA-HQ-OAR-2015-0827-9201 (Oct. 5, 2017) (“Tesla

Sobolewski ¶ 7 (“Nat’l Grid Decl.”) (ADD19); Declaration of Caroline Choi ¶ 10 (“SCE Decl.”) (ADD4); Declaration of Paul Lau ¶ 6 (“SMUD Decl.”) (ADD9); Tesla Decl. ¶ 10 (ADD14).

Because EVs have zero tailpipe GHG emissions, EPA’s GHG standards provide a critical regulatory incentive for the development and deployment of such vehicles and supporting infrastructure. EPA’s decision to weaken the performance standards undermines that incentive, adversely affecting Industry Petitioners’ business interests. Further, the Revised Determination’s unsubstantiated negative findings regarding the feasibility, cost, and consumer acceptance of EV technologies adversely affect investment in EVs and supporting infrastructure.

Industry Petitioners adopt State Petitioners’ and NGO Petitioners’ arguments that the Revised Determination is final agency action, violates Section 12(h), and is otherwise arbitrary and capricious in violation of the APA. States Br., Argument, Sec. II-III; NGOs Br., Sec. I-II. Industry Petitioners underscore, in particular, that the Revised Determination is centrally based on unsupported and inaccurate statements regarding the feasibility, cost, and consumer acceptance of EV technologies. The Revised Determination uncritically parrots certain stakeholder comments on these points, is not based on independent analysis, and fails to address

Comments”) (JA__ - __); Joint Comments on Vehicle GHG Standards by Electric Power Companies and Utilities, EPA-HQ-OAR-2015-0827-9175 (Oct. 5, 2017) (“Utility Petitioner Comments”) (JA__ - __).

extensive contrary record evidence or to respond meaningfully to Industry Petitioners' comments. For all these reasons, this Court should vacate the Revised Determination and reinstate the 2017 Determination.

STANDING

NCAT and Utility Petitioners have standing to challenge EPA's Revised Determination. A petitioner establishes Article III standing by demonstrating (i) a "concrete and particularized" injury that is "actual or imminent," (ii) that this injury is "fairly ... trace[able]" to the challenged conduct, and (iii) that the requested relief is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations in original) (citations omitted); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). An association has standing to sue on behalf of its members if (1) at least one member would have standing to sue in its own right, (2) "the interests the association seeks to protect are germane to its purpose," and (3) "neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Petitioner NCAT satisfies this test.⁷

⁷ Industry Petitioners submitted declarations in support of standing with their Response to Motions to Dismiss, Doc. #1748067, reproduced in the separate addendum filed herewith at ADD1-20. NCAT withdraws the declaration of O. Kevin Vincent submitted by Workhorse Group, Inc. because Workhorse is no longer an NCAT member.

This Court has made clear that if a petitioner “is ‘an object of the [agency] action (or forgone action) at issue’ ... there should be ‘little question’” regarding the petitioner’s standing. *Id.* at 900 (quoting *Lujan*, 504 U.S. at 561-62). Such is the case here, as NCAT member Tesla is directly regulated by the MY 2022-2025 standards. *See* Tesla Decl. ¶ 7, ADD13.

More broadly, Industry Petitioners are seeking redress of actual and imminent injury to their businesses caused by the Revised Determination. Economic injury is a cognizable harm for purposes of constitutional standing. *See, e.g., Clinton v. City of N.Y.*, 524 U.S. 417, 432-33 (1998); *Carpenters Indus. Council*, 854 F.3d at 5 (“A dollar of economic harm is still an injury-in-fact for standing purposes.”). And “petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test.” *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990).

The Revised Determination has had and continues to have adverse effects on Industry Petitioners’ economic interests. EV manufacturers, including at least one NCAT member, earn and sell tradable compliance credits under the MY 2017-2025 standards. U.S. EPA, Greenhouse Gas Emission Standards for Light-Duty Vehicles: Manufacturer Performance Report for the 2016 Model Year 23-25 (Jan. 2018)⁸

⁸ <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TGIA.pdf>.

(ADD31-33) (credits earned); *id.* at 69-71 (ADD34-36) (credit sales); Benjamin Leard & Virginia McConnell, Resources for the Future, *New Markets for Credit Trading under US Automobile Greenhouse Gas and Fuel Economy Standards* at 11-12 (May 2017)⁹ (ADD50-51) (“RFF Credit Market Report”) (credit prices). Petitioners have demonstrated a “substantial likelihood” that the Revised Determination has caused and will continue to adversely affect credit markets. *See Competitive Enter. Inst.*, 901 F.2d at 113. The Revised Determination cites data showing manufacturers’ increasing use of, and a decreasing supply of, compliance credits. 83 Fed. Reg. at 16,079 (JA___). Credit demand and prices correlate positively with the standards’ stringency, *see* RFF Credit Market Report at 11, 18 (ADD50, 57), and the Revised Determination represents a binding decision to weaken the standards. “Common sense and basic economics,” *Carpenters Indus. Council*, 854 F.3d at 6, support the conclusion that the Revised Determination has reduced interest in credit transactions and values.

Further, EPA’s MY 2022-2025 standards provide long-term incentives for Industry Petitioners’ investments in manufacturing EVs and deploying charging infrastructure. *See, e.g.*, Nat’l Grid Decl. ¶ 7 (ADD19); SCE Decl. ¶¶ 5, 14 (ADD2, 5-6); SMUD Decl. ¶ 4 (ADD8); Tesla Decl. ¶ 9 (ADD13). Industry Petitioners

⁹ <http://www.rff.org/files/document/file/RFF-Rpt-AutoCreditTrading.pdf>.

collectively have invested, or are in the process of investing, billions of dollars. *See, e.g.*, SCE Decl. ¶ 8 (ADD3-4); SMUD Decl. ¶ 5 (ADD8-9); Tesla Decl. ¶ 8 (ADD13); Utility Petitioner Comments at 2 (JA____). EPA’s Revised Determination undermines the value of such investments and imposes on Industry Petitioners additional costs. *See, e.g.*, Nat’l Grid Decl. ¶ 8 (ADD19-20); SCE Decl. ¶¶ 11-12 (ADD4-5); SMUD Decl. ¶¶ 8-9 (ADD9-10).

This Court also has recognized informational and procedural injuries as injuries in fact. *See, e.g., Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). Industry Petitioners are harmed by EPA’s failure to follow the procedural requirements of the MTE regulations and its inaccurate and unsupported findings regarding EV technology costs, affordability and consumer acceptance. Tesla Decl. ¶ 13 (ADD15); SCE Decl. ¶¶ 11-12 (ADD4-5).

Petitioners’ injuries would be redressed by a decision vacating the Revised Determination and thus reinstating the 2017 Determination. This would eliminate a critical legal predicate for weakening the standards and mitigate the harms described above. Vacatur would “relieve a discrete injury,” and Petitioners “need not show that a favorable decision will relieve [their] every injury.” *See Energy Future Coal v. EPA*, 793 F.3d 141, 144-45 (D.C. Cir. 2015) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)).

Finally, Industry Petitioners have prudential standing because the interests

they seek to protect are “arguably within the zone of interests to be protected or regulated by the statute” at issue. *See Sierra Club*, 292 F.3d at 902 (citation omitted). Where, as in the case of NCAT member Tesla, a petitioner is “itself the subject of the contested regulatory action,” it necessarily satisfies this test. *See Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399-400 (1987); Tesla Decl. ¶ 7 (ADD13). Further, Industry Petitioners supply fuel and fueling infrastructure for vehicles regulated by the standards, and thus are directly affected. *See, e.g., Energy Future Coal.*, 793 F.3d at 145 (biofuel producers within zone of interests of regulation directed at vehicle manufacturers).

ARGUMENT

I. EPA’S REVISED DETERMINATION VIOLATES SECTION 12(H) AND IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

A. The Revised Determination Violates Section 12(h) and Is Arbitrary and Capricious

As set forth in State Petitioners’ and NGO Petitioners’ briefs, States Br., Argument, Sec. II; NGOs Br., Sec. I, EPA’s Revised Determination violates Section 12(h). EPA is “not free to ignore or violate [these] regulations while they remain in effect.” *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (citation omitted), *limited on other grounds*, 891 F.3d 1041, 1052 (D.C. Cir. 2018). Under Section 12(h), EPA must make its determination based on the TAR and public comments, and EPA must set forth “in detail” the basis for its

determination. 40 C.F.R. § 86.1818-12(h)(2), (4). When adopting Section 12(h), EPA explained that its determination must be “based on a comprehensive, integrated assessment of all of the results of the review” and the decisionmaking process would “be as robust and comprehensive as that in the original setting of the MY2017-2025 standards.” 77 Fed. Reg. 62,624, 62,784 (Oct. 15, 2012). EPA’s vague and cursory Revised Determination makes a mockery of those requirements.

In addition, as State and NGO Petitioners argue, States Br., Argument, Sec. III; NGOs Br., Sec. II, the Revised Determination is arbitrary and capricious, in violation of APA Section 706(2)(A), because it lacks factual support in the record and fails to provide the reasoned explanation required to justify reversal of the 2017 Determination. This Court will set aside an agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Under this standard, “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.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); *see also Nat. Res. Def. Council, Inc. v. EPA*, 655 F.2d 318, 328 (D.C. Cir. 1981) (A court’s “examination of the record must be searching ... ‘requir[ing] enough steeping in technical matters to determine whether the agency “has exercised a reasoned discretion.”’” *Id.* (citations omitted)).

Further, EPA must provide a “reasoned analysis” justifying a change in policy such as the Revised Determination. *State Farm*, 463 U.S. at 57. “[T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” but “[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA’s Revised Determination fails to meet these requirements.

B. EPA’s Treatment of EVs and Related Technologies Underscores the Revised Determination’s Fatal Defects

EPA’s treatment of EV technologies played a central role in the Revised Determination. EPA states that “[m]any of the key assumptions EPA relied upon in its January 2017 Determination, including ... the consumer acceptance of advanced technology vehicles, were optimistic or have significantly changed and thus no longer represent realistic assumptions.” 83 Fed. Reg. at 16,078 (JA___). And EPA listed “changes in trends of electrification since the January 2017 Determination” as first among the reasons for determining that the MY 2022–2025 standards “may not be feasible or practicable and there is greater uncertainty as to whether technology will be available to meet the standards on the timetable established in the regulations.” *Id.* at 16,079 (JA___). But in support, EPA points only to comments that “question[] the feasibility of the standards due to flagging consumer demand for

fuel-efficient vehicles including electric vehicles” and assert that “the need for greater electrification than EPA originally projected means that issues unique to electrification must be considered.” *Id.* at 16,079-80 (JA ___ - ___). These findings are no more than a repetition of certain stakeholder views, and are untethered to record information or independent analysis on EPA’s part.

In violation of Section 12(h), the Revised Determination does not purport to be based on the TAR. The TAR documented the growing selection of available EV models, declines in battery costs, increases in range, and other improvements—concluding that EV advances exceeded expectations reflected in the 2012 rule. TAR at 5-62–5-63 (JA ___ - ___). In its 2017 Determination, EPA relied heavily on the TAR and TSD, concluding that the standards are feasible at reasonable cost without need for extensive electrification. 2017 Determination at 3-4 (JA ___ - ___). In the Revised Determination, EPA did not address or rebut this analysis. *See* 83 Fed. Reg. at 16,079-81 (JA ___ - ___). This defect, and EPA’s failure to “set forth in detail the bases for [its] determination,” 40 C.F.R. § 86.1818-12(h)(4), plainly violate Section 12(h).

More generally, the Revised Determination’s discussion of EV technologies is not based on technical analysis, does not cite record evidence, and fails to meaningfully address relevant elements of the 2017 Determination or public comments. In the 2017 Determination, EPA concluded—based on the TAR and the

extensive analysis reflected in the 719-page TSD¹⁰—that the MY 2022-2025 standards can be met largely through advances in gasoline vehicle technologies, requiring only low levels of penetration of strong hybrids and EVs (plug-in and battery EVs). 2017 Final Determination at 3-5, 12, 18, 24-25 (JA ___ - ___, ___, ___, ___, ___). During the 2017 MTE public comment period, Industry Petitioners and other commenters submitted extensive evidence regarding improvements in EV technologies, costs, and consumer demand—arguing that, even if EPA’s standards can be met largely through gasoline engine technologies, EV technologies provide a feasible, affordable, and cost-effective element of manufacturers’ compliance strategies. *See, e.g.*, NCAT Comments at 13-23 (JA ___ - ___); Tesla Comments at 3-4 (JA ___ - ___); Utility Petitioner Comments at 4-5 (JA ___ - ___).

The Revised Determination entirely fails to address EPA’s previous technical analyses or these public comments. For example, as purported evidence of flagging consumer demand for EVs, EPA in the Revised Determination cited EV sales data provided in comments from an auto industry association (an Intervenor in this case) that appears to run up to the beginning of 2016. 83 Fed. Reg. at 16,080 (JA ___). But numerous other sources of data—including Industry Petitioners’ comments—show increasing EV sales in recent years, steeply decreasing costs, and rapidly

¹⁰ In the 2016 TSD, EPA provided in-depth technical analysis of EV technology cost and effectiveness. TSD at 2-60–2-132, 2-335–2-405 (JA ___ - ___, ___ - ___).

expanding offerings in terms of vehicle range and type. *See, e.g.*, NCAT Comments at 13-20 (JA___ - ___); Tesla Comments at 3-4 (JA___ - ___); Utility Petitioner Comments at 4-5 (JA___ - ___). EPA provided no response to or analysis of this information. Similarly, EPA claimed to have new information showing low consumer acceptance of EVs, yet only referred vaguely to comments without citing record information or explaining the agency's change of position from the TAR and 2017 Determination. 83 Fed. Reg. at 16,087 (JA___). This is but one illustration of the Revised Determination's pervasive—and arbitrary and capricious—failure to address record evidence or provide a reasoned analysis justifying EPA's reversal of course.

Finally, EPA failed to meaningfully consider or respond to Industry Petitioners' comments on EV technology advances and cost reductions, consumer acceptance, and economic benefits. NCAT Comments at 10-31 (JA___ - ___). This was arbitrary and capricious and warrants vacatur. *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 15-16 (D.C. Cir. 2015).

CONCLUSION

For the foregoing reasons, the Court should vacate EPA's Revised Determination.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of the Court's Per Curiam Order filed January 11, 2019 (Doc. #1768141) because it contains 3,519 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) of the and Circuit Rule 32(e)(1).

This brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in proportionally spaced, 14-point Times New Roman typeface using Microsoft Word 2016.

/s/ Robert A. Wyman, Jr.

Robert A. Wyman, Jr.

CERTIFICATE OF SERVICE

I, Robert A. Wyman, Jr., hereby certify that on February 7, 2019, the foregoing has been electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robert A. Wyman, Jr.
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