UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-2780, 17-2806 Caption [use short title]

Motion for: Summary Vacatur or, in the Alternative, Stay Pending Judicial Review

Set forth below precise, complete statement of relief sought:

The Court should summarily vacate the National Highway Traffic Safety Administration's unlawful delay of a final rule that increased the penalty rate for violations of fuel-economy standards, and reinstate the unlawfully delayed rule as of its prior effective date. In the alternative, the Court should stay the unlawful delay pending its review of the merits.

Natural Resources Defense Council v. National Highway Traffic Safety Administration

MOVING PARTY: NRDC, Sierra Club, Center for Biological Diversity **OPPOSING PARTY:** NHTSA; Jack Danielson; Dep't of Transportation: Elaine Chao

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Ian Fein **OPPOSING ATTORNEY:** H. Thomas Byron III

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Court- Judge/ Agency appealed from: Petition for Review from the National Highway Transportation Safety Administration

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Ian Fein **Date:** 10/24/2017 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Nos. 17-2780 (L), 17-2806

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

On Petition for Review of a Rule of the
National Highway Traffic Safety Administration

PETITIONERS' MOTION FOR SUMMARY VACATUR OR, IN THE ALTERNATIVE, STAY PENDING JUDICIAL REVIEW

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CORPORATE DISCLOSURE STATEMENT

Petitioners Natural Resources Defense Council, Inc. (NRDC), Sierra Club, and Center for Biological Diversity are non-profit organizations with no parent corporations and no outstanding stock shares or other securities in the hands of the public. NRDC, Sierra Club, and Center for Biological Diversity do not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NRDC, Sierra Club, or Center for Biological Diversity.

Dated: October 24, 2017

/s/ *Ian Fein*
Ian Fein

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INTRODUCTION

The National Highway Traffic Safety Administration (Administration) recently suspended, without notice or comment, an important final rule that increased civil penalties for violating fuel-economy standards. Congress mandated that increase because decades of inflation had eroded the penalty's deterrent effect. After the recent change in administration, however, the agency indefinitely delayed the penalty increase without statutory authority and in blatant disregard of the Administrative Procedure Act (APA). 82 Fed. Reg. 32,139 (July 12, 2017) [ADD-2-3[1]]. This Court should summarily vacate the unlawful delay because it directly contravenes settled Circuit precedent.

This Court's decision in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), is dispositive. Like the present case, *Abraham* involved an agency's attempt, at the start of a new presidential administration, to delay an energy efficiency rule promulgated by the prior administration. This Court rejected the agency's assertion, also made here, that such a delay was within its "inherent power," as well as its further claim that the imminent

[1] Attachments are included in an Addendum and cited as ADD-__.

effective date of the rule constituted "good cause" to delay it without notice or comment. This Court vacated the agency's unlawful delay and reinstated the energy efficiency rule as of its original effective date.

The Administration here has done precisely what this Court forbade in *Abraham*. It relied on the same meritless justifications this Court already rejected. And it did so one week after the D.C. Circuit summarily vacated another agency's similar attempt to suspend a final rule, without notice or comment, based on non-existent "inherent authority." *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).

This Court too should summarily vacate the Administration's manifestly invalid suspension.

A quick ruling is important here because delay is precisely what the Administration has sought to achieve with its unlawful behavior; any further delay would reward its disregard for Circuit precedent. Further delay would also harm Petitioners' members and the public. Automakers are deciding, now, whether to comply with fuel-economy standards based on the applicable penalty: delaying the long-overdue penalty increase will thus lead to less efficient vehicles and greater emissions of harmful air pollutants. Meanwhile, the only countervailing purpose for the delay is to make it easier for automakers to evade the

standards. Thus, even if the Court does not grant summary vacatur, it should stay the suspension and expedite its review of the merits.[2]

BACKGROUND

Civil penalties deter violations of fuel-economy standards

The Energy Policy and Conservation Act of 1975 (Energy Conservation Act) requires the Secretary of Transportation to establish mandatory fuel-economy standards for cars and light trucks. 49 U.S.C. §§ 32901-32919. The fleet-wide standards must be set at the "maximum feasible" levels. *Id.* § 32902; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1182-85 (9th Cir. 2008). Although designed primarily to reduce the nation's oil consumption, the standards also reduce emissions of harmful air pollutants and thereby benefit public health. *See* 77 Fed. Reg. 62,624, 63,003 (Oct. 15, 2012).

The Energy Conservation Act further requires the Secretary to enforce the fuel-economy standards by assessing civil monetary penalties against automakers that produce noncompliant fleets. 49 U.S.C. § 32912. The Secretary delegated these responsibilities to the

[2] Petitioners notified Respondents' and Movants' counsel of the instant motion. Respondents and Movants oppose the requested relief and intend to file responses.

Administration. 49 C.F.R. § 1.95(a). The purpose of the penalties is to deter violations of the fuel-economy standards and "foster compliance with the law." *Id.* § 578.2. However, when it is cheaper for automakers to pay the penalty than to meet the standards by implementing fuel-saving technology, many automakers will choose to forego the improvements and pay the penalty instead—as they have in the past, *see* Nat'l Highway Traffic Safety Admin., CAFE Pub. Info. Ctr., Civil Penalties, https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html (last visited Oct. 24, 2017).

In 1975, when Congress first created the fuel-economy penalties, it set the penalty rate at $5 per tenth of a mile per gallon.[3] *See* 49 U.S.C. § 32912(b). In 1997, the Administration raised that rate slightly, to $5.50. 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).

By 2010, many experts had concluded that the outdated $5.50 penalty rate "may not provide a strong enough incentive for manufacturers to comply" with the fuel-economy standards. Gov't

[3] The formula for calculating the civil penalty is: (penalty rate) x (number of tenths of a mile per gallon by which a non-compliant fleet falls short of the fuel-economy standard) x (number of vehicles in the non-compliant fleet).

Accountability Office, GAO-10-336, *Vehicle Fuel Economy* 17 (2010) [hereinafter GAO Report] [ADD-31].[4] The Government Accountability Office thus recommended that the Administration consider increasing the penalty to restore its deterrent effect. *Id.* at 18 [ADD-32].

The Administration increases the outdated penalties

In October 2015, Petitioner Center for Biological Diversity formally requested that the Administration increase the fuel-economy penalties. *See* Ctr. for Biological Diversity, Petition for Rulemaking 13-14 (Oct. 1, 2015) [hereinafter Environmental Petition] [ADD-46-47].[5]

One month later, while the Administration was considering that request, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Pub. L. 114-74, § 701, 129 Stat. 584, 599 (codified at 28 U.S.C. § 2461 note). That law recognized that inflation had significantly eroded the deterrent effect of many civil penalties. Congress thus required that agencies "shall" increase their penalties with an initial catch-up adjustment in 2016, followed by subsequent annual inflation adjustments. *Id.* § 701(b)(1)(D). And

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[4] Available at http://www.gao.gov/assets/310/301194.pdf.

[5] Available at http://www.biologicaldiversity.org/programs/climate_law_institute/transportation_and_global_warming/fuel_economy_standards/pdfs/15_10_1_Center_Petition_re_Civil_Penalties.pdf.

because these increases were long overdue, Congress required agencies to act promptly: It instructed that the initial increase "shall take effect no later than August 1, 2016," and the subsequent adjustments "not later than January 15 of every year thereafter." *Id.* § 701(b)(1)(A), (D).

In July 2016, the Administration issued an interim rule updating the various civil penalties that it administers. 81 Fed. Reg. 43,524 (July 5, 2016) [ADD-17-22]. The agency found, based on changes in the Consumer Price Index, that the original fuel-economy penalty rate of $5 would be $22 as adjusted for inflation. *Id.* at 43,526 [ADD-19]. The Administration thus raised the $5.50 penalty rate by the maximum adjustment of 150 percent, to $14 per tenth of a mile per gallon. *Id.*

The Alliance of Automobile Manufacturers and Association of Global Automakers acknowledged the Administration was "obligated" to increase the fuel-economy penalty rate. All. of Auto. Mfrs. & Ass'n of Glob. Automakers, Petition for Partial Reconsideration 1 (Aug. 1, 2016) [hereinafter Industry Petition] [ADD-49].[6] They requested, however, that the agency not apply the $14 penalty rate to pre-Model Year 2019

[6] Available at https://www.globalautomakers.org/system/files/document/attachments/joint_petition_for_reconsideration_cafe_civil_penalties_8-01-16_final.pdf.

vehicles. *Id.* at 5-6 [ADD-53-54]. They argued that, given the time involved in designing and producing a fleet, automakers had already decided whether to comply with the standards for Model Years 2016, 2017, and 2018 based on the $5.50 penalty rate. *Id.*

In December 2016, the Administration issued a final rule addressing both the Industry and Environmental Petitions. 81 Fed. Reg. 95,489 (Dec. 28, 2016) [hereinafter Penalty Rule] [ADD-12-15]. The agency concluded that, because the purpose of the civil penalty is to "encourage manufacturers to comply with the [fuel-economy] standards," it would allow manufacturers additional time "to design and produce vehicles in response to the increased penalties." *Id.* at 95,490-91 [ADD-13-14]. The Administration thus granted automakers' request to apply the $14 penalty rate beginning with Model Year 2019 fleets. *Id.* The agency also determined that the Penalty Rule effectively addressed the Environmental Petition because "the increased penalty will accomplish [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles in those future model years." *Id.*

The Administration published the final Penalty Rule in the Federal Register on December 28, 2016, with an effective date of January 27, 2017. *Id.* at 95,489 [ADD-12].

The Administration unlawfully suspends the penalty increase, without notice or comment

On January 20, 2017, the Trump administration announced plans to postpone final regulations that had not yet taken effect. 82 Fed. Reg. 8346 (Jan. 24, 2017). Among these was the Penalty Rule. 82 Fed. Reg. 8694 (Jan. 30, 2017). The Administration temporarily delayed the rule three times, setting a new effective date of July 10, 2017. *Id.*; 82 Fed. Reg. 15,302 (Mar. 28, 2017); 82 Fed. Reg. 29,009 (June 27, 2017).[7]

On July 12, 2017, two days after that new effective date, the Administration announced that it had *indefinitely* delayed the Penalty Rule as of July 7. 82 Fed. Reg. 32,139 [hereinafter Delay Rule] [ADD-2-3]. The agency did not provide any notice or opportunity to comment on the delay. It asserted that the delay was "consistent with [its] statutory authority to administer the [fuel-economy] program and its inherent authority to do so efficiently." *Id.* at 32,140 [ADD-3]. And it further claimed that it had "good cause" to evade notice-and-comment procedures because the effective date of the Penalty Rule was "imminent." *Id.*

[7] The Administration did not provide notice or an opportunity to comment on these temporary delays, claiming they were exempt as "rules of … procedure" under the APA, 5 U.S.C. § 553(b)(3)(A).

The Administration also announced that it was reconsidering the penalty rate and accepting public comments on that reconsideration. 82 Fed. Reg. 32,140 (July 12, 2017) [ADD-5-10]. The agency provided no timeline for completing its reconsideration. And based on the Delay Rule, it asserted that "[d]uring reconsideration, the applicable civil penalty rate is $5.50." *Id.* at 32,143 [ADD-8].

Petitioners timely asked this Court to review the Delay Rule. *See* 49 U.S.C. § 32909(a)(2); *Abraham*, 355 F.3d at 192-94 (court of appeals had jurisdiction to review delays to effective date of final rules under Energy Conservation Act). So did several states. Case No. 17-2806.

ARGUMENT

I. The Delay Rule Is Unlawful and Should Be Summarily Vacated

A. The Administration lacked authority to delay the effective date of the final Penalty Rule

It is "well-established" that "'an agency literally has no power to act … unless and until Congress confers power upon it.'" *Abraham*, 355 F.3d at 202 (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). That is because an agency, as a "creature of statute," has "*only* those authorities conferred upon it by Congress." *Id.* (internal quotation marks omitted); *see also Clean Air Council*, 862 F.3d at 9 (it is

"axiomatic" that agencies "may act only pursuant to authority delegated to them by Congress").

The Delay Rule is invalid because Congress did not authorize suspending the Penalty Rule. Congress has permitted agencies to postpone or stay a final rule's effective date in narrow circumstances, *e.g.*, 5 U.S.C. § 705; 42 U.S.C. § 7607(d)(7)(B), none of which apply here.

In fact, Congress instructed the Administration here *not* to delay—much less suspend indefinitely—the effective date of the long-overdue increase to the fuel-economy penalty rate. Instead, Congress directed that the inflation adjustment "shall take effect not later than August 1, 2016." Pub. L. 114-74, § 701(b)(1)(D), 129 Stat. at 599. Congress mandated this prompt increase because decades of inflation had significantly eroded the deterrent effect of the fuel-economy penalty. And Congress further instructed that the Administration "shall" make subsequent annual adjustments "not later than January 15 of every year thereafter." *Id.* § 701(b)(1)(A). The agency's indefinite delay of the penalty increase thus violates at least two separate statutory deadlines.

The Administration here did not explain how indefinitely delaying the Penalty Rule could be squared with Congress's instruction for a

prompt penalty increase and subsequent annual adjustments. Nor can it belatedly do so now. This Court "'must judge the propriety of [the Delay Rule] solely by the grounds invoked by the agency' when it acted." *Clean Air Council*, 862 F.3d at 9 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *accord Abraham*, 355 F.3d at 204 n.13 ("[I]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))).

Instead, the Administration suggested that summarily suspending the penalty increase was somehow "consistent with" its statutory authority to administer the fuel-economy program and its "inherent authority" to do so efficiently. 82 Fed. Reg. at 32,140 [ADD-3]. This vague assertion does not support the ultra vires action.[8]

The Administration's authority to administer the fuel-economy program derives from the Energy Conservation Act. 49 U.S.C. §§ 32901-32919. That statute contains no provision authorizing the suspension of

[8] *See generally* Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, Harv. L. & Pol'y Rev. (forthcoming) (manuscript at 7-14), https://ssrn.com/abstract=3049004 (explaining how agencies under the Trump administration have failed to identify legal authority for their delay or suspension of dozens of final rules).

a final rule. *See Abraham*, 355 F.3d at 202 (comparing Clean Air Act section 307(d)(7)(B), which authorizes staying a final rule for three months during reconsideration in limited circumstances, to Energy Conservation Act provisions that do not even provide for reconsideration, much less a stay). And an agency's general authority to administer a regulatory program does not alone provide the power to suspend final rules—especially where, as here, Congress separately established deadlines for those rules to take effect. *See Nat. Res. Def. Council v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992) (rejecting agency's contention that its "general authority" to prescribe regulations "includes the power to stay regulations already promulgated").

Lacking any statutory authorization for the delay, the Administration also resorted to claiming an "inherent authority" to suspend the penalty increase during reconsideration. 82 Fed. Reg. at 32,140 [ADD-3]. But the agency "cites nothing for the proposition that it has such authority, and for good reason." *Clean Air Council*, 862 F.3d at 9. This Court in *Abraham* already "reject[ed] the contention" that an agency has "'inherent power' to suspend a duly promulgated rule where no statute conferred such authority." *Id.* (citing *Abraham*, 355 F.3d at 202). The Administration's assertion of such inherent authority here is

thus even more "puzzling" than the Department of Energy's similar meritless claim that this Court already rejected in *Abraham*. 355 F.3d at 202.

In short, the Administration "must point to something in [the relevant statutes] that gives it authority" to delay the Penalty Rule. *Clean Air Council*, 862 F.3d at 9. It did not, because it cannot. The Delay Rule must therefore be "set aside" as "in excess of statutory … authority." 5 U.S.C. § 706(2)(C).

B. The Administration violated the APA by failing to provide notice or an opportunity to comment

Even if the Administration had authority to delay the Penalty Rule (which it did not), the Delay Rule is *still* plainly unlawful because the agency failed to provide notice or an opportunity to comment and thus acted "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

The APA generally requires notice and comment for all agency rulemakings, including the amendment or repeal of a final rule. *Id.* §§ 551(5), 553(b)-(c). These procedures "serve the need for public participation in agency decisionmaking" and "ensure the agency has all

pertinent information before it when making a decision." *Time Warner Cable Inc. v. Fed. Commc'ns Comm'n*, 729 F.3d 137, 168 (2d Cir. 2013).

Because suspending a rule is tantamount to an amendment or repeal, notice and comment is also required for any such suspension. *See Abraham*, 355 F.3d at 204-06 (agency violated APA by delaying final rule without notice or comment); *Nat. Res. Def. Council v. Envtl. Prot. Agency* (*NRDC v. EPA*), 683 F.2d 752, 762-64 & n.23 (3d Cir. 1982) (same); *see also Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("agency action which has the effect of suspending a duly promulgated [rule] …. constitutes rulemaking subject to notice and comment requirements").

The APA provides a limited exception to the notice-and-comment requirement where the agency for "good cause" finds that such procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). But this Court has repeatedly made clear that the exception "should be narrowly construed and only reluctantly countenanced." *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (internal quotation marks omitted), *superseded by statute on other grounds*, 8 U.S.C. § 1101(a)(42). It is "not an 'escape clause'"; a "true and … supportable finding of necessity or emergency must be made and

published." *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 385 (2d Cir. 1978) (internal quotation marks omitted).

Each of the justifications that the Administration offered for invoking the good-cause exception here has already been squarely rejected by this Court.

First, the Administration claimed it had good cause to circumvent notice-and-comment procedures because the effective date of the Penalty Rule was "imminent" and it needed "additional time" to reconsider the rule. 82 Fed. Reg. at 32,140 [ADD-3]. But the APA does not permit an agency to suspend a rule without notice or comment simply because the agency decides to revisit it on the eve of its effective date. This Court rejected precisely the same argument in *Abraham*, where the agency claimed that it "wished for more time to 'review and consider[]'" the final rule that had an "imminent" effective date. 355 F.3d at 205. This Court held that such imminence does not provide good cause to avoid notice-and-comment procedures. *Id.* And the Third Circuit reached the same conclusion when the Environmental Protection Agency sought to postpone and reconsider a rule at the start of the Reagan administration. "[T]he imminence of a deadline … is not sufficient to constitute 'good cause' within the meaning of the APA," the

court explained, because otherwise an agency "could simply wait until the eve of a … deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *NRDC v. EPA*, 683 F.2d at 765 & n.25.

Second, the Administration attempted to justify its failure to follow APA procedures here because it is "already seeking out public comments" as part of its penalty rate reconsideration. 82 Fed. Reg. at 32,140 [ADD-3]. But providing "notice and comment procedures *after* the postponement [of a final rule] does not cure the failure to provide them *before* the postponement." *NRDC v. EPA*, 683 F.2d at 768 (emphasis added). Inviting comment on the appropriate penalty rate "cannot replace" the requirement to separately solicit comment on "whether the [rule] should [have] be[en] postponed in the first place." *Id.* Thus, in *Abraham*, this Court rejected as "without merit" the agency's argument that providing notice and comment on replacement efficiency standards either "cured or mooted the absence of notice and comment prior to the amendment of the original standards' effective date." 355 F.3d at 206 n.14. This Court explained that the reconsideration process "addressed questions wholly different from

those that would have been addressed in a proceeding to amend the standards' effective date." *Id.* So too here.

Third, and finally, the Administration also suggested that "no party will be harmed by the delay" because the Penalty Rule would "not affect the civil penalty amounts assessed against any manufacturer for violating a [fuel-economy] standard prior to the 2019 model year." 82 Fed. Reg. at 32,140 [ADD-3]. But as *Abraham* made clear, notice-and-comment procedures are required to delay the effective date of a final rule even when that rule's compliance date may be years away. *See* 355 F.3d at 189 (compliance date for unlawfully delayed efficiency rule was five years after original effective date); *see also California v. Bureau of Land Mgmt.*, No. 17-cv-03804-EDL, 2017 WL 4416409, at *7-8 (N.D. Cal. Oct. 4, 2017) (postponement of rule's effective date was unlawful, even where compliance date of delayed rule was several months away).

And in any event, the Administration's suggestion is also factually mistaken because the public here *is* harmed by the unlawful delay. The Delay Rule weakens the deterrence for fuel-economy violations, and thus likely will result in less efficient vehicles and greater emissions of harmful air pollutants because automakers are deciding now whether to comply with fuel-economy standards in future model years. *See infra* at

19-24. Indeed, if there were no "concrete impact from the delay," as the Administration falsely suggests, 82 Fed. Reg. at 32,140 [ADD-3], that would undermine any reason for the Delay Rule in the first place—much less the asserted "good cause" to circumvent notice-and-comment procedures. *See Abraham*, 355 F.3d at 205 (exception applies only where such procedures would pose a "threat to the *public* interest" or do "real harm"); *Nat'l Nutritional Foods*, 572 F.2d at 385 (exception requires a "supportable finding of necessity or emergency").

In short, "indefinite postponement of the effective date of the [Penalty Rule] required notice and comment," and the Administration "did not have good cause for dispensing with the APA's requirements." *NRDC v. EPA*, 683 F.2d at 767. Because the Delay Rule was "promulgated without complying with the APA's notice-and-comment requirements" and "failed to meet any of the exceptions to those requirements," it is an "invalid rule" that must be vacated. *Abraham*, 355 F.3d at 206.

II. In the Alternative, the Court Should Stay the Delay Rule

If the Court does not summarily vacate the Delay Rule, it should stay that rule and expedite its review of the merits. Issuance of a stay involves consideration of four factors: (1) likelihood of success on the

merits; (2) irreparable injury absent a stay; (3) substantial injury to other parties if a stay is granted; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). As discussed above, the Delay Rule is clearly unlawful, so the first factor strongly favors a stay. As discussed below, so do the other three.[9]

A. Delaying the penalty increase irreparably harms Petitioners

Unless the Delay Rule is stayed (or quickly vacated), it will irreparably injure Petitioners by reducing compliance with fuel-economy standards, resulting in greater emissions of dangerous air pollutants that harm their members' health.

Vehicle fuel consumption, as well as the production and distribution of that fuel, results in emissions of harmful air pollutants like nitrogen oxide, particulate matter, and volatile organic compounds. *See* 77 Fed. Reg. at 62,901-08, 63,003. These air pollutants have immediate and harmful effects on local air quality and human health; exposure to such pollutants is associated with higher rates of

[9] Petitioners informed Respondents of their desire to stay the Delay Rule pending judicial review. Respondents stated they oppose such relief. *See* Fed. R. App. P. 18(a)(2)(A).

respiratory disease, especially among children, and even premature death. *Id.* Fuel-economy standards reduce emissions of these pollutants and can result in "significant declines in the adverse health effects" they cause. *Id.* at 63,062.

Civil penalties play a key role in achieving these public health benefits by deterring violations of fuel-economy standards. *See* 49 C.F.R. § 578.2 (fuel-economy penalties "foster compliance with the law"). Automakers admit that they decide whether to comply with the standards based in part on the penalties they would pay if they do not. Industry Petition at 2, 5 [ADD-50, 53]. The Administration recognizes this too. 81 Fed. Reg. at 95,490-91 [ADD-13-14]. The penalties are also important because they influence the price of credits that some automakers purchase in lieu of achieving the standards. *See* 49 U.S.C. § 32903; Industry Petition at 3 [ADD-51] (acknowledging the price of credits are "directly related" to the penalty amount). And because "manufacturers will pursue the strategy … that results in the lowest overall cost to the manufacturer," 81 Fed. Reg. at 43,527 [ADD-20], a higher penalty rate means that more automakers will actually achieve the standards by implementing fuel-saving technology, rather than merely purchasing credits or paying penalties instead.

Absent a stay, the Delay Rule will thus likely result in more violations of fuel-economy standards (and greater emissions of harmful air pollutants) because it reverts to the $5.50 penalty rate that does "not provide a strong enough incentive for manufacturers to comply." GAO Report at 17 [ADD-31]. That outdated penalty rate is only one-fourth the original $5 statutory rate as adjusted for inflation, *see supra* at 6, and is significantly less expensive than the costs to achieve the fuel-economy standards, Tonachel Decl. ¶¶10-15 [ADD-66-70]. Indeed, the Administration acknowledges that "many manufacturers are falling behind the [fuel-economy] standards for model year 2016 and … 2017," 82 Fed. Reg. at 32,141 [ADD-6], years when automakers based their compliance decisions on the $5.50 penalty rate, *see* Industry Petition at 5 [ADD-53]. If the $5.50 rate did not sufficiently incentivize compliance with the standards in those years, it will not do so for future model years either, given the standards "are set to rise at a significant rate over the next several years," 82 Fed. Reg. at 32,141 [ADD-6].

By contrast, if the Court stays the Delay Rule, the reinstated $14 penalty rate will properly deter violations because the resulting penalties would be comparatively more expensive than the costs to achieve the fuel-economy standards. *See* Tonachel Decl. ¶¶11-15 [ADD-

67-70]; *see also* 28 U.S.C. § 2461 note, § 2(b)(2) (inflation adjustments "maintain the deterrent effect of civil monetary penalties"). Indeed, the Administration itself "expects that increasing the level of the [fuel-economy] penalty rate will lead to … increased compliance with [the fuel-economy] standards, which would result in greater fuel savings and other benefits." 82 Fed. Reg. at 32,142 [ADD-7].[10]

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[10] For the same reasons, Petitioners have standing to challenge the unlawful Delay Rule. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Petitioners are dedicated to protecting human health and the environment by promoting energy efficiency and curbing harmful pollution. Tonachel Decl. ¶¶4-5 [ADD-64-65]; Trujillo Decl. ¶5 [ADD-74]; Linhardt Decl. ¶¶3-5 [ADD-76-77]; Siegel Decl. ¶¶2-6 [ADD-83-84]. Petitioners have members who were procedurally injured when the Administration failed to allow comment on the Delay Rule. Munguia Decl. ¶¶14-15 [ADD-96-97]; Woodfield Decl. ¶¶10-11 [ADD-102]; Hume Decl. ¶¶9-10 [ADD-107-108]; Blomquist Decl. ¶9 [ADD-112]; Dietzkamei Decl. ¶16 [ADD-120]. That rule also substantively injures these members because they live close to oil refineries and major highways, and thus face increased health risks from greater emissions of harmful air pollutants. Munguia Decl. ¶¶2-13 [ADD-93-96]; Woodfield Decl. ¶¶2-9 [ADD-99-102]; Hume Decl. ¶¶5-10 [ADD-105-107]; Blomquist Decl. ¶¶6-9 [ADD-111-112]; Dietzkamei Decl. ¶¶8-15 [ADD-116-120]; *see LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (petitioner had standing where she lived and worked near sulfur dioxide-emitting solid waste facility and had "no choice but to breathe the air"); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 325-26 (2d Cir. 2003) (similar). These harms are traceable to the Delay Rule and redressable by this Court because reinstating the Penalty Rule will deter violations of fuel-economy standards and lessen harmful pollution. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 187 (2000) ("civil penalties provide sufficient deterrence to support redressability").

This harm is irreparable, absent a stay, because automakers are already designing their Model Year 2019-and-after fleets and deciding whether to comply with the fuel-economy standards based on the applicable penalty. Unless the Delay Rule is stayed, a later ruling on the merits likely will not result in sufficient compliance because, by automakers' own account, they will have less ability to improve the fuel-economy of their fleets at that time. *See* Industry Petition at 5, 8 [ADD-53, 56] (claiming that once automakers "set their compliance plans" for a particular model year, they have "very limited technology options" to improve the fuel-economy of their fleets). Nor does the Administration's ongoing reconsideration of the penalty rate provide adequate relief, because the agency has not set a deadline for completing that process and has indicated that it likely will not apply its new rate to Model Year 2019 fleets. *See* 82 Fed. Reg. at 32,143 [ADD-8] (noting the agency "expects that its inflationary adjustment will provide lead time in advance of assessing a new [fuel-economy] penalty").

It is therefore critical to stay the Delay Rule (or vacate it quickly). Otherwise, the air pollutants emitted by non-compliant fleets will

continue for the life of those vehicles. And the harms caused by those emissions cannot be undone.[11]

B. The public interest and balance of equities support a stay

The final two stay factors—harm to opposing parties and weighing the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Here, the public benefits from staying the Delay Rule far outweigh any countervailing interest in preserving the Administration's invalid delay. *See League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action.").

A stay will cause no harm to the Administration. It will simply restore the $14 penalty rate that the agency previously promulgated pursuant to the Energy Conservation Act and Inflation Adjustment Act. Enforcing that rate while this Court reviews the Delay Rule's merits "do[es] not constitute substantial harm" to the Administration because it is "no different from [the agency's] burdens under the statutory scheme[s]." *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604,

[11] If the Court does not grant a stay, Petitioners respectfully request that it still expedite briefing and argument in this case.

615 (D.C. Cir. 1980). Nor will a stay prevent the Administration's ongoing reconsideration of the penalty rate.

A stay will not substantially harm automakers either. The Penalty Rule did not impose any new regulatory standards on automakers. Instead, it merely increased the penalty for automakers who choose to violate the "feasible" fuel-economy standards. 49 U.S.C. § 32902(a). Any technology investments automakers make in response to a stay will thus be to achieve standards that govern irrespective of the applicable penalty rate. Nor will a stay itself result in any higher penalties paid by automakers, because this Court will have resolved the merits of Petitioners' challenge before any Model Year 2019 penalties are due.

Meanwhile, on the other side of the scale, the public benefits from a stay are substantial. In addition to the public health benefits described above, staying the Delay Rule and incentivizing greater compliance with fuel-economy standards will also promote the nation's energy security, save consumers money at the pump, encourage technology innovation, and reduce emissions of greenhouse gases that destabilize the global climate. *See* 77 Fed. Reg. at 62,658-62, 62,999-63,006, 63,055-62; *see also* Tonachel Decl. ¶¶16-18 [ADD-70-71]

(societal benefits from $14 penalty rate far outweigh those from $5.50 rate). A stay will thus further Congress's twin goals of enforcing the fuel-economy program, 49 U.S.C. §§ 32901-32919, and "maintain[ing] the deterrent effect of civil monetary penalties," 28 U.S.C. § 2461 note, § 2(b)(2). "[T]here is a substantial public interest in having governmental agencies abide by the federal laws that govern their … operations." *League of Women Voters*, 838 F.3d at 12 (internal quotation marks omitted).

In short, the public benefits from staying the Delay Rule far outweigh any hypothetical interest in making it cheaper for automakers to evade the fuel-economy standards.

CONCLUSION

The Court should grant the motion, vacate the unlawful Delay Rule, and reinstate the Penalty Rule as of its prior effective date. In the alternative, the Court should stay the Delay Rule pending its review of the merits.

Dated: October 24, 2017 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Motion complies with the type-volume limitations of Rule 27(d)(2)(a) because it contains 5,170 words, excluding parts of the document exempted by Rule 32(f).

Dated: October 24, 2017

/s/ *Ian Fein*
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 24, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Ian Fein*
Ian Fein

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Natural Res. Def. Council v. Nat'l Highway Traffic Safety Admin.
Nos. 17-2780 (L), 17-2806

Exhibit A

Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This final rule has no such effect on state, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Catalog of Federal Domestic Assistance

This final rule affects the verification guidelines of veteran-owned small businesses, for which there is no Catalog of Federal Domestic Assistance program number.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on July 5, 2017, for publication.

List of Subjects in 38 CFR Part 74

Administrative practice and procedures, Privacy, Reporting and recordkeeping requirements, Small business, Veteran, Veteran-owned small business, Verification.

Dated: July 7, 2017.

Michael Shores,

Director, Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

PART 74—VETERANS SMALL BUSINESS REGULATIONS

Accordingly, the interim rule amending 38 CFR part 74 which was published at 82 FR 11154 on February 21, 2017, is adopted as final without change.

[FR Doc. 2017–14600 Filed 7–11–17; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2016–0136]

RIN 2127–AL82

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule; delay of effective date.

SUMMARY: NHTSA is delaying the effective date of the final rule entitled ''Civil Penalties,'' published in the **Federal Register** on December 28, 2016, because NHTSA is reconsidering the appropriate level for CAFE civil penalties.

DATES: As of July 7, 2017, the effective date of the final rule published in the **Federal Register** on December 28, 2016, at 81 FR 95489, is delayed indefinitely pending reconsideration.

FOR FURTHER INFORMATION CONTACT: Rebecca Schade, Office of Chief Counsel, at (202) 366–2992.

SUPPLEMENTARY INFORMATION: On July 5, 2016, NHTSA published an interim final rule updating the maximum civil penalty amounts for violations of statutes and regulations administered by NHTSA, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). The penalty for exceeding an applicable Corporate Average Fuel Economy (CAFE) standard was among the penalties adjusted for inflation in the interim final rule. In accordance with the Inflation Adjustment Act and guidance on calculating the inflationary adjustment mandated by the Act issued by the Office of Management and Budget, NHTSA increased the civil penalty for failing to meet an applicable CAFE standard from $5.50 per tenth of a mile per gallon (mpg) to $14 per tenth of an mpg.

The Auto Alliance and Global Automakers jointly petitioned NHTSA for reconsideration of the interim final rule regarding the inflationary adjustment of CAFE non-compliance penalties (hereafter, the Alliance and Global petition will be referred to as the ''Industry Petition'') [1] on August 1, 2016. The Industry Petition argued that NHTSA used the wrong base year to calculate the inflationary adjustment to the CAFE civil penalty and raised concerns about applying the adjusted civil penalty retroactively. The Industry Petition also argued that in the event that NHTSA chose not to adopt the base year suggested in the petition, NHTSA should seek comment on whether NHTSA should adopt a lower penalty level than the one in the interim final rule based on ''negative economic impacts,'' as permitted by the Inflation Adjustment Act.

On December 28, 2016, NHTSA published a final rule in response to the Industry Petition.[2] To address concerns raised in the Industry Petition about applying the adjusted penalty retroactively, NHTSA delayed application of the $14 per tenth of an mpg penalty until the 2019 model year, which begins in October 2018 for most manufacturers. The final rule did not address the other points raised in the Industry Petition.

The December 28, 2016 final rule is not yet effective and would currently become effective on July 10, 2017.[3]

NHTSA is now reconsidering the final rule because the final rule did not give adequate consideration to all of the relevant issues, including the potential economic consequences of increasing CAFE penalties by potentially $1 billion per year, as estimated in the Industry Petition. Thus, in a separate document

[1] Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016 interim final rule raising the same concerns as those raised in the Industry Petition. Both petitions can be found in Docket No. NHTSA–2016–0075, accessible via *www.regulations.gov.*

[2] 81 FR 95489.

[3] 82 FR 8694 (Jan. 30, 2017); 82 FR 15302 (Mar. 28, 2017); 82 FR 29009 (June 27, 2017).

published in this **Federal Register**, NHTSA is seeking comment on whether $14 per tenth of an mpg is the appropriate penalty level for civil penalties for violations of CAFE standards given the requirements of the Inflation Adjustment Act and the Energy Policy and Conservation Act (EPCA) of 1975, which authorizes civil penalties for violations of CAFE standards.[4] Because NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration.

There is good cause to implement this delay without notice and comment under 5 U.S.C. 553(b)(B) and 553(d)(3) because those procedures are impracticable, unnecessary, and contrary to the public interest in these circumstances, where the effective date of the rule is imminent. Moreover, the agency is, through a separate document, already seeking out public comments on the underlying issues, which may be extensive, and additional time will be required to thoughtfully consider and address those comments before deciding on the appropriate course of regulatory action. A delay in the effective date is therefore consistent with NHTSA's statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest. In addition, no party will be harmed by the delay in the effective date of the rule. On the contrary, the rule does not increase CAFE penalties before Model Year 2019, and therefore, the delay will not affect the civil penalty amounts assessed against any manufacturer for violating a CAFE standard prior to the 2019 model year at the earliest, *i.e.,* until sometime in 2020. Therefore, the increased penalty rate set forth in the rule would not be applied for current violations, so there is no immediate, concrete impact from the delay.

Authority: Pub. L. 101–410, Pub. L. 104–134, Pub. L. 109–59, Pub. L. 114–74, Pub L. 114–94, 49 U.S.C. 32902 and 32912; delegation of authority at 49 CFR 1.81, 1.95.

Jack Danielson,

Acting Deputy Administrator.

[FR Doc. 2017–14526 Filed 7–7–17; 11:15 am]

BILLING CODE 4910–59–P

[4] NHTSA incorporates the discussions in the document seeking comment on the appropriate CAFE civil penalties level by reference.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2017–0059]

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Reconsideration of final rule; request for comments.

SUMMARY: NHTSA seeks comment on whether and how to amend the civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards. NHTSA initially raised the civil penalty rate for CAFE standard violations for inflation in 2016, but upon further consideration, NHTSA believes that obtaining additional public input on how to proceed with CAFE civil penalties in the future will be helpful. Therefore, NHTSA is issuing this document to seek public comment as it *sua sponte* reconsiders its final rule regarding the appropriate inflationary adjustment for CAFE civil penalties.

DATES: *Comments:* Comments must be received by October 10, 2017. See the **SUPPLEMENTARY INFORMATION** section below for more information on submitting comments.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Regardless of how you submit your comments, you must include the docket number identified in the heading of this document. Note that all comments received, including any personal information provided, will be posted without change to *http://www.regulations.gov*. Please see the ''Privacy Act'' heading below.

You may call the Docket Management Facility at 202–366–9324.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. NHTSA will continue to file relevant information in the Docket as it becomes available.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy*. Anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

FOR FURTHER INFORMATION CONTACT: Thomas Healy, Office of the Chief Counsel, NHTSA, telephone (202) 366–2992, facsimile (202) 366–3820, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

NHTSA sets [1] and enforces [2] CAFE standards for the United States, and in doing so, assesses civil penalties against vehicle manufacturers who fall short of their compliance obligations and are unable to make up the shortfall with credits.[3] The amount of the civil penalty was originally set by statute in 1975, and for most of the duration of the CAFE program, has been $5.50 per each tenth of a mile per gallon that a manufacturer's fleet average CAFE level falls short of its compliance obligation, multiplied by the number of vehicles in the fleet [4] that has the shortfall. The basic equation for calculating a manufacturer's civil penalty amount is as follows:

[1] 49 U.S.C. 32902.

[2] 49 U.S.C. 32911, 32912.

[3] Credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year) or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903; 49 CFR part 538.

[4] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year—a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

Exhibit B

published in this **Federal Register**, NHTSA is seeking comment on whether $14 per tenth of an mpg is the appropriate penalty level for civil penalties for violations of CAFE standards given the requirements of the Inflation Adjustment Act and the Energy Policy and Conservation Act (EPCA) of 1975, which authorizes civil penalties for violations of CAFE standards.[4] Because NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration.

There is good cause to implement this delay without notice and comment under 5 U.S.C. 553(b)(B) and 553(d)(3) because those procedures are impracticable, unnecessary, and contrary to the public interest in these circumstances, where the effective date of the rule is imminent. Moreover, the agency is, through a separate document, already seeking out public comments on the underlying issues, which may be extensive, and additional time will be required to thoughtfully consider and address those comments before deciding on the appropriate course of regulatory action. A delay in the effective date is therefore consistent with NHTSA's statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest. In addition, no party will be harmed by the delay in the effective date of the rule. On the contrary, the rule does not increase CAFE penalties before Model Year 2019, and therefore, the delay will not affect the civil penalty amounts assessed against any manufacturer for violating a CAFE standard prior to the 2019 model year at the earliest, *i.e.,* until sometime in 2020. Therefore, the increased penalty rate set forth in the rule would not be applied for current violations, so there is no immediate, concrete impact from the delay.

Authority: Pub. L. 101–410, Pub. L. 104–134, Pub. L. 109–59, Pub. L. 114–74, Pub L. 114–94, 49 U.S.C. 32902 and 32912; delegation of authority at 49 CFR 1.81, 1.95.

Jack Danielson,

Acting Deputy Administrator.

[FR Doc. 2017–14526 Filed 7–7–17; 11:15 am]

BILLING CODE 4910–59–P

[4] NHTSA incorporates the discussions in the document seeking comment on the appropriate CAFE civil penalties level by reference.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2017–0059]

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Reconsideration of final rule; request for comments.

SUMMARY: NHTSA seeks comment on whether and how to amend the civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards. NHTSA initially raised the civil penalty rate for CAFE standard violations for inflation in 2016, but upon further consideration, NHTSA believes that obtaining additional public input on how to proceed with CAFE civil penalties in the future will be helpful. Therefore, NHTSA is issuing this document to seek public comment as it *sua sponte* reconsiders its final rule regarding the appropriate inflationary adjustment for CAFE civil penalties.

DATES: *Comments:* Comments must be received by October 10, 2017. See the **SUPPLEMENTARY INFORMATION** section below for more information on submitting comments.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

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SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

NHTSA sets [1] and enforces [2] CAFE standards for the United States, and in doing so, assesses civil penalties against vehicle manufacturers who fall short of their compliance obligations and are unable to make up the shortfall with credits.[3] The amount of the civil penalty was originally set by statute in 1975, and for most of the duration of the CAFE program, has been $5.50 per each tenth of a mile per gallon that a manufacturer's fleet average CAFE level falls short of its compliance obligation, multiplied by the number of vehicles in the fleet [4] that has the shortfall. The basic equation for calculating a manufacturer's civil penalty amount is as follows:

[1] 49 U.S.C. 32902.

[2] 49 U.S.C. 32911, 32912.

[3] Credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year) or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903; 49 CFR part 538.

[4] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year—a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

(penalty rate, in $) × (amount of shortfall, in tenths of an mpg) × (# of vehicles in manufacturer's non-compliant fleet) = $ due as penalty for non-compliant fleet.

To date, automakers have paid more than $890 million in penalties relating to the CAFE standards.[5] Additionally, since the introduction of credit trading and transfers in MY 2011, some manufacturers have turned to acquiring credits from competitors rather than paying civil penalties for non-compliance, and it is likely that this involves significant expenditures. In light of the fact that CAFE standards are set to rise at a significant rate over the next several years, and since NHTSA's *Projected Fuel Economy Performance Report*[6] indicates that many manufacturers are falling behind the standards for model year 2016 and increasingly so for model year 2017, it is likely that many manufacturers will face the possibility of paying larger CAFE penalties over the next several years than at present.

NHTSA has long had authority under the Energy Policy and Conservation Act (EPCA) of 1975, Public Law 94–163, section 508, 89 Stat. 912 (1975), to raise the amount of the penalty for CAFE shortfalls if it can make certain findings,[7] as well as the authority to compromise and remit such penalties under certain circumstances.[8] If NHTSA were to raise penalties for CAFE shortfalls, the higher amount would apply to *any* manufacturer who owed them; the authority to compromise and remit penalties, however, is limited and on a case-by-case basis.

For both raising penalties and compromising them under EPCA, NHTSA's burden is considerable. If NHTSA seeks to raise CAFE penalties under EPCA, NHTSA may only do so if it concludes through rulemaking that the increase in the penalty both (1) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed, *and* (2) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of the State. A finding of ''no substantial deleterious impact'' may only be made if NHTSA determines that it is likely that the increase in the penalty (A) will not cause a significant increase in unemployment in a State or a region of a State, (B) adversely affect competition, or (C) cause a significant increase in automobile imports. Nowhere does EPCA define ''substantial'' or ''significant'' in the context of this provision. The rulemaking process to raise penalties includes specifically soliciting comments from the Federal Trade Commission, among others, and requires a public hearing following a comment period of at least 45 days. NHTSA has never adjusted the CAFE civil penalty using this EPCA provision.

If NHTSA seeks to compromise or remit penalties for a given manufacturer, a rulemaking is not necessary, but the amount of a penalty may be compromised or remitted only to the extent (1) necessary to prevent a manufacturer's insolvency or bankruptcy, (2) the manufacturer shows that the violation was caused by an act of God, a strike, or a fire, or (3) the Federal Trade Commission certifies that a reduction in the penalty is necessary to prevent a substantial lessening of competition. As with raising penalties, NHTSA has never previously attempted to undertake this process.

The Center for Biological Diversity petitioned NHTSA on October 1, 2015, to conduct rulemaking to raise the amount of the penalty to $10, the maximum possible under EPCA at that time.[9] A month later, while NHTSA was considering that petition, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act),[10] which applied to all civil penalties administered by federal agencies, as discussed in the prior **Federal Register** documents cited above. OMB guidance directed NHTSA and other federal agencies to follow a specific formula to adjust its civil penalties, pursuant to the Act's requirements, including the penalty for CAFE shortfalls, pursuant to the Inflation Adjustment Act.[11]

On July 5, 2016, NHTSA published an interim final rule, adopting inflation adjustments for penalties under its administration, following the formula in the Act. One of these adjustments included raising the penalty rate for CAFE non-compliance from $5.50 to $14.[12] NHTSA also indicated in that document that the new maximum penalty rate that the Secretary is permitted to establish for such violations is $25.

In response to the changes to the CAFE provisions promulgated in the interim final rule, the Auto Alliance and Global Automakers jointly petitioned NHTSA for reconsideration (the Industry Petition).[13] The Industry Petition raised concerns with retroactivity (applying the penalty increase associated with model years that have already been completed or for which a company's compliance plan had already been ''set''); which ''base year'' NHTSA should use for calculating the adjusted penalty rate; and whether an immediate increase in the penalty rate to $14 would cause a ''negative economic impact.''

In response to the Industry Petition, NHTSA issued a final rule published on December 28, 2016.[14] NHTSA agreed that raising the penalty rate for model years already fully complete would be inappropriate, given how courts generally disfavor the retroactive application of statutes. NHTSA also agreed that raising the rate for model years for which product changes were infeasible due to lack of lead time, did not seem consistent with Congress' intent that the CAFE program be responsive to consumer demand. NHTSA therefore stated that it would not apply the inflation-adjusted penalty rate of $14 until model year 2019, as that seemed to be the first year in which product changes could be made in response to the higher penalty rate. NHTSA further stated that its December final rule responded to the CBD petition for rulemaking. The December 28, 2016 final rule is not yet effective, and, in a separate document published in this **Federal Register**, NHTSA is delaying the effective date of the rule pending reconsideration to allow for public comment on this issue.[15]

[5] The highest CAFE penalty paid to date for a shortfall in a single fleet was $30,257,920, paid by DaimlerChrysler for its imported passenger car fleet in MY 2006. Since MY 2012, only Jaguar Land Rover and Volvo have paid civil penalties. *See https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.*

[6] Available at *https://one.nhtsa.gov/CAFE_PIC/MY%202016%20and%202017%20Projected%20Fuel%20Economy%20Performance%20Report%20Final.pdf.*

[7] 49 U.S.C. 32912.

[8] 49 U.S.C. 32913.

[9] A copy of this petition is available in the rulemaking docket.

[10] Public Law 114–74, Sec. 701.

[11] This OMB guidance is available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf* (last accessed May 22, 2017).

[12] 81 FR 43524 (July 5, 2016). This interim final rule also updated the maximum civil penalty amounts for violations of all statutes and regulations administered by NHTSA, and was not limited solely to penalties administered for CAFE violations.

[13] Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016 interim final rule raising the same concerns as those raised in the Industry Petition. Both petitions can be found in docket listed on this document accessible via *www.regulations.gov.*

[14] 81 FR 95489 (Dec. 28, 2016).

[15] 82 FR 8694 (Jan. 30, 2017); 82 FR 15302 (Mar. 28, 2017); 82 FR 29009 (June 27, 2017).

II. NHTSA's Reconsideration of Final Rule and Request for Comment on How To Adjust CAFE Civil Penalties

CAFE penalties are straightforward to administer, but determining the appropriate amount of inflation adjustment is more complicated than originally understood. As CAFE standard stringency continues to increase, the nation's increased abundance of fuel resources has reduced fuel prices and is causing consumers to make purchasing decisions based on factors other than fuel economy, the potential effects of higher penalties for shortfalls may be more widely felt. In fact, NHTSA's data indicates that many automakers are projected to fall behind the standards for model years 2016 and 2017. Moreover, as explained earlier, once NHTSA settles on an amount for CAFE penalties, that becomes the amount applicable to all shortfalls, and NHTSA has no leeway to compromise or remit penalties for manufacturers who feel that their compliance circumstances are dire, unless they are actually facing bankruptcy. The consequences of this decision, therefore, are considerable and fairly permanent. NHTSA is therefore *sua sponte* reconsidering the December 28, 2016 final rule.

The Inflation Adjustment Act provides an exception to give federal agencies the ability to adjust the ''catch-up'' amount of a civil monetary penalty by less than the required amount. In order to make such an adjustment, the head of the agency must determine through notice and comment rulemaking that either (1) increasing the penalty by the otherwise required amount will have a ''negative economic impact,'' or (2) the social costs of increasing the penalty by the otherwise required amount outweigh the benefits. The Director of the Office of Management and Budget must agree with either conclusion by an agency before an agency can act upon such a conclusion.[16] The term ''negative economic impact'' is not defined in the Inflation Adjustment Act, though OMB's guidance noted that it expected a concurrence that a penalty increase would have a ''negative economic impact'' to be ''rare.'' [17]

Additionally, the OMB guidance directed agencies to calculate the initial ''catch-up adjustment'' based on either the year the penalty was originally established by Congress, or last adjusted (by Congress or by the agency), whichever is later.[18] If NHTSA determined that it was appropriate to use a different base year than the 1975 base year used to calculate the adjustment in the interim final rule, that decision could have a significant impact on the future CAFE penalties level.

After further consideration of these issues, and because the July 5, 2016 interim final rule did not provide an opportunity for interested parties to provide input fully, NHTSA has determined that it should seek public comment on whether and how NHTSA should consider the issues raised above in seeking to implement the Inflation Adjustment Act as it pertains to CAFE penalties.

Both exceptions to the Inflation Adjustment Act require the agency to assess the economic effects of increasing the penalty amount. Relevant, therefore, to both exceptions is information concerning the costs and benefits of increased penalties. In general, the agency expects that increasing the level of the CAFE penalty rate will lead to both increased penalties being paid and increased compliance with CAFE standards, which would result in greater fuel savings and other benefits. We request comment on any information related to these costs and benefits, including:

- What would be the aggregate increased cost of applying a higher fine rate? To what extent would this be based on increased fines versus increase compliance?
- What would be the effect on penalty payments of applying a higher fine rate?
- What would be the effect on the average price of passenger cars and light trucks sold in the U.S?
- How much additional fuel would be saved by raising the CAFE penalty rate any amount between $5.50 per tenth of a mile per gallon and $14 per tenth of a mile per gallon, and based on current projections of fuel prices, what would be the monetized benefit to consumers, if any, as compared to additional costs to consumers associated with higher penalties?
- What would be the environmental impacts of this fuel savings?
- Are there any other costs or benefits the agency should consider?
- Do commenters have data suggesting whether societal costs outweigh societal benefits?

In acting under the ''negative economic impact'' exception, two slightly different overarching questions also present themselves: First, whether the ''impact'' resulting from raising the CAFE penalty rate leads to a ''negative economic impact,'' and second, whether and how the EPCA requirements in 49 U.S.C. 32912 for what NHTSA must consider in raising CAFE penalty rates under that section interact with NHTSA's obligations under the Inflation Adjustment Act. NHTSA therefore seeks comment on the following:

- If NHTSA were to consider potential ''negative economic impacts'' associated with raising the CAFE penalty rate, what impacts, specifically, should NHTSA evaluate, why are those impacts relevant and not others, and what magnitude of impacts should be regarded as constituting ''negative economic impacts''?
- Do commenters have information that could be useful to NHTSA in evaluating ''negative economic impacts'' that they would be willing to provide?
- ''Negative economic impact'' also potentially requires the agency to consider impacts that are similar to those considered in cost-benefit analysis. For example:
  - If there are increased prices due to increased penalties, what effect may that have on sales, including transfer of sales from new vehicles to used vehicles?
  - If any impact on sales exists, would there be any adverse safety, fuel economy, or environmental impacts if consumers remain in older vehicles, which are less likely to have advanced safety and environmental features, or may be less fuel efficient than new model year vehicles? Would rising prices have a disproportionate impact on rural and disadvantaged communities, including with respect to safety, fuel economy, and environmental benefits?
  - If prices are affected by raising the penalties, would this restrict consumer choice?
  - If the prices of new model year vehicles rise as a result of higher CAFE penalties, would there be an impact on the price of older model year vehicles, and what economic impact might there be as a result?;
  - If increased penalties increase the costs of vehicles, would that lead to any secondary economic impacts on the nation, on a state or group of states, or on a region within a state or group of states, if as a result consumers spend less money on other desired goods and services?;
  - If penalties rise, could that create disincentives for automakers to build certain types of vehicles with lower fuel economy, such as vehicles specially designed to accommodate Americans with disabilities? And if, as a result of higher CAFE penalties, the prices of such vehicles rise or the availability of such vehicles falls, what might be the impact on consumers of such vehicles?

[16] *See* Section 701(c), Public Law 114–74.
[17] OMB Guidance, at 3.
[18] *Id.*

• Do commenters believe that the EPCA considerations for raising CAFE penalty rates under 49 U.S.C. 32912 are relevant to the catch-up adjustment required by the Inflation Adjustment Act? Why or why not?

• Do commenters believe that the EPCA considerations for ''substantial deleterious impact'' are relevant to a determination of ''negative economic impact''? If so, do commenters believe that those considerations *must be* accounted for in determining negative economic impact, or simply that they are informational, and what is the legal basis for that belief?

• If the EPCA considerations are relevant, how should they be applied in this instance?

• Do commenters have data suggesting what levels of ''substantial energy conservation,'' as envisioned by EPCA, would outweigh any ''substantial deleterious impact'' of raising penalties? Why or why not?

• Assuming the factors under 32912 are relevant, can commenters provide specific, documented information (including references to the sources relied on) with regard to the following:

○ Would there be any potential effects on employment nationally, on specific states or groups of states, or within regions of a state or groups of states, which could result from raising the CAFE penalty rate any amount between $5.50 per tenth of a mile per gallon and $14 per tenth of a mile per gallon?

○ Would rising penalties affect employment on specific sectors of the economy?

○ Are there any potential effects on competition within the automotive sector and the market shares of individual automakers that could result from raising the CAFE penalty rate any amount between $5.50 per tenth of a mile per gallon and $14 per tenth of a mile per gallon?

○ Are there any potential effects on automobile imports that could result from raising the CAFE penalty rate any amount between $5.50 per tenth of a mile per gallon and $14 per tenth of a mile per gallon?

Finally, regarding whether NHTSA used the appropriate base year to calculate the adjustment in the interim final rule, should NHTSA instead use the passage of EISA in 2007 as the ''base year'' for calculating the catch-up adjustment? Do commenters believe that Congress, as a whole, ''adjusted'' or re-''established'' the CAFE penalty amount in EISA within the meaning of the Inflation Adjustment Act when Congress amended the penalty provision? What is the basis for commenters' belief? That is, could it be argued that Congress, as a whole, explicitly considered and rejected a change to the specific civil penalty dollar amount in the statute ($5.00) and instead ratified the penalty while at the same time amending the penalty provision to authorize the use of civil penalty revenue to support NHTSA's CAFE rulemaking and to support research and development of the advanced technology vehicles?[19] Under such an interpretation, Congress may have re-''established'' the CAFE penalty in 2007, meaning that it could be used as the base year to apply the inflation adjustment multiplier. If so, what would the economic consequences of such a change in base year be?

In the event that NHTSA decides that it should adopt a CAFE civil penalty level other than $14, how much lead time (in model years) should NHTSA provide to manufacturers to allow them to adjust their production to the new penalty level? What is the factual and legal basis to support such lead time if NHTSA determines to adopt a different penalty level?

III. CAFE Penalty During Reconsideration

Since NHTSA is reconsidering its December 28, 2016 final rule, including whether $14 per tenth of a mile per gallon is the appropriate inflationary-adjusted penalty level, NHTSA is delaying the effective date of the final rule pending reconsideration in a separate document also published in this **Federal Register**. During reconsideration, the applicable civil penalty rate is $5.50 per tenth of a mile per gallon, which was the civil penalty rate prior to NHTSA's inflationary adjustment. Since $5.50 is also the penalty rate that applies under the December 28, 2016 final rule until Model Year 2019, NHTSA expects that delaying the final rule pending reconsideration will not affect the actual payment of CAFE penalties that would have otherwise applied prior to Model Year 2019.

NHTSA expects that its inflationary adjustment will provide lead time in advance of assessing a new CAFE penalty level.[20] As NHTSA explained in the December 28, 2016 **Federal Register** document, absent lead time, increasing the civil penalties for falling short of CAFE standards would not lead to an increase in fuel economy. Most manufacturers could not alter their compliance plans in response to the increase in civil penalties for several model years, and therefore raising the penalty rate without lead time would seem to impose retroactive punishment without generating any additional fuel savings. Neither of these outcomes seems consistent with Congress' intent either in EPCA or in the Inflation Adjustment Act.

IV. Public Participation

NHTSA requests comment on all aspects of this document. This section describes how you can participate in this process.

How do I prepare and submit comments?

To ensure that your comments are correctly filed in the Docket, please include the Docket Number NHTSA–2017–0073 in your comments. Your comments must not be more than 15 pages long.[21] NHTSA established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments, and there is no limit on the length of the attachments. If you are submitting comments electronically as a PDF (Adobe) file, NHTSA asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions.[22] Please note that pursuant to the Data Quality Act, in order for substantive data to be relied on and used by NHTSA, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, NHTSA encourages you to consult the guidelines in preparing your comments. DOT's guidelines may be accessed at *https://www.transportation.gov/regulations/dot-information-dissemination-quality-guidelines.*

[19] In a September 16, 2016 letter to NHTSA supplementing their August 1, 2016 petition for reconsideration of the July 5, 2016 interim final rule adjusting the CAFE penalties, the petitioners argued that Congress had considered increasing the CAFE penalty and instead ultimately ratified the existing one. As support for this argument, the petitioners cited a subcommittee discussion draft of June 1, 2007, published in the record of a hearing before the Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce entitled ''Legislative Hearing on Discussion Draft Concerning Alternative Fuels, Infrastructure and Vehicles,'' June 7, 2007, Serial Number 110–53, available at *https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg42440/pdf/CHRG-110hhrg42440.pdf.*

[20] The appropriate lead time is one of the issues on which NHTSA is seeking public comment.

[21] *See* 49 CFR 553.21.

[22] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

Tips for Preparing Your Comments

When submitting comments, please remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the **DATES** section above.

How can I be sure that my comments were received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. When you send a comment containing confidential business information, you should include a cover letter setting forth the information specified in NHTSA's confidential business information regulation.[23]

In addition, you should submit a copy from which you have deleted the claimed confidential business information to the Docket by one of the methods set forth above.

Will NHTSA consider late comments?

NHTSA will consider all comments received before midnight Eastern Standard Time on the comment closing date indicated above under **DATES**. To the extent practicable, NHTSA will also consider comments received after that date. If a comment is received too late for us to practicably consider as part of this action, NHTSA will consider that comment as an informal suggestion for a future rulemaking action.

How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov* and following the online instructions for accessing the dockets. You may also read the materials at the DOT Docket Management Facility by going to the street address given above under **ADDRESSES**.

V. Regulatory Notices and Analyses

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This action is limited to seeking comment on an adjustment of a civil penalty under a statute that NHTSA enforces, and has been determined not to be ''significant'' under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget. Because this rulemaking seeks comment on the penalty amounts enacted under the IFR and does not change the number of entities that are subject to civil penalties, the impacts are anticipated to be non-significant.

B. Regulatory Flexibility Act

NHTSA has also considered the impacts of this rule under the Regulatory Flexibility Act. I certify that this rule will not have a significant impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The amendments only affect manufacturers of motor vehicles. Low-volume manufacturers can petition NHTSA for an alternate CAFE standard under 49 CFR part 525, which lessens the impacts of this rulemaking on small businesses by allowing them to avoid liability for potential penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this rule.

C. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local governments early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The reason is that this rule applies to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive Order do not apply.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because NHTSA does not believe that this rule will necessarily have a $100 million effect, no Unfunded Mandates assessment will be prepared.

E. Executive Order 12778 (Civil Justice Reform)

This rule does not have a retroactive or preemptive effect. Judicial review of this rule may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for

[23] 49 CFR part 512.

reconsideration be filed prior to seeking judicial review.

F. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, NHTSA states that there are no requirements for information collection associated with this rulemaking action.

G. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *https://www.transportation.gov/privacy.*

Jack Danielson,

Acting Deputy Administrator.

[FR Doc. 2017–14525 Filed 7–7–17; 11:15 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket Number 170314267–7566–02]

RIN 0648–BG48

Fisheries of the Northeastern United States; Monkfish; Framework Adjustment 10

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This action approves and implements regulations submitted by the New England and Mid-Atlantic Fishery Management Councils in Framework Adjustment 10 to the Monkfish Fishery Management Plan. This action sets monkfish specifications for fishing years 2017–2019 (May 1, 2017 through April 30, 2020). It also increases current days-at-sea allocations and trip limits. This action is intended to allow the fishery to more effectively harvest its optimum yield.

DATES: This rule is effective July 12, 2017.

ADDRESSES: Copies of Framework Adjustment 10 and the accompanying environmental assessment (EA) are available on request from: John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Framework 10 and the EA are also accessible via the Internet at: *https://www.greateratlantic.fisheries.noaa.gov/sustainable/species/monkfish/index.html.* These documents are also accessible via the Federal eRulemaking Portal: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Policy Analyst, (978) 281–9182.

SUPPLEMENTARY INFORMATION:

Background

The New England and the Mid-Atlantic Fishery Management Councils jointly manage the Monkfish Fishery Management Plan (FMP). The fishery extends from Maine to North Carolina from the coast out to the end of the continental shelf. The Councils manage the fishery as two management units, with the Northern Fishery Management Area (NFMA) covering the Gulf of Maine (GOM) and northern part of Georges Bank, and the Southern Fishery Management Area (SFMA) extending from the southern flank of Georges Bank through Southern New England and into the Mid-Atlantic Bight to North Carolina.

The monkfish fishery is primarily managed by landing limits and a yearly allocation of monkfish days-at-sea (DAS) calculated to enable vessels participating in the fishery to catch, but not exceed, the target total allowable landings (TAL) for each management area. The catch limits are calculated to maximize yield in the fishery over the long term. Based on a yearly evaluation of the monkfish fishery, the Councils may revise existing management measures through the framework provisions of the FMP to better achieve the goals and objectives of the FMP and achieve optimum yield, as required by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The monkfish fishery has not fully harvested its quota since 2011. The fishery underharvested its available quota in the last three years (Table 1). The Councils developed Framework 10 to enhance the operational efficiency of existing management measures in an effort to better achieve optimum yield.

TABLE 1—MONKFISH LANDINGS COMPARISON FOR FISHING YEARS 2013–2015

Management area	Target TAL (mt) for fishing years 2013–2015	2013 Landings (mt)	2014 Landings (mt)	2015 Landings (mt)	Average percent (%) of TAL landed 2013–2015
NFMA	5,854	3,596	3,403	4,080	63
SFMA	8,925	5,088	5,415	4,733	57

Approved Measures

1. Establish Specifications for Fishing Years 2017–2019

This action retains the biological reference points previously established in Framework 8 (79 FR 41919; July 8, 2014). The overfishing limit (OFL) for fishing years 2017–2019 (May 1, 2017 through April 30, 2020) is 17,805 mt for the NFMA and 23,204 mt for the SFMA. The acceptable biological catch (ABC) for each area, which equals the annual catch limit (ACL), is 7,592 mt for the NFMA and 12,316 mt for the SFMA. Additional background information on these specifications is available in the proposed rule (82 FR 21498; May 9, 2017), and is not repeated here.

Although the biological reference points are unchanged, this action increases monkfish total allowable landings (TAL), or quotas, for the next three fishing years (Table 2). The TALs are derived after reducing an assumed amount of discards and a management uncertainty buffer from the ABC.

Exhibit C

[FR Doc. 2016–31215 Filed 12–27–16; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2016–0136]

RIN 2127–AL82

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule; response to petition for reconsideration; response to petition for rulemaking.

SUMMARY: On July 5, 2016, NHTSA published an interim final rule updating the maximum civil penalty amounts for violations of statutes and regulations administered by NHTSA, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This decision responds to a petition for partial reconsideration of that interim final rule. After carefully considering the issues raised, the Agency grants some aspects of the petition, and denies other aspects. This decision amends the relevant regulatory text accordingly. This decision also responds to a petition for rulemaking on a similar topic.

DATES: *Effective date:* This rule is effective January 27, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Rebecca Yoon, Office of the Chief Counsel, NHTSA, telephone (202) 366–2992, facsimile (202) 366–3820, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Background on CAFE Penalties and Interim Final Rule

The National Highway Traffic Safety Administration (NHTSA) administers Corporate Average Fuel Economy (CAFE) standards under 49 U.S.C. 32901 *et seq.* Vehicle manufacturers that produce passenger cars and light trucks for sale in the United States are subject to these standards,[1] and are subject to civil penalties for failure to meet the standards.[2] Manufacturers generally meet the standards by applying technology to their vehicles to improve their fleet-wide fuel economy, but may also apply credits earned from over-compliance with standards in another year or purchased from another manufacturer. If a manufacturer does not have credits to apply, and does not apply sufficient fuel economy-improving technologies to their vehicles to meet their fleet-wide standards, then that manufacturer is liable for civil penalties.[3]

Congress has prescribed the formula for calculating a civil penalty for violation of a CAFE standard. That formula multiplies the penalty rate times the number of tenths-of-a-mile-per-gallon by which a non-compliant fleet falls short of an applicable CAFE standard, times the number of vehicles in that non-compliant fleet.[4] For many years, the penalty rate has been $5.50 per tenth-of-a-mile-per-gallon. As an illustration, assume that Manufacturer A produced 1,000,000 light trucks in model year 2010. Assume further that A has a light truck standard of 20 mpg for MY 2010, and an achieved light truck average fuel economy level of 19.7 mpg in that model year. If A has no credits to apply, then A's assessed civil penalty under this historical penalty rate would be:

$5.50 (penalty rate) × 3 (tenths of an mpg) × 1,000,000 (vehicles in Manufacturer A's light truck fleet) = $16,500,000 due for A's light truck fleet for MY 2010.

To date, few manufacturers have actually paid civil penalties, and the amounts of CAFE penalties paid generally have been relatively low. Additionally, since the introduction of credit trading and transfers for MY 2011 and after, many manufacturers have taken advantage of those flexibilities rather than paying civil penalties for non-compliance.

The Federal Civil Penalties Inflation Adjustment Act Improvements Act (November 2, 2015) (the ''Act'') prescribed an inflation adjustment for many civil monetary penalties, including CAFE's civil penalty rate. In that Act, Congress generally required Federal agencies that administer civil monetary penalties to make an initial ''catch-up'' adjustment for inflation through an interim final rule by July 1, 2016, and then to make subsequent annual adjustments for inflation (*see* Pub. L. 114–74, Sec. 701). NHTSA developed an interim final rule (IFR) implementing the Agency's responsibilities under that Act, and that IFR published in the **Federal Register** on July 5, 2016. The NHTSA IFR included adjustments for all civil monetary penalties administered by the Agency, including those prescribed by the CAFE program. In accordance with the Act and OMB guidance, the updated penalty rate increased from $5.50 per tenth of a mile per gallon (mpg) to $14 per tenth of an mpg.[5] NHTSA stated in implementation guidance that it issued following the IFR that the Agency intended to apply the $14 rate to any penalties assessed on and after August 4, 2016, beginning with penalties applicable to violations for MY 2015, and also applying to any violations from prior model years that resulted from recalculation of a manufacturer's previous CAFE levels.[6]

II. Industry Petition for Reconsideration

The Auto Alliance and Global Automakers jointly petitioned NHTSA for reconsideration of the interim final rule with regard to the inflation adjustment for CAFE non-compliance penalties (hereafter, the Alliance and Global petition will be referred to as the ''Industry Petition'') on August 1, 2016. The Industry Petition asked that NHTSA not apply the penalty increase to non-compliances associated with ''model years that have already been completed or for which a company's compliance plan has already been set.'' Specifically, the Industry Petition stated that:

> Our most significant concern with the IFR is that it would apply retroactively to the 2014 and 2015 Model Years (which have been completed for all manufacturers but for which the compliance files are not all closed), to the 2016 Model Year (which is complete for many manufacturers) and to the 2017 and 2018 Model Years (for which manufacturers have already set compliance plans based on guidance from NHTSA, including the [historical penalty amounts of $5.50 per tenth of an mpg]). Applying the increased civil penalties in this manner is profoundly unfair to manufacturers, does not improve the effectiveness of this penalty, and does nothing to further the policies underlying the CAFE statute.

Industry Petition at 3.

In the alternative, the Industry Petition requested that if NHTSA decided to apply the penalty increase to MYs 2014–2018, the Agency should recalculate the adjusted penalty rate

[1] 49 U.S.C. 32911(b).

[2] 49 U.S.C. 32912(b).

[3] Civil penalties are remitted to the U.S. Treasury.

[4] 49 U.S.C. 32912(b).

[5] NHTSA's explanation of its process, including reliance on OMB guidance for calculating the initial adjustment required by the Act, is set forth in the interim final rule at 81 FR 43524–26 (Jul. 5, 2016). The interim final rule also discusses the ''rounding rule'' under the prior version of the Federal Civil Penalties Inflation Adjustment Act, which prevented NHTSA from raising the $5.50 rate after 1997.

[6] Memorandum, ''Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 for the Corporate Average Fuel Economy (CAFE) Program,'' July 18, 2016.

using 2007 as the ''base year'' for calculating the inflation adjustment. As another alternative, the Industry Petition sought a finding that immediately increasing the penalty to $14 would cause a ''negative economic impact,'' thereby requiring a smaller initial penalty increase. *See* Public Law 114–74, Sec. 701(c) (providing for an exception to the otherwise-applicable penalty increase, if the Agency finds through a rulemaking proceeding that the increase would cause a ''negative economic impact,'' a term that the statute does not define).[7]

III. Petition for Rulemaking To Raise Civil Penalty Rate

The Center for Biological Diversity (CBD) petitioned NHTSA on October 1, 2015, just over a month prior to passage of the Act, to conduct a rulemaking to raise the civil penalty rate for CAFE standard violations under NHTSA's then-existing statutory authority. The CBD petition stated correctly that NHTSA had not adjusted the $5.50 civil penalty rate for inflation since 1997, and requested that the Agency follow the procedure laid out at 49 U.S.C. 32912(c) to undertake a rulemaking to raise the amount to the maximum then allowed by Congress, $10 per tenth-of-an-mpg. A month later, Congress changed the statutory landscape by enacting the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

IV. NHTSA Response to Petitions

Having carefully considered the issues raised by the petitioners, NHTSA will grant the Industry Petition in part and deny it in part. Beginning with model year 2019, NHTSA will apply the full penalty prescribed by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015. NHTSA is required by the Act to continue adjusting the civil penalty for inflation each year, so the penalty rate applicable to MY 2019 and after fleets will be $14 per tenth-of-an-mpg, *plus* any adjustment(s) for inflation that occur between now and a violation's assessment. The Agency concludes that this decision also effectively addresses the issue raised by the CBD Petition. The discussion below presents the Agency's analysis and conclusion.

A. Model Years 2014–2016

NHTSA agrees with the Industry Petitioners that applying the $14 civil penalty rate to violations of CAFE standards in model years prior to the enactment of the Act would not result in additional fuel savings, and thus would seem to impose retroactive punishment without accomplishing Congress' specific intent in establishing the civil penalty provision of the Energy Policy and Conservation Act (''EPCA''). Model years typically begin prior to their respective calendar year. By November 2, 2015 (the date of enactment of the civil penalties adjustment Act), nearly all manufacturers subject to the CAFE standards had completed both model years 2014 and 2015, and no further vehicles in those model years were being produced in significant numbers. This argument is even stronger considering that all manufacturers would have completed these model years prior to July 5, 2016, the date of the IFR. If all the vehicles for a model year have already been produced, then there is no way for their manufacturers to raise the fuel economy level of those vehicles in order to avoid higher penalty rates for non-compliance.

In the specific context of EPCA as amended, the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards. *See* 49 CFR 578.2 (section addressing penalties states that a ''purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law''); *see generally,* 49 U.S.C. 32911–32912; *United States* v. *General Motors,* 385 F.Supp. 598, 604 (D.D.C. 1974), *vacated on other grounds,* 527 F.2d 853 (D.C. Cir. 1975) (''The policy of the Act with regard to civil penalties is clearly to discourage noncompliance''). Assuming that higher civil penalty rates are intended, in the particular context of CAFE, to provide greater incentives for manufacturers to comply with applicable standards, then raising penalty rates for model years already completed and thus unchangeable would be not only retroactive,[8] but incapable of serving the purpose of causing greater compliance with CAFE standards. Based on the governing statutory framework and the specific CAFE regulatory scheme, NHTSA believes that Congress would not have intended retroactive application of an inflation adjustment to overcome this core substantive purpose and intent of EPCA. This analysis compels the conclusion that applying an increased penalty rate to MYs 2014 and 2015 would not be appropriate, nor would applying it to MY 2016, which was underway by November 2, 2015 and over halfway complete by July 5, 2016.[9]

B. Model Years 2017 and 2018

The Industry Petition asserts that manufacturers have set their product and compliance plans for MY 2017 and 2018 based on the CAFE penalty provisions in place prior to July 2016, and that it is too late at this juncture to make significant changes to those plans and avoid non-compliances (for the manufacturers already intending not to comply). The Agency determined above that it is not appropriate to apply an increased penalty rate to CAFE non-compliance in past model years, *i.e.,* MY 2016 and before, which could not be changed in response to a higher penalty rate. The next question presented by the Industry Petition is how to address future model years' vehicles whose fuel economy levels cannot be changed at this juncture.

For immediate future model years (*i.e.,* 2017 and 2018), the theoretical possibility exists that manufacturers could respond to a higher penalty rate by increasing their fleet fuel economy and thus achieving CAFE compliance or mitigating their non-compliance. However, because of industry design, development, and production cycles, vehicle designs (including drivetrains, which are where many fuel economy improvements are made) are often fixed years in advance, making adjustments to fleet fuel economy difficult without a lead time of multiple years.

Here, the Industry Petitioners assert that their plans for what technology to put on which MYs 2017 and 2018 vehicles are, at the point the IFR was issued, fixed and inalterable. NHTSA takes manufacturers' product cycles into account when NHTSA sets fuel economy standards. For example,

[7] Because the Agency is granting the Industry Petition's request to apply inflation-adjusted penalties only to MY 2019 and after, the Agency need not address the Industry Petition's alternative requests.

[8] Retroactivity is not favored in the law. The Supreme Court has stated that ''congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.'' *Landgraf* v. *USI Film Products,* 511 U.S. 244, 280 (1994), citing *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204, 208 (1988). NHTSA believes that in the specific context of the CAFE program and the statutes that govern it, Congress could not have intended to impose higher civil penalty rates for time periods when they would not incentivize increased fuel economy.

[9] The decision not to apply the increased penalties retroactively is similar to the approach taken by various other federal agencies in implementing the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. *See, e.g.,* Department of Justice, Interim final rule with request for comments: Civil Monetary Penalties Inflation Adjustment, 81 FR 42491 (June 30, 2016) (applying increased penalties only to violations after November 2, 2015, the date of the Act's enactment); Federal Aviation Administration, Interim Final Rule: Revisions to Civil Penalty Inflation Adjustment Tables, 81 FR 43463 (July 5, 2016) (applying increased penalties only to violations after August 1, 2016).

because NHTSA recognizes that manufacturers' product and compliance plans are difficult to alter significantly for years ahead of a given model year,[10] the Agency includes product cadence in its assessment of CAFE standards, by limiting application of technology in its analytical model to years in which vehicles are refreshed or redesigned. NHTSA believes that this approach facilitates continued fuel economy improvements over the longer term by accounting for the fact that manufacturers will seek to make improvements when and where they are most cost-effective.

In an analogous context, EPCA provides that when DOT amends a fuel economy standard to make it more stringent, that new standard must be promulgated ''at least 18 months before the beginning of the model year to which the amendment applies.'' 49 U.S.C. 32902(a)(2). The 18 months' notice requirement for increases in fuel economy standards represents a congressional acknowledgement of the importance of advance notice to vehicle manufacturers to allow them the lead time necessary to adjust their product plans, designs, and compliance plans to address changes in fuel economy standards. Similarly here, affording manufacturers lead time to adjust their products and compliance plans helps them to account for such an increase in the civil penalty amount. In this unique case, the 18-month lead time for increases in the stringency of fuel economy standards provides a reasonable proxy for appropriate advance notice of the application of substantially increased—here nearly tripled—civil penalties.

Given that NHTSA issued the IFR in July 2016, 18 months from that date would be January 2018, which would encompass MY 2017 for most manufacturers and models and part of MY 2018. Based on the Industry Petition, comments, and agency expertise, NHTSA believes that, in this instance, applying the adjusted penalties only for MY 2019 and after provides a reasonable amount of lead time for manufacturers to adjust their plans and products to take into account the substantial change in penalty level.

For future model years for which the vehicles to be produced and their technologies are essentially fixed (*i.e.,* MYs 2017–2018), it is conceivable that some manufacturers might be able to change production volumes of certain lower- or higher-fuel-economy models, which could help them to reduce or avoid CAFE non-compliance penalties. However, in this particular instance, compelling such a result through the immediate application of higher penalty rates to product design decisions that have already been made and cannot be changed would be contrary to a fundamental congressional purpose of the CAFE program. The Energy Independence and Security Act (EISA) amendments of 2007 required that fuel economy standards be attribute-based, demonstrating congressional intent that the CAFE program be responsive to consumer demand. *See* 49 U.S.C. 32902(b)(3). Applying higher civil penalty rates in a way that would force manufacturers to disregard consumer demand (*e.g.,* by restricting the availability of vehicles that consumers want) would be inconsistent with that fundamental statutory command. Providing some lead time, as here, mitigates that concern.

In order to reconcile competing statutory objectives in the unique context of multi-year vehicle product cycles, NHTSA will grant the Industry Petition insofar as it seeks to apply the penalty increase only for model years 2019 and after. For CAFE standard non-compliances that occur(ed) for model years 2014–2018, NHTSA intends to assess civil penalties at the rate of $5.50 per tenth of an mpg. Beginning with model year 2019, NHTSA will apply the full penalty prescribed by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015. NHTSA is required by the Act to continue adjusting the civil penalty for inflation each year, so the penalty rate applicable to MY–2019-and-after fleets will be $14 per tenth-of-an-mpg, *plus* any adjustment(s) for inflation that occur between now and then. *See* Public Law 114–74, Sec. 701(b)(2).

NHTSA believes this approach appropriately harmonizes the two congressional directives of adjusting civil penalties to account for inflation and maintaining attribute-based, consumer-demand-focused standards, applied in the context of the presumption against retroactive application of statutes. *See, e.g., Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208. This decision increases civil penalties starting with the model year that manufacturers, in this particular instance, are reasonably able to design and produce vehicles in response to the increased penalties. *See* Industry Petition at 4–6 (seeking application of the adjusted civil penalties only to MY 2019 and after).

In summary, NHTSA partially grants the Industry Petition for Reconsideration insofar as it seeks implementation of the civil penalties adjustment only to MY 2019 and after, and denies the Industry Petition in all other respects.

This action also effectively responds to the petition for rulemaking from CBD to increase the civil penalty rate as permitted by EPCA/EISA. The civil penalty rate beginning in MY 2019 will be substantially higher than the CBD petition requested, and NHTSA believes that the increased penalty will accomplish CBD's goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles in those future model years. To the extent that the CBD Petition requests an earlier penalty rate increase, it is denied for the reasons set forth in this decision.

V. Regulatory Notices and Analyses

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563, and has been determined not to be ''significant'' under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget.

B. Regulatory Flexibility Act

NHTSA has also considered the impacts of this rule under the Regulatory Flexibility Act. I certify that this rule will not have a significant impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The amendments only affect manufacturers of motor vehicles. Low-volume manufacturers can petition NHTSA for an alternate CAFE standard under 49 CFR part 525, which lessens the impacts of this rulemaking on small businesses by allowing them to avoid liability for potential penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this rule.

C. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials

[10] One of the Industry Petitioners, the Alliance, submitted supplemental materials describing the activities and events that make up product cycles, which support this point. *See* Docket No. NHTSA–2016–0136.

in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local governments early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The reason is that this rule applies to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive Order do not apply.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because NHTSA does not believe that this rule will necessarily have a $100 million effect, no Unfunded Mandates assessment will be prepared.

E. Executive Order 12778 (Civil Justice Reform)

This rule does not have a retroactive or preemptive effect. Judicial review of this rule may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

F. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, we state that there are no requirements for information collection associated with this rulemaking action.

G. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *https://www.transportation.gov/privacy.*

List of Subjects in 49 CFR Part 578

Fuel economy, Motor vehicles, Penalties.

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for 49 CFR part 578 is revised to read as follows:

Authority: Pub. L. 101–410, Pub. L. 104–134, Pub. L. 109–59, Pub. L. 114–74, Pub L. 114–94, 49 U.S.C. 32902 and 32912; delegation of authority at 49 CFR 1.81, 1.95.

■ 2. Section 578.6 is amended by revising paragraph (h) to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

* * * * *

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than $40,000 for each violation. A separate violation occurs for each day the violation continues.

(2) Except as provided in 49 U.S.C. 32912(c), beginning with model year 2019, a manufacturer that violates a standard prescribed for a model year under 49 U.S.C. 32902 is liable to the United States Government for a civil penalty of $14, plus any adjustments for inflation that occurred or may occur (for model years before model year 2019, the civil penalty is $5.50), multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(i) Calculated under 49 U.S.C. 32904(a)(1)(A) or (B) for automobiles to which the standard applies produced by the manufacturer during the model year;

(ii) Multiplied by the number of those automobiles; and

(iii) Reduced by the credits available to the manufacturer under 49 U.S.C. 32903 for the model year.

* * * * *

Issued on: December 21, 2016.

Mark R. Rosekind,

Administrator.

[FR Doc. 2016–31136 Filed 12–27–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

RIN 0648–XF074

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Possession and Trip Limit Modifications for the Common Pool Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason adjustment.

SUMMARY: This action increases the possession and trip limits for Southern New England/Mid-Atlantic yellowtail flounder and reduces the possession and trip limits for Georges Bank cod in place for Northeast multispecies common pool vessels for the remainder of the 2016 fishing year. The Regional Administrator is authorized to adjust possession and trip limits for common pool vessels to facilitate harvesting, or prevent exceeding, the pertinent common pool quotas during the fishing year. Increasing the possession and trip limits on Southern New England/Mid-Atlantic yellowtail flounder is intended to provide additional fishing opportunities and help allow the common pool fishery to catch its allowable quota for the stock, while reducing the possession and trip limits for Georges Bank cod is necessary to prevent overharvest of the common pool quota for that stock.

DATES: The action increasing the possession and trip limits for Southern New England/Mid-Atlantic yellowtail flounder is effective December 22, 2016, through April 30, 2017. The action decreasing the possession and trip limits for Georges Bank cod is effective January 1, 2017, through April 30, 2017.

FOR FURTHER INFORMATION CONTACT: Kyle Molton, Fishery Management Specialist, 978–281–9236.

SUPPLEMENTARY INFORMATION: The regulations at 50 CFR 648.86(o) authorize the Regional Administrator to adjust the possession and trip limits for common pool vessels in order to

Exhibit D

authority for this collection of information is contained in 47 U.S.C. 151, 152, 154, 154(i), 155(c), 157, 201, 202, 208, 214, 301, 302a, 303, 307, 308, 309, 310, 311, 314, 316, 319, 324, 331, 332, 333, 336, 534, 535 and 554.

Nature and Extent of Confidentiality: There is no need for confidentiality required with this collection of information.

Privacy Impact Assessment: Yes.

Needs and Uses: On July 20, 2015, the Commission released the *Part 1 R&O* in which it updated many of its Part 1 competitive bidding rules (*See Updating Part 1 Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures,* Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, and Third Report and Order, FCC 15–80, 30 FCC Rcd 7493 (2015), modified by *Erratum,* 30 FCC Rcd 8518 (2015) (*Part 1 R&O*)). Of relevance to the information collection at issue here, the Commission: (1) Implemented a new general prohibition on the filing of auction applications by entities controlled by the same individual or set of individuals (but with a limited exception for qualifying rural wireless partnerships); (2) modified the eligibility requirements for small business benefits, and updated the standardized schedule of small business sizes, including the gross revenues thresholds used to determine eligibility; (3) established a new bidding credit for eligible rural service providers; (4) adopted targeted attribution rules to prevent the unjust enrichment of ineligible entities; and (5) adopted rules prohibiting joint bidding arrangements with limited exceptions. The updated Part 1 rules apply to applicants seeking licenses and permits.

Additionally, on June 2, 2014, the Commission released the *Mobile Spectrum Holdings R&O,* in which the Commission updated its spectrum screen and established rules for its upcoming auctions of low-band spectrum. Of relevance to the information collection at issue here, the Commission stated that it could reserve spectrum in order to ensure against excessive concentration in holdings of below-1–GHz spectrum (*In the Matter of Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* FCC 14–63, Report and Order, 29 FCC Rcd 6133, 6190, para. 135 (2014) (*Mobile Spectrum Holdings R&O*). *See also Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016; Technical Formulas for Competitive Bidding,* Public Notice, 30 FCC Rcd 11034, Appendix 3 (WTB 2015); *Wireless Telecommunications Bureau Releases Updated List of Reserve-Eligible Nationwide Service Providers in each PEA for the Broadcast Incentive Auction,* Public Notice, AU No. 14–252 (WTB 2016).

The Commission also revised the currently approved collection of information under OMB Control Number 3060–0798 to permit the collection of the additional information for Commission licenses and permits, pursuant to the rules and information collection requirements adopted by the Commission in the *Part 1 R&O* and the *Mobile Spectrum Holdings R&O.* As part of the collection, the Commission is now approved for the information collection and recordkeeping requirements associated with 47 CFR 1.2110(j), 1.2112(b)(2)(iii), 1.2112(b)(2)(v), 1.2112(b)(2)(vii), and 1.2112(b)(2)(viii). Also, in certain circumstances, the Commission requires the applicant to provide copies of their agreements and/or submit exhibits.

In addition, the Commission is now approved for various other, non-substantive editorial/consistency edits and updates to FCC Form 601 that correct inconsistent capitalization of words and other typographical errors, and better align the text on the form with the text in the Commission rules both generally and in connection with recent non-substantive, organizational amendments to the Commission's rules.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2016–15819 Filed 7–1–16; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2016–0075]

RIN 2127–AL73

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Interim final rule.

SUMMARY: This interim final rule updates the maximum civil penalty amounts for violations of statutes and regulations administered by NHTSA pursuant the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015. This final rule also amends our regulations to reflect the new civil penalty amounts for violations of the National Traffic and Motor Vehicle Safety (the Safety Act) Act authorized by the Fixing America's Surface Transportation Act (FAST Act).

DATES: *Effective date:* This rule is effective August 4, 2016.

Petitions for reconsideration: Petitions for reconsideration of this final rule must be received not later than August 19, 2016.

ADDRESSES: Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., West Building, Fourth Floor, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Thomas Healy, Office of Chief Counsel, NHTSA, telephone (202) 366–2992, facsimile (202) 366–3820, 1200 New Jersey Ave SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Background

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvement Act (the 2015 Act), Pub. L. 114–74, Section 701, was signed into law. The purpose of the 2015 Act is to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act requires agencies to make an initial catch up adjustment to the civil monetary penalties they administer through an interim final rule and then to make subsequent annual adjustments for inflation. The amount of increase of any adjustment to a civil penalty pursuant to the 2015 Act is limited to

150 percent of the current penalty. Agencies are required to issue the interim final rule with the initial catch up adjustment by July 1, 2016.

The method of calculating inflationary adjustments in the 2015 Act differs substantially from the methods used in past inflationary adjustment rulemakings conducted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act), Pub. L. 101–410. Previously, adjustments to civil penalties were conducted under rules that required significant rounding of figures. For example, a penalty increase that was greater than $1,000, but less than or equal to $10,000, would be rounded to the nearest multiple of $1,000. While this allowed penalties to be kept at round numbers, it meant that penalties would often not be increased at all if the inflation factor was not large enough. Furthermore, increases to penalties were capped at 10 percent. Over time, this formula caused penalties to lose value relative to total inflation.

The 2015 Act has removed these rounding rules; now, penalties are simply rounded to the nearest $1. While this creates penalty values that are no longer round numbers, it does ensure that penalties will be increased each year to a figure commensurate with the actual calculated inflation. Furthermore, the 2015 Act ''resets'' the inflation calculations by excluding prior inflationary adjustments under the Inflation Adjustment Act, which contributed to a decline in the real value of penalty levels. To do this, the 2015 Act requires agencies to identify, for each penalty, the year and corresponding amount(s) for which the maximum penalty level or range of minimum and maximum penalties was established (*i.e.,* originally enacted by Congress) or last adjusted other than pursuant to the Inflation Adjustment Act.

The Director of the Office of Management and Budget (OMB) provided guidance to agencies in a February 24, 2016 memorandum on how to calculate the initial adjustment required by the 2015 Act.[1] The initial catch up adjustment is based on the change between the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October in the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI–U. The February 24, 2016 memorandum contains a table with a multiplier for the change in CPI–U from the year the penalty was established or last adjusted to 2015. To arrive at the adjusted penalty the agency must multiply the penalty amount when it was established or last adjusted by Congress, excluding adjustments under the Inflation Adjustment Act, by the multiplier for the increase in CPI–U from the year the penalty was established or adjusted provided in the February 24, 2016 memorandum. The 2015 Act limits the initial inflationary adjustment to 150 percent of the current penalty. To determine whether the increase in the adjusted penalty is less than 150 percent, the agency must multiply the current penalty by 250 percent. The adjusted penalty is the lesser of either the adjusted penalty based on the multiplier for CPI–U in Table A of the February 24, 2016 memorandum or an amount equal to 250% of the current penalty. This interim final rule adjusts the civil penalties for violations of statutes and regulations that NHTSA administers consistent with the February 24, 2016 memorandum.

[1] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), *available at www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16–06.pdf.*

II. Inflationary Adjustments to Penalty Amounts in 49 CFR Part 578

Changes to Civil Penalties for School Bus Related Violations of the Safety Act (49 CFR 578.6(a)(2))

The maximum civil penalty for a single violation of 30112(a)(1) of Title 49 of the United States Code involving school buses or school bus equipment, or of the prohibition on school system purchases and leases of 15 passenger vans as specified in 30112(a)(2) of Title 49 of the United States Code was set at $10,000 when the penalty was established by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Pub. L. 109–59, 119 Stat. 1942, enacted in 2005. Applying the multiplier for the increase in CPI–U for 2005 in Table A of the February 24, 2016 memorandum (1.19397) results in an adjusted civil penalty of $11,940. The maximum civil penalty for a related series of violations of 30112(a)(1) and 30112(a)(2) was $15,000,000 when the penalty was established by SAFETEA–LU in 2005. Applying the multiplier for the increase in CPI–U for 2005 results in an adjusted maximum civil penalty of $17,909,550.

Changes to Civil Penalties for Filing False or Misleading Reports Under 49 U.S.C. 30165(a)(4)

The Moving Ahead for Progress in the 21st Century Act (MAP–21) of 2012, Pub. L. 112–141, established a maximum civil penalty for persons knowingly or willfully submitting materially false or misleading information to NHTSA after certifying that the information was accurate pursuant to 49 U.S.C. 30166(o) of $5,000 per day. Applying the multiplier for the increase in CPI–U for 2012 in Table A of the February 24, 2016 memorandum (1.02819) results in an adjusted civil penalty of $5,141. MAP–21 established a maximum civil penalty for a related series of daily violations of 49 U.S.C. 30166(o) of $1,000,000. Applying the multiplier for the increase in CPI–U for 2012 results in an adjusted civil penalty of $1,028,190 for a related series of daily violations of 49 U.S.C. 30166(o).

Change to Penalty for Violation of 49 U.S.C. Chapter 305 (49 CFR 578.6(b))

The Anti Car Theft Act of 1992, Pub. L. 102–519, 204, 106 Stat. 3393 (1992) established a civil penalty of $1,000 for each violation of the reporting requirements related to maintaining the Nation Motor Vehicle Title Information System. Applying the multiplier for the increase in CPI–U for 1992 in Table A of the February 24, 2016 memorandum (1.67728) results in an adjusted civil penalty of $1,677.

Change to Maximum Penalty Under 49 U.S.C. 32506(a) (49 CFR 578.6(c))

The Motor Vehicle Information and Cost Savings Act (Cost Savings Act), Pub. L. 92–513, 86 Stat. 953, (1972), established a civil penalty of $1,000 for each violation of a bumper standard established pursuant to the Cost Savings Act. Applying the multiplier for the increase in CPI–U for 1972 in Table A of the February 24, 2016 memorandum (5.62265) results in an adjusted civil penalty of $5,623. Since this would result in an increase to the current civil penalty of greater than 150 percent, the adjusted civil penalty is $2,750 (Current penalty $1,100 × 2.5).

The Cost Savings Act also established a maximum civil penalty of $800,000 for a related series of violations of the bumper standards established pursuant to the Act. Applying the multiplier for the increase in CPI–U for 1972 in Table A of the February 24, 2016 memorandum (5.62265) results in an adjusted civil penalty of $4,498,120. Since this would result in an increase to the current civil penalty of greater than 150 percent, the adjusted civil penalty is $3,062,500 (Current penalty $1,225,000 × 2.5).

Change to Penalties Under the Consumer Information Provisions (49 CFR 578.6(d)(1))

The Cost Savings Act established a civil penalty of $1,000 for each violation of 49 U.S.C. 32308(a) related to providing information on crashworthiness and damage susceptibility. Applying the multiplier for the increase in CPI–U for 1972 in Table A of the February 24, 2016 memorandum (5.62265) results in an adjusted civil penalty of $5,623. Since this would result in an increase to the current civil penalty of greater than 150 percent, the adjusted civil penalty is $2,750 (Current penalty $1,100 × 2.5). The Cost Savings established a maximum civil penalty of $400,000 for a series of related violations of 49 U.S.C. 32308(a). Applying the multiplier for the increase in CPI–U for 1972 in Table A of the February 24, 2016 memorandum (5.62265) results in an adjusted civil penalty of $2,249,060. Since this would result in an increase to the current civil penalty of greater than 150 percent, the adjusted civil penalty is $1,500,000 (Current penalty $600,000 × 2.5).

Change to Penalties Under the Tire Consumer Information Provisions (49 CFR 578.6(d)(2))

The Energy Independence and Security Act of 2007, Pub. L. 110–140, 121 Stat. 1507 (2007) established a civil penalty of $50,000 for each violation related to the tire information fuel efficiency information program under 49 U.S.C. 32304A. Applying the multiplier for the increase in CPI–U for 2007 in Table A of the February 24, 2016 memorandum (1.13833) results in an adjusted civil penalty of $56,917.

Change to Penalties Under the Country of Origin Content Labeling Provisions (49 CFR 578.6(d)(2))

The American Automobile Labeling Act, Pub L. 102–388, § 210, 106 Stat. 1556 (1992), established a civil penalty of $1,000 for willfully failing to affix, or failing to maintain, the label required by the Act. Applying the multiplier for the increase in CPI–U for 1992 in Table A of the February 24, 2016 memorandum (1.67728) results in an adjusted civil penalty of $1,677.

Change to Penalties Under the Odometer Tampering and Disclosure Provisions (49 CFR 578.6(f))

MAP–21 adjusted the civil penalty for each violation of 49 U.S.C. Chapter 327 or a regulation issued thereunder related to odometer tampering and disclosure to $10,000 per violation. Applying the multiplier for the increase in CPI–U for 2012 in Table A of the February 24, 2016 memorandum (1.02819) results in an adjusted civil penalty of $10,282. MAP–21 established a maximum civil penalty of $1,000,000 for a related series of violations of 49 U.S.C. Chapter 327 or a regulation issued thereunder. Applying the multiplier for the increase in CPI–U for 2012 results in an adjusted civil penalty of $1,028,190 for a related series of violations.

MAP–21 also adjusted the civil penalty for violations of 49 U.S.C. Chapter 327 or a regulation issued thereunder with intent to defraud to $10,000 per violation. Applying the multiplier for the increase in CPI–U for 2012 results in an adjusted civil penalty of $10,282.

Change to Penalties Under the Vehicle Theft Protection Provisions (49 CFR 578.6(g))

The Motor Vehicle Theft Law Enforcement Act of 1984 (Vehicle Theft Act), Public Law 98–547, § 608, 98 Stat. 2762 (1984), established a civil penalty of $1,000 for each violation of 49 U.S.C. 33114(a)(1)–(4). Applying the multiplier for the increase in CPI–U for 1984 in Table A of the February 24, 2016 memorandum (2.25867) results in an adjusted civil penalty of $2,259. The Vehicle Theft Act also established a maximum penalty of $250,000 for a related series of violations of 49 U.S.C. 33114(a)(1)–(4). Applying the multiplier for the increase in CPI–U for 1984 results in an adjusted civil penalty of $564,668.

The Anti Car Theft Act of 1992 established a civil penalty of $100,000 per day for violations of the Anti Car Theft Act related to operation of a chop shop. Applying the multiplier for the increase in CPI–U for 1992 in Table A of the February 24, 2016 memorandum (1.67728) results in an adjusted civil penalty of $167,728.

Change to Penalties Under the Automobile Fuel Economy Provisions (49 CFR 578.6(g))

The Energy Policy and Conservation Act (EPCA) of 1975, Public Law 94–163, § 508, 89 Stat. 912 (1975), established a civil penalty of $10,000 for each violation of 49 U.S.C. 32911(a). Applying the multiplier for the increase in CPI–U for 1975 in Table A of the February 24, 2016 memorandum (4.3322) results in an adjusted civil penalty of $43,322. Since this would result in an increase to the current civil penalty of greater than 150 percent, the adjusted civil penalty is $40,000 (Current penalty $16,000 × 2.5).

EPCA also established a civil penalty of $5 multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy for automobiles to which the standard applies manufactured by the manufacturer during the model year, multiplied by the number of those automobile and reduced by the credits available to the manufacturer. Applying the multiplier for the increase in CPI–U for 1975 results in an adjusted civil penalty of $22. Since this would result in an increase to the current civil penalty of greater than 150 percent, the adjusted civil penalty is $14 (Current penalty $5.50 × 2.5).

In 1978 Congress amended EPCA, Public Law 95–619, 402, 92 Stat. 3255 (Nov. 9, 1978) to allow the Secretary of Transportation to establish a new civil penalty for each .1 of a mile a gallon by which the applicable average fuel economy standard under EPCA exceeds the average fuel economy for automobiles to which the standard applies manufactured by the manufacturer during the model year. These amendments, which are codified in 49 U.S.C. 32912(c), state that the new civil penalty cannot be more than $10. Applying the multiplier for the increase in CPI–U for 1978 in Table A of the February 24, 2016 memorandum (3.54453) to the $10 maximum penalty the Secretary is permitted to establish under 49 U.S.C. 32912(c) results in an adjusted civil penalty of $35. Since this would result in an increase of greater than 150 percent, the adjusted maximum civil penalty that the Secretary is permitted to establish under 49 U.S.C. 32912(c) is $25 (Current maximum penalty $10 × 2.5). Because the new maximum penalty that the Secretary is permitted to establish under 49 U.S.C. 32912(c) is $25, the new adjusted civil penalty in 49 CFR 578.6(h)(2) of $14 does not exceed the maximum penalty that the Secretary is permitted to impose.

Change to Penalties Under the Medium and Heavy Duty Vehicle Fuel Efficiency Program (49 CFR 578.6(i))

In 2011, the agency established a maximum penalty of $37,500 per vehicle or engine for violations of 49 CFR 535. Applying the multiplier for the increase in CPI–U for 2011 in Table A of the February 24, 2016 memorandum (1.05042) results in an adjusted civil penalty of $39,391.

III. Codification of Increases to NHTSA's Civil Penalty Authority in the FAST Act

On December 4, 2015, the FAST Act, Public Law 114–94, was signed into law. Section 24110 of the FAST Act

increased the maximum civil penalty that NHTSA may collect for each violation of the Safety Act under 49 U.S.C. 30165(a)(1) and 49 U.S.C. 30165(a)(3) to $21,000 per violation (previously $7,000) and the maximum amount of civil penalties that NHTSA can collect for a related series of violations to $105 million (previously $35 million). In order for these increases to become effective, the Secretary of Transportation was required to certify to Congress that NHTSA has issued the final rule required by Section 31203 of MAP–21. Section 31203 required NHTSA to provide an interpretation of civil penalty factors in 49 U.S.C. 30165 for NHTSA to consider in determining the amount of penalty or compromise for violations of the Safety Act. Pub. L. 112–141, § 31203, 126 Stat. 758 (2012). The increases in maximum civil penalties in Section 24110 of the FAST Act became effective the date of the Secretary's certification.

NHTSA issued the final rule required by Section 31203 of MAP–21 on February 24, 2016. On March 17, 2016, the Secretary certified to Congress by letter to the Chairman and Ranking Member of the Senate Committee on Commerce, Science, and Transportation, and to the Chairman and Ranking Member of the House Committee on Energy and Commerce that NHTSA had issued the Final Rule. On March 22, 2016, the Office of the Secretary of Transportation published a notice in the **Federal Register** notifying the public that the increase was in effect.[2] NHTSA is codifying these increases in this interm final rule.

IV. Public Comment

NHTSA is promulgating this interim final rule to ensure that the amount of civil penalties contained in 49 CFR 578.6 reflect the statutorily mandated ranges as adjusted for inflation. Pursuant to the 2015 Act, NHTSA is required to promulgate a ''catch-up adjustment'' through an interim final rule. Pursuant to the 2015 Act and 5 U.S.C. 553(b)(3)(B), NHTSA finds that good cause exists for immediate implementation of this interim final rule without prior notice and comment because it would be impracticable to delay publication of this rule for notice and comment and because public comment is unnecessary. By operation of the Act, NHTSA must publish the catch-up adjustment by July 1, 2016. Additionally, the 2015 Act provides a clear formula for adjustment of the civil penalties, leaving the agency little room for discretion. Furthermore, the increases in NHTSA's civil penalty authority authorized by the FAST Act are already in effect and the amendments merely update 49 CFR 578.6 to reflect the new statutory civil penalty. For these reasons, NHTSA finds that notice and comment would be impracticable and is unnecessary in this situation.

V. Rulemaking Analyses and Notices

Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This action is limited to the adoption of adjustments of civil penalties under statutes that the agency enforces, and has been determined to be not ''significant'' under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget. Because this rulemaking does not change the number of entities that are subject to civil penalties, the impacts are limited. Furthermore, excluding the penalties in 49 CFR 578.6(h)(2) for violations of Corporate Average Fuel Economy standards, this final rule does not establish civil penalty amounts that NHTSA is required to seek.

We also do not expect the increase in the civil penalty amount in 49 CFR 578.6(h)(2) to be economically significant. Over the last five model years, NHTSA has collected an average of $20 million per model year in civil penalties under 49 CFR 578.6(h)(2). Therefore, increasing the current civil penalty amount by 150 percent would not result in an annual effect on the economy of $100 million or more.

Furthermore, NHTSA contends that the economic effects of increasing the civil penalty in 49 CFR 578.6(h)(2) are not directly proportional to the increase in the amount of civil penalty. Manufacturers could pursue several strategies to avoid liability for civil penalties under 49 CFR 578.6(h)(2), including purchasing offset credits from other manufacturers, production and marketing changes to influence the average fuel economy of vehicles produced by the manufacturer, and vehicle design changes intended to increase the vehicle's fuel economy. NHTSA contends that manufacturers will pursue the strategy, or mix on strategies, that results in the lowest overall cost to the manufacturer. For this reason the expected economic impacts of this rule can be expected to be lower than the amount of the increase to the civil penalty amount in 49 CFR 578.6(h)(2).

Regulatory Flexibility Act

We have also considered the impacts of this rule under the Regulatory Flexibility Act. I certify that this rule will not have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The amendments almost entirely potentially affect manufacturers of motor vehicles and motor vehicle equipment.

The Small Business Administration's regulations define a small business in part as a business entity ''which operates primarily within the United States.'' 13 CFR 121.105(a). SBA's size standards were previously organized according to Standard Industrial Classification (''SIC'') Codes. SIC Code 336211 ''Motor Vehicle Body Manufacturing'' applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System (''NAICS''), Subsector 336—Transportation Equipment Manufacturing, which provides a small business size standard of 1,000 employees or fewer for automobile manufacturing businesses. Other motor vehicle-related industries have lower size requirements that range between 500 and 750 employees.

For example, according to the SBA coding system, businesses that manufacture truck trailers, travel trailers/campers, carburetors, pistons, piston rings, valves, vehicular lighting equipment, motor vehicle seating/interior trim, and motor vehicle stamping qualify as small businesses if they employ 500 or fewer employees. Similarly, businesses that manufacture gasoline engines, engine parts, electrical and electronic equipment (non-vehicle lighting), motor vehicle steering/suspension components (excluding springs), motor vehicle brake systems, transmissions/power train parts, motor vehicle air-conditioning, and all other motor vehicle parts qualify as small businesses if they employ 750 or fewer employees. See *http://www.sba.gov/size/sizetable.pdf* for further details.

Many small businesses are subject to the penalty provisions of 49 U.S.C. Chapter 301 (Safety Act) and therefore may be affected by the adjustments made in this rulemaking. For example, based on comprehensive reporting

[2] 81 FR 15413.

pursuant to the early warning reporting (EWR) rule under the Safety Act, 49 CFR part 579, of the more than 60 light vehicle manufacturers reporting, over half are small businesses. Also, there are other, relatively low production vehicle manufacturers that are not subject to comprehensive EWR reporting. Furthermore, there are about 70 registered importers. Equipment manufacturers (including importers), entities selling motor vehicles and motor vehicle equipment, and motor vehicle repair businesses are also subject to penalties under 49 U.S.C. 30165.

As noted throughout this preamble, this rule will only increase the penalty amounts that the agency could obtain for violations covered by 49 CFR 578.6. Under the Safety Act, the penalty provision requires the agency to take into account the size of a business when determining the appropriate penalty in an individual case. See 49 U.S.C. 30165(b). The agency would also consider the size of a business under its civil penalty policy when determining the appropriate civil penalty amount. See 62 FR 37115 (July 10, 1997) (NHTSA's civil penalty policy under the Small Business Regulatory Enforcement Fairness Act (''SBREFA'')). The penalty adjustments would not affect our civil penalty policy under SBREFA.

Since, this regulation does not establish a penalty amount that NHTSA is required to seek, except for civil penalties under 49 CFR 578.6(h)(2), this rule will not have a significant economic impact on small businesses. Furthermore, low volume manufacturers can petition for an exemption from the Corporate Average Fuel Economy standards under 49 CFR part 525. This will lessen the impacts of this rulemaking on small business by allowing them to avoid liability for penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this rule.

Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The reason is that this rule will generally apply to motor vehicle and motor vehicle equipment manufacturers (including importers), entities that sell motor vehicles and equipment and motor vehicle repair businesses. Thus, the requirements of Section 6 of the Executive Order do not apply.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rule will not have a $100 million effect, no Unfunded Mandates assessment will be prepared.

Executive Order 12778 (Civil Justice Reform)

This rule does not have a retroactive or preemptive effect. Judicial review of this rule may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, we state that there are no requirements for information collection associated with this rulemaking action.

Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://dms.dot.gov.*

List of Subjects in 49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires, Penalties.

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for 49 CFR part 578 is revised to read as follows:

Authority: Pub. L. 101–410, Pub. L. 104–134, Pub. L. 109–59, Pub. L. 114–74, Pub. L. 114–94, 49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

■ 2. Section 578.6 is revised to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

(a) *Motor vehicle safety*—(1) *In general.* A person who violates any of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, or 30141 through 30147 of Title 49 of the United States Code or a regulation prescribed under any of those sections is liable to the United States Government for a civil penalty of not more than $21,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty under this paragraph for a related series of violations is $105,000,000.

(2) *School buses.* Notwithstanding paragraph (a)(1) of this section, a person who:

(i) Violates section 30112(a)(1) of Title 49 United States Code by the manufacture, sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation of a school bus or school bus equipment (as those terms are defined in 49 U.S.C. 30125(a)); or

(ii) Violates section 30112(a)(2) of Title 49 United States Code, shall be subject to a civil penalty of not more than $11,940 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle

equipment and for each failure or refusal to allow or perform an act required by this section. The maximum penalty under this paragraph for a related series of violations is $17,909,550.

(3) *Section 30166.* A person who violates section 30166 of Title 49 of the United States Code or a regulation prescribed under that section is liable to the United States Government for a civil penalty for failing or refusing to allow or perform an act required under that section or regulation. The maximum penalty under this paragraph is $21,000 per violation per day. The maximum penalty under this paragraph for a related series of daily violations is $105,000,000.

(4) *False and misleading reports.* A person who knowingly and willfully submits materially false or misleading information to the Secretary, after certifying the same information as accurate under the certification process established pursuant to section 30166(o), shall be subject to a civil penalty of not more than $5,141 per day. The maximum penalty under this paragraph for a related series of daily violations is $1,028,190.

(b) *National Automobile Title Information System.* An individual or entity violating 49 U.S.C. Chapter 305 is liable to the United States Government for a civil penalty of not more than $1,677 for each violation.

(c) *Bumper standards.* (1) A person that violates 49 U.S.C. 32506(a) is liable to the United States Government for a civil penalty of not more than $2,750 for each violation. A separate violation occurs for each passenger motor vehicle or item of passenger motor vehicle equipment involved in a violation of 49 U.S.C. 32506(a)(1) or (4)—

(i) That does not comply with a standard prescribed under 49 U.S.C. 32502, or

(ii) For which a certificate is not provided, or for which a false or misleading certificate is provided, under 49 U.S.C. 32504.

(2) The maximum civil penalty under this paragraph (c) for a related series of violations is $3,062,500.

(d) *Consumer information*—(1) *Crashworthiness and damage susceptibility.* A person who violates 49 U.S.C. 32308(a), regarding crashworthiness and damage susceptibility, is liable to the United States Government for a civil penalty of not more than $2,750 for each violation. Each failure to provide information or comply with a regulation in violation of 49 U.S.C. 32308(a) is a separate violation. The maximum penalty under this paragraph for a related series of violations is $1,500,000.

(2) *Consumer tire information.* Any person who fails to comply with the national tire fuel efficiency program under 49 U.S.C. 32304A is liable to the United States Government for a civil penalty of not more than $56,917 for each violation.

(e) *Country of origin content labeling.* A manufacturer of a passenger motor vehicle distributed in commerce for sale in the United States that willfully fails to attach the label required under 49 U.S.C. 32304 to a new passenger motor vehicle that the manufacturer manufactures or imports, or a dealer that fails to maintain that label as required under 49 U.S.C. 32304, is liable to the United States Government for a civil penalty of not more than $1,677 for each violation. Each failure to attach or maintain that label for each vehicle is a separate violation.

(f) *Odometer tampering and disclosure.* (1) A person that violates 49 U.S.C. Chapter 327 or a regulation prescribed or order issued thereunder is liable to the United States Government for a civil penalty of not more than $10,281 for each violation. A separate violation occurs for each motor vehicle or device involved in the violation. The maximum civil penalty under this paragraph for a related series of violations is $1,028,190.

(2) A person that violates 49 U.S.C. Chapter 327 or a regulation prescribed or order issued thereunder, with intent to defraud, is liable for three times the actual damages or $10,281, whichever is greater.

(g) *Vehicle theft protection.* (1) A person that violates 49 U.S.C. 33114(a)(1)-(4) is liable to the United States Government for a civil penalty of not more than $2,259 for each violation. The failure of more than one part of a single motor vehicle to conform to an applicable standard under 49 U.S.C. 33102 or 33103 is only a single violation. The maximum penalty under this paragraph for a related series of violations is $564,668.

(2) A person that violates 49 U.S.C. 33114(a)(5) is liable to the United States Government for a civil penalty of not more than $167,728 a day for each violation.

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than $40,000 for each violation. A separate violation occurs for each day the violation continues.

(2) Except as provided in 49 U.S.C. 32912(c), a manufacturer that violates a standard prescribed for a model year under 49 U.S.C. 32902 is liable to the United States Government for a civil penalty of $14 multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(i) Calculated under 49 U.S.C. 32904(a)(1)(A) or (B) for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(ii) Multiplied by the number of those automobiles; and

(iii) Reduced by the credits available to the manufacturer under 49 U.S.C. 32903 for the model year.

(i) *Medium- and heavy-duty vehicle fuel efficiency.* The maximum civil penalty for a violation of the fuel consumption standards of 49 CFR part 535 is not more than $39,391 per vehicle or engine. The maximum civil penalty for a related series of violations shall be determined by multiplying $39,391 times the vehicle or engine production volume for the model year in question within the regulatory averaging set.

Issued on: June 22, 2016.

Mark R. Rosekind,

Administrator.

[FR Doc. 2016–15800 Filed 7–1–16; 8:45 am]

BILLING CODE 4910–59–P

Exhibit E

United States Government Accountability Office

GAO

Report to the Chairman, Subcommittee on Energy and Environment, Committee on Energy and Commerce, House of Representatives

February 2010

VEHICLE FUEL ECONOMY

NHTSA and EPA's Partnership for Setting Fuel Economy and Greenhouse Gas Emissions Standards Improved Analysis and Should Be Maintained

Although NHTSA and EPA Worked to Propose CAFE and GHG Emissions Standards That Are Aligned, the Programs Have Several Key Differences

Although the Proposed Standards Based on Vehicle Footprint Should Result in Benefits, Actual Vehicle Sales May Affect the Level of Benefits Realized

Although the proposed CAFE and GHG emissions standards are distinct and automobile manufacturers will be subject to both sets, EPA and NHTSA have worked to develop standards that are aligned (what the agencies refer to as "harmonized") with the intention that manufacturers can build one fleet of vehicles to comply with both sets of standards. This should lower the cost of compliance for manufacturers compared to a case in which the standards were set separately and without regard for the other's design. This harmonization is possible because fuel economy and GHG emissions have a clear and direct relationship—specifically, vehicle tailpipe carbon dioxide emissions are directly related to the quantity of fuel burned.[20] Given the relationship between GHG emissions and fuel economy, actions to increase fuel economy also necessarily reduce GHG emissions; therefore, manufacturers can use the same technologies to help meet both standards.

NHTSA and EPA have proposed standards for both passenger cars and light trucks that are based on vehicle footprint so that each vehicle is subject to a target level based on its footprint, with smaller vehicles having a stricter target (see fig. 3). The footprint-based standard is applied to individual vehicle models based on the size of each vehicle. Because each manufacturer sells a different mix of vehicle sizes, under the proposed standards each manufacturer will have different CAFE and GHG emissions standards.

[20]Vehicle tailpipe emissions of carbon dioxide account for 90 to 95 percent of all vehicle GHG emissions.

NHTSA first adopted a footprint-based approach—as opposed to a single fleetwide standard—for model year 2008 through 2011 light truck standards.[21] A number of the experts we interviewed supported the current approach of subjecting both passenger car and light truck fleets to footprint-based standards. In the model year 2008 through 2011 light truck rule, NHTSA cited several potential benefits of a footprint-based approach over a single, fleetwide CAFE standard, including the following:

- *Larger reductions in oil consumption.* Oil consumption would be reduced because automakers would be required to improve the fuel economy of vehicles of all sizes rather than only those near the standard.

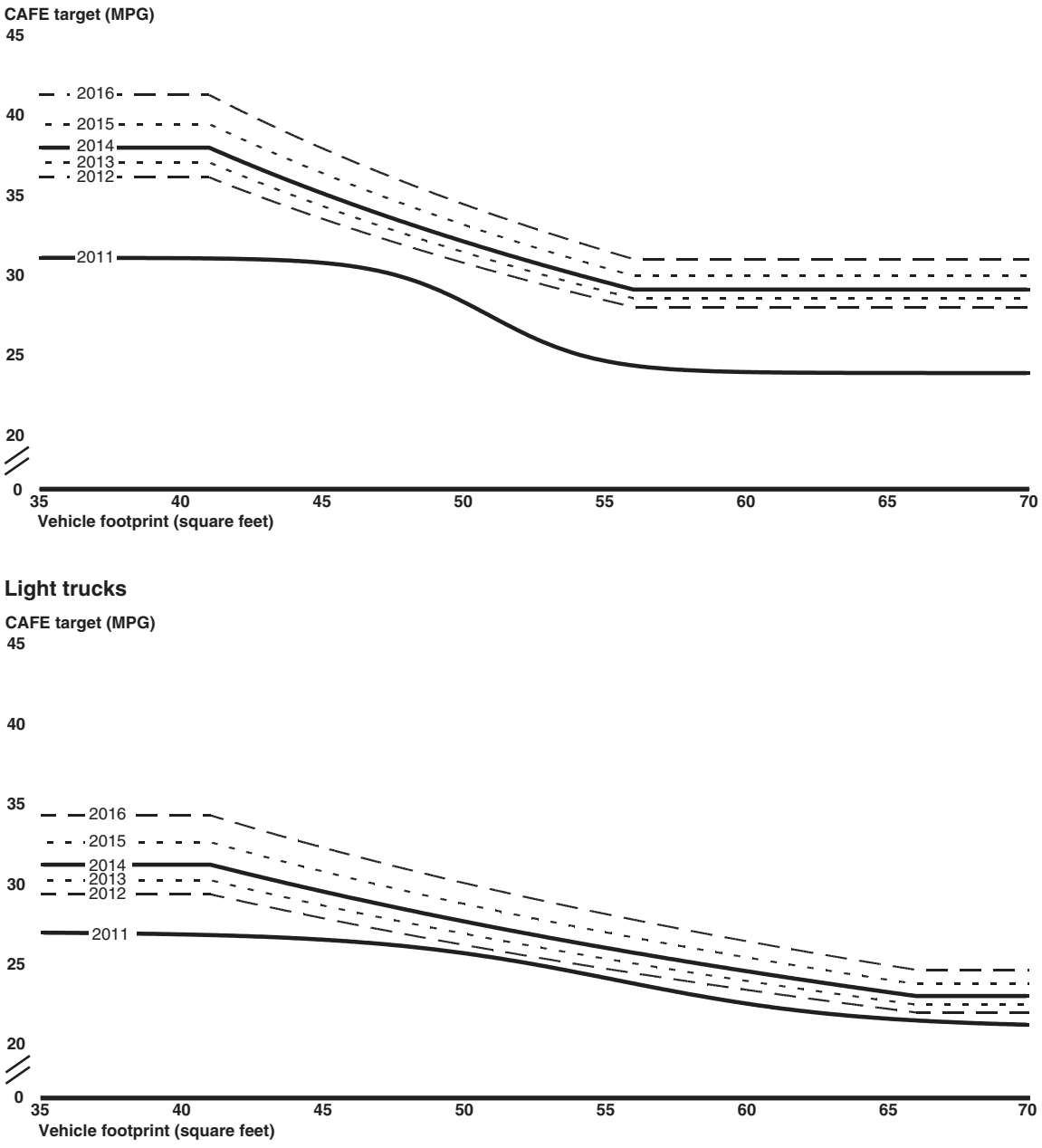
- *Enhanced safety.* Manufacturers would not have an incentive to comply with CAFE standards by pursuing strategies that compromise safety—such as (1) reducing the size of vehicles (applicable fuel-economy targets now become higher as size decreases) or (2) designing models to be classified as light trucks rather than cars, which can increase a vehicle's propensity to roll over—in order to comply with CAFE standards. Under a single standard, manufacturers could reduce vehicle size as one approach for CAFE compliance.

- *More even disbursement of the regulatory cost burden.* Fuel-economy improvements would be spread across the industry, instead of concentrating on manufacturers of heavier, lower fuel-economy vehicles.

- *Addressing concerns about consumer choice.* Manufacturers now must improve the fuel economy of all light trucks, regardless of size, which addresses criticisms that single, fleetwide CAFE standards were hindering the efforts of some companies to offer a mix of vehicles matching consumer desires. For instance, under the previous system, instead of installing more fuel-saving technologies across their fleets, manufacturers might have moved toward building fewer large vehicles and more small vehicles to meet new CAFE standards, even though consumers typically have not demanded small vehicles. In a footprint-based standard, manufacturers must improve the fuel economy of all light trucks, no matter their size.

[21]For model year 2008 through 2010 light trucks standards, manufacturers could opt to comply with the reformed footprint-based standards or an equivalent single fleetwide standard. Only General Motors opted to voluntarily comply with the reformed standard in 2008 and 2009. Starting with model year 2011 light trucks, all manufacturers must adhere to the footprint-based standard.

Figure 3: Proposed CAFE Footprint Curves for Passenger Cars and Light Trucks, Model Years 2012 through 2016 and Existing 2011 Curve



Source: Notice of Proposed Rulemaking for CAFE standards for MY 2012 to 2016.

The CAFE requirement for each manufacturer—which is the basis for determining compliance[22]—will be determined at the end of the model year based on actual production. For example, manufacturers selling a greater proportion of large vehicles will have a lower average target to meet than will manufacturers focusing on smaller vehicles. Based on estimated sales projections, the proposed targets are estimated to achieve an average of 34.1 mpg across all model year 2016 vehicles sold.

While NHTSA and EPA expect benefits from adopting a standard based on vehicle footprint and predict that the administration's goal of a fleetwide average 34.1 mpg and 250 grams per mile carbon dioxide in 2016 will be met, there is no guarantee that a specific national target will be achieved.[23] This is a tradeoff of adopting a footprint standard compared to the single national CAFE standard NHTSA used in the past. Because the actual fleetwide fuel-economy levels will depend on actual vehicle sales—specifically, the size of cars consumers buy—there is the possibility that the actual fleetwide mpg in 2016 will be higher or lower and realized costs and benefits of the standards will be higher or lower than estimated. For example, even though all of the vehicles in each manufacturer's fleet may be in compliance with its footprint-based requirement, manufacturers may sell a greater number of large-footprint vehicles than predicted, which would lower each manufacturer's CAFE requirement. If this is the case, the national fleet may not reach the target of 34.1 mpg by 2016, and the estimated benefits of the standards, which assume achieving a national fleetwide average of 34.1 mpg, would not be fully realized.[24] The opposite, however, could also be the case. If a greater number of smaller vehicles (generally with higher CAFE levels) are sold than expected, manufacturers will have higher CAFE requirements, the national fleet may exceed the

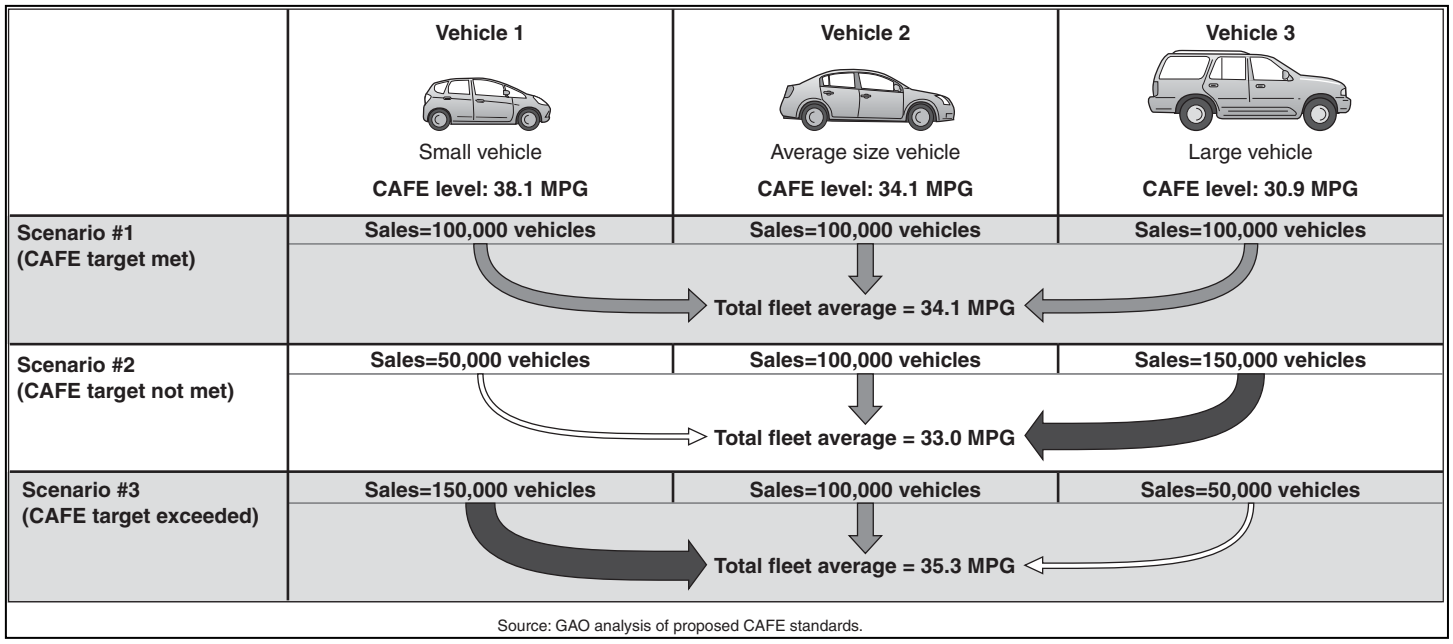
[22]Manufacturer compliance will be determined based on the fuel economy levels of actual vehicles produced compared with the CAFE footprint standard for each of those vehicles.

[23]The administration's goal has often been stated as a fleetwide average of 35.5 mpg. This value is equivalent to the 250 grams per mile carbon dioxide value if all of the carbon dioxide reductions come from fuel economy improvements.

[24]Some public comments on the Notice of Proposed Rulemaking suggested that NHTSA should mitigate against this possibility by imposing a "backstop"—a minimum CAFE standard that all manufacturers would be required to meet regardless of the footprint of their vehicles. EISA requires a backstop standard for domestically-manufactured passenger cars of either 27.5 mpg or 92 percent of the average projected fuel economy level of passenger cars in any given model year, whichever is greater. However, NHTSA did not include a backstop for imported passenger cars or light trucks in the September 2009 proposed rule.

target of 34.1 mpg, and estimated benefits assuming a fleetwide average of 34.1 mpg would be exceeded (see fig. 4). Similar scenarios could occur with respect to EPA's GHG standards.

Figure 4: Potential Scenarios for Meeting CAFE Targets, Based on Varying Vehicle Sales



Source: GAO analysis of proposed CAFE standards.

Variation in the Standards, Which Result Primarily from Differences in Legal Authorities, May Present Challenges, but GHG Penalties May Increase Compliance

Several key differences between the EPA and NHTSA standards largely arise from the legal authorities under which the standards are set. NHTSA's authority to administer the CAFE program is derived from EPCA, as amended by EISA, requires that NHTSA, for passenger cars and light trucks in each future model year, establish standards at "the maximum feasible average fuel-economy level that it decides manufacturers can achieve in that model year." EPCA further directs NHTSA to make this determination based on consideration of four statutory factors: technological feasibility, economic practicability, the effect of other standards of the government on fuel economy, and the need of the nation to conserve energy. However, the law does not direct NHTSA on how to balance these four factors—which can conflict—thereby giving NHTSA discretion to define, give weight to, and balance the four factors based on the circumstances in each CAFE rulemaking. Furthermore, how NHTSA balances these four factors can vary from rulemaking to rulemaking. For example, in the model year 2012 through 2016 rulemaking, NHTSA cited

economic practicability concerns—given the state of the economy and the financial state of automakers—to set standards at a level lower than it otherwise could have in accordance with Office of Management and Budget (OMB) guidelines on federal regulatory impact analysis.[25] In addition to the four statutory factors, NHTSA also considers the potential for adverse safety consequences and consumer demand when establishing CAFE standards.

EPA's authority to set GHG standards is derived from the CAA, which authorizes EPA to regulate emissions of air pollutants from all mobile source categories. EPA must prescribe standards for the emission of any air pollutant from motor vehicles which causes or contributes to air pollution that endangers public health or welfare. In prescribing these statutory standards, EPA considers such issues as technology effectiveness, cost of compliance, the lead time necessary to implement the technology, safety, energy impacts associated with the use of the technology, and other impacts on consumers. EPA has the discretion to consider and weigh these various factors, particularly those related to issues of technical feasibility and lead time.

Some differences affect the process each agency must use to set standards, which in turn leads to key differences between the standards. For example, EPCA requires that EPA, in testing fuel economy of passenger vehicles, use 1975 test procedures or procedures that give comparable results under which air conditioning is not turned on. As a result, manufacturers cannot realize the benefits of air conditioning improvements for complying with CAFE standards, and NHTSA has, to date, not taken into account air conditioning improvements when setting CAFE standards.[26] Under the CAA, however, EPA is not subject to the same limitations, and its proposed GHG standards account for air conditioner improvements. Specifically, the mpg equivalent of EPA's 2016 target of 250 g/mi of CO_2 emissions corresponds to 35.5 mpg. The CAFE target is 34.1 mpg because it cannot account for air conditioning improvements.

In addition, certain flexibility mechanisms designed to achieve and reduce the cost of compliance are authorized by one program but not the other.

[25]OMB Circular A-4, September 17, 2003.

[26]However, in the current proposed rule, NHTSA sought comment on providing manufacturers with CAFE credits for improving air conditioner efficiency for light trucks.

This creates potential challenges to harmonization and for manufacturers attempting to manage the design of a fleet. For example, EPA's proposed GHG standards offer a "temporary lead time" mechanism for manufacturers that sell a limited number of vehicles in the U.S.[27] Although this specific flexibility does not exist in the CAFE standards, under EPCA, NHTSA may exempt qualifying small-volume manufacturers (defined as manufacturers that produce under 10,000 vehicles worldwide annually) from the passenger car standard for a model year. As a result, manufacturers that are able to take advantage of EPA's temporary lead time mechanism to comply with GHG standards may face challenges in complying with CAFE standards. Some experts we met with said that these inconsistencies in flexibility mechanisms between the two sets of standards may present challenges to some manufacturers in meeting the harmonized standards.

Mechanisms available for enforcing the standards also differ between the two agencies due to statutory differences. For example, the Clean Air Act prohibits the sale of vehicles without a certificate of conformity from EPA which indicates that the vehicle meets applicable emission standards.[28] If EPA determines that a vehicle does not meet the emission standards, it may not issue a certificate, thus preventing the manufacturer from legally selling the vehicle. The Clean Air Act also gives EPA authority to recall noncompliant vehicles. NHTSA can take neither of these actions. Because a CAFE standard applies to a manufacturer's entire fleet for a model year, CAFE fines are assessed for the entire noncomplying fleet. Pursuant to EPCA, fines associated with CAFE noncompliance are currently $5.50 for every tenth of an mpg a manufacturer's fuel economy is short of the standard multiplied by the number of vehicles in a manufacturer's fleet for a given model year. NHTSA recognizes that some manufacturers regularly pay fines instead of complying with CAFE standards; in particular, many European manufacturers pay fines each year. Fines for CAFE standards have not been increased since 1997, and GAO has reported that, as a result, CAFE penalties may not provide a strong enough incentive for manufacturers to comply with CAFE. NHTSA officials noted that under EPCA, NHTSA has the authority to raise the fines up to $10 per tenth of an mpg. However, raising fines requires an analysis finding that substantial energy conservation would result and that raising fines would not have

[27]This allowance is available during model years 2012 though 2015 to manufacturers whose vehicles sales in the U.S. in model year 2009 are below 400,000 vehicles.

[28]42 USCS § 7522(a)(1).

substantially deleterious impact on the U.S. economy. GAO has recommended that agencies collecting penalties regularly conduct these types of analyses.[29]

In contrast to CAFE fines, penalties for violation of a motor vehicle emission standard under the CAA, which may be much higher, are determined on a per-vehicle basis. The CAA gives EPA broad authority to levy fines and require manufacturers to remedy vehicles if the agency determines there are a substantial number of noncomplying vehicles.[30] EPA must consider an assortment of factors, such as the gravity of the violation, the economic impact of the violation, the violator's history of compliance, and other matters,[31] in determining the appropriate penalty. The CAA does not authorize manufacturers to intentionally pay fines as an alternative to compliance, and EPA does not include in its standard-setting modeling analysis the option for manufacturers to pay fines instead of compliance. Manufacturers may be subject to fines as high as $37,500 per vehicle under Section 205 of the CAA. Given that fines for noncompliance with GHG standards may be higher than fines for noncompliance with CAFE, having harmonized standards may provide incentives to manufacturers that have traditionally chosen to pay CAFE penalties instead of complying with standards, to comply with both sets of standards.

[29]See GAO, *Vehicle Fuel Economy: Reforming Fuel Economy Standards Could Help Reduce Oil Consumption by Cars and Light Trucks, and Other Options Could Complement These Standards*, GAO-07-921(Washington, D.C.: Aug. 2, 2007) and GAO, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation under Current Law*, GAO-03-409 (Washington, D.C.: Mar. 14, 2003).

[30]74 Fed. Reg. 49454, 49477 (Sept. 28, 2009).

[31]42 U.S.C. § 7524(c)(2).

Exhibit F

Via Electronic and First Class Mail

October 1, 2015

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Mark R. Rosekind, Ph.D., Administrator
National Highway Traffic Safety Administration
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RE: Petition for Rulemaking to Implement New Emissions Testing for Motor Vehicles and Increase Penalties for Violations of Fuel Standards

Dear Administrator McCarthy and Administrator Rosekind,

The Center for Biological Diversity (the "Center") requests that you take immediate action to protect public health and the environment from the toxic impacts of greenhouse gas and nitrogen oxides emissions from motor vehicles, and from corporate practices designed to evade regulations restricting the quantity of these dangerous emissions. Specifically, pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), Title II of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7521-7554, and Title VI of the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. §§ 32901-32919, the Center requests that the U.S. Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA"):

(1) immediately conduct in-use emissions testing of each make and model of diesel-powered motor vehicles sold in the United States since 2009 that have not previously undergone such tests;

(2) immediately conduct in-use emissions testing of each make and model of other fossil fuel-powered motor vehicles sold in the United States since 2009 that have not previously undergone such tests;

(3) promulgate regulations to require on-road emissions testing for all types of new diesel-powered motor vehicles;

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(4) promulgate regulations to require on-road emissions testing for all other types of new fossil fuel-powered motor vehicles; and

(5) promulgate regulations to increase the penalties for violations of corporate average fuel economy standards.

As you are well-aware, Volkswagen recently admitted that 11 million of its diesel cars sold worldwide since 2009, including nearly half a million sold in the United States, contain software specifically designed to cheat emissions tests. The software — known as "defeat devices" — can detect when a car is being tested in a laboratory setting and adjusts engine operations to emit less-polluting exhaust during the test than in real-world driving conditions. EPA has said that these devices allowed each car to spew up to *40 times* the legal limit of nitrogen oxides emissions in the United States. Accordingly, in addition to the specific actions requested above, **the Center also requests that EPA assess the maximum permissible penalties against VW for such egregious violations of law.**

This widespread fraud not only deceived consumers who purchased VW cars based on the belief the cars were "clean diesel," but is a significant threat to public health and the environment. Emissions of nitrogen oxides contribute to climate change and ocean acidification — nitrogen oxides react with other substances to form the greenhouse gas ozone, and contain a highly potent and long-lived greenhouse gas. In addition, ground-level ozone can trigger or worsen asthma and other respiratory ailments, make the lungs more susceptible to infection, damage vegetation and reduce crop yields. Nitrogen oxides are also a precursor to particulate matter which causes breathing problems, lung tissue damage and premature death.

To make matters worse, the use of such devices, and thus unlawful emissions of such dangerous pollutants, may not be limited to VW. Indeed, defeat devices have existed almost since the inception of the CAA, and EPA has previously levied fines against car and truck manufacturers for the use of such devices. Recent reports indicate that tests of on-road emissions of cars made by other companies exceed that of laboratory testing, indicating that these manufactures might also be using defeat devices — or, at a minimum, are not performing as required. Despite the existence of technology that can measure emissions during normal operation and use, EPA does not require such tests for the vast majority of motor vehicles.

And the recent scandal highlights yet another industry-wide problem — that car manufacturers routinely pay fines, rather than comply with mandatory fuel economy standards that seek to improve fuel efficiency and reduce carbon dioxide emissions. As we have frequently pointed out, and as government reports indicate, the meager fines are too low to act as a deterrent, thereby failing to inspire the technological innovation contemplated by EPCA and the CAA. Yet NHTSA has not increased the penalty for violation of the standards in nearly two decades.

Comprehensive action is therefore needed to ensure long-term solutions to such pervasive problems. Taking the actions requested in this petition will improve the accuracy of emissions testing of motor vehicles and help ensure against future deception, and incentivize compliance with fuel economy standards intended to reduce greenhouse gas emissions and improve energy security. In other words, granting this petition will help better protect public health and the

environment from dangerous air pollutants from motor vehicles, while ensuring fuel economy continues to improve as intended by the CAA and EPCA.[1] The Center requests that EPA and NHTSA take the regulatory actions requested in this petition within 180 days.

I. Factual Background: Harmful Emissions from Motor Vehicles

As the VW scandal demonstrates, motor vehicles emit harmful air pollutants. In fact, according to the Union of Concerned Scientists, transportation is the largest single source of air pollution in the United States.[2] Motor vehicles emit carbon dioxide, oxides of nitrogen, particulate matter, hydrocarbons, carbon monoxide, sulfur dioxide, as well as benzene and other hazardous air pollutants.[3] These emissions contribute to a myriad of public health problems, negative impacts to public welfare and the environment, and climate change.

A. Emissions from Motor Vehicles Are Harmful to Public Health

Motor vehicles emit air pollutants that cause or contribute to health problems, including nitrogen oxides. For example, ground level ozone is created by chemical reaction between nitrogen oxides and volatile organic compounds. Ground-level ozone pollution is linked to many public health impacts, especially those related to respiratory function. Ozone can irritate the respiratory tract and throat, impair lung function, and cause coughing, chest pains and lung inflammation.[4] EPA has recognized the association between ozone exposure and hospital visits for respiratory problems — especially for children — noting that ozone pollution is responsible for as much as twenty percent of all summertime respiratory hospital visits.[5] Ozone is also linked to the development of respiratory diseases, such as asthma.[6] But the health effects of ozone are not limited to respiratory illnesses. Ozone pollution is linked to other serious health impacts, such as heart disease and certain types of strokes.[7] "[M]ost importantly," according to the American Lung Association, ozone exposure and the associated health impacts can shorten lives

[1] The provisions of this Petition are severable. If any request contained within this Petition is found to be invalid or unenforceable, the invalidity or lack of legal obligation shall not affect other provisions of the Petition.
[2] Union of Concerned Scientists, *Cars, Trucks and Air Pollution*, http://www.ucsusa.org/clean_vehicles/why-clean-cars/air-pollution-and-health/cars-trucks-air-pollution html#.Vgh8P_lViko (last updated Dec. 5, 2014).
[3] *Id.*
[4] Barbara Hackley et al., Air Pollution: Impact on Maternal and Perinatal Health, 52 J. MIDWIFERY & WOMEN'S HEALTH 435, 436 table 1 (2010), available at http://www.sciencedirect.com/science/article/pii/S1526952307001079.
[5] Ozone Action Days, Region 7 Air Program, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region07/air/quality/action htm (last updated Aug. 28, 2015).
[6] *Id.*; Michelle L. Bell et al., The Exposure-Response Curve for Ozone and Risk of Mortality and the Adequacy of Current Ozone Regulations, 114 ENVTL. HEALTH PERSPECTIVES 532, 532 (2006), available at http://www ncbi.nlm.nih.gov/pubmed/ 16581541.
[7] Jean-Bernard Ruidavets et al., Ozone Air Pollution Is Associated with Acute Myocardial Infarction, 111 CIRCULATION 563, 566 (2005), available at http://circ.ahajournals.org/content/111/5/563.long; J. B. Henrotin et al., Short Term Effects of Ozone Air Pollution on Ischaemic Stroke Occurrence: A Case Crossover Analysis from a 10-Year Population-Based Study in Dijon, France, 64 OCCUPATIONAL & ENVTL. MED. 439, 442 (2007), available at http://oem.bmj.com/content/64/7/439.short

by months and even years.[8] "Even at very low levels including days that meet current regulatory requirements," ozone is associated with premature mortality.[9]

Ozone also has detrimental ecological effects. According to EPA, ozone "affects sensitive vegetation and ecosystems, including forests, parks, wildlife refuges, and wilderness areas," especially during growing seasons.[10] Ozone can interfere with a plant's ability to produce and store food, visibly damage leaves, and make plants susceptible to damage from disease, insects, competition and severe weather.[11]

Nitrogen oxides also mix with other air pollutants to create particulate matter ("PM"). The effects associated with PM exposure are "premature mortality, increased hospital admissions and emergency department visits, and development of chronic respiratory disease."[12] California has identified diesel PM as a toxic air contaminant and has estimated that 70 percent of the cancer risk from the air Californians breathe is attributable to diesel PM; EPA says that diesel PM is "likely to be a carcinogen."[13] Diesel exhaust is a major contributor to PM pollution. In fact, it is estimated that diesel-powered vehicles and equipment account for nearly half of all nitrogen oxides and more than two-thirds of all PM emissions from U.S. transportation sources.[14]

B. Emissions from Motor Vehicles Contribute to Climate Change

The burning of fossil fuels is the largest source of domestic greenhouse gas emissions, accounting for 77 percent of total warming emissions in 2013.[15] One of the primary sources of such emissions is from the transportation sector, which in 2013 accounted for 27 percent of all greenhouse gas emissions in the United States.[16] The largest source of such emissions from the transportation sector is passenger cars, representing nearly 43 percent of emissions in 2013.[17]

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[8] Stephanie Carroll Carson, Ozone, Warming Temperatures, Coal-Fired Power Plants Impact NC Air, PUB. NEWS SERV. (May 2, 2014), http://www.publicnewsservice.org/2014-05-02/climate-change-air-quality/ozone-warmingtemperatures-coal-fired-power-plants-impact-nc-air/a39132-1.
[9] Bell, supra note 6 at 535.
[10] Ecosystem Effects, Ground-Level Ozone, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/airquality/ozonepollution/ecosystem html (last updated Sept. 25, 2015).
[11] *Id.*
[12] EPA, Fine Particulate Matter National Ambient Air Quality Standards, 80 Fed. Reg. 15340, 15347 (Mar. 23, 2015).
[13] Union of Concerned Scientists, *California: Diesel Trucks, Air Pollution and Public Health*, http://www.ucsusa.org/clean_vehicles/why-clean-cars/air-pollution-and-health/trucks-buses-and-other-commercial-vehicles/diesel-trucks-air-pollution.html#.VXRuhc9Viko; Trade, Health and Environmental Impact Project, *Driving Harm: Health and Community Impacts of Living Near Truck Corridors* (Jan. 2012), http://hydra.usc.edu/scehsc/pdfs/Trucks%20issue%20brief.%20January%202012.pdf.
[14] Union of Concerned Scientists, *Diesel Engines and Pubic Health*, http://www.ucsusa.org/clean_vehicles/why-clean-cars/air-pollution-and-health/trucks-buses-and-other-commercial-vehicles/diesel-engines-and-public.html#.Vgh-7vlViko (last accessed Sept. 28, 2015).
[15] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2013* (Apr. 15, 2015), EPA 430-R-15-004, available at http://www3.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2015-Main-Text.pdf.
[16] *Id*.
[17] *Id.*

The transportation sector has been the fastest-growing source of greenhouse gas emissions since 1990.[18]

Carbon dioxide is the dominant greenhouse gas driving observed changes in the Earth's climate.[19] Emissions of nitrogen oxides also contribute to climate change through two primary means: (1) nitrogen oxides react with other substances to form the greenhouse gas ozone; and (2) nitrous oxide is itself a highly potent and long-lived greenhouse gas. Nitrous oxide behaves very similarly to carbon dioxide in that it both directly traps heat in the atmosphere and remains in existence for many decades once emitted.[20]

There is a strong, international scientific consensus that anthropogenic climate threatens human society and natural systems. The U.S. Global Change Research Program in its 2009 report *Climate Change Impacts in the United States* similarly stated that "global warming is unequivocal and primarily human-induced" and "widespread climate-related impacts are occurring now and are expected to increase."[21] The U.S. National Research Council similarly concluded that "[c]limate change is occurring, is caused largely by human activities, and poses significant risks for — and in many cases is already affecting — a broad range of human and natural systems."[22] Based on observed and expected harms from climate change, in 2009 EPA concluded that greenhouse gas pollution endangers the health and welfare of current and future generations.[23] Current atmospheric concentrations of greenhouse gases are already resulting in significant climate change impacts that are projected to worsen as emissions rise.[24]

Key changes include warming temperatures, the increasing frequency of extreme weather events, rapidly melting glaciers, ice sheets, and sea ice and rising sea levels.[25] There will be significant costs associated with these changes. For example, in the United States in 2011 alone, a record 14 weather and climate disasters occurred, including droughts, heat waves, and floods, that cost at least $1 billion each in damages and loss of human lives.[26] In addition, air pollution components that trigger asthma attacks, specifically air particulates and ozone, are expected to increase with climate change;[27] in 2020, the continental United States could pay an average of

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[18] *Id.*
[19] NRC. 2011. Climate Stabilization Targets: Emissions, Concentrations, and Impacts over Decades to Millennia. Washington, DC: National Academies Press, *available at* http://www.nap.edu/catalog/12877.html.
[20] Solomon, S., et al., Technical Summary, Working Group I, (2007), at 27, *available at* http://ipccwg1.ucar.edu/wg1/Report/AR4WG1_Print_TS.pdf.
[21] Karl, T. R. et al. 2009. Global Climate Change Impacts in the United States. U.S. Global Change Research Program. Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson, (eds.). Cambridge University Press, 2009.
[22] NRC. 2010. Advancing the Science of Climate Change, National Research Council, available at www nap.edu.
[23] U.S. Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Federal Register 66496 (2009).
[24] Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: Climate Change Impacts in the United States: The Third National Climate Assessment. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2; IPCC. 2013. Summary for Policymakers. Working Group I Contribution to the IPCC Fifth Assessment Report Climate Change 2013: The Physical Science Basis.
[25] Melillo, supra n. 24; IPCC, supra n. 24.
[26] NOAA. 2012. NOAA : Extreme Weather 2011, *available at* http://www.noaa.gov/extreme2011/; WMO. 2012. World's 10th warmest year, warmest year with La Niña on record, second-lowest Arctic sea ice extent.
[27] Bernstein, A. S., and S. S. Myers. 2011. Climate change and children's health. Current Opinion in Pediatrics 23:221–6.

$5.4 billion (2008$) in health impact costs associated with the climate penalty on ozone, with California experiencing the greatest estimated impacts averaged at $729 million.[28]

Anthropogenic climate change also poses a significant threat to biodiversity. Climate change is already causing changes in distribution, phenology, physiology, genetics, species interactions, ecosystem services, demographic rates and population viability: many animals and plants are moving poleward and upward in elevation, shifting their timing of breeding and migration, and experiencing population declines and extirpations.[29] Because climate change is occurring at an unprecedented pace with multiple synergistic impacts, climate change is predicted to result in catastrophic species losses during this century.

The Intergovernmental Panel on Climate Change ("IPCC") concluded that 20 to 30 percent of plant and animal species will face an increased risk of extinction if global average temperature rise exceeds 1.5°C to 2.5°C relative to 1980-1999, with an increased risk of extinction for up to 70 percent of species worldwide if global average temperature exceeds 3.5°C relative to 1980-1999.[30] Other studies have predicted similarly severe losses: 15 to 37 percent of the world's plants and animals committed to extinction by 2050 under a mid-level emissions scenario;[31] the potential extinction of 10 to 14 percent of species by 2100 if climate change continues unabated;[32] and the loss of more than half of the present climatic range for 58 percent of plants and 35 percent of animals by the 2080s under the current emissions pathway, in a sample of 48,786 species.[33] Scientists have warned that the Earth is fast approaching a global "state-shift" that could result in unanticipated and rapid changes to Earth's biological systems.[34] As summarized by the 2014 National Climate Assessment, "landscapes and seascapes are changing rapidly, and species, including many iconic species, may disappear from regions where they have been prevalent or become extinct, altering some regions so much that their mix of plant and animal life will become almost unrecognizable."[35]

In addition, the ocean's absorption of anthropogenic greenhouse gas emissions, including both carbon dioxide and nitrogen oxides, has already resulted in more than a 30 percent increase

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[28] Union of Concerned Scientists, Rising Temperatures and Your Health: After the Storm - The Hidden Health Risks of Flooding in a Warming World (2012), *available at* http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/climate-change-and-flooding.pdf.

[29] Maclean, I. M. D., and R. J. Wilson. 2011. Recent ecological responses to climate change support predictions of high extinction risk. Proceedings of the National Academy of Sciences of the United States of America 108: 12337-1234; Warren, R., J. Price, A. Fischlin, S. de la Nava Santos, and G. Midgley, Increasing impacts of climate change upon ecosystems with increasing global mean temperature rise, 106 CLIMATE CHANGE 141–177 (2011); Cahill, A.E. et al. 2012. How does climate change cause extinction? Proceedings of the Royal Society B, doi:10.1098/rspb.2012.1890.

[30] IPCC. 2007. Climate Change 2007 : Synthesis Report: An Assessment of the Intergovernmental Panel on Climate Change. www.ipcc.ch.

[31] Thomas, C. D., et al., Extinction risk from climate change, 427 NATURE 145-48 (2004).

[32] Maclean and Wilson, supra n. 29.

[33] Warren, R. et al. 2013. Quantifying the benefit of early climate change mitigation in avoiding biodiversity loss. Nature Climate Change 3:678-682.

[34] Barnosky, A.D. et al., Approaching a state shift in Earth's biosphere, 486 NATURE 52 (2012).

[35] Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: Climate Change Impacts in the United States: The Third National Climate Assessment. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2.

in the acidity of ocean surface waters, at a rate faster than anything believed to have occurred in the past 300 million years.[36] Ocean acidity is projected to increase by 150 to 200 percent by the end of the century if carbon dioxide emissions continue unabated.[37] Ocean acidification negatively affects a wide range of marine species by hindering the ability of calcifying marine creatures to build protective shells and skeletons and by disrupting metabolism and critical biological functions.[38] The adverse effects of ocean acidification are already being observed in wild populations, including reduced coral calcification rates,[39] dissolution of pteropod shells in the California Current,[40] reduced shell weights of foraminifera in the Southern Ocean,[41] and mass die-offs of larval Pacific oysters in the Pacific Northwest.[42]

II. Legal Background: The Regulation of Emissions from Motor Vehicles

Given the negative impacts on public health and the environment caused by the emission of air pollutants from various sources, including the transportation sector, Congress has enacted several laws to regulate and limit the amount of air pollutants from motor vehicles.

A. The Clean Air Act

In enacting the CAA, Congress found that "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, *and the increasing use of*

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[36] Doney, S.C., Mahowald N. Lima, et al., "Impact of Anthropogenic Atmospheric Nitrogen and Sulfur Deposition on Ocean Acidification and the Inorganic Carbon System", Proc. Nat. Acad. Sci. 2007; 104(37); 14580. doi: 10173/pnas.0702218104; James C Orr, et al., Anthropogenic Ocean Acidification over the Twenty-First Century and its Impacts on Calcifying Organisms, 437 NATURE 681-86 (2005).

[37] Feely, Richard A., S. Doney and S. Cooley, 2009, "Ocean Acidification: Present Conditions and Future Changes in a High CO2 World", Oceanography 22 (4) (June): 36-47; Hönisch, Bärbel, Andy Ridgwell, Daniela N. Schmidt, Ellen Thomas, Samantha J. Gibbs, Apply Slujs, Re Zeebe et al. 2012; "The Geological Record of Ocean Acidification", Science 335 (6072) March: 1058-63. doi. 10. 1126/science. 1208277; Orr, James C. Victoria, J. Fabry, Oliver Aumont, Laurent Bopp, Scott C. Doney, Richard A. Feely, Anand Gnandaesikan, et al., Anthropogenic Ocean Acidification over the Twenty-First Century and Its Impact on Calcifying Organisms, 437 NATURE 681-86 (2005), doi: 10, 1038/nature 04095.

[38] Feely, supra n. 37; Fabry V.J., Seibel BA, Feely, RA, Orr J., "Impacts of Ocean Acidification on Marine Fauna and Ecosystem Processes" 65 ICES J. MAR SCI. 414 (2008); Kroeker K.J., Kordas, R.L., Crim R.N., Singh G.G., Meta-analysis Reveals Negative Yet Variable Effects of Ocean Acidification on Marine Organisms, ECOL. LETT., 2010:no-no. doi:10.1111/j.1461-0248.2010.01518.x.

[39] De'ath G. Lough JM, Fabricius KE, "Declining Coral Calcification on the Great Barrier Reef", 323 SCIENCE 116, doi:10.1126/science.1165283; Cooper T.F., De'Ath G., Fabricius KE, Lough, JM, Declining Coral Calcification in Massive Porties in Two Nearshore Regions of the Northern Great Barrier Reef, 14 GLOB CHANGE BIO. 529-538 (2008), doi:10.1111/j. 1365-2486.2007.01520 x; Bates N. Amat A., Andersson A., Feedbacks and Responses of Coral Calcification on the Bermuda Reef System to Seasonal Changes in Biological Processes and Ocean Acidification on the Bermuda Reef System, 7 BIOGEOSCIENCES 2509-2530 (2010), doi:105194/bg-7-2509-2010.

[40] Bednaršek N. Feely, RA, Reum JCP, Peterson B., Menkel J., Limacina Helicina Shell Dissolution as an Indicator of Declining Habitat Suitability Owing to Ocean Acidification in the California Current Ecosystem, Proc. R. Soc. B. 2014:281:20140123; Gledhill, D.K., Wannikhof R. Millero FJ, Eakin M. Ocean Acidification of the Greater Caribbean Region 1996- 2006, J. Geophys Res. 2008; 113(C10): C10031. doi:10.1029/2007JC004629.

[41] Moy, A.D., Howard W.R., Bray S.G., Trull, T.W., Reduced Calcification in Modern Southern Ocean Planktonic Foraminifera, 2 NAT. GEOSCI. 276-280 (2009), doi:10,1038/ngeo460.

[42] Barton A., Hales B., Waldbusser G.G., Langdo C., Feely R., The Pacific Oyster, Crassostrea Gigas, Shows A Negative Correlation to Naturally Elevated Carbon Dioxide levels: Implications for Near Term Ocean Acidification Effects, 57 LIMMOL OCEANOGR. 698-710 (2012), doi:10.4319/lo. 2012.573.0698.

motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock..."[43] Accordingly, the CAA establishes a comprehensive scheme "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[44]

To reach these goals, Title II of the CAA prescribes a regulatory scheme to control emissions from mobile sources.[45] Specifically, the CAA requires EPA to promulgate regulations that establish standards for the emissions of air pollutants from new motor vehicles that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" and prohibits exceedances of those standards.[46] The CAA mandates that EPA set emission standards for particular pollutants from light and heavy duty vehicles, including carbon monoxide, hydrocarbons and oxides of nitrogen and amend the standards as necessary to protect public health and welfare.[47]

Pursuant to these statutory requirements, EPA has established emissions standards and testing procedures for light duty vehicles and heavy trucks.[48] To ensure compliance with these standards, EPA requires manufacturers to receive a certificate of conformity from EPA before a manufacturer can introduce vehicles into U.S. commerce.[49] To receive such a certificate, manufacturers must submit a detailed application to EPA for each test group of vehicles it intends to sell in the United States; the application must include a certification that the vehicles comply with emission standards as determined by specific testing procedures required by EPA, and a description of any air emission control devices contained within the vehicles.[50] The CAA provides for a fine of up to $37,500 for each car that does not conform to details within the certificate of compliance.[51]

In recognition of the fact that manufacturers may attempt to circumvent emission standards, the CAA prohibits any person from manufacturing, selling, offering to sell or installing any part in a motor vehicle that bypasses, defeats or renders inoperative any device or element of a vehicle's emission control technology.[52] EPA's implementing regulations specifically prohibit the use of "defeat devices," defined generally as an air emission control device "that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use…"[53] Under the CAA and EPA's regulations, manufacturers may be liable for up to $3,750 for each use of a defeat device.[54]

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[43] 42 U.S.C. § 7401(a)(2).
[44] *Id.* § 7401(b)(1).
[45] *Id.* §§ 7521-7590.
[46] *Id.* §§ 7521; 7522.
[47] *Id.* § 7521.
[48] 40 C.F.R. Part 86 (emission standards and testing procedures for light-duty vehicles and light trucks); 40 C.F.R. § 86.1811-04 (emission standards for light-duty vehicles including NOx); *id.* § 86.1816-05, -18 (emission standards for heavy-duty vehicles).
[49] 40 C.F.R. § 86.1848-01.
[50] *Id.* §§ 86.1843-01; 86.1844-01.
[51] 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.
[52] 42 U.S.C. § 7522(a)(3)(B).
[53] 40 C.F.R. § 86.1809-01; *id.* § 86.1803-01.
[54] 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4.

B. The Energy Policy and Conservation Act

Congress enacted the EPCA in 1975 following the energy crisis caused by the 1973 Mideast oil embargo.[55] In enacting EPCA, Congress observed that "[t]he fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply retarding our economic growth and necessitating an alteration in our life's habitats and expectations."[56] Among the goals of EPCA are to "'decrease dependence on foreign imports, enhance national security [and to] achieve the efficient utilization of scarce resources...'"[57] The fundamental purpose of EPCA, however, is energy conservation.[58]

To comply with these goals, EPCA vests NHTSA with broad regulatory authority,[59] and requires NHTSA to set fuel economy standards at "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year."[60] In this way, EPCA is meant to encourage technological innovation — meaning new technologies, not simply better versions of what exists today. As the court in *Center for Auto Safety v. Thomas* noted, "[t]he experience of a decade leaves little doubt that the congressional scheme in fact induced manufacturers to achieve major technological breakthroughs as they advanced towards the mandated goal."[61] And as explained by the D.C. Circuit "when a statute is technology forcing, the agency can impose a standard which only the most technologically advanced plants in an industry have been able to achieve — even if only in some of their operations some of the time."[62]

In 2007, Congress passed the Energy Independence and Security Act of 2007 ("EISA"), which amended EPCA.[63] The EISA eliminated the previous 27.5 mpg standard for passenger cars with a mandate that NHTSA set separate passenger car and light truck standards for each model year beginning in 2011 "to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year."[64] Fuel economy standards for model years 2021 through 2030 must be the maximum feasible average fuel economy standard for each fleet of passenger and non-passenger cars for that model year.[65] These standards are known as the corporate average fuel economy ("CAFE") standards.

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[55] *Center for Biological Diversity v. Nat'l Highway Safety Transportation Administration*, 538 F.3d 1172, 1182 (9th Cir. 2008).
[56] H.R. Rep. No. 94-340 at 1-3 (1975), as reprinted in 1975 U.S.C.C.A.N. 1762, 1763.
[57] *Center for Biological Diversity*, 538 F.3d at 1182 (quoting S.Rep. No. 94-516 (1975) (Conf. Rep.), as reprinted in 1975 U.S.C.C.A.N. 1956, 1957).
[58] *Id.* at 1195.
[59] 49 U.S.C. § 32910.
[60] *Id.* § 32902(a). In determining what constitutes the "maximum feasible" level, NHTSA must take into account four factors: technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy. *Id.* § 32902(f).
[61] 847 F.2d 843, 870 (D.C. Cir. 1988) (overruled on other grounds); see *also Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 358-59 (D. Vt. 2008) (discussing technology-forcing character of EPCA and the use of increased fuel efficiency to augment performance rather than mileage).
[62] *Kennecott Greens Creek Min. Co. v. Mine Safety and Health Admin.*, 476 F.3d 946, 957 (D.C. Cir. 2008).
[63] Pub. L. 11-140, 121 Sat. 1492 (Dec. 18, 2007).
[64] 49 U.S.C. § 32902(b)(2)(A).
[65] *Id.* § 32902(b)(2)(B).

To help manufacturers comply with the CAFE standards, EPCA prescribes civil penalties that NHTSA can impose if their cars do not meet regulatory requirements. Specifically, a manufacturer is liable for a civil penalty of five dollars per automobile for each 0.1 mile per gallon shortfall.[66] The Act vests NHTSA with the authority to raise the total penalty up to ten dollars for each 0.1 mile per gallon shortfall, provided it first makes certain findings. NHTSA raised the penalty to $5.50 for each 0.1 mile per gallon shortfall in 1997, but has not raised it since, nor has the penalty been adjusted for inflation.[67]

III. The VW Scandal Reveals the Need to Issues Regulations to Amend Testing Procedures and Increase Penalties for Violations of Fuel Economy Standards

Volkswagen recently admitted that 11 million of its diesel cars sold worldwide since 2009, including nearly half a million sold in the United States, contain software specifically designed to cheat emissions tests. EPA has said that these devices allowed each car to spew up to *40 times* the legal limit of nitrogen oxides in the United States. Better testing procedures that more accurately reflect a vehicle's on-road emissions could prevent such egregious actions from occurring in the future.

This scandal raises yet another problem in the government's regulation of emissions from motor vehicles — that manufacturers regularly pay civil penalties rather than comply with NHTSA's CAFE standards. The penalties are therefore clearly inadequate to deter violations and inspire the technological innovation contemplated by EPCA, and reduce carbon dioxide emissions, and must be increased as a result.

A. EPA Must Promulgate Regulations to Require On-Road Emissions Testing, and Must Test Cars Sold in the United States Since 2009

The VW scandal demonstrates that EPA's current testing procedures for passenger cars and light trucks do not accurately reflect the actual emissions of these vehicles. EPA must promulgate regulations that require accurate, on-road testing sufficiently rigorous to detect defeat devices and thereby protect public health and welfare from the deleterious impacts of motor vehicle emissions.

As explained by EPA in its Notice of Violation to VW, "defeat devices" can detect when a car is being tested in a laboratory setting and adjusts engine operations to emit less-polluting exhaust during the test than in real-world driving conditions. Specifically, VW manufactured and installed software in the electronic control modules ("ECM") of vehicles equipped with 2.0 liter diesel engines.[68] The software could sense when the vehicle was being tested pursuant to EPA's dynamometer testing equipment.[69] When the software sensed testing, it produced compliant emission results under an ECM calibration, but at all other times the ECM ran a separate calibration that reduced the effectiveness of the emission control system, and the selective

[66] *Id.* § 32912(b).
[67] *See* 62 Fed. Reg. 5,167, 5,168 (Feb. 4, 1997) (raising the penalty to $5.50 for every 0.1 mpg); *codified at* 49 C.F.R. § 578.6(h)(2).
[68] EPA, Notice of Violation to Volkswagen AG, Sept. 18, 2015.
[69] *Id.*

catalytic reduction, or the lean NOx trap, in particular.[70] EPA has determined that the software is an air emission control device that was not described in VW's certification applications and is an illegal defeat device, and that "VW violated section 203(a)(1) the CAA, 42 U.S.C. § 7522(a)(1), each time it sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported…" one of the offending vehicles as a result.[71]

But this is not the first time a manufacturer has used these illegal, deceitful devices. Despite the express prohibitions on the use of defeat devices in the CAA and EPA's regulations, the use of such devices by a variety of manufacturers has been discovered on several occasions.[72] Indeed, such devices have been used beginning shortly after the enactment of the CAA, with early regulatory actions specifically intended to prevent their use.[73] And car and truck manufacturers have repeatedly been caught using such devices for almost as long as their use has been prohibited. For example, in 1973, EPA found that VW had installed temperature-sensitive devices that turned off emissions controls on tens of thousands of its vehicles.[74] And in 1998, the U.S. Department of Justice and EPA settled an enforcement case against the diesel engine industry for the widespread use of defeat devices in everything from tractor trailers to pick-up trucks. The settlement required seven companies, which comprised 95 percent of the U.S. heavy duty diesel engine market, to pay over one billion dollars, including $83.4 million in civil penalties, the largest ever imposed in environmental enforcement at that time.[75]

As suggested by EPA's letter to VW, a key reason vehicle manufacturers are able to use such devices to beat emissions tests are the inadequate testing procedures currently required by EPA. In particular, EPA's requirements for testing light-duty vehicles and trucks, known as the Federal Test Procedure ("FTP"), use a chassis dynamometer to test for various emissions, including nitrogen oxides, in a laboratory setting by simulating driving conditions. But given the artificial, predictable conditions in which the tests are run, software can sense when treadmill-like dynamometer equipment is being used based on the position of the steering wheel, vehicle speed and how long the engine operates, among other inputs.[76]

But alternative, on-road testing technologies exist. For example, on-road vehicle remote sensing is a type of technology that can scan the emissions of thousands of vehicles within a single day, and has previously been used to monitor real driving conditions by using optical sensors or a laboratory vehicle that follows cars and samples exhaust plumes.[77] And EPA already

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[70] *Id.*
[71] *Id.*
[72] *See e.g.*, U.S. Dep't of Justice, *Clean Air Act Mobile Sources Cases*, http://www.justice.gov/enrd/mobile-sources (updated May 14, 2015) (describing past enforcement actions for the use of defeat devices).
[73] *See e.g.*, 37 Fed. Reg. 28,775 (Dec. 29, 1972) (order requiring defeat devices to be eliminated by March 1973).
[74] *See e.g.*, Michael Biesecker and Eric Tucker, *German automaker facing 'tsunami' of possible enforcement actions after emissions scandal*, Associated Press, Sept. 28, 2015, http://www.usnews.com/news/business/articles/2015/09/28/volkswagen-faces-major-legal-trouble-in-emissions-scandal.
[75] U.S. Dep't of Justice, Press Release: DOJ, EPA Announce One Billion Dollar Settlement With Diesel Engine Industry For Clean Air Act Violations, Oct. 22, 1998, *available at* http://www.justice.gov/archive/opa/pr/1998/October/499_enr.htm.
[76] Notice of Violation to Volkswagen.
[77] International Council on Clean Transportation, Guidance note about on-road vehicle emissions remote sensing, June 2013, *available at* http://www.theicct.org/sites/default/files/publications/RSD_Guidance_BorKlee.pdf.

requires on-road testing for heavy-duty diesel trucks.[78] Specifically, EPA has established a mandatory manufacturer-run, in-use emissions testing for heavy-duty diesel trucks using a portable emission measurement system ("PEMS").[79] PEMS typically involves equipping a test vehicle with a portable gas analyzer, and measuring emission rates during the driving. In announcing the regulatory change, EPA specifically noted that using such systems is "a significant step forward. . . in helping ensure that heavy-duty diesel engines comply with applicable emission standards" and that "these systems offer[] advantages over conventional approaches to assess in-use exhaust emissions from engines for design improvement, research, modeling, and compliance purposes."[80] Nevertheless, EPA has not implemented a similar requirement for passenger cars and light trucks.

The urgent need for such testing is now beyond dispute, and its benefits would not be limited to detecting the use of unlawful defeat devices alone. Even when cars do not contain defeat devices, the laboratory tests often fail to accurately reflect emissions as laboratory settings do not adequately incorporate road and weather conditions, use of accessories and aggressive driving. On-road tests reflect normal operation and use, and therefore a more accurate picture of emissions. And the benefits would not be limited to emissions of nitrogen oxides — the use of on-road emissions testing would also enable tests to more accurately reflect a vehicle's fuel efficiency and thus, its carbon dioxide emissions.

While current regulations vest EPA with the authority to conduct or require testing on any vehicle using driving cycles and conditions that may reasonably be expected to be encountered in normal operation and use (i.e., on-road conditions) for purposes of investigating the use of defeat devices,[81] the regulations do not go far enough as they do not mandate such inspections prior to putting new cars and light trucks on the road.[82] Mandating on-road inspections prior to the introduction of new light-duty motor vehicles is thus necessary to ensure cars comply with emission standards.

Accordingly, the Center hereby requests that EPA promulgate regulations to require on-road testing for all types of new diesel-powered motor vehicles not already subject to such testing requirements. The Center also requests that EPA promulgate regulations to require on-road testing for all other types of fossil fuel-powered motor vehicles. While VW's scandal involved diesel-powered cars, there is no indication that the use of such devices is limited to diesel vehicles. In fact, recent reports indicate that VW's gasoline-powered cars, as well as models from other manufacturers, consume significantly more fuel than measured in laboratory tests.

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[78] *See e.g.*, EPA, Regulatory Announcement: Final Rule on In-Use Testing Program for Heavy-Duty Diesel Engines and Vehicles, EPA420-F-05-021, June 2005, *available at* http://www3.epa.gov/otaq/regs/hd-hwy/inuse/420f05021.pdf.
[79] *Id.*
[80] *Id.*
[81] 40 C.F.R. § 86.1809.
[82] *See e.g.*, International Council on Clean Transportation, In-use emission testing of light-duty diesel vehicles in the U.S., May 30, 2015, *available at* http://www.theicct.org/sites/default/files/publications/WVU_LDDV_in-use_ICCT_Report_Final_may2014.pdf (noting that there is no regulatory requirement in the United States to verify compliance of Tier 2 vehicles for emissions standards over off-cycle tests such as on road emissions testing).

Specifically, the Center requests that EPA adopt regulations in 40 C.F.R. part 86 and/or 1066 requiring on-road emissions testing as part of the certification process necessary to introduce any vehicle type into U.S commerce. These regulations could emulate those required for heavy-duty highway engines, adjusted as necessary to accommodate testing parameters needed for passenger cars and lighter trucks, and require state-of-the art on-road emission testing technology.[83]

The Center also requests that EPA conduct immediate in-use testing of each make and model of diesel-powered motor vehicles sold in the United States since 2009 that have not already undergone such tests, and each make and model of other fossil fuel-powered motor vehicles sold in the United States since 2009[84] to ensure that emissions comply with relevant standards, and any additional violators are held accountable.

B. NHTSA Must Promulgate Regulations to Increase the Penalties for Violations of CAFE Standards

NHTSA must increase the penalty for violations of CAFE standards. As explained above, EPCA vests NHTSA with the authority to impose a civil penalty of five dollars per automobile for each 0.1 mile per gallon a car falls short of the standards.[85] EPCA also vests NHTSA with the authority to increase the penalty for violations, provided it first makes certain findings. These findings include that increasing the penalty "will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed; . . . will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State" and will not cause significant unemployment, a significant increase in automobile imports or adversely affect competition.[86]

NHTSA exercised its statutory authority to increase the maximum civil penalty to $5.50 for each 0.1 mile per gallon shortfall in 1997. But NHTSA has not increased the penalty since, nor has it been adjusted for inflation. It is no surprise then that NHTSA has repeatedly acknowledged that many companies choose to regularly pay the fines rather than comply with the standards.[87] Indeed, the Government Accountability Office ("GAO") has reported that because the fines for violations of the CAFE standards have not increased, "CAFE penalties may not provide a strong enough incentive for manufacturers to comply with CAFE."[88] In this way, EPCA has not been implemented to its full potential, and continuing technological innovation and reductions in greenhouse emissions are thwarted. However, the GAO also found that "stricter penalties" for "noncompliance could improve compliance with CAFE standards."[89]

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[83] *See* 40 C.F.R. part 1065 (emission testing requirements for heavy-duty highway vehicles).
[84] To the extent conducting these tests is not feasible, the Center alternatively requests that EPA conduct in-use testing of a significant portion of the top selling makes and models of motor vehicles in the United States.
[85] 49 U.S.C. § 32912(b).
[86] *Id.*
[87] GAO, Report to Congress, Vehicle Fuel Economy: NHTSA and EPA's Partnership for Setting Fuel Economy and Greenhouse Gas Emissions Standards Improved Analysis and Should Be Maintained, Feb. 2010, GAO-10-336, *available at* http://www.gao.gov/assets/310/301199 html.
[88] *Id*.
[89] *Id.*

Accordingly, the Center hereby requests that NHTSA promulgate regulations to increase the penalty for a violation of the CAFE standards. Specifically, the Center requests that NHTSA amend its regulation at 49 C.F.R. § 578.6(h)(2) to increase the penalty to the statutory maximum of $10 per 0.1 mile per gallon shortfall. The Center believes that NHTSA can easily make the requisite statutory findings in order to do so. Ensuring compliance with CAFE standards will promote competition by encouraging innovation and technological improvements, and will lead to economic benefits by reducing costly greenhouse gas emissions.[90] And the requested increase in the penalty is reasonable, as it is still below the statutory minimum adjusted for inflation. Specifically, the five dollar fine in 1975 adjusted for inflation would be roughly $22.15 today.[91]

IV. Conclusion

The transportation sector is the single largest source of air pollution and the second largest source of greenhouse gas emissions in the United States. While there are laws in place to attempt to reduce the impacts of these emissions by prescribing limits on the quantity of such emissions, the recent VW scandal reveals that car manufacturers often find ways to skirt such requirements. Improving testing procedures by requiring in-use testing of vehicles currently on the road, and on-road testing of all new motor vehicles in the future would help ensure emissions tests better reflect actual emissions, and thus provide a more accurate picture of whether car manufacturers are actually complying with emission standards. Similarly, increasing the penalties for a violation of the CAFE standards would incentivize compliance with fuel economy standards and reduce emissions of greenhouse gases from motor vehicles. All of these actions would promote the protection of public health, welfare and the environment by reducing dangerous emissions and reducing our dependency on dirty fossil fuels, as envisioned by the CAA and EPCA.

Sincerely,

/s/ Kristen Monsell

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[90] *See e.g.*, Ker Than, *Estimated social cost of climate change not accurate, Stanford scientists say*, Stanford Report, Jan. 12, 2015, http://news.stanford.edu/news/2015/january/emissions-social-costs-011215.html (estimating the social cost of carbon to be $220 per ton rather than $37 as estimated by the government); *see also* Marten, A.L., and Newbold, S.C., *Estimating the social cost of non-CO2 GHG emissions: Methane and nitrous oxide*, 51 Energy Policy 957 (2012), available as EPA Working Paper No. 11-10 at http://yosemite.epa.gov/ee/epa/eed nsf/ec2c5e0aaed27ec385256b330056025c/ f7c9fc6133698cc38525782b00556de1/$FILE/2011-01v2.pdf (estimating the social cost of nitrous oxide to be $4,300 to $33,000 per metric ton in 2015).

[91] U.S. Dep't of Labor, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator htm.

Exhibit G

August 1, 2016

The Honorable Mark Rosekind, Ph.D.
Administrator
National Highway Traffic Safety Administration
1200 New Jersey Avenue, S.E.
West Building, Fourth Floor
Washington, D.C. 20590

RE: Petition for Partial Reconsideration of the Interim Final Rule on Civil Penalties, NHTSA Docket 2016-0075, 81 Fed. Reg. 43524, July 5, 2016

Dear Dr. Rosekind:

The Alliance of Automobile Manufacturers[1] (the Alliance) and the Association of Global Automakers[2] (Global Automakers) are petitioning for partial reconsideration of the Interim Final Rule[3] (IFR) adjusting the civil penalties under several statutes administered by NHTSA. According to the IFR, the adjustments were made pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the Improvements Act).[4] The Alliance and Global Automakers seek reconsideration of the portion of the IFR that applies to civil penalties under the Corporate Average Fuel Economy (CAFE) program and the CAFE standards at 49 C.F.R. Parts 531 and 533.

Introduction

The Alliance and Global Automakers recognize that NHTSA was obligated to take some action in response to the Improvements Act, which directed nearly all federal agencies to make inflation adjustments to monetary civil penalties. We realize that NHTSA is not empowered to exempt the CAFE program from this directive. We do, however, have serious concerns about the effects of the significant adjustment to the CAFE penalty in the IFR.

[1] The Alliance of Automobile Manufacturers is an association of 12 vehicle manufacturers which account for roughly 77% of all car and light truck sales in the United States. These members are BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car USA.
[2]The Association of Global Automakers represents international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Our members include American Honda Motor Co., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive Ltd., Nissan North America, Inc., Subaru of America, Inc., Suzuki Motor of America, Inc., and Toyota Motor North America, Inc.
[3] 81 Fed. Reg. 43524 (July 5, 2016).
[4] Pub. L. 114-74, Section 701.

At the outset, the Alliance and Global Automakers respectfully submit that the agency used the wrong base year for the calculation of the inflation adjustment. Specifically, the Alliance and Global Automakers note that the last time the CAFE civil penalty was "established or adjusted" was 2007, when Congress adopted the Energy Independence and Security Act (EISA).[5] Congress explicitly considered and rejected a change to the specific civil penalty dollar amount in the statute ($5.00/0.1 mpg), and instead ratified the penalty while at the same time amending the penalty provision to authorize the use of civil penalty revenue to support NHTSA's CAFE rulemaking and to support research and development of advanced technology vehicles.[6] Thus, Congress reset the CAFE penalty in 2007, albeit at the same $5.00/0.1 mpg level, and that is the base year that should have been used to apply the inflation adjustment multiplier.

Moreover, due to the unique nature of the civil penalties under the CAFE program, including especially the statutory requirement to provide a minimum of eighteen months leadtime before making a CAFE standard more stringent, it is not appropriate to apply such increases retroactively to penalties applicable to model years that have already been completed or for which a company's compliance plan has already been set. The Alliance and Global Automakers observe that NHTSA can follow some alternative pathways that would enable NHTSA to make adjustments to the standard penalty adjustment approach, yet also take these unique factors into account.

The factors that distinguish CAFE civil penalties from most other civil penalty schemes include the following:

- As NHTSA has acknowledged in various contexts, a number of manufacturers meet their CAFE obligations by electing to pay civil penalties. Indeed, NHTSA itself has characterized the option of paying the civil penalty as a "compliance flexibility."[7] An increase in the CAFE civil penalties will therefore directly impact the actual costs of the CAFE program on such manufacturers.

- In recognition of the fact that CAFE compliance through the use of technology requires significant leadtime on the part of automakers, the CAFE statute provides that increases in CAFE standards can therefore be made only with a minimum of 18 months' lead time in advance of a model year. This is intended to provide manufacturers time to develop their compliance strategy and to anticipate any civil penalties they may need to pay. The sudden imposition of a large civil penalty increase would upset this statutory schedule and expose manufacturers to far higher penalties than they had planned for, in contravention of Congress' intent.

- Different from most other federal programs that impose civil penalties, the CAFE program contemplates compliance levels that are not static and, indeed, have been

[5] Pub. L. 110-140.
[6] Section 112 of Pub. L. 110-140.
[7] http://www.nhtsa.gov/CAFE_PIC/CAFE_PIC_home.htm, last accessed July 27, 2016.

adjusted on an annual basis since adoption of the One National Program in 2009 and the 2011 Joint Final Rule on CAFE and Greenhouse Gas Standards.

- And, unlike most civil penalty schemes in other statutes, CAFE civil penalties follow a prescribed formula that may not be compromised by NHTSA (except under extremely rare circumstances, as discussed below). Thus, an adjustment to the CAFE civil penalties does not merely increase the maximum theoretical penalties that the Agency could collect; it automatically increases the actual penalties that the manufacturers will pay, and this is true whether a company chooses to purchase credits or pay penalties directly as the price of credits is connected to the penalty amount.

Our most significant concern with the IFR is that it would apply retroactively to the 2014 and 2015 Model Years (which have been completed for all manufacturers but for which the compliance files are not all closed), to the 2016 Model Year (which is complete for many manufacturers) and to the 2017 and 2018 Model Years (for which manufacturers have already set compliance plans based on guidance from NHTSA, including the existing civil penalty amounts). Applying the increased civil penalties in this manner is profoundly unfair to manufacturers, does not improve the effectiveness of this penalty, and does nothing to further the policies underlying the CAFE statute.

Additionally, given NHTSA's recognition that paying civil penalties is a "compliance flexibility" that some manufacturers have elected, NHTSA's past estimates of the cost of compliance with the CAFE program have taken into account the costs of paying penalties. The sudden and retroactive imposition of the higher civil penalty amounts contained in the IFR (which were estimated by NHTSA to result in only $50 million in civil penalties being collected) would ***actually increase the annual estimated cost of compliance with the CAFE program by at least $1 billion based on NHTSA's own modeling tools***.

Finally, the IFR significantly underestimated the economic impact of the increases. According to the IFR, economic impact was estimated solely by reviewing historic penalties paid by manufacturers. The economic impact instead should have been derived from an analysis of expected current and future compliance costs based on the Final Rules for Model Years 2011-2016 and Model Years 2017-2021. Equally important, in focusing exclusively on penalties, the IFR failed to take into account at all the impact on the credit market, even though the recently released Draft Technical Assessment Report identified credit trading as "the primary flexibility in model year 2014."[8] Clearly, the purchase price of credits is directly related to the penalty that would otherwise be paid by a manufacturer. Thus, any analysis of the potential economic impact of a penalty increase should have quantified the impact on the credit market. All of these issues are discussed in more detail below.

[8] U.S. Environmental Protection Agency, National Highway Traffic Safety Administration, California Air Resources Board. Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 (EPA-420-D-16-900. July 2016. Available at http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/Draft-TAR-Final.pdf (last accessed July 26, 2016) at Page 3-19.

This Petition raises fundamental issues with respect to the administration of the CAFE program. The industry is already facing significant challenges in planning for compliance with the Model Year 2017- 2021 CAFE standards, so the implementation of the IFR would only serve to increase those challenges without any environmental benefits in the short term, and without attempting to harmonize the goals of the Improvements Act with the requirements of the CAFE statute.

The Alliance and Global Automakers strongly urge NHTSA to withdraw the Interim Final Rule as it pertains to CAFE civil penalties and reissue a new Interim Final Rule that applies the inflation adjustment to the base year of 2007. If NHTSA is unable to agree that 2007 is the base year, this petition urges NHTSA to withdraw the IFR and to undertake a notice-and-comment rulemaking as authorized by the Improvements Act to develop a more appropriate formula for an inflation adjustment to the CAFE civil penalties, and to harmonize the timetable for any such adjustment with the unique leadtime requirements of the CAFE statute under the Improvements Act. In either case, NHTSA should confirm that it will not apply the new penalties before Model Year 2019.

Discussion

1. The Interim Final Rule Used the Wrong Base Year for Calculating the Inflation Adjustment of the CAFE Civil Penalty

The Improvements Act requires federal agencies to adjust civil monetary penalties contained in their statutes by applying a defined "cost of living adjustment" to the penalty measured from the last calendar year in which the penalty was "established or adjusted" by Congress (other than by operation of the Federal Civil Penalties Inflation Adjustment Act of 1990). The IFR concluded that the last calendar year in which the CAFE penalty was "established or adjusted" by Congress was 1975, the year that the CAFE statute was originally enacted.

In fact, however, the last time the CAFE civil penalty was "established or adjusted" was 2007, when Congress adopted the Energy Independence and Security Act (EISA).[9] In considering that legislation, Congress explicitly considered and rejected a change to the specific civil penalty dollar amount in the statute ($5.00/0.1 mpg),[10] and instead ratified the penalty while at the same time modified the penalty provision to authorize the use of civil penalty revenue to support NHTSA's CAFE rulemaking and to support research and development of advanced technology vehicles.[11] Thus, Congress reset the CAFE penalty in 2007, albeit at the same

[9] Pub. L. 110-140.
[10] See Discussion Draft of June 1, 2007, published in the Hearing Record of the Committee on Energy and Commerce entitled Legislative Hearing on Discussion Draft Concerning Alternative Fuels, Infrastructure and Vehicles, June 7, 2007, Serial Number 110-53.
[11] Section 112 of Pub.L. 110-140.

$5.00/0.1 mpg level,[12] and that is the base year that should have been used to apply the inflation adjustment multiplier.[13]

If NHTSA had applied the adjustment factor for 2007, instead of 1975, the significant economic consequences of the adjustment that are discussed in more detail below would, of course, be substantially mitigated.

2. A Sudden and Retroactive Increase In Civil Penalties Would Not Be Consistent With the Leadtime Provisions of the CAFE Statute.

In support of its conclusion that the increase in CAFE civil penalties will not have a significant economic impact, NHTSA states in the IFR that manufacturers may make "production and marketing changes to influence the average fuel economy of vehicles produced by the manufacturer" to account for the increased civil penalties.[14] As a practical matter, however, this is simply not the case, at least in the near term.

The enhanced civil penalties set forth in the IFR are scheduled to become effective August 4, 2016, and NHTSA has indicated that it intends to apply them to all Model Years that have not been closed out, including the 2015 Model Year.[15] (It is unclear what NHTSA intends for manufacturers whose compliance file is still open for the 2014 Model Year). But the 2015 Model Year is complete for all manufacturers, and many manufacturers have already ended (or shortly will end) production for the 2016 Model Year. Additionally, manufacturers have already set their compliance plans for the 2017 and 2018 Model Years based on the civil penalty amounts in effect prior to August 4 based on previous guidance from NHTSA. As NHTSA itself noted in its Implementation White Paper, however, its goal is to "ensure that the new civil penalties are fairly and uniformly applied," a goal which cannot be met if some manufacturers' compliance files are still open for Model Years 2014 or 2015, and some are closed.

Additionally, the CAFE statute itself recognizes the need for sufficient leadtime to make changes to improve fuel efficiency in a manufacturer's fleet. For this reason, the statute provides that any amendment to a CAFE standard that has the effect of making the standard more stringent must be promulgated at least 18 months before the beginning of the model year to which the amendment applies.[16] This leadtime requirement is Congress' recognition that manufacturers need to be able to engage in advance planning not only for purposes of compliance, but also for the potential payment of civil penalties. A sudden and substantial increase in the civil penalty formula would upset this statutory balance by unfairly upsetting the manufacturers' reasonable expectations regarding the penalty amounts that would be due. Moreover, applying the enhanced civil penalties to model years that have ended, or to model

[12] By 2007, the actual CAFE civil penalty was $5.50/0.1 mpg as a result of a previous inflation adjustment rulemaking by NHTSA, and presumably Congress knew that fact and expected NHTSA to continue to apply the inflation adjusted amount.
[13] See Final floor votes in the House and Senate which overwhelmingly approved the final version of EISA by 314-100 and 86-8 respectfully (House Floor vote #1170 and Senate Recorded Vote #430).
[14] 81 Fed. Reg. at 43527.
[15] NHTSA White Paper entitled "Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvement[s] Act of 2015 for the Corporate Average Fuel Economy (CAFE) Program," July 18, 2016.
[16] 49 U.S.C. 32902(g)(2).

years where it is too late for manufacturers to make significant changes, does nothing to further the fuel savings goals of the CAFE statute, or to improve the effectiveness of this penalty.

The Alliance and Global Automakers are aware that courts (and administrative agencies) generally apply the law as it is in effect at the time they adjudicate compliance, and that there is nothing inherently problematic in most cases with Congress' decision to apply penalty adjustments to conduct that occurred prior to the effective dates of the penalty adjustments. However, the Supreme Court has noted an exception to this general rule: if applying a change retroactively would disturb settled rights, the change is not applied retroactively. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985), citing *Bradley v. School Board*, 416 U.S. 696, 720 (1974). The manufacturers have substantial "right[s] that ha[ve] matured" with respect to Model Years 2014, 2015 and 2016, and, these rights are largely matured for Model Years 2017 and 2018 due to the compliance flexibilities built into the CAFE program.

While the Alliance and Global Automakers acknowledge that NHTSA must take action to adjust the CAFE penalty in accordance with the Improvements Act, it must also do so in a way that harmonizes that adjustment with the underlying structure and purposes of the CAFE law. The *Bennett* exception to the general retroactivity rule applies. NHTSA should not apply the adjusted penalty to any Model Year prior to Model Year 2019.

3. If NHTSA Retains the 1975 Baseline Year for the Adjusted Penalties, There Will Be A Significantly Higher Economic Impact on the Costs of Compliance with the CAFE Standards than NHTSA Estimated in the IFR.

In the IFR, NHTSA asserted that the proposed increase in CAFE civil penalties would not be economically significant, based on a review of penalties paid over the last five years:

> We also do not expect the increase in the civil penalty amount in 49 CFR 578.6(h)(2) to be economically significant. Over the last five model years, NHTSA has collected an average of $20 million per model year in civil penalties under 49 CFR 578.6(h)(2). Therefore, increasing the current civil penalty amount by 150 percent would not result in an annual effect on the economy of $100 million or more.[17]

However, a recitation of the penalties manufacturers previously paid fails fully to comprehend the economic impact of the proposed increase in two important ways: it does not accurately reflect NHTSA's own estimates of the impact of the increases in CAFE standards in coming years and it completely overlooks the impact of the increases on the CAFE credit market.

NHTSA has recognized that some manufacturers may elect to pay civil penalties in lieu of meeting the CAFE standards for a given model year. NHTSA has acknowledged this practice in a number of contexts and has treated the civil penalties as part of the industry's overall costs

[17] 81 Fed. Reg. at 43527.

of compliance with the CAFE program. NHTSA included the following passage in the preamble to the 2012 Final Rule establishing the CAFE Standards for Model Years 2017-2021:

> As it has in past rulemakings and in the NPRM preceding today's final rule, NHTSA has also applied its CAFE model in a manner that simulates the potential that, as allowed under EISA/EPCA and as suggested by their past CAFE levels, some manufacturers could elect to pay civil penalties rather than achieving compliance with future CAFE standards. ***EISA/EPCA allows NHTSA to take this flexibility into account when determining the maximum feasible stringency of future CAFE standards.***[18]

NHTSA proceeded to apply its CAFE Compliance and Effects Model ("the Volpe model") with the assumption that several manufacturers would elect to pay civil penalties. NHTSA observed that "to assume these manufacturers would exhaust available technologies before paying civil penalties would cause unrealistically high estimates of market penetration of expensive technologies such as diesel engines and strong HEV's as well as correspondingly inflated estimates of both the costs and benefits of any potential CAFE standards."[19] In other words, NHTSA clearly recognizes that manufacturers have the choice to pay civil penalties in lieu of meeting the applicable fuel economy standards and relied on the Volpe Model to justify the cost-effectiveness and economic practicability of the Model Year 2017-2021 CAFE standards.

The Alliance and Global Automakers have run the latest Volpe Model using the recent and increased higher civil penalty amounts against the 2015 Model Year fleet (the same assumption used by NHTSA in the Draft Technical Assessment Report).[20] The Volpe model calculated an average annual cost increase of approximately $1 billion over the baseline with the higher penalty amount inputted.[21]

It is worth noting that the $1 billion is just the cost of technologies and civil penalties and does not take into consideration the unintended consequence of subsequently higher costs for the purchase of CAFE credits which will exponentially increase as the standards increase and the volume of CAFE credits available in the market diminish. The impact on CAFE credits is discussed further in this petition.

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[18] 77 Fed. Reg. 62624 at 62666 (October 15, 2012) (Emphasis added).
[19] 77 Fed. Reg. at 63008 (Footnote 1111).
[20] U.S. Environmental Protection Agency, National Highway Traffic Safety Administration, California Air Resources Board. Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 (EPA-420-D-16-900. July 2016. Available at http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/Draft-TAR-Final.pdf (last accessed July 26, 2016).
[21] Value derived from analysis of NHTSA Volpe model results with inputs of $14.00 and $5.50 per 0.1 mpg CAFE non-compliance civil penalties using the most recent version of the Volpe model ("2016 Draft TAR for Model Years 2022-2025 Passenger Cars and Light Trucks", available at http://www.nhtsa.gov/Laws+&+Regulations/CAFE+-+Fuel+Economy/CAFE+Compliance+and+Effects+Modeling+System:+The+Volpe+Model, last accessed July 27, 2016). Class 2b and 3 medium-duty vehicles removed for consistency with compliance fleets to which the CAFE non-compliance civil penalty applies.

In light of the Volpe model output, we do not believe the analysis that was used in the IFR is the correct methodology for making a determination regarding the economic significance of the penalty increase.

The IFR also omitted from its analysis the impact that the increases would have on another important compliance flexibility, credit trading among the manufacturers. The recently released Draft Technical Assessment Report (Draft TAR) identified various flexibilities that the CAFE program allows for manufacturers to reach compliance. According to the Draft TAR, in recent model years many manufacturers (reflecting a significant portion of all vehicle production) have needed to utilize various credit flexibilities to achieve compliance.

Among the range of credit flexibilities available, the Draft TAR cites trading as an increasingly important and commonly utilized flexibility. As previously noted, the Draft TAR explicitly states that credit trading among manufacturers was "the primary [credit] flexibility in model year 2014." During the last five years (the same time period that the IFR reviewed for penalties historically paid), the Draft TAR shows that approximately 50 million CAFE credits were traded among manufacturers.[22] While credit transaction terms are not public, the theoretical ceiling price of credits prior to the IFR would have been $5.50 per credit, discounted based on several factors, including overall supply and demand and the expiration date of the individual credit. Assuming for the sake of argument a 25% discount, over the last five years, manufacturers would have spent over $200 million purchasing credits. Assuming the same 25% discount from $14.00, manufacturers would have spent over $500 million over the past five years to purchase the same number of credits (with no real world benefits in terms of fuel savings) – an economic impact of over $300 million purely within the credit market.

The IFR's penalty increase will dramatically impact the credit trading market, including the price of credits. The availability of credits will be significantly reduced as the CAFE standards rapidly increase over the next few years, and the price of credits will increase substantially if the CAFE penalty is adjusted to $14.00/ 0.1 mpg, a factor the agency should have incorporated into its analysis of the economic impact of the proposed increase.

Finally, the IFR significantly overstates the options available to manufacturers for avoiding liability for civil penalties (even with credit trading). As discussed in Section 2, above, manufacturers have no technology options for compliance with respect to Model Years 2014 – 2016, and very limited technology options (if any) for Model Years 2017-2018. With respect to credit trading, the IFR did not account for the limitations on that option. By law, the domestic minimum passenger car CAFE standard cannot be met by purchasing CAFE credits at all; thus automakers may have to cover that gap by paying civil penalties.

4. CAFE Civil Penalties Are Formulaic and Not Subject to Being Compromised.

Unlike nearly all civil penalty statutes, which establish maximum penalties but confer extensive discretion on the regulating agency to impose a lesser amount when circumstances warrant, the CAFE statute establishes a precise and immutable formula for determining the

[22] Draft TAR Figure 3.15 showing the volume of credits traded between Model Years 2010 and 2014.

amount of civil penalties applicable to a shortfall to the fuel economy standards. NHTSA does not have any discretion to alter the civil penalty formula, nor to impose a lesser amount than that which the statute dictates.[23] For this reason, the large CAFE penalty increase as set forth in the IFR would have a harsher and more direct effect than will occur in other programs and statutes administered by NHTSA, as well as the other civil penalty statutes over which the Improvements Act mandated a penalty increase.

As noted above, NHTSA has acknowledged that the payment of civil penalties is a CAFE "compliance flexibility" that some manufacturers elect to undertake. In order to exercise this flexibility, the manufacturers must to be able to estimate the amount of the penalties far enough in advance to weigh that against the alternative path of making fleet changes to meet the standards. If the IFR were to be implemented as written, a number of manufacturers will have elected to pay civil penalties based on one set of assumptions and guidance from NHTSA, only to have a different penalty framework imposed at the eleventh hour without warning. This, coupled with the inability of NHTSA to compromise or adjust the civil penalties, (absent extremely rare circumstances that virtually never apply), means that NHTSA would effectively be unable to take into account the reasonable expectations of the manufacturer in its collection of civil penalties, in contradiction to the leadtime structure that Congress wrote into the CAFE statute from the beginning.

5. As CAFE Standards Rise, the Effective Penalty for Excess Gallons of Fuel Already Increases Automatically.

We also note that since the fundamental goals of EPCA that was enacted in 1975 and EISA that was enacted in 2007 are to reduce oil consumption, it is important to note that the standards themselves have already accounted for inflation. NHTSA uses harmonic averaging for fleet calculations and adjustment factors for credit trades and transfers. These mechanisms ensure that gallons of fuel are properly reflected in the mathematics of compliance.[24] It would be similarly appropriate to consider the gallons of excess fuel consumption in determining the final inflation adjustment, as outlined below:

- Consider a theoretical manufacturer that made one passenger car in 1978 when the standard was 18 mpg. If that vehicle achieved only 17.9 mpg, the penalty for that vehicle would be $5.00. In its lifetime, that vehicle would use 60.6 gallons of fuel more than it would have had it achieved its 18 mpg target. On a gallon basis, that manufacturer's penalty would have been $5.00/60.6 gallons or $0.083/gallon.

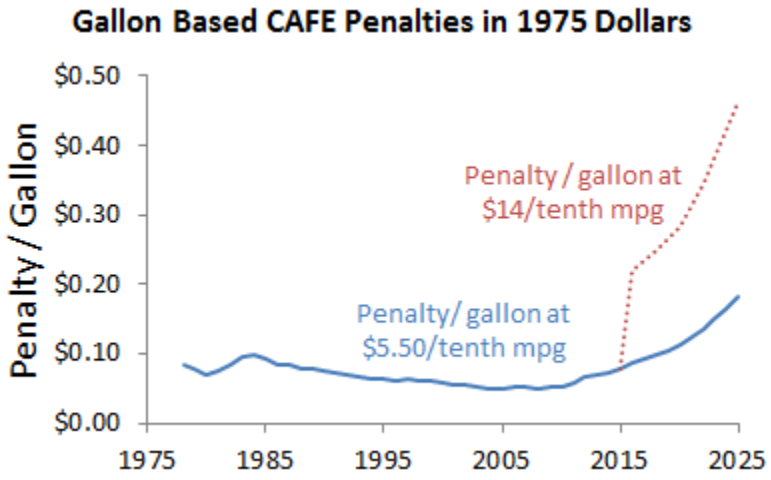
[23] We note that 49 U.S.C § 32913 (a) allows NHTSA to compromise civil penalties under extremely rare circumstances (e.g., manufacturer insolvency or an Act of God, or a certification by the Federal Trade Commission that a reduction in the penalty is needed to prevent a substantial lessening of competition), but this provision has rarely if ever come into play and is fundamentally different in character than the typical ability of government agencies to compromise penalties based on enforcement discretion.

[24] NHTSA already adjusts traded credits on a "gallon" basis to comply with the statutory requirements of 49 U.S.C. 32903(f) to ensure that traded credits are adjusted to preserve total oil savings. See 49 CFR 536.4(c).

- Now consider that same theoretical manufacturer in 2015, again making one passenger car when the standards were 36.2 mpg. If again that manufacturer failed to meet its fuel economy target by 0.1 mpg, that vehicle would use 14.9 gallons more than it would have had it met its target. The gallon based penalty would be $5.50/14.9 gallons or $0.369/gallon in 2015 dollars. Converting to 1975 dollars using the OMB factor of 4.3322 would yield $0.085/gallon, effectively the same penalty on a per-gallon basis as the 1978 example.

The methodology by which the excess fuel consumption is calculated is similar to NHTSA's methods when converting CAFE credits to gallons saved in the document "LD-CAFE credit gallon equivalent."[25]

The example above demonstrates the well-known fact that fuel consumption and fuel economy have a non-linear relationship. As a result of this non-linearity, increases in CAFE standards build in an "inflation adjustment" under which manufacturers pay more and more for each excess gallon of fuel used due to a failure to meet the standards. This is illustrated by the graph below, which shows that even if CAFE penalties remain at $5.50/0.1 mpg, the per-gallon penalty will increase due to the increasing stringency of the CAFE program. If the penalties were suddenly increased to $14.00/0.1mpg, the per-gallon penalty amount would far exceed the 250% maximum increase called for in the Improvements Act.



Request for Relief

In light of the above, the Alliance and Global Automakers petition NHTSA to withdraw the Interim Final Rule as it pertains to CAFE civil penalties and reissue a new Interim Final Rule that applies the inflation adjustment to the base year of 2007. If NHTSA is unable to agree that 2007 is the base year, this petition urges NHTSA to withdraw the IFR and to undertake a notice-

[25] Available at http://www.nhtsa.gov/Laws+&+Regulations/CAFE+-+Fuel+Economy/CAFE_credit_status (last accessed July 30, 2016).

and-comment rulemaking as authorized by the Improvements Act that accomplishes the following objectives:

1. **The Baseline Year for the Inflation Adjustment Should Be 2007.**

The Alliance and Global Automakers request that NHTSA withdraw the Interim Final Rule as it pertains to CAFE civil penalties and reissue a new Interim Final Rule that applies the inflation adjustment to the base year of 2007.

2. **If NHTSA Does Not Concur that 2007 is the Proper Baseline Year, then the Final Rule Should Impose a Smaller Increase for the First Penalty Adjustment.**

The Improvements Act imposed a largely non-discretionary obligation on agencies to adjust their civil penalties for inflation according to a specified formula that was created by the Office of Management and Budget (OMB). The Improvements Act does, however, contain an exception permitting the head of an agency to adjust the amount of a civil penalty by less than the formula would otherwise dictate if the head of the agency finds that increasing the civil penalty by the required amount would have a negative economic impact. If the Director of OMB concurs with the agency's finding, then a smaller increase may be adopted for the first adjustment (which then establishes the baseline for future adjustments.)

It is appropriate for NHTSA to exercise this discretion with respect to the CAFE penalties. As noted above, the Volpe model for CAFE cost estimates shows an average annual cost increase for CAFE compliance of approximately $1 billion, more than ten times higher than the threshold for "significance" under Executive Order 12866 – and significantly higher than the $50 million estimate that NHTSA included in the IFR. Moreover, NHTSA should seek public comment on whether the increase dictated by the Improvements Act would have other cascading effects on the assumptions underlying NHTSA's CAFE analysis, such as whether the higher penalties would alter the conclusions about the economic practicability of the Model Year 2017-2021 standards and how the increased civil penalty amount is affecting the market price of tradeable CAFE credits.

3. **The Final Rule Should Clarify that the Penalty Increases Will Not Apply to Open Model Years**.

Given the unique nature of the CAFE program, in which paying a penalty is an accepted alternative to meeting the fuel economy standards and in which NHTSA has no authority to alter the statutory penalty formula, it would be particularly unfair to apply any increased penalty to a manufacturer with respect to its Model Years 2014, 2015 and 2016 fleet performance that was completed in accordance with prior CAFE guidance from NHTSA. The CAFE compliance files are still open for at least some manufacturers with respect to Model Years 2014 and 2015, and Model Year 2016 is open for all manufacturers; however, it is obviously too late for manufacturers to make any changes to these fleets, even if leadtime were not an issue. Thus, applying the IFR's increased penalty levels to these model years would be purely punitive with absolutely no environmental or fuel-saving benefit and would unfairly disturb the longstanding

expectations of the manufacturers in light of the previous CAFE standard-setting rulemaking by NHTSA.

NHTSA's sister agency, Federal Motor Carrier Safety Administration, has already determined not to apply its increased penalties to open matters because "recalculating the amount of the proposed penalty would not induce further compliance."[26] Similar logic can be applied in the case of CAFE fines. As noted above, the CAFE compliance fines are open for some 2014, 2015 and all 2016 Model Years. Further efforts to comply with those Model Years simply cannot occur. NHTSA should observe that fact, and draw the same conclusion. It is acknowledged that FMCSA has a separate statutory provision to exercise its penalty authority in a manner that induces further compliance, and that the CAFE statute does not confer the same discretion on NHTSA. The point here is that another DOT agency has decided that it would be unreasonable to apply the new penalties retroactively, noting that applying an inflation adjustment to cases awaiting administrative review could raise questions of equity.

4. The Final Rule Should Apply the Improvements Act in a Manner that is Consistent with the CAFE Statute.

Beyond the issues of open model years and the first penalty adjustment, NHTSA should set forth an overall timetable and approach for penalty increases that makes sense in light of the various factors discussed above. In particular, NHTSA should reset the adjustment against the 2007 baseline. In the alternative, NHTSA should seek comment on whether a lower initial adjustment to the CAFE penalties is warranted, given the strict penalty formula in the CAFE statute and the agency's lack of discretion to adjust the formula. And, because increased penalties have the effect of making the CAFE standard more stringent, NHTSA should also seek comment on a reasonable timetable for penalty increases that enable manufacturers to adjust their compliance plans as appropriate. Because the CAFE statute provides for at least 18 months leadtime for more stringent standards, it would not be appropriate for any penalty increases to be imposed before Model Year 2019. Any subsequent penalty increases should be announced at least 18 months prior to the effective date of each increase.

5. NHTSA Should Defer Assessing Any CAFE Penalties Until the Issues Raised by This Petition Are Fully Resolved.

Because of the unique nature of the CAFE program, the Alliance and Global Automakers urge NHTSA to refrain from assessing any CAFE penalties for Model Year 2014, 2015 or 2016 until the concerns outlined in this petition are fully resolved. While the IFR specified that the adjustment for CAFE penalties will take effect on August 4, 2016, there will be unnecessary confusion should NHTSA proceed with imposing CAFE penalties during the pendency of this petition. As there is no statutory imperative specifying a schedule for resolving CAFE penalties, a modest suspension of activity on open CAFE penalty cases while the issues raised by this petition are resolved would help avoid that confusion, or any unnecessary proceedings under the refund provisions of Section 32903(h) of the CAFE statute.

[26] 81 Fed. Reg. 41453, 41454 (June 27, 2016).

Conclusion

The Alliance and Global Automakers respectfully request NHTSA to act promptly to withdraw the IFR and reissue a new IFR that applies the inflation adjustment to the base year of 2007. If NHTSA is unable to agree that 2007 is the base year for which the CAFE penalty was reset, we urge NHTSA to withdraw the IFR and undertake a notice-and-comment rulemaking to consider an appropriate civil penalty adjustment for the CAFE program, taking into account the unique interplay between the stringency of the CAFE standard and the civil penalty levels. Any such penalty increase should 1) not apply to open model years; 2) impose a smaller increase for the first penalty adjustment (either the adjustment applicable to the 2007 baseline or such other smaller increase as NHTSA determines by rulemaking); and 3) provide overall consistency with the goals and directives of the CAFE statute.

We appreciate NHTSA's consideration of this very important request. Representatives of both the Alliance and Global Automakers are available to meet with NHTSA to discuss this petition in more detail.

Sincerely,

Chris Nevers
Vice President of Energy and Environment
Alliance of Automobile Manufacturers

Julia Rege
Director, Environment and Energy Affairs
Association of Global Automakers

Cc: Thomas Healy, NHTSA
James Tamm, NHTSA
Ryan Harrington, DOT
Kevin Green, DOT

Exhibit H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents.	Case No. 17-2780

DECLARATION OF LUKE TONACHEL

I, Luke Tonachel, state and declare as follows:

1. I am the Director of the Clean Vehicles and Fuels Project at the Natural Resources Defense Council (NRDC). I have been employed by NRDC for the past 13 years. I have personal knowledge of the subject matter of this declaration and, if called as a witness, could and would competently testify as to its contents.

2. I received my Bachelor of Science Degree in Mechanical Engineering from the University of Rochester and my Master of Public Policy Degree from the University of California, Berkeley.

3. I have extensive professional experience working on clean transportation policies at the state and federal level. I have provided detailed technical comments on clean and efficient vehicle regulatory policies,

such as the Corporate Average Fuel Economy standards, through proceedings conducted by the National Highway Traffic Safety Administration and the Environmental Protection Agency and state environmental and utility regulatory agencies. I have conducted detailed analysis of environmental and economic impacts to support comments and testimony before the agencies and have been a lead author of recent reports including *Supplying Ingenuity II: U.S. Suppliers of Key Clean, Fuel-Efficient Vehicle Technologies* by NRDC and the BlueGreen Alliance and the *Environmental Assessment of a Full Electric Transportation Portfolio* by NRDC and the Electric Power Research Institute.

4. For decades, a core part of NRDC's work has been decarbonizing and cleaning up transportation sector emissions, through strengthening fuel economy and carbon-pollution standards for passenger vehicles and heavy-duty trucks, promoting policies encouraging the adoption of electric vehicles, and advocating for cleaner fuels. Our staff relies on various tools to achieve these goals, ranging from education and advocacy at the state and federal level to litigation.

5. Ensuring strong Corporate Average Fuel Economy (CAFE) standards is an essential part of our transportation work to reduce reliance on petroleum and associated pollution. Our advocacy on CAFE standards has included participating and submitting comments in the following rulemakings: *Reforming the Automobile Fuel Economy Standards Program*

(Docket No. 2003-16128); *Average Fuel Economy Standards for Light Trucks Model Years 2008-2011* (Docket No. 2006-24306); *Average Fuel Economy Standards for Passenger Cars and Light Trucks, Model Years 2011-2015* (Docket No. NHTSA-2008-0089) and the accompanying environmental review process; *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2012-2016* (Docket No. EPA-HQ-OAR-2009-0472; NHTSA-2009-0059); and *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards* (Docket No. EPA-HQ-OAR-2010-0799; NHTSA-2010-0131) and the accompanying environmental review process. NRDC also helped litigate *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), which challenged the 2006 final rule setting CAFE standards for model years 2008-2011 and the environmental analysis accompanying the rule.

6. The National Highway Traffic Safety Administration (NHTSA) enforces compliance with its CAFE standards by imposing civil monetary penalties on manufacturers that violate the standards.

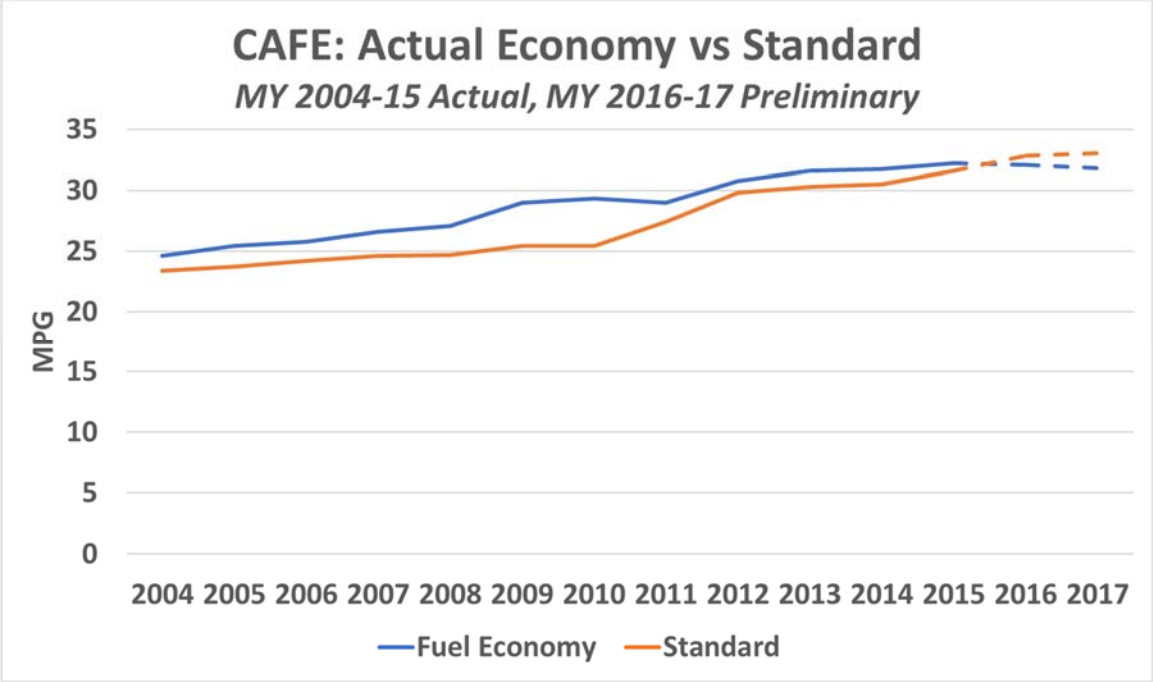
7. NHTSA uses the following formula to calculate the appropriate penalty: (the civil penalty rate) times (each tenth of a mile per gallon by which the manufacturer's fleet falls short of the applicable CAFE standard) times (the number of vehicles in the manufacturer's non-compliant fleet).

8. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires federal agencies to adjust their civil penalties for inflation, to maintain the deterrent effect of these penalties and promote compliance with the law. Pursuant to this requirement, NHTSA in December 2016 raised the penalty rate to $14 for Model Years 2019 and after. NHTSA had last adjusted the penalty rate to account for inflation in 1997, from $5 to $5.50.

9. Incentivizing manufacturer compliance with CAFE standards depends on a penalty structure which is strong enough to cause manufacturers to improve the fuel economy of new passenger vehicles rather than to pay a fine.

10. NHTSA's own data underscores the importance of an appropriately-designed penalty. Based on data from NHTSA's Public Information Center and its Projected Fuel Economy Performance Report, NHTSA has projected that, as CAFE standards continue to rise, more manufacturers are expected to fall short of the standards in Model Years (MY) 2016 and 2017, when the penalty rate is only $5.50. NRDC used this data to prepare Figure 1 below. Moving forward, it will become increasingly important to ensure that the penalty is strong enough to incentivize greater compliance.

Figure 1: CAFE Actual versus Standard History and Near-Term Projections



11. NRDC's analysis of the CAFE penalty adjustment shows that $14 per tenth of a mile provides an appropriate regulatory incentive by making it more economically attractive for manufacturers to meet the standards than to pay the penalty. We based our analysis on the outputs of NHTSA's own publicly available Compliance and Effects Modeling System[1] used to assess CAFE standards (commonly referred to as "Volpe model"), and which utilizes the agency's updated set of assumptions under the Midterm Evaluation process as part of the Technical Assessment Report (TAR 2016).[2]

[1] Available at https://www.nhtsa.gov/corporate-average-fuel-economy/compliance-and-effects-modeling-system.

[2] Available at https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas#TAR.

12. Based on the results of the Volpe model runs, passenger vehicle and light truck manufacturers are estimated to achieve a fleetwide average fuel economy of 30.9 miles per gallon (mpg) in MY2016. For MY2019, the same manufacturers are estimated to achieve an industry fleetwide average of 34.7 mpg—or an increase of roughly 4 mpg compared to MY2016. For MY2020, the estimated fleetwide average is 35.4 mpg—an increase of 4.5 mpg above MY2016.

13. Using the NHTSA Volpe model, which includes the agency's updated technology cost inputs from 2016, NRDC calculated the marginal cost of compliance for improving fuel economy beyond the MY2016 levels. NRDC also confirmed the marginal costs represented by the Volpe model by conducting a quadratic regression for the fuel economy cost curve. As shown in Table 1 below, which summarizes these marginal cost results, improving efficiency by 1 mpg would cost approximately $107 per vehicle; improving efficiency by 2 mpg would cost an additional $114 above the initial $107; and so on.

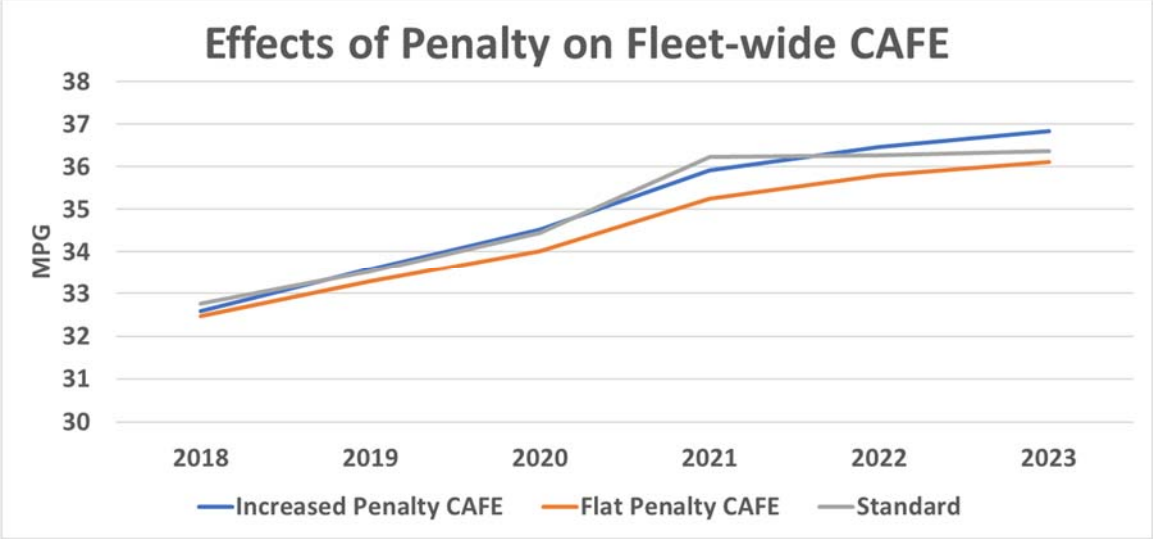
Table 1: Marginal Cost Results

MPG Increase	Marginal Cost ($/MPG)	Marginal Cost ($/0.1MPG)
1	107	10.7
2	114	11.4
3	120	12.0
4	126	12.6
5	132	13.2
6	139	13.9
7	145	14.5

14. Thus, with a penalty rate of $14 per tenth of a mile per gallon (or $140 per mpg), it would be more economically attractive for manufacturers to improve fuel economy by 4 mpg to meet the MY2019 achieved levels (as compared to MY2016) than to pay the penalty. Conversely, with a penalty rate of $5.50 per tenth of a mile per gallon (or $55 per mpg) it would be more economically attractive to not adopt fuel economy improvements and to pay the penalty instead. The same holds true for the 4.5 mpg increase required to meet the MY2020 levels.

15. NHTSA's Volpe model further confirms that the updated penalty rate of $14 would improve compliance. Using the Volpe model, NRDC modeled two scenarios: (a) where the penalty rate remained at $5.50 ("Flat Penalty CAFE"); and (b) where the updated penalty rate of $14 applies in MY2019 and after ("Increased Penalty CAFE"). NRDC also adjusted the model to assume that manufacturers will behave in an economically rational manner and choose to pay the penalty when it is less expensive than the costs of compliance. As illustrated in Figure 2 below, NRDC found that a penalty rate of $5.50 leads to under-compliance with the CAFE standards, while the updated penalty rate of $14 incentivizes compliance.

Figure 2: Effects of Penalty on Full Manufacturer Penalty Response



16. Applying the $14 penalty rate not only induces manufacturer compliance, it also brings significant net benefits to consumers. One output from the Volpe model is a summary of the social costs and benefits of a particular set of inputs. NRDC used two different Volpe model runs to compare the net societal benefits of a $14 penalty rate to those of a $5.50 penalty rate. The model shows that the societal benefits of a $14 penalty rate (i.e., fuel savings, decreased refueling time, greater energy security, decreased pollution) greatly outweigh the societal costs (i.e., technology and maintenance costs, safety and congestion issues), when that penalty rate is applied to MY2019 and beyond.

Table 2: Economic Impact of $14 Penalty Rate with Full Manufacturer Penalty Response (Nominal $M)

(Nominal $M)	2018	2019	2020	2021	2022	2023
Social Costs	393	977	1,643	2,123	2,141	2,209
Societal Benefits	1,234	3,054	4,945	6,047	5,931	6,399
Net Benefit	**841**	**2,077**	**3,303**	**3,924**	**3,789**	**4,190**

17. By contrast, as shown in Table 3 below, the net benefits to society are far lower when the penalty rate is only $5.50. A penalty rate of $14 would result in $1.81 billion greater net benefits in 2019 than would a penalty rate of $5.50.

Table 3: Economic Impact of Increased vs Flat Penalty (Nominal $M)

(Nominal $M)	2018	2019	2020	2021	2022	2023
Social Costs	56	114	221	437	641	754
Societal Benefits	175	381	728	1,367	1,981	2,334
Net Benefit	**119**	**267**	**507**	**931**	**1,340**	**1,580**

18. Rolling back the CAFE penalty rate to $5.50 weakens an important deterrent for manufacturer non-compliance, disadvantages consumers by reducing the number of more fuel-efficient vehicle choices in the marketplace, and subjects the public to additional emissions of dangerous air pollutants, including greenhouse gases. The updated penalty rate of $14 sends the right signals to manufacturers, spurring them to improve the efficiency of their fleets to meet the fuel-economy standards, rather than allowing them an easy out if they fail to comply. The $14 penalty rate should be left in place.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on October 19, 2017, in New York, New York.

Luke Tonachel

Exhibit I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents.	Case No. 17-2780

DECLARATION OF GINA TRUJILLO

I, Gina Trujillo, state and declare as follows:

1. I am the Director of Membership at the Natural Resources Defense Council (NRDC). I have served in that role since January 1, 2015 and I have worked in NRDC's membership department for more than 23 years. I have personal knowledge of the subject matter of this declaration, and if called as a witness, could and would competently testify as to its contents.

2. My duties include supervising the maintenance of membership records and preparation of materials that NRDC distributes to members and prospective members. Those materials describe NRDC and identify its mission. I am familiar with NRDC's mission statement and its priorities.

3. NRDC is a membership organization incorporated under the laws of the State of New York. It is recognized as a not-for-profit corporation under section 501(c)(3) of the United States Internal Revenue Code. NRDC's primary office is in New York City.

4. NRDC has over 500,000 members nationwide. When a person becomes a member of NRDC, that person authorizes NRDC to take legal action on his or her behalf to protect the environment and public health.

5. NRDC's mission is to "safeguard the earth – its people, its plants and animals, and the natural systems on which all life depends." Cleaning up the transportation and energy sector is a key part of carrying out this mission statement, and NRDC engages in various forms of advocacy on this front, from participating in regulatory proceedings at the state and federal level to engaging in litigation when necessary as well.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on September 26, 2017, in New York, New York.

Gina Trujillo

Exhibit J

DECLARATION OF ANDREW LINHARDT

I, Andrew Linhardt, declare as follows:

1. I am the Deputy Legislative Director for Transportation at Sierra Club. I was formerly the organization's Associate Director for Legislative and Administrative Advocacy.

2. In my current role, I manage and coordinate Sierra Club's policies and efforts on behalf of its members to advocate for greater fuel efficiency for our nation's vehicle fleet. I also serve as the organization's lead lobbyist on transportation issues. While at the Sierra Club, I have worked on numerous matters involving the National Highway Traffic Safety Administration's (NHTSA) corporate average fuel (CAFE) standards and the Environmental Protection Agency's (EPA) greenhouse gas regulations for light-duty and heavy-duty vehicles.

3. The Sierra Club is a non-profit membership organization incorporated under the laws of the State of California, with its principal place of business in Oakland. The Sierra Club's mission is to explore, enjoy and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

4. As part of carrying out this mission, for decades the Sierra Club has used the traditional tools of advocacy--organizing, lobbying, litigation, and public outreach—to push for policies that decrease air and climate pollution by reducing our nation's dependence on fossil fuels.

5. Sierra Club has a long history of involvement in vehicle regulations aimed at tackling pollution and lessening our dependence on oil as a transportation fuel. Together with other organizations, Sierra Club has in the past challenged NHTSA's CAFE standards for light-duty vehicles for failure to comply with the relevant requirements under the Energy Policy and Conservation Act. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008).

6. Sierra Club has long advocated for climate regulations for vehicles. In 2002, Sierra Club and other organizations filed a lawsuit against EPA requesting the agency to regulate greenhouse gases from motor vehicles. EPA settled that lawsuit and denied the petition in 2003, on the grounds that the agency lacked authority to do so. Sierra Club and numerous states and environmental organizations challenged that denial, ultimately leading to the Supreme Court's decision in *Massachusetts v. EPA*, which held that greenhouse gases are air pollutants subject to regulation under the Clean Air Act. 549 U.S. 497 (2007).

7. The Supreme Court's ruling resulted in EPA's issuance of a finding

that six greenhouse gases endanger the public health and welfare of current and future generations, which forms the basis of the agency's greenhouse gas regulations for light-duty and heavy-duty vehicles. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

8. In 2010, NHTSA and EPA jointly issued CAFE and greenhouse gas emission standards for light-duty vehicles. *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25,324 (May 7, 2010). Sierra Club and others commented on the proposed rule and intervened in the industry's lawsuit challenging the standards. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *rev'd on other grounds sub nom. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). NHTSA and EPA updated these standards in 2012. *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

9. In 2011, NHTSA and EPA adopted CAFE and greenhouse gas standards for heavy-duty trucks, updating these standards in 2016. *Greenhouse Gas Emission Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles; Final Rule*, 76 Fed. Reg. 57,106 (Sep. 15, 2011); *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and*

Heavy-Duty Engines and Vehicles-Phase 2, 81 Fed. Reg. 73,478 (Oct. 25, 2016). Sierra Club and others intervened to defend those rules against industry challenges. *Delta Construction Company v. EPA*, 783 F.3d 1291 (D.C. Cir. 2015); *Truck Trailer Manufacturers Association v. EPA*, Nos. 16-1430, 16-1447 (D.C. Cir. 2017).

10. For years, Sierra Club has actively engaged in the rulemaking and litigation around EPA's National Ambient Air Quality Standards that regulate criteria air pollutants, many of which are emitted by vehicles. These conventional pollutants contribute to the formation of smog and soot, which cause respiratory and heart disease, and even premature death. *See, e.g.*, *American Lung Association v. EPA*, No. 17-1172 (D.C. Cir. 2017).

11. The Energy Policy and Conservation Act authorizes NHTSA to establish civil penalties for violations of the fuel economy standards, and to raise the amount of such penalties if it makes certain findings. The amount of the CAFE civil penalty was established by statute in 1975 and, for most of the duration of the program was set at $5.50 for each tenth of a mile per gallon that a manufacturer's fleet, on average, falls short of its compliance obligation, multiplied by the number of vehicles in the fleet with this shortfall.

12. In 2015, Congress amended the Inflation Adjustment Act, directing all federal agencies to adjust their civil penalties following a formula set forth therein.

To comply with the law, in July 2016 NHTSA issued an interim rule that adjusted the CAFE civil penalty from $5.50 to $14. *Civil Penalties*, 81 Fed. Reg. 43,524 (July 5, 2016). In response to industry's petitions for reconsideration, in December 2016 NHTSA issued a final rule that provides that the $14 penalty rate applies to model year 2019 and later vehicles. *Civil Penalties*, 81 Fed. Reg. 95,489 (Dec. 28, 2016).

13. On July 6, 2017, NHTSA published two notices in the Federal Register. The first notice announced that the agency is reconsidering the December rule that adjusts the CAFE civil penalties for inflation. *Civil Penalties*, 82 Fed. Reg. 32,140 (July 12, 2017). The second notice indefinitely delays the effective date of that rule pending its reconsideration in order to allow for public comment. *Civil Penalties*, 82 Fed. Reg. 32,139 (July 12, 2017). This delay, which was issued without opportunity for public comment, is the basis for this lawsuit.

14. CAFE civil penalties are a critical part of Sierra Club's advocacy to reduce pollution in the transportation sector because those penalties encourage automobile manufacturers to comply with the fuel economy standards. If Sierra Club's challenge to NHTSA's delay is successful, higher civil penalties will remain in place and influence automakers' planning for compliance with the standards. It is critical that these higher penalties are properly implemented.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on October 5, 2017.

Andrew Linhardt

Exhibit K

DECLARATION OF KASSIA R. SIEGEL

I, Kassia R. Siegel, declare as follows:

1. I am the director of the Center for Biological Diversity's Climate Law Institute. I have personal knowledge of the facts and statements contained herein and, if called as a witness, could and would competently testify to them.

2. The Center for Biological Diversity (the "Center") is a non-profit corporation with offices in California and throughout the United States. The Center works to protect wild places and their inhabitants. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. Combining conservation biology with litigation, policy advocacy, and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension, for the spiritual welfare of generations to come. In my role as director of the Center's Climate Law Institute, I oversee all aspects of the Center's climate and air quality work.

3. The Center works on behalf of it members, who rely upon the organization to advocate for their interests in front of state, local and federal entities, including EPA and the courts. The Center has approximately 61,400 members.

4. The Center has developed several different practice areas and programs, including the Climate Law Institute, an internal institution with the primary mission of curbing global warming and other air pollution, and sharply limiting its damaging effects on endangered species, their habitats, and human health for all of us who depend on clean air, a safe climate, and a healthy web of life.

5. Global warming represents the most significant and pervasive threat to biodiversity worldwide, affecting both terrestrial and marine species from the tropics to the poles. Absent major reductions in greenhouse gas emissions, by the middle of this century upwards of 35 percent of the earth's species could be extinct or committed to extinction as a result of global warming. With even moderate warming scenarios producing sufficient sea level rise to largely inundate otherwise "protected" areas like the Everglades and the Northwest Hawaiian Islands, climate

change threatens to render many other biodiversity conservation efforts futile. To prevent extinctions from occurring at levels unprecedented in the last 65 million years, emissions of carbon dioxide and other greenhouse gases must be reduced deeply and rapidly. Given the lag time in the climate system and the likelihood that positive feedback loops will accelerate global warming, leading scientists have warned that we have only a few decades, at most, to significantly reduce greenhouse gas emissions if we are to avoid catastrophic effects. Deep and immediate greenhouse gas reductions are required if we are to save many species which the Center is currently working to protect, including but not limited to the polar bear, Pacific walrus, bearded seal, ringed seal, ribbon seal, Kittlitz's murrelet, American pika, Emperor penguin, and many species of corals. Leading scientists have also stated that levels of carbon dioxide, the most important greenhouse gas, must be reduced to no more than 350 parts per million (ppm) and likely less than that, "to preserve a planet similar to that on which civilization developed and to which life on Earth is adapted" (J. Hansen et al., *Target Atmospheric CO2: Where Should Humanity Aim?*, 2 Open Atmospheric Sci. J. 217, 218 (2008)).

6. One of the Climate Law Institute's top priorities is the full and immediate use of the Clean Air Act to rein in greenhouse gases and other pollutants. The Clean Air Act is our strongest and best existing tool for doing so, and we have long worked to enforce the Clean Air Act's mandates to accomplish this goal. For example, the Center was a Plaintiff in *Massachusetts vs. EPA*, which resulted in the landmark Supreme Court decision finding that greenhouse gases are pollutants under the Clean Air Act, which ultimately led to EPA's first-ever rulemaking to reduce greenhouse gas emissions from passenger cars and light trucks under section 202. That rulemaking is comprised of the *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) ("Endangerment Finding"), and the *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324, 25,397 (May 7, 2010), updated twice since then, the last time by EPA and the National Highway Traffic Safety Administration through 2025, *2017 and Later Model year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, Final Rule*, 77 Fed. Reg. 62624 (Oct. 15, 2012). EPA affirmed

these latest light-duty vehicle standards in a mid-term evaluation. *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation* (January 2018), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf. The Center submitted comments to each of those successor light duty vehicle rules, as well as to the first medium duty/heavy duty vehicle rule and its proposed successor, the *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, Phase 2; Proposed Rule,* 80 Fed. Reg. 40138 (July 13, 2015).

7. EPA's rulemaking to reduce greenhouse gases from passenger vehicles preceded significant additional regulatory activity for greenhouse gases under other Clean Air Act programs, including rulemakings that enforce the Clean Air Act's PSD permitting program and best available control technology ("BACT") requirements for greenhouse gases emitted by stationary sources and implementation of New Source Performance Standards for various industrial facilities. *E.g., Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,* 75 Fed. Reg. 31,514 (2010). EPA's rulemakings were upheld in 2012 in *Coalition for Responsible Regulation v. EPA* (D.C. Cir. 2012) 684 F.3d 102, a matter in which the Center submitted an amicus brief. The Supreme Court affirmed *Coalition for Responsible Regulation* in part, upholding EPA's authority to require BACT for greenhouse gas emissions from facilities that must obtain PSD permits due to their potential to emit non-greenhouse gas pollutants. *See Util. Air Reg. Group v. EPA*, 573 U.S. __, 134 S. Ct. 2427, 2449 (2014).

8. We have also worked to obtain an endangerment finding and emission standards for greenhouse gases from aircraft for nearly a decade. In 2007, we and others petitioned EPA to issue an endangerment finding and greenhouse gas standards for aircraft under Clean Air Act section 231. When EPA failed to respond, we and others sued EPA for unreasonable delay in 2010, and obtained a court order requiring EPA to undertake an endangerment finding for aircraft in 2011. *Center for Biological Diversity v. EPA,* 794 F. Supp. 2d 151 (D.D.C. 2011). When EPA failed to act, we notified it of our intent to sue for unreasonable delay in 2014. In 2015, EPA released a proposed endangerment finding and an advance notice of proposed rulemaking for

aircraft greenhouse gases, *Proposed Finding That Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare and Advance Notice of Proposed Rulemaking, Proposed Rule*, 80 Fed. Reg. 37758 (July 1, 2015). When EPA failed to finalize the endangerment finding, we filed a second lawsuit in April 2016 to compel EPA to act. *Center for Biological Diversity v. EPA*, No. 1:16-CV-00681. On August 15, 2016, EPA issued the Aircraft Endangerment Finding.

9. We also commented on EPA's proposed rulemakings to set standards and guidelines for greenhouse gas emissions from new, modified/reconstructed, and existing power plants under Clean Air Act sections 111(b) and 111(d). (Center comments, EPA- EPA-HQ-OAR-2011-0660-10171 [June 22, 2012]; HQ-OAR-2013-0495-10119 [May 9, 2014]; EPA-HQ-OAR-2013-0602-25292 [Dec. 1, 2014].) We sought leave from this Court to intervene on behalf of EPA in the ongoing litigation over both the existing and the new, modified/reconstructed final power plant greenhouse gas rulemakings, and were granted that leave. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed October 23, 2015); *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Oct. 23, 2015). We have since actively participated in that litigation through numerous filings. We have also been involved in many other Clean Air Act administrative proceedings and legal actions seeking to enforce the Act's provisions for greenhouse gases. For example, the Center and others filed a lawsuit challenging an EPA rule exempting large-scale biomass-burning facilities from carbon dioxide limits under the Clean Air Act. *See Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir 2013). On July 12, 2013, this Court overturned EPA's exemption for "biogenic carbon dioxide," confirming that Clean Air Act limits on carbon dioxide pollution apply to industrial facilities that burn biomass, including tree-burning power plants. *Id.* We have participated in numerous other legal actions, including but not limited to *Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014) (challenging EPA's decision to exempt the Avenal power plant from Clean Air Act requirements applicable at the time of permit issuance), and *Resisting Environmental Destruction on Indigenous Lands v. EPA*, 716 F.3d 1155 (9th Cir. 2013) (challenging errors in air permits that would allow Shell to conduct exploratory drilling in the Arctic ocean). In September, 2010, we petitioned EPA to issue greenhouse gas standards for

locomotive engines pursuant to Clean Air Act section 213(a)(5). *Petition for Rulemaking Under the Clean Air Act to Reduce Greenhouse Gas and Black Carbon Emissions from Locomotives* (Sept. 21, 2010). In December 2009, we petitioned EPA to designate greenhouse gases as criteria air pollutants under Clean Air Act section 108 and to issue National Ambient Air Quality Standards (NAAQS) sufficient to protect public health and welfare. *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act* (Dec. 2, 2009). These examples are illustrative of our advocacy in this area, not exhaustive.

10. In addition to our work on greenhouse pollution, the Center has worked through the Clean Air Act to address other pollutants that adversely impact biodiversity and human health. For example, we filed suit against EPA for failing to review and revise the air quality criteria for oxides of nitrogen and sulfur oxides and the NAAQS for nitrogen dioxide and sulfur dioxide. This case resulted in a court-ordered settlement agreement setting forth deadlines for EPA to update these critically important standards. On February 9, 2010, EPA issued updated primary NAAQS for nitrogen dioxide. *Primary National Ambient Air Quality Standards for Nitrogen Dioxide; Final Rule*, 75 Fed. Reg. 6474 (February 9, 2010). On June 22, 2010, EPA issued updated primary NAAQS for sulfur dioxide. *Primary National Ambient Air Quality Standard for Sulfur Dioxide; Final Rule*, 75 Fed. Reg. 35520 (June 22, 2010). On April 3, 2012, EPA decided not to revise the 40-year-old secondary NAAQS for sulfur and nitrogen oxides, despite acknowledging ongoing harm to terrestrial and aquatic ecosystems from acid rain and other depositional pollution. *Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur*, 77 Fed. Reg. 20218 *(April 3, 2012).* We challenged the latter decision as contrary to the Clean Air Act. *See Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014). We also filed suit in 2010 against EPA for failing to meet numerous deadlines for limiting dangerous particle pollution, including deadlines for: (a) determining whether areas in five western states are complying with existing air pollution standards, and (b) ensuring that states are implementing legally required plans to meet the standards. *Ctr. for Biological Diversity v. Jackson*, N.D. Cal. No. CV 10-1846 MMC (filed April 29, 2010). This case resulted in another settlement establishing deadlines for EPA to carry out these important duties.

11. On October 1, 2015, the Center filed a petition with NHTSA requesting the agency to increase civil penalties applicable to manufacturers whose vehicle fleets fail to meet the annual average corporate fuel efficiency standards ("CAFE standards"). Those penalties are established under the Energy Policy and Conservation Act, 39 U.S.C. § 32912(b) ("EPCA"), and apply to every one-tenth of a mile per gallon that a manufacturer's average corporate fuel efficiency standards falls short of the applicable CAFE standards in any model year, multiplied by the number of vehicles failing to reach that standard. The Center pointed out that the penalty amount of $5.50 had not been increased and noted that some automobile manufacturers elect to pay penalties rather than comply with NHTSA's CAFE standards, resulting in increased emissions of greenhouse gases and other pollutants. A month later, on November 2, 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvement Act ("2015 Civil Penalties Adjustment Act"). The 2015 Civil Penalty Act requires federal agencies to adjust civil penalties applicable to violations of statutes they implement to account for inflation, with the goal of "deterring violations and furthering the policy goals embodied in such laws and regulations . . .." Public Law 101-74, Title VII, § 701(b), sec. 2(a)(1).

12. In 2016, NHTSA implemented the 2015 Civil Penalties Adjustment Act and increased CAFE penalties from $5.50 to $14. NHTSA took this step by means of a memorandum entitled *Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 for the Corporate Average Fuel Economy (CAFE) Program, available at* https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/civilpenaltyincreaseupdate.pdf (July 18, 2016) ("Civil Penalty Rule"). In response to a reconsideration petition, NHTSA delayed the effective date of the Civil Penalty Rule to July 10, 2017. *Final rule; response to petition for reconsideration; response to petition for rulemaking*, 81 Fed. Reg. 95489 (Dec. 28, 2016.) But on July 12, 2017, NHTSA issued a new final rule, *Final Rule; delay of effective date,* 82 Fed. Reg. 32139 ("Delay Rule"), which delayed the Civil Penalty Rule's effective date "indefinitely pending reconsideration." *Id.* NHTSA provided neither notice nor opportunity to comment on the Delay Rule.

13. NHTSA and EPA estimate that the CAFE standards save approximately 170 billion gallons, or 4 billion barrels, of oil, and reduce greenhouse gas emissions by the some 2 billion metric tons over the lifetime of the vehicles they covers. 77 Fed. Reg. 62627. The vehicles regulated by the standards are responsible for some 60 percent of all U.S. transportation-related fuel consumption and greenhouse gas emissions. *Id.* The ground-level ozone and particulate matter emissions reductions the CAFE standards produce are critical components of the attainment of primary National Ambient Air Quality Standards, significantly reducing the national inventory and ambient concentrations of criteria pollutants, especially $PM_{2.5}$ and ozone, *id.* at 62627, and significantly reducing serious health issues, including premature mortality. *Id.* at 62629. Net economic benefits from the CAFE standards are estimated to be in the range of $326 billion to $451 billion. *Id.* at 62631.

14. The 2017-2025 light-duty vehicle greenhouse gas and CAFE standards are critical to reducing the dangerous pollution caused by the nation's vehicle fleet. The pollutants from these vehicles include oxides of nitrogen, particulate matter, ground-level ozone, and greenhouse gases, all of which endanger human health and welfare and cause serious adverse health effects to the public, including members of the Center. These pollutants particularly affect persons living next to busy highways and freeways. Short-term exposure to emissions of nitrogen dioxide "can aggravate respiratory diseases, particularly asthma, leading to respiratory symptoms (such as coughing, wheezing, or difficulty breathing), hospital admissions and visits to emergency rooms"; longer-term exposure "may contribute to the development of asthma and potentially increase susceptibility to respiratory infections."[1] Emissions of nitrogen oxides also contribute to the formation of tropospheric ozone. Ozone can reduce lung function, harm lung tissue, and trigger a variety of respiratory health problems in humans, and can damage "sensitive vegetation and ecosystems, including forests, parks, wildlife refuges and wilderness areas."[2] Exposure to particulate matter can affect both the lungs and heart and cause premature death in people with heart or lung disease, nonfatal heart attacks, aggravated asthma, decreased lung function, and

[1] EPA, Basic Information about NO2, *available at* https://www.epa.gov/no2-pollution/basic-information-about-no2#Effects.
[2] EPA, Ozone Basics, *available at* https://www.epa.gov/ozone-pollution/ozone-basics#effects.

increased respiratory symptoms, such as irritation of the airways, coughing or difficulty breathing.[3]

15. Center members suffer ill health effects directly traceable to the oxides of nitrogen, particulate matter and ozone emissions from the light-duty vehicle fleet. Because low civil penalty rates encourage non-compliance with CAFE standards, which can result in the nation's vehicle fleet's failure to meet the stringency set by law, an indefinite delay of the adjusted penalties will increase emissions of these pollutants and directly affect the health and well-being of our members. Conversely, reversal of the Delay Rule will remove incentives for non-compliance, reduce dangerous pollution, improve air quality and increase our members' health and well-being.

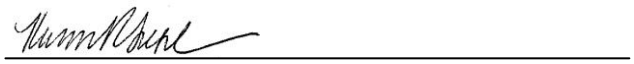
16. The Center's members rely on the organization to support efforts to increase fuel efficiency and thereby reduce harmful pollution from vehicles, to enforce the provisions of EPCA, the 2015 Civil Penalty Act, the Clean Air Act, and other laws, and to compel the light-duty vehicle fleet to meet the actual stringency levels (both for CAFE standards and for greenhouse gas emissions) NHTSA and EPA promulgate.

17. The Center's members also rely on the organization to protect their procedural and informational rights. As shown above, the Center, on behalf of its members, frequently comments on agency rulemakings, including many of the regulations affecting motor vehicles, and the Center disseminates the information it obtains, advocates on behalf of more stringent and effective standards, and seeks to enforce applicable laws and regulations to protect its members' health and well-being from the negative effects of vehicle pollution. Because the Delay Rule was implemented without notice and an opportunity to comment, the Center and its members were deprived of the opportunity to weigh in and be heard concerning the ill effects of this rule, to disseminate information about NHTSA's intended actions to its members, and to seek to change the outcome. The lack of notice and comment directly injured the Center's and its members' procedural and informational rights.

[3] EPA, Health and Environmental Effects of Particulate Matter (PM), *available at https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm.*

18. Conversely, a reversal of the Delay Rule would require NHTSA to provide notice and comment to the public and follow the applicable procedural rules if it again determined to alter the effective date of the Civil Penalty Rule. Providing notice and the opportunity to comment would allow the Center, on behalf of its members, and those members themselves to submit comments that may influence the agency's ultimate decision and lead it to retain the 2019 effective date. Those actions would address both the substantive and the procedural harm caused by the indefinite delay of the Civil Penalties Rule.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 31, 2017, at Oakland, California.



Kassia R. Siegel

Exhibit L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents.	Case No. 17-2780

DECLARATION OF FAVIOLA MUNGUIA

I, Faviola Munguia, state and declare as follows:

1. I am a member of the Natural Resources Defense Council (NRDC). I joined NRDC in May 2017 because I wanted to help defend our laws and prevent the Trump administration from rolling back important environmental and public health protections—issues that are very important to me. I rely on NRDC to be on the front lines advocating on these issues for me, my community, and the world.

2. I first came to the United States in 1990, when I was seven years old. My family settled in Wilmington, California, and never moved. Wilmington is a small, predominantly Latino community within the City of Los Angeles. It is adjacent to the Port of Los Angeles.

3. The air quality in Wilmington is terrible. We are surrounded by three large oil refineries—Phillips 66, Valero, and Tesoro—all within two or three

miles of my home. The refineries are a constant presence in our lives. Every day when you wake up and come out of your house in the morning you smell a thick, distinct chemical smell. It's not normal. It doesn't smell like air. It goes away when you leave the area, and it hits you again as soon as you return. It's a constant reminder: the smell doesn't let you forget that there's something wrong here. It's right there in your nose. And there's no way whatever we're smelling is good for us.

4. Growing up here, I thought asthma was a common thing that everyone gets eventually, like chicken pox. Half of my friends had it in middle school. I remember asking my mom when I was going to get it too.

5. When I was younger I used to be a runner. I would usually go over to Palos Verde to run, where the air is cleaner by the ocean. Any time I would run around here I wouldn't last more than a mile. My chest would start hurting all of a sudden, and my eyes would feel weird. So I stopped. I don't run around here anymore.

6. In April 2017 my dad died from pulmonary fibrosis. He never smoked in his life, and had otherwise been a very health man. He was a gardener who worked mostly outdoors, in nearby communities like Carson, Torrance, and San Pedro. So he was exposed to the air pollution every day. I can't explain to you what an ugly illness pulmonary fibrosis is and how much he suffered. Although there are no definite causes, I had a gut feeling that I knew where the illness came from. I just knew.

7. I am terribly concerned about the health risks that I and my family continue to face from breathing the polluted air in Wilmington. My mother and three siblings live here, all within a mile of each other. As do ten of my nephews and nieces. I care a lot about them, and I worry about their future.

8. The pollution problems we experience here first-hand in Wilmington have made me learn more about the issues. As I continue to understand more about how it all works, I have come to realize that it's a much larger problem. My awareness started in my nose at our front door, and it extended out to the whole world. I'm very distraught and bothered by it. That's why I became a member of NRDC.

9. It's also why I strongly support efforts to reduce our fuel consumption. If we decrease our demand for fuel, the refineries that surround us here in Wilmington will refine less fuel and reduce their pollution of our air.

10. Our government should be doing whatever it can to promote the shift to more fuel-efficient cars. Fuel consumption by cars and trucks is a huge part of the problem. Based on what I've read, I'm sure the car companies are coming up with technology to reduce fuel consumption or replace it entirely with electric cars. But instead of acknowledging that innovation, industry is helping feed the problem by producing more gas guzzling cars.

11. When my father died, it made me realize that I want my next car to be an electric one. I don't want to buy another gasoline car. I bought my first car in 2010, and paid it off two years ago. But I'll be on the market for a car again soon and I want it to be electric. I don't want to be part of the problem anymore.

12. Because of all this, I strongly support strict fuel-economy standards and believe it is important that proper incentives and penalties be in place to ensure that car companies comply with those standards.

13. I am aware that the National Highway Traffic Safety Administration recently delayed a long-overdue increase to the penalties for violating fuel-economy standards. I strongly oppose this delay, which will allow car companies to more easily evade those standards. If the penalty increase does not take effect soon, it may be cheaper for car companies to pay the lower penalty than to comply with the standards. As a result, they will produce less-efficient gasoline cars that consume more fuel for decades to come. And the fuel for those cars will come from refineries like those in Wilmington, which means the delay will cause more air pollution in my community. The delay will also decrease the number of electric cars available for consumers like me that want cleaner options.

14. I am also aware that the National Highway Traffic Safety Administration delayed the penalty increase without providing notice or an opportunity to comment. If it had followed those procedures, I expect NRDC would have commented to oppose the delay forcefully on behalf of me and its other members. Had I known about it, I would have wanted to comment too.

15. The public needs to have a voice on issues like this. People like myself who live near the refineries and are most affected by the government's actions should have a word in these decisions before they are made. In fact,

anybody who cares about these issues should be able to weigh in. We need to have a voice.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on October 11, 2017, in Wilmington, California.

Faviola Munguia

Exhibit M

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents.	Case No. 17-2780

DECLARATION OF KATHLEEN WOODFIELD

I, Kathleen Woodfield, state and declare as follows:

1. I am a member of the Natural Resources Defense Council (NRDC). I joined NRDC about 15 years ago because I was concerned about air pollution in my community. I rely on NRDC to advocate on behalf of me and the health of my community.

2. I live in San Pedro, California. I have lived within the same few blocks since 1985. San Pedro is part of the City of Los Angeles, and is adjacent to the Port of Los Angeles and the community of Wilmington.

3. San Pedro falls within the South Coast Air Basin, a region that suffers from some of the worst air quality in the nation. According to the American Lung Association, it is the most ozone-polluted region in the country. Air quality in the South Coast Air Basin violates federal and state

standards for ozone and particulate matter, among other pollutants. These pollutants can create and exacerbate cardiovascular and respiratory problems such as asthma.

4. The air quality in San Pedro is especially affected by emissions of pollutants caused by fuel production, transportation, and consumption. My home is only a few blocks away—or about a half-mile, as the crow flies—from Interstate 110, one of the most heavily travelled urban highways in the country. I also live close to several refineries in Wilmington: less than four miles from the Phillips 66 refinery and about six miles from the Valero and Tesoro refineries. The fuel and byproducts produced in these refineries are often stored nearby, including massive amounts of highly volatile butane at the Rancho LPG facility only two miles from my house. These products are also transported via rail and trucks through my community.

5. I am deeply concerned about the health risks I face from breathing air pollution caused by fuel consumption and production. The health impacts associated with air pollution are extensive, and more information about those impacts comes forward regularly. Older adults, like myself, are especially at risk because our bodies are less able to compensate for the effects of environmental hazards. I suffer from chronic sinusitis, an inflammation of the sinuses that can be caused by air pollution. My husband has had throat cancer and also suffered from pneumonia this past year.

6. Because of these health risks, I strongly support all efforts to reduce air pollution, including stringent Corporate Average Fuel Economy (CAFE) standards. I believe it is critically important to have rules in place that help keep the air as clean as possible. Increased fuel economy translates to less fuel consumed and refined—and therefore fewer emissions of dangerous air pollutants. For these reasons, I drive a hybrid Toyota Prius.

7. I understand that the National Highway Traffic Safety Administration (NHTSA) enforces the CAFE standards by assessing civil penalties for non-compliance. I believe it is critically important that the penalty be high enough to deter violations. If paying the penalty is cheaper than implementing technological improvements to comply with the CAFE standards, more automakers will choose to violate those standards.

8. I also understand that NHTSA in 2016 had increased the penalty rate for CAFE standard violations from $5.50 to $14 per tenth of a mile per gallon for Model Year 2019-and-after vehicles. However, after the change in administration, NHTSA in 2017 indefinitely delayed the effective date of that increase, and did so without providing notice or an opportunity to comment.

9. I am strongly opposed to any delay of the effective date of the penalty increase. I believe it is vitally important that auto manufactures have the proper incentives to invest in cleaner technologies as they design and produce their Model Year 2019-and-after vehicles. Any delay in the

penalty increase will likely cause more auto manufacturers to violate the CAFE standards, resulting in increased fuel consumption and production and emissions of dangerous air pollutants—and even worse air quality and public health in communities like my own. Relaxing fuel-economy standards or penalties for noncompliance is unconscionable, really. Wherever possible, the government should try to direct costs back to the industry itself—and not externalize the health costs on people who happen to live in vulnerable areas.

10. I am also very unhappy with NHTSA's failure to provide notice or an opportunity to comment before indefinitely delaying the effective date of the penalty increase. Had NHTSA allowed for public input on the delay, I would have expected NRDC to submit comments strongly opposing any delay. I am always looking for NRDC to be in the room, so to speak, advocating on behalf of me and the many other NRDC members whose health is negatively affected by air pollution. I also expect the California Air Resources Board, South Coast Air Quality Management District, and other public health organizations would have weighed in to oppose any delay.

11. These are public health issues—and if the government is not listening to the public, it is creating policy in a bubble. If the government is only listening to industry and looking at what is advantageous to their bottom line, the government is not taking into consideration the externalized costs and health impacts on the citizens that breathe the air.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on September 12, 2017, in San Pedro, California.

Kathleen Woodfield

Exhibit N

DECLARATION OF DIANA HUME

I, Diana Hume, declare as follows:

1. My name is Diana Hume and I am over the age of 18 and competent to give this declaration. All of the following information is based on my experience and personal knowledge.

2. I have lived in Richmond, CA for 17 years.

3. I joined the Sierra Club in 2001. I joined the Club because I believe that the organization is very effective at using different advocacy strategies to protect and preserve our environment. Sierra Club represents my interests in litigation on matters that affect me and my community, and also participates in stakeholder processes related to the development of pollution regulations on my behalf.

4. I am retired. Previously I worked for the University of California, as a policy analyst at the President's Office of General Counsel.

5. For the past 17 years, my partner and I have lived in a WWII development called Atchison Village, which is located adjacent to the Richmond Parkway and the Burlington Northern Santa Fe (BNSF) tracks. I live less than a mile from the Chevron Richmond refinery. Because of the location of our home, I am exposed to particulate matter pollution from oil cars traveling on these tracks. I am also exposed to conventional and hazardous air pollutants

emitted by the Chevron refinery, which was recently allowed to introduce new equipment to process heavier crude. I am very concerned about Chevron finding a way to process dirtier crude, which I have heard is a possibility. If the Sierra Club is successful in its efforts to reduce fuel use, that will help mitigate this concern.

6. I spend a lot of time outdoors in the area where I live. I like walking, and I garden a lot in Point Richmond, so I breathe polluted air on a daily basis. I have been coughing more lately. I believe the emissions from the Chevron refinery are a major cause of this dirty air.

7. I am aware that ozone and particulate matter pollution harm human health, causing respiratory illnesses, heart attacks, and premature death. This pollution especially affects children and the elderly, like me. Asthma is actually a big problem here in Richmond. Contra Costa County is in marginal non-attainment for ozone. I am also aware that hazardous air pollutant emissions from refineries, like benzene and volatile organic compounds, cause cancer. There have in fact been several cancer cases in Atchinson Village. One woman in her 50s, who was not a smoker, recently died of lung cancer. I believe that, at least in part, all these illnesses are related to the high air pollution levels caused by the oil industry facilities that operate in this area.

8. The extent of air pollution in my community and of the illnesses caused by it has made me well aware of the importance of enacting strong regulations aimed at decreasing our oil consumption. I know that this is the key purpose of the National Highway Traffic Safety Administration's (NHTSA) fuel economy standards for vehicles. The law requires carmakers to pay penalties if their new cars do not meet the required standards; these penalties are a crucial tool for improving the fuel economy of our cars.

9. I have been told that last year NHTSA issued a regulation that establishes higher penalties for violations of the fuel economy standards for passenger cars and light duty trucks, in order to foster compliance with those standards and reduce our reliance on oil. With the change of administration, however, in July NHTSA issued a rule that delays the effective date of these higher penalties indefinitely. NHTSA issued this rule without providing the public any opportunity to comment on it.

10. I am extremely concerned that this delay will encourage automakers' non-compliance with the standards and increase our oil use. If NHTSA had provided an opportunity to comment on this rule, Sierra Club would have filed comments on my behalf opposing this delay. That is why I support Sierra Club's challenge to this delay. If Sierra Club succeeds, higher penalties will be applied as established in NHTSA's regulation from last

year, which will encourage carmakers to comply with the standards. I believe that enforcement of all those regulations will result in less oil being refined in Richmond and less oil cars traveling the BNSF tracks, which will help to improve air quality in Atchison Village and the surrounding areas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Richmond, California, on October 13, 2017

Diana Hume

Diana Hume

Exhibit O

DECLARATION OF JAMES T. BLOMQUIST

I, James T. Blomquist declare as follows:

1. My name is James T. Blomquist. I am 66 years old and competent to give this declaration. The following information is based on my personal knowledge and experience.

2. My wife and I have lived in Los Angeles, CA since 2002.

3. Since 2011, I work at a political consulting firm, where my wife is the president.

4. I joined the Sierra Club in 1974, and with the exception of one two-month lapse, I have been a member ever since. I was living in New Jersey at the time, and I became a member of the Club because I wanted to go on hikes. Throughout the years I have been active in several chapters, where I have held a number of positions, including Northwest Representative in Seattle, Washington Representative in D.C., director of environmental programs in San Francisco, and Southern California Representative in Los Angeles. I rely on Sierra Club to represent my interests in protecting the environment through public education, organizing, lobbying, and litigation.

5. I enjoy bicycle riding, hiking, and fishing. In Los Angeles I fish on the west fork of the San Gabriel River in the San Gabriel Mountains. It is one of the few trout streams in Southern California.

6. I have lived close to several multilane freeways, including California highways 134 and 2, since 1997 when I moved to Los Angeles. Vehicles on these highways emit soot and other pollutants. As a result, the air around my house is highly polluted; there is always black dust over the living surfaces, the exterior house, the driveway, and the garage. When I sweep outside my house, I must wear a large mask to prevent inhalation of this dirty air. My mask is form-fitting over my nose and mouth, and it has replaceable canisters. If I don't wear it I get a raw throat which affects my breathing.

7. I am aware of the health impacts of smog and soot on human health, especially to those with asthma, the elderly, and children. I read the Los Angeles Times and other publications that regularly discuss those impacts. I recently read in the New York Times that air pollution affects bike riders and other people living in cities. My nephew lives in Los Angeles, which is a non-attainment area for both ozone and particulate matter. He and his wife commute on bike and public transit every day. Recently we discussed that bike riders need to be aware of the harmful effects of this pollution.

8. I know that corporate average fuel economy standards for vehicles are a critical tool used by the National Highway Traffic Safety Administration (NHTSA) and the state of California to address this dangerous pollution. Vehicle standards lead to decreased gasoline use and thus to less tailpipe

emissions. The law requires vehicle manufacturers to pay civil penalties for violations of those standards, but those penalties have for years been very low and several carmakers have opted for paying the penalties instead of making the needed investments to make cleaner cars. Last year, NHTSA increased those civil penalties to account for inflation, indicating that those adjusted penalties would encourage compliance with vehicle standards.

9. I am aware that Sierra Club is challenging a NHTSA regulation that delays the effective date of those higher penalties indefinitely. In doing so, NHTSA did not provide the public notice and the opportunity to comment on this decision, which prevented the Sierra Club from informing me and other members and from representing our interests in this rulemaking. If this rule is not enforced, carmakers will continue to choose to pay low penalties instead of investing in cleaner technologies, further increasing air pollution. On the other hand, if the delay is overturned, higher penalties will deter carmakers from violating the standards, which will help decrease air pollution. This will also address NHTSA's violations of my rights to comment in this proceeding.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Los Angeles, CA, on October 13, 2017.

James T. Blomquist

James T. Blomquist

Exhibit P

DECLARATION OF JANET DIETZKAMEI

I, Janet DietzKamei, state and declare as follows:

1. I am over 18 years of age and competent to give this declaration. I have personal knowledge of the following facts, and if called as a witness could and would testify competently to them. As to those matters which reflect an opinion, they reflect my personal opinion and judgment on the matter.

2. I live in Fresno, California, and have lived there since 2003. I am retired from a career as a Federal employee, having worked for the Air Force, the U.S. Department of the Treasury, the Veterans' Administration and the United States Department of Agriculture Forest Service for 25 years.

3. I am deeply concerned and care greatly about the quality of the air in Fresno and the surrounding areas. The poor air quality in my home town, my community and California's Central Valley makes me severely ill, and I am keenly interested in doing all I can to improve the air I must breathe. I am a member of the Center for Biological Diversity (the "Center"), and I rely upon the Center to represent my interests in protecting our air quality and our environment through the gathering and dissemination of information about air pollution, advocacy to remediate that pollution, and enforcement of our environmental laws. I am also a member of the Central Valley Air Quality Coalition ("CVAQ"), since June, 2016, I have been active with CVAQ since May, 2015, and the Fresno Environmental Reporting Network ("FERN"), since December, 2015, organizations that monitor and report on the pollution in our air and advocate on behalf of myself and other citizens to reduce that pollution.

4. I am aware that the National Highway Transportation and Safety Administration (NHTSA) has issued performance standards for the nation's fleet of cars and light duty trucks that require these vehicles' average fuel efficiency to increase year over year. These standards are known as Corporate Average Fuel Efficiency, or CAFE, rules. Increased fuel efficiency means that vehicles combust less and less gasoline per mile traveled, thereby decreasing the amount of dangerous pollutants they emit, including ozone-forming greenhouse gases and particulate matter. I am aware that NHTSA's last rulemaking for CAFE standards for passenger vehicles and light trucks

set increasingly stringent average fuel efficiency standards for vehicles in model years through 2022, with further projected, increasingly stringent efficiency standards for vehicles in model years through 2025.

5. I am also aware that NHTSA's CAFE rules allow manufacturers to pay civil penalties if their vehicle fleets do not meet the standards in any year. I understand that the penalties are assessed for every one-tenth of a mile per gallon by which a manufacturer's vehicle fleet's fuel efficiency falls below the CAFE standards in any year, multiplied by the number of vehicles that do so. The original penalty amount of the applicable civil penalty NHTSA assesses was set in 1975 at $5.00, and was later increased to $5.50. I further understand that over the years, some manufacturers have paid penalties because their vehicle fleets did not comply with the CAFE standards.

6. I know that in November 2015, Congress enacted a law, the Federal Civil Penalties Inflation Adjustment Act Improvement Act (the Act), that required federal agencies to adjust the amount of civil penalties they administer to account for inflation since the date the penalties were originally set, in order to ensure that penalties remain high enough to discourage non-compliance with regulations the agencies set. I am aware that in 2016, NHTSA, in compliance with this Act, issued a rule that increased the amount of the CAFE civil penalties to $14 and applied the increased penalty to all vehicles sold in model year 2019 or thereafter. I understand that the purpose of this rule, and the increase of the penalty, was to make sure that the penalty was high enough to promote compliance by vehicle manufacturers with the applicable CAFE standards.

7. I have also learned that in July 2017, NHTSA issued another rule (the 2017 Stay Rule) which delayed the imposition of the increased penalty *indefinitely*. NHTSA provided no notice of this indefinite delay and accepted no comments before issuing this final rule. Therefore, as it stands, the civil penalty is $5.50. The date when the adjusted penalty of $14 will be applied to manufacturers has now been indefinitely delayed, and it is unknown whether or when it will ever be applied.

8. I am extremely concerned about and personally injured by the 2017 Stay Rule. It is my understanding that manufacturers make a decision whether to comply with CAFE standards in part by weighing the costs of noncompliance – that is, the penalty amount – against the cost of

implementing technology that increases fuel efficiency. In other words, if manufacturers conclude that paying penalties costs them less and forgo implementing technologies that actually increase the fuel efficiency of their vehicles and thus reduce pollution, then the millions of cars and trucks they produce that year will *not* comply with the CAFE standards then or during the vehicles' lifetimes; and, as a result, the harmful air pollution these vehicles produce will *not* be reduced in the amount that compliance with the standards would accomplish. This outcome directly harms my health and has concrete, direct and frightening daily effects on my personal quality of life.

9. Since about 2006, or some three years after moving to Fresno, I have suffered from severe asthma. I had allergies before moving to Fresno in 2003, but had never had asthma. I was diagnosed with asthma after having a severe reaction to an unknown trigger pollutant. Within 5 days, I was in the Emergency Room ("ER") with severe bronchitis, exceedingly sick. The consulting doctor was leaning toward admitting me to hospital. I was prescribed inhalers and other asthma relieving medications with the understanding that if I did not improve, I would return to the ER.

10. Air quality in Fresno and the San Joaquin Valley is among the worst in the nation, and the many cars and trucks on the road in Fresno and in the Valley contribute enormously to the problem. My house is located about 1,400 feet from the busy California Highway -180 freeway as the crow flies. I have a personal monitor positioned in my back porch, a part of the Purple Air Network. I must monitor, using Purple Air monitors and Air Resources Board District monitors, both the particulate matter and the ozone in my area on a daily and sometimes hourly basis, and when the air quality for either of these pollutants turns from good to moderate, if ozone is above good, I cannot leave the house, when particulates are above good, I cannot leave the house without wearing a mask, and even then I still take the risk of suffering a severe and debilitating asthma attack. I also cannot leave my house any time there is smoke in the air. During the months of November through February, my asthma symptoms are exacerbated by smoky air. To prevent pollutants picked up while outside, from coming into our home, my husband and I take off outside clothing to put on clean clothing only worn inside of the house. I have towels on my sofa and chairs which can be washed after visitors sit on our furniture. No one can wear shoes inside of the house.

We have a 9 pound dog which lives inside of the house. When he returns from a walk, or goes out for potty breaks, we wash his feet and wipe him with a damp towel.

11. Asthma has made me exceedingly sick. When I suffer an attack, it is difficult just to breathe. A particularly severe attack occurred in the summer of 2012 when I simply went outside to take my dog for a walk. Even though I wore a mask, PM2.5 particulates and ozone were in the moderate level, I began having trouble breathing as I could not inhale any air. Feeling faint and lightheaded, I panicked and turned around to go back home. I nearly lost consciousness right there on the road. I believe that only the adrenaline produced by my panic allowed me to make it back home, where I administered asthma medication and then passed out. The mask only protected me from the PM2.5 particulates, not the ozone, a lesson I learned that day. The entire experience was horrific. Because I never want to experience such an attack again, I now do not leave my home if either the particulate matter or the ozone is not within the "good" range as indicated by real-time monitoring websites. I access those sites with my computer or on the phone, and often again on my phone after leaving my house to make sure the air quality has not changed. I receive alerts on my phone indicating air quality has degraded to air I can not breathe. I depend upon these alerts.

12. When I begin having an attack, I feel a heaviness in my chest and cannot get air. Often I also start coughing. I feel like a fish out of water, gasping. If I am outside and begin to feel this chest pressure, shortness of breath, and/or coughing, I go into a building, a house, a car, or anywhere else that is enclosed so that I am better sheltered from the polluted air. Other effects of particulate matter and ozone air pollution on my health sometimes include sneezing and sniffling, feeling tired, achy, suffering from headaches, and feeling as if I am about to come down with a cold or flu. I also have a chronic cough when the particulate matter count increases. I love to ride my bike and have been an avid outdoor person for my entire life, but now must spend most of my time inside my house. Because my activity level is so severely restricted, I now also suffer from unhealthy weight gain. To protect myself from pollutants, I always check air quality before going to the gym to do some water aerobics. Sometimes there is an unexpected trigger, resulting in when I do drive to the gym, I sometimes cannot walk from the parking lot to the gym because I begin to feel an asthma attack coming on, and I must drive back home.

13. I sometimes take Interstates 580 and 680 when I travel to speak on air pollution or to see family and friends, and pass by the oil refineries in Richmond and Martinez. I am aware of and remember these refineries well from my childhood, as at that time they emitted a terrible smell. I know that increased gasoline consumption by vehicles requires more oil refining and more transportation of that oil in tankers on our highways, including the highway close to my house. I am aware that the pollutants that affect me so seriously are emitted by these refineries and by the big oil tankers that bring gasoline to the gas stations where I live, and I am worried about their effects on my health and mobility. If the penalties for not complying with the efficiency rules are not raised and manufacturers simply pay penalties rather than comply, then more oil will be needed and refined and transported to the areas around my home, and more of the pollutants that harm me will be emitted.

14. Many of my friends and acquaintances and their children who live in Fresno or elsewhere in the Central Valley suffer from asthma or other severe health complications because of the air pollution caused by motor vehicles. I am concerned for them as well and fear for their well-being. During periods when air pollution is above moderate, many asthmatics end up in Central Valley Emergency Rooms and hospitals. I do all I can possibly do to avoid becoming so ill.

15. As long as the 2017 Stay Rule delays the application of appropriately adjusted civil penalties, manufacturers may not be incentivized to comply with the CAFE standards by implementing technologies that otherwise would increase their vehicles' fuel efficiency and decrease the pollution they cause. As a result, the air I must breathe will often continue to be too polluted, and I will become sick or be compelled to stay shut into my house. NHTSA's 2017 Stay Rule therefore causes direct and severe harm to me personally. If fuel efficiency does not increase, or increases less than it would if penalties actually did deter non-compliance with CAFE standards, my health will continue to suffer and get even worse, and my quality of life cannot improve. I suffer emotional distress knowing that the effectiveness of CAFE rules is undercut because the imposition of effective penalties is indefinitely delayed. On the other hand, if the indefinite delay is overturned and the higher penalties are assessed so that they do deter non-compliance, particulate matter and ozone

pollution will be reduced, days when the air quality remains good will increase, my health will improve and I will be able to leave my house more often.

16. NHTSA's finalized the 2017 Stay Rule without providing any notice or opportunity to comment. This lack of notice and comment opportunity deprives me of my procedural rights to be informed about forthcoming agency action so that I can talk about or rely on the Center to comment on them, inform others about them, and seek to stop or alter them if they affect me or my friends and neighbors negatively or if they are unlawful. I am active in learning about and disseminating information about Fresno's poor air quality and its causes. When the air quality permits it, I speak about the effects of air pollution on my health at local, district and state-level air quality board meetings and I travel to Sacramento to speak to lawmakers on the subject. I also participate in air quality improving workshops and air quality improving training on subjects such as electric vehicle programs. I am currently attending workshops, participating in, and following Fresno City Plans to develop strategies to reduce city vehicle usage, including promoting and improving city transportation such as bus service. NHTSA's final decision to delay, indefinitely, the application of higher CAFE penalties, without providing notice and an opportunity to comment, has deprived me of my ability to obtain information about the agency's intended action before it takes place, and to rely on the Center to submit comments in opposition. It has also deprived me of the opportunity to communicate with others about this action so it might be stopped. As such, the imposition of the stay without notice or comment has harmed my procedural rights as a citizen and a member of the Center.

17. However, if the 2017 Stay Rule is overturned and NHTSA must provide notice and an opportunity to comment regarding any new proposed rule concerning the implementation of the civil penalty adjustment to the CAFE standards, the violation of these procedural and informational rights will be effectively resolved.

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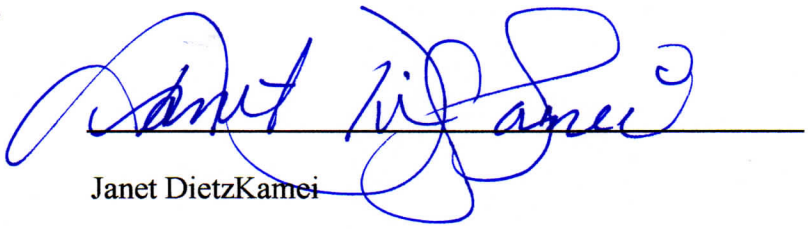
I declare under penalty of perjury that the foregoing is true and correct and was executed on October 5, 2017 at Fresno, California.



Janet DietzKamei