



September 27, 2021

Administrator Michael Regan  
U.S. Environmental Protection Agency (EPA)  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**RE: Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, Docket EPA-HQ-OAR-2021-0208**

Dear Administrator Regan:

Today, I write on behalf of Americans for Prosperity (AFP) activists across all 50 states to provide comments opposing the U.S. Environmental Protection Agency's ("EPA" or "Agency") proposed rule to revise existing greenhouse gas ("GHG") emissions standards for light-duty vehicles for 2023 and later model years under the Clean Air Act ("CAA"). This proposed rule is the most expensive to date of the Biden administration; EPA estimates \$150 billion through 2050.<sup>1</sup> These new burdensome vehicle regulations will raise the price of a new vehicle by \$1,044, constraining choice and replacing consumer preferences with politically preferred technology and fuels that hurt the most vulnerable citizens.

These comments focus on the statutory and procedural concerns regarding EPA's reliance on public relations representations from auto manufacturers to base compliance costs and lead time for more stringent vehicle emission standards of the CAA (42 U.S.C. § 7521), the impact this proposed rule will have on consumer choice with the push toward electric vehicles (EVs), docketing violations under the CAA (42 U.S.C. § 7607), the top-down policies of California and states that have adopted California's vehicle standards of the CAA (42 U.S.C. § 7507) resulting in worse environmental outcomes, and clear violations of the Environmental Research, Development, and Demonstration Authorization Act of 1978 ("ERDDAA"; 42 U.S.C. § 4365).

The Proposed Rule Violates Section 202(a) of the Clean Air Act

Under Section 202(a) of the CAA, "[t]he Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>2</sup> The Administrator must exercise reasonable judgment and decision-making under Section 202(a).

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<sup>1</sup> <https://www.americanactionforum.org/week-in-regulation/fuel-efficiency-picture-becomes-more-complete/>.

<sup>2</sup> 42 U.S.C. § 7521(a)(1).

For this proposed rule, EPA is “changing its 2020 position and restoring its previous approach by proposing to find, in light of the statutory purposes of the Clean Air Act and in particular of section 202(a), that it is more appropriate to place greater weight on the magnitude and benefits of reducing emissions that endanger public health and welfare, while continuing to consider compliance costs, lead time and other relevant factors.”<sup>3</sup> The Agency has broad authority under Section 202(a), “EPA is afforded considerable discretion under section 202(a) when assessing issues of technical feasibility and availability of lead time to implement new technology. Such determinations are ‘subject to the restraints of reasonableness,’ which ‘does not open the door to “crystal ball” inquiry.’” *NRDC*, 655 F.2d at 328, quoting *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973).<sup>4</sup> The proposed rule violates this requirement, relying almost entirely on EPA’s vehicle standards finalized in 2012 and the voluntary commitments of five automakers as the justification for compliance costs and lead time.

The 2012 final rule set standards for model years 2017-2025. As part of the 2012 vehicle standards a Mid-term Evaluation (MTE) was required, EPA began this process in 2016. The process was rushed, giving stakeholders and the public only thirty days to comment. EPA signed off on the MTE one week prior to President Trump taking office and more than one year before the midterm review was scheduled to be completed. In 2017, automakers asked the Trump administration for relief from the stringent standards knowing it would be difficult to meet the targets by 2025.<sup>5</sup> The automakers knew the rules would impose significant costs and were not aligned with consumer preferences.<sup>6</sup>

In December 2017, Mitch Bainwol, then-President and CEO of Alliance of Automobile Manufacturers, testified before the House Energy and Commerce Committee Subcommittee on Digital Commerce and Consumer Protection that:

“[M]uch has changed since the agencies issued the final rulemaking for the MY 2017-2025 vehicle fuel economy/GHG emission standards in 2012... I pointed out how several of the assumptions – such as gas prices, technology effectiveness and cost, and the consumer acceptance of advanced technology vehicles – on which the agencies determined that automakers would be able to comply with the current MY 2022-2025 standards have drastically shifted since 2012. That pattern has only continued, making compliance with the more aggressive later year standards very challenging.”<sup>7</sup>

The other assertion EPA relies on to satisfy Section 202(a) requirements is the readiness of automakers to meet the stringency, compliance cost, and lead time being proposed. This hinges on the five automakers that joined the California Framework and other automakers who have recently stated their commitment to lowering vehicle emissions and moving toward EVs. These public relations representations from consistently noncompliant manufacturers are in no way binding or enforceable. The five automakers that joined the California Framework represent only one-third of automakers and in 2017 they were petitioning the federal government for less stringent standards. Even the Center for Biological Diversity recognizes these statements are empty, “[a]utomakers tore up the last promise they made to cut pollution, so why would anyone

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<sup>3</sup> 86 FR 43729.

<sup>4</sup> 86 FR 43752.

<sup>5</sup> [https://www.wsj.com/articles/auto-makers-ask-epas-pruitt-to-reverse-fuel-economy-emissions-decision-1487738674?mod=article\\_inline](https://www.wsj.com/articles/auto-makers-ask-epas-pruitt-to-reverse-fuel-economy-emissions-decision-1487738674?mod=article_inline).

<sup>6</sup> <https://www.reuters.com/article/us-usa-automakers-emissions-idUSKBN16102J>.

<sup>7</sup> <https://docs.house.gov/meetings/IF/IF18/20171212/106715/HHRG-115-IF18-Wstate-BainwolM-20171212.pdf>.

trust their new one . . . . Voluntary pledges from auto companies make a New Year’s resolution to lose weight look like a legally binding contract.”<sup>8</sup>

The use of the 2012 standard as Section 202(a) justification is not reasoned decision-making. Automakers have not been compliant with stringent standards set during the Obama administration and will not be able to achieve the even more stringent standards being proposed. According to EPA’s 2020 Automotive Trends Report, out of 14 large vehicle manufacturers, only three achieved regulatory compliance based on emission performance without help from banked credits. All other large manufacturers used a combination of banked or purchased credits, along with technology improvements, to achieve compliance in model year 2019.<sup>9</sup> EPA acknowledges, “In the last four years, the industry GHG performance has been above the industry-wide average standard, resulting in net withdrawals from the bank of credits to maintain compliance.”<sup>10</sup> EPA has created its authority to establish a greenhouse gas credit trading program, as well as the retroactive commandeering of credits from model year 2021 and 2022, from whole cloth. This absence of statutory authority is underscored by the explicit delegation of authority to the Department of Transportation/NHTSA under EPCA for related trading programs. Section 202(a) requires reasoned decision-making, this reliance on non-binding voluntary statements from noncompliant automakers is a clear violation of Section 202(a). Put differently, automakers have failed to achieve EPA’s stringent vehicle standards technologically, raising fundamental questions about the reasonability of the agency’s decision-making.

#### The Proposed Rule Will Raise the Cost of New Vehicles and Hurt the Most Vulnerable

In 2021 the average price of a new vehicle is over \$40,000, nearly \$2,300 above the average cost in 2020.<sup>11</sup> EPA’s proposed rule is the most expensive rule to date from the Biden administration costing \$150 billion through 2050.<sup>12</sup> These new burdensome vehicle regulations will raise the price of new vehicles yet again with a low estimate from EPA of an additional \$1,044 in cost per vehicle by 2026. The proposal constrains choice and replaces consumer preferences with politically preferred technology and fuels that hurt the most vulnerable Americans.

Affordable mobility for individuals, especially low-income individuals is essential to earn success, provide for their families, and ultimately realize their potential. In the Regulatory Impact Analysis (RIA) EPA claims, “[t]hese standards might affect affordability of vehicles and their impacts on low-income households in particular.”<sup>13</sup> The Agency suggests “online working and shopping may provide alternative ways to accomplish some goals, for those with stable access to internet services.”<sup>14</sup> This out of touch response is one of many throughout the regulatory analysis, this does not present a solution to the problem for many working individuals or students that rely on a vehicle to get places.

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<sup>8</sup> <https://biologicaldiversity.org/w/news/press-releases/biden-yields-to-automakers-issues-weak-emissions-standards-2021-08-05/>.

<sup>9</sup> <https://www.epa.gov/automotive-trends/highlights-automotive-trends-report#Highlight7>.

<sup>10</sup> <https://www.epa.gov/automotive-trends/highlights-automotive-trends-report#Highlight8>.

<sup>11</sup> <https://www.cnet.com/roadshow/news/average-new-car-price-records/>.

<sup>12</sup> <https://www.americanactionforum.org/week-in-regulation/150-billion-vehicle-emissions-rule-tops-year-so-far/>.

<sup>13</sup> <https://www.epa.gov/system/files/documents/2021-08/420r21018.pdf>.

<sup>14</sup> <https://www.epa.gov/system/files/documents/2021-08/420r21018.pdf>.

EPA and the administration's focus on helping disadvantaged communities is lost in this proposed rule, many of these low-income individuals live in these communities. In the RIA the Agency states "[i]t is not clear how to identify the socially acceptable minimum level of transportation service. It seems reasonable to assume that such a socially acceptable minimum level should allow access to employment, education, and basic services like buying food, but it is not clear where consumption of transportation moves from necessity to optional."<sup>15</sup> When push comes to shove the Agency does not recognize affordable mobility or freedom of mobility as a means of allowing people to prosper in society. The Agency views this as a current "necessity" that can change to an "option". Any supposed benefits from the proposed standard would not be going to these disadvantaged communities and would instead hurt them. What you can expect is, you will be priced out of new vehicles and used vehicles could increase in price too. This sentiment from EPA should concern consumers and environmental justice advocates.

#### The Proposed Rule Violates Key Provisions of CAA Sections 307(d)

EPA's proposed rule is subject to CAA Section 307(d), as published in the Federal Register EPA does not acknowledge its statutory and legal authority in this rulemaking being subject to Section 307(d). Section 307(d) establishes unique docketing and procedural requirements, Senator Carper raised serious concerns regarding these requirements last year when EPA promulgated the SAFE rule.<sup>16</sup> Under Section 307(d)(4)(b)(ii) "[t]he drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule."<sup>17</sup>

During the SAFE rulemaking the docketing concerns raised by Senator Carper brought on an Inspector General evaluation. As stated in the Office of Inspector General report "OGC attorneys said that in joint rulemakings in 2010 and 2012, as well as for the final SAFE Vehicles Rule in 2020, the Agency's practice was to treat [National Highway Traffic Safety Administration] NHTSA as a coauthor both before and after initiating interagency review. Using this interpretation, NHTSA would not be considered an "other agency" for purposes of the docketing provision."<sup>18</sup> EPA's current proposed rule is not a joint rulemaking with NHTSA and is subject to Section 307(d)(4)(b)(ii).

EPA has violated this provision; the proposed rule and 12866 interagency comments speak of a collaborative process with NHTSA. "EPA has coordinated with NHTSA, both on a bilateral level as well as through the interagency review of the EPA proposal led by the Office of Management and Budget."<sup>19</sup> There is no evidence in the docket of their bilateral or interagency coordination, EPA is using NHTSA's updated modeling and has a shared interest in this area. The Agency "notes that EPA may coordinate with NHTSA, and has done so, regardless of the formality of joint rulemaking. EPA has consulted significantly with NHTSA in the development of this proposal. Consultation is the usual approach Congress specifies when it recognizes that EPA and

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<sup>15</sup> <https://www.epa.gov/system/files/documents/2021-08/420r21018.pdf>.

<sup>16</sup> <https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=FE5DF235-9547-4FCA-96E0-1506475CD845>.

<sup>17</sup> 42 U.S.C. § 7607.

<sup>18</sup> [https://www.epa.gov/sites/default/files/2021-04/documents/epa\\_oig\\_20210420-21-e-0125.pdf](https://www.epa.gov/sites/default/files/2021-04/documents/epa_oig_20210420-21-e-0125.pdf).

<sup>19</sup> 86 FR 43728.

another agency share expertise and equities in an area.”<sup>20</sup> As stated in the proposed rule, if EPA has consulted significantly with NHTSA throughout the development process this should be seen in the docket to remain transparent, this is not a joint rulemaking and NHTSA is not considered a coauthor.

### California and Section 177 States Have Reduced Less Emissions Through Top-Down Regulations and Mandates

California has reduced less transportation-related CO<sub>2</sub> emissions than states that have avoided top-down transportation climate policies. Based on data from the U.S. Energy Information Administration<sup>21</sup> from 2005 to 2018 Alabama, Kentucky, and Oklahoma have each reduced transportation-related CO<sub>2</sub> emissions five times more than California. West Virginia has reduced transportation-related CO<sub>2</sub> emissions 16 times more than California. While Wyoming has reduced emissions 24 times more than California.

Not only do California and Section 177 States’ mandates fail to benefit the environment, but they also pick technological winners and losers that hurt the most vulnerable in society. This proposed rule will force automakers to do the same to stay compliant. This does little to benefit the environment when consumer preferences lie elsewhere. California environmental lawyer Jennifer Hernandez articulated this argument well:

[T]he state needs to embrace the best available technology today, even if it’s not zero carbon and stop making ill-considered technology choices that continue to result in higher pollution impact in disadvantaged communities. [California Air Resources Board] CARB has rejected rules that would mandate trucks powered by compressed natural gas or biogas, technologies that are feasible today and would both substantially reduce greenhouse gas emissions and improve air quality in low-income communities that are disproportionately affected by particulate air pollutants, in favor of an all-electric trucking fleet that is at best aspirational and may not be technically feasible at all in view of many experts.<sup>22</sup>

The proposed rule places a heavy emphasis on the California Framework with a lens of “environmental exceptionalism”, coming from a state that has continually mandated top-down regulations that achieve worse environmental outcomes and hurt the most vulnerable. This should sound the alarm for Americans. California and New York’s (Section 177 state) top-down transportation climate policies have benefited the wealthiest in the state. Before the pandemic, half of the electric vehicles sold in the U.S. were purchased in California and New York.<sup>23</sup> The Pacific Research Institute found that almost 80 percent of those utilizing EV tax incentives have incomes over \$100,000, making it not just a corporate handout but also a transfer from all workers to wealthier Americans.<sup>24</sup> The California Framework and failed top-down policies leave Americans behind and should not be gold standard for EPA to set national vehicle emissions regulations. A better way is to recognize and embrace bottom-up innovations, remove barriers to voluntary efficiency and environmental progress, reorient programs away from restrictions on new market entrants, and streamline permitting and licensing requirements for all types of energy innovation.

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<sup>20</sup> 86 FR 43755.

<sup>21</sup> <https://www.eia.gov/environment/emissions/state/>.

<sup>22</sup> <https://thebreakthrough.org/journal/no-14-summer-2021/green-jim-crow>.

<sup>23</sup> <https://evadoption.com/ev-market-share/ev-market-share-state/>.

<sup>24</sup> [https://www.pacificresearch.org/wp-content/uploads/2018/02/CarSubsidies\\_final\\_web.pdf](https://www.pacificresearch.org/wp-content/uploads/2018/02/CarSubsidies_final_web.pdf).

## The Proposed Rule Violates the Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA) for Science Advisory Board Advice

Despite intense and repeated interest from EPA’s Congressionally mandated Science Advisory Board in the scientific and technical underpinnings of previous Clean Air Act standards for greenhouse gases from light-duty vehicles over the last decade, EPA has clearly violated peer review and scientific advice requirements under ERDDAA. ERDDAA directs the EPA Administrator to establish a standing Science Advisory Board. Congress further required that “[t]he Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the Clean Air Act..., or under any other authority of the Administrator, is provided to any other federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.” Providing this information at the stage of interagency review and comment facilitates the Board providing “its advice and comments on the adequacy of the scientific and technical basis of the... regulation, together with any pertinent information in the Board’s possession.”<sup>25</sup>

EPA violated this requirement with the Proposed Rule. On June 24, 2021, the Proposed Rule began formal review and comment by other federal agencies through the Office of Information and Regulatory Affairs Executive Order 12866 process. It completed the interagency process on July 29, 2021.<sup>26</sup> There is no evidence in the docket, the Science Advisory Board’s website, or elsewhere that EPA provided the Proposed Rule or any relevant scientific and technical information to the Board at any time.<sup>27</sup> Any claim by EPA that the interagency process under Executive Order 12866 does not constitute “formal review and comment” ignores the context of ERDDAA and CAA Section 307 and would eviscerate this clear direction from Congress. In addition, the failure to provide the Proposed Rule to the Board even after interagency review had been completed, including through the full public comment period, is a compounding violation that eliminates the Board’s role under ERDDAA as well as its potential role as an interested stakeholder in the notice-and-comment process. These violations are particularly egregious for three reasons:

First, on March 31, 2021, three months before the Proposed Rule had been provided to other agencies for review and comment, EPA announced it was “resetting” the entire membership of its Science Advisory Board, removing the several dozen sitting members before the end of their membership terms for the first time in the Board’s history.<sup>28</sup> On August 2, EPA announced the new members, including appointments to several new or relevant subpanels focused on climate science, economic analysis, and environmental justice analysis.<sup>29</sup> The Board was disbanded for the duration of the interagency review period and, for the six weeks that the charter SAB has been reconstituted, EPA has not provided the proposed rule to the Board for review and comment underscores the harm of this violation of ERDDAA, actions that undermine the dual goals of independent scientific advice and transparency.

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<sup>25</sup> 42 U.S.C. § 4365(c).

<sup>26</sup> <https://www.reginfo.gov/public/do/eoDetails?rrid=181811>.

<sup>27</sup> <https://sab.epa.gov/ords/sab/f?p=100:17:13823333728984:::17::>

<sup>28</sup> <https://www.epa.gov/newsreleases/administrator-regan-directs-epa-reset-critical-science-focused-federal-advisory>.

<sup>29</sup> <https://www.epa.gov/newsreleases/epa-announces-selections-charter-members-science-advisory-board>.

Second, the Science Advisory Board has been extremely interested in prior rulemaking in this area, offering individual and/or Board advice and comment on rulemaking activities over the last decade. More recently, this has included a variety of methodological, modeling, economic, scientific, and technical feedback in mid-2019,<sup>30</sup> October 2019,<sup>31</sup> January 2020,<sup>32</sup> and February 2020.<sup>33</sup> In the background for the January 2020 meeting, the full SAB considered a workgroup's recommendation and "decided that the SAB should provide advice and comment on the science supporting the proposed rule." In its October 2019<sup>34</sup> and January 2020<sup>35</sup> comments, which numbered dozens of pages, the Board highlighted "significant weaknesses that should be addressed in the regulatory analysis," as well as "analytic concerns" with "strong policy ramifications." EPA's proposed rule has not included a request, let alone meaningful feedback, for the statutorily required role of the independent Science Advisory Board.

Third, inconsistencies and a lack of meaningful engagement with peer review bodies like the Science Advisory Board have resulted in litigation<sup>36</sup> and significant reports from EPA's Office of the Inspector General<sup>37</sup> when EPA has previously sidestepped these procedural requirements related to the scientific determinations underpinning this rule, including the so-called "endangerment finding."

AFP appreciates the opportunity to provide comment, and our activists look forward to consideration of this feedback.

Sincerely,

Abigale Tardif  
Policy Analyst, Regulations

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<sup>30</sup> <https://www.scientificamerican.com/article/epas-science-advisory-board-to-scrutinize-clean-car-rollback/>.

<sup>31</sup> [https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/3bd8a1aea4943223852584e1005463de/\\$FILE/SAFE%20SAB%20Draft%20Review\\_10\\_16\\_19\\_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/3bd8a1aea4943223852584e1005463de/$FILE/SAFE%20SAB%20Draft%20Review_10_16_19_.pdf).

<sup>32</sup> <https://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsBOARD/0ec6d42fef549b8885258442006ddbc5!OpenDocument&TableRow=2.2#2.;>  
[https://yosemite.epa.gov/sab/sabproduct.nsf/0/0EC6D42FEF549B8885258442006DDBC5?OpenDocument;](https://yosemite.epa.gov/sab/sabproduct.nsf/0/0EC6D42FEF549B8885258442006DDBC5?OpenDocument)  
[https://yosemite.epa.gov/sab/sabproduct.nsf/MeetingCalBOARD/D87AC6491A9811C1852584CD006F3CC6?OpenDocument.](https://yosemite.epa.gov/sab/sabproduct.nsf/MeetingCalBOARD/D87AC6491A9811C1852584CD006F3CC6?OpenDocument)

<sup>33</sup> [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/1FACEE5C03725F268525851F006319BB/\\$FILE/EPA-SAB-20-003+.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/1FACEE5C03725F268525851F006319BB/$FILE/EPA-SAB-20-003+.pdf).

<sup>34</sup> [https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/3bd8a1aea4943223852584e1005463de/\\$FILE/SAFE%20SAB%20Draft%20Review\\_10\\_16\\_19\\_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/3bd8a1aea4943223852584e1005463de/$FILE/SAFE%20SAB%20Draft%20Review_10_16_19_.pdf).

<sup>35</sup> [https://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsBOARD/1FACEE5C03725F268525851F006319BB/\\$FILE/EPA-SAB-20-003+.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsBOARD/1FACEE5C03725F268525851F006319BB/$FILE/EPA-SAB-20-003+.pdf).

<sup>36</sup> <http://climatecasechart.com/climate-change-litigation/case/delta-construction-co-inc-v-epa/>.

<sup>37</sup> <https://www.inhofe.senate.gov/epw-archive/press/epa-ig-finds-serious-flaws-in-centerpiece-of-obama-global-warming-agenda>.