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VIA ELECTRONIC SUBMISSION

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**Attn: Docket No. EPA-HQ-OAR-2018-0283
Docket Nos. NHTSA-2018-0067, 2017-0069**

RE: Supplemental Comment and Request for Correction of Center for Biological Diversity; Environmental Defense Fund; Natural Resources Defense Council; Public Citizen, Inc.; and Union of Concerned Scientists on Environmental Protection Agency’s and National Highway Traffic Safety Administration’s Proposed Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018)

Commenters respectfully submit this **supplemental comment** on the Environmental Protection Agency’s (EPA) and National Highway Traffic Safety Administration’s (NHTSA) Proposed Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (“Proposed Rule”). This comment addresses several developments after the close of the formal comment period that underscore the central relevance of the most recent version of EPA’s Optimization Model for reducing Emissions of Greenhouse gases from Automobiles (“OMEGA”) to a robust analysis of the SAFE Proposed Rule; as well as the unreasonableness of EPA’s reliance on NHTSA’s Corporate Average Fuel Economy (“CAFE”) model instead. Commenters hereby request, once again, that the agencies withdraw the SAFE proposal. At minimum, EPA must release the latest full version of OMEGA and place it in the SAFE rulemaking docket. The agencies must then reopen the formal comment period for at least 60 days so that members of the public can use the updated model to analyze the effects of the SAFE rule and tailor their comments accordingly. Finalizing the Proposed Rule without these steps would unlawfully deprive commenters of essential information and disregard relevant analysis.

Commenters additionally file this submission as a **Request for Correction** (“RFC”) to EPA under the Information Quality Act (Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106- 554, § 515 Appendix C, 114 Stat. 2763A-153) (“IQA”),

EPA's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002 ("EPA Information Quality Guidelines"), and the Office of Management and Budget's *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies* (2002) ("OMB Guidelines"), as recently updated by OMB's *Memorandum on Improving Implementation of the Information Quality Act*, M-19-15, April 24, 2019 ("OMB Memo"). EPA's treatment of the OMEGA model and reliance on the CAFE model do not meet the minimum standards for objectivity, utility, integrity, and overall quality demanded by the IQA, OMB Guidelines, and OMB Memo.¹ EPA must promptly correct the public record by, at a minimum, disseminating the latest full version of the OMEGA model.

The bases for this supplemental comment and request for correction are described further below.

BACKGROUND

The Proposed Rule would roll back the current Clean Car Standards, one of our country's biggest success stories in the effort to tackle climate change. The transportation sector is now the single largest contributor to U.S. greenhouse gas emissions,² and the light-duty fleet is the largest contributor to transportation emissions,³ yet the Proposed Rule would dramatically weaken existing safeguards and thereby increase carbon pollution by billions of tons, exacerbating the climate crisis that is already costing hundreds of billions of dollars annually and jeopardizing human health and lives. Finalizing the proposal would also mean higher bills at the gas pump, would result in the loss of jobs, and would place the American auto industry at a technological disadvantage in the global market. Furthermore, the proposal includes an unprecedented attack on longstanding state clean-car leadership.

EPA's vehicular emission standards must "take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period."⁴ Thus, EPA developed "the OMEGA model in order to make a reasonable estimate of how manufacturers will add technologies to vehicles in order to meet a fleet-wide CO₂ emissions level."⁵ The model uses a series of inputs to calculate how manufacturers could use technologies to reduce carbon pollution from vehicles, and how much those technologies would cost to deploy.⁶ But the model is not

¹ See Comments of the Center For Biological Diversity, Conservation Law Foundation, Earthjustice, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Inc., Sierra Club, Union Of Concerned Scientists on the Proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, Docket ID Nos. NHTSA-2018-0067-12000, EPA-HQ-OAR-2018-0283-5070 (Oct. 26, 2018) (hereinafter "Comment of NGOs on Proposed SAFE Rule").

² Energy Information Administration, *Power sector carbon dioxide emissions fall below transportation sector emissions*, Today in Energy Blog (Jan. 19, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29612>.

³ EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017, EPA-430-R-19-001, at 2-29.

⁴ 42 U.S.C. § 7521(a)(2).

⁵ 77 Fed. Reg. 25,234, 25,452 (May 7, 2010).

⁶ See 77 Fed. Reg. at 25,452-54.

static; as emissions-reduction technologies, the vehicle fleet, and the standards themselves change, EPA periodically updates the model and its inputs. EPA consistently has released these updates to the public, and the records remain available on EPA's public website.⁷ But EPA failed to release the latest full version of OMEGA with the SAFE proposal. And the agency abruptly, and without cogent explanation, announced that it would no longer rely on this purpose-built model for the SAFE rulemaking and would instead rely on a non-peer-reviewed analysis generated via application of NHTSA's CAFE model.⁸

SUPPLEMENTAL COMMENT

In earlier submissions, Commenters have detailed extensive concerns regarding EPA's exclusion of the OMEGA model from the docket for the Proposed Rule as well as the agency's unreasonable reliance on NHTSA's CAFE model instead.⁹ This comment highlights several developments postdating the formal comment period. These developments further underscore that EPA's basis for the GHG standards included in the Proposed Rule is fatally flawed and that EPA may not lawfully finalize these standards as proposed.

An April 25, 2019 EPA Science Advisory Board memo highlights EPA's lack of insight into the inputs and parameters of the CAFE model analysis. In response to questions from the Science Advisory Board, EPA explained that:

- In regards to the Proposed Rule's "analysis using [a model that supplies inputs to the CAFE model] and its technical assumptions related to EV/PHEV penetration," EPA notes that these items "were developed by NHTSA, and EPA has no further information at this time concerning technical assumptions other than what is available in the [Proposed Rule] and related docket materials."¹⁰
- EPA "[s]imilarly" lacked "specific information on how EV tax credits or other financial incentives may have been incorporated in the [Proposed Rule] analysis developed by NHTSA."¹¹

⁷ EPA, *Optimization Model for reducing Emissions of Greenhouse Gases from Automobiles (OMEGA)*, <https://www.epa.gov/regulations-emissions-vehicles-and-engines/optimization-model-reducing-emissions-greenhouse-gases> (last visited May 23, 2019).

⁸ 83 Fed. Reg. at 43,022 ("[F]or today's analysis, only one tool is used. Previously, EPA developed 'OMEGA,'" but "[f]or today's analysis, an updated version of the CAFE model is used.").

⁹ Comment of NGOs on Proposed SAFE Rule at 18, 23, 25; Comment of Environmental Defense Fund on Proposed SAFE Rule, at III-57, Docket ID Nos. EPA-HQ-OAR-2018-0283-5775, NHTSA-2018-0067-12108 (Oct. 26, 2018); Comment of Union of Concerned Scientists on Proposed SAFE Rule, Tech. App'x I(2), Docket ID Nos. EPA-HQ-OAR-2018-0283-5840, NHTSA-2018-0067-12039 (Oct. 26, 2018).

¹⁰ Memorandum from Alison Cullen, Chair, SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons regarding Preparations for Chartered SAB Discussions of EPA Planned Agency Actions and their Supporting Science in the Spring 2018 Regulatory Agenda, at C-7 (Apr. 25, 2019).

¹¹ *Ibid.*

Meanwhile, in FOIA litigation initiated by Commenters Natural Resources Defense Council and Environmental Defense Fund¹² after the comment period closed, EPA has averred that:

- The agency has updated the OMEGA model since its last public release without disclosing the latest full version to the public¹³;
- The latest undisclosed version of the model “was prepared in order to assist an [EPA] decisionmaker in arriving at a decision on issues related ... to the regulation of greenhouse gas emissions” from new automobiles¹⁴;
- In April 2018, the agency “used the results from [the latest] version of the OMEGA model ... as part of an interagency review process for the SAFE Vehicles Rule”¹⁵; and
- The agency “considered results from the interim OMEGA model in its broader consideration of greenhouse gas regulation as part of an interagency review process, but ultimately did not rely on the draft OMEGA model for its analysis in the rulemaking process. The draft version thus contains reasons which might have supplied, but did not supply, the basis for agency policy.”¹⁶

EPA has not disputed that the results of its own modeling, which it presented to the White House Office of Management and Budget as part of interagency review of the Proposed Rule, undermine the CAFE model analysis underlying the Proposed Rule.¹⁷

These developments show the unreasonableness of EPA’s exclusive reliance on the CAFE model in its assessment of the Proposed Rule. EPA’s statements to the Science Advisory Board highlight that the agency did not even have access to underlying information and assumptions relevant to the CAFE model. When the agency applied its own, purpose-built and peer-reviewed OMEGA model to the SAFE rulemaking package, its results diverged from those of the CAFE model.¹⁸ Yet despite the agency’s lack of insight into the CAFE model, and its own expert analysis diverging from the CAFE model’s results, EPA relied exclusively on the CAFE model in the Proposed Rule.

Moreover, these developments further demonstrate that EPA has unreasonably withheld its OMEGA model. EPA has contended in ongoing OMEGA FOIA litigation that it may assert the deliberative-process privilege to withhold factual information it admits it has considered--the

¹² See *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (complaint filed Dec. 3, 2018).

¹³ See EPA Answer ¶¶ 33-38, Dkt. 26, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed Feb. 13, 2019).

¹⁴ EPA, *Memorandum of Law in Support of EPA’s Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment*, Dkt. 47, at 9, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed May 3, 2019) (“EPA Summary Judgment Motion”) (internal quotation marks and citation omitted).

¹⁵ *Id.* at 4 n.2 (internal quotation marks and citation omitted).

¹⁶ EPA, *Reply Memorandum of Law in Further Support of EPA’s Cross-Motion for Summary Judgment*, Dkt. 54, at 3, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed May 23, 2019) (citations, quotations, and alterations omitted) (“EPA Summary Judgment Reply”).

¹⁷ See Comment of NGOs on Proposed SAFE Rule, Appendix A at 21, Docket Nos. NHTSA-2018-0067-12000, EPA-HQ-OAR-2018-0283-5070.

¹⁸ See E.O. 12,866 Review Materials for Proposed SAFE Rule, Docket ID EPA-HQ-OAR-2018-0283-0453, at 24.

latest full version of the OMEGA model--as long as it does not *rely on* that information as the basis of a decision.¹⁹ That self-serving principle conflicts with not just FOIA,²⁰ but also with the principle of administrative law that “the agency may not exclude information from the record simply because it did not ‘rely’ on the excluded information.”²¹ EPA has now admitted that the latest version of the OMEGA model, and the information generated thereby, were part of interagency review of the Proposed Rule overseen by the White House Office of Management and Budget. EPA’s admission that the latest OMEGA model formed part of the basis for the agency’s presentation to OMB confirms that decisionmakers have “directly or indirectly *considered*” the materials that the agency did not disclose,²² even though those materials “ha[v]e not been *relied upon*” in the Proposed Rule.²³

It is firmly established that “[a]n agency may not scrub the record of all evidence that does not support the agency’s final decision.”²⁴ The public, no less than a court, must be able to view that evidence so that it can assess the soundness of EPA’s factfinding. The need for public disclosure is especially compelling where, as with the current version of OMEGA, the evidence “relate[s] to matters of such central relevance ... that there is a substantial likelihood that the rule would [be] significantly changed” if the evidence was made public.²⁵

If the agencies move ahead to finalize the Proposed Rule, the final rule would be arbitrary, capricious, and unlawful on account of EPA’s unreasonable reliance on the CAFE model and exclusion of the OMEGA model.²⁶ The agency’s statements make clear that EPA did not have access to key aspects of the CAFE model. And EPA has admitted that it in fact used the latest version of the OMEGA model in the course of this rulemaking process. Yet neither the preamble nor the regulatory impact analysis for the Proposed Rule discuss the OMEGA model results or explain why the agency chose not to “rel[y] upon,” or even address, its apparently contrary results. EPA’s failure to appropriately explain or justify the agency’s rejection of these materials is arbitrary and deeply prejudicial to Commenters, who have sought at length to bring transparency to this analysis.²⁷

¹⁹ See EPA Summary Judgment Motion at 1, 10; see also 5 U.S.C. § 552(b)(5).

²⁰ See Natural Resources Defense Council & Environmental Defense Fund, *Memorandum of Law in Support of Motion for Summary Judgment*, Dkt. 40, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed Apr. 8, 2019); Natural Resources Defense Council & Environmental Defense Fund, *Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment & Reply in Support of Plaintiffs’ Motion for Summary Judgment and Motion to Expedite*, Dkt. 50, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed May 13, 2019).

²¹ *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 288 (D.D.C. 2013). See also *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 647 (D.C. Cir. 2013) (“The obligation of the reviewing court is to assess the ‘whole record,’ meaning that our analysis must consider not only the evidence supporting the [agency’s] decision but also ‘whatever in the record fairly detracts from its weight.’” (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951))).

²² *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006) (emphasis added).

²³ EPA Summary Judgment Motion at 10.

²⁴ *Fort Sill Apache Tribe v. Nat’l Indian Gaming Comm’n*, 345 F. Supp. 3d 1, 10 (D.D.C. 2018).

²⁵ 42 U.S.C. § 7607(d)(8).

²⁶ See generally *Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁷ See Compl., Dkt. 1, 11-15, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed Dec. 3, 2018) (detailing the history of Commenters’ efforts to obtain the latest full version of the OMEGA model).

REQUEST FOR CORRECTION

Pursuant to the Information Quality Act, Commenters independently request that EPA “correct” its dissemination of information regarding the cost to automobile manufacturers of deploying technologies to reduce greenhouse-gas emissions in order to meet federal standards. Numerous public comments on the Proposed Rule have already noted extensive information-quality concerns regarding the proposal, including that the only model used to project compliance with EPA’s greenhouse-gas emission standards²⁸—NHTSA’s CAFE model—is flawed, has not been properly subject to peer review, and yields erroneous results.²⁹ The recent developments described above further demonstrate that EPA’s treatment of the CAFE and OMEGA models does not meet minimum quality standards demanded by the IQA, OMB Guidelines, and OMB Memo.

Moreover, after the formal comment period closed, the OMB Memo informed federal agencies that “computer code *used*” to perform a specialized analysis should be released to the public.³⁰ As noted earlier, EPA now has admitted that it “*used* the results from [the latest] version of the OMEGA model ... as part of an interagency review process for the [Proposed Rule].”³¹ Yet, in contravention of the OMB Memo, EPA has not disseminated the computer code the agency used to perform its specialized analysis. While Commenters express no position here on the merits of the OMB Memo, Executive Branch agencies must follow their own rules, including rules that voluntarily limit agency discretion.³² Even if EPA is deviating from the instruction of the OMB Memo on the ground that it is non-binding, EPA still must give a good reason for the deviation.³³

EPA has not offered any reasoned justification for its refusal to release the latest full version of the OMEGA model, let alone for its refusal to acknowledge and appropriately consider its own results from OMEGA modeling. EPA’s position in the FOIA litigation amounts to a vague and conclusory assertion that the agency has discretion to classify the latest full version of the core OMEGA model (a specialized calculator) as part of a purely internal “deliberative process.”³⁴

²⁸ Proposed Rule, 83 Fed. Reg. at 43,002/2 n.61.

²⁹ Comment of NGOs on Proposed SAFE Rule, Appendix A at 23; Comment of Environmental Defense Fund on Proposed SAFE Rule, Section III: *The NHTSA Model is Systematically Flawed and Projects Dramatically Overstated Vehicle Technology Costs, Understated Fuel Savings, and Erroneous Net Societal Benefits*, at 57 (Oct. 26, 2018).

³⁰ OMB Memo at 8.

³¹ EPA Summary Judgment Motion at 4 n.2 (internal quotation marks and citation omitted) (emphasis added).

³² *See, e.g., Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (noting the longstanding principle that federal agencies must “follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions”); *Nat’l Env’tl. Dev. Assoc.’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (quoting *Environmental, LLC v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011) (“[A]n agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations.”)). The Information Quality Act does not itself create rights in third parties. *Mississippi Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 128, 184-86 (D.C. Cir. 2015).

³³ *Edison Elec. Inst. v. EPA*, 391 F.3d 1267, 1269 (D.C. Cir. 2004) (observing that the critical question was whether the agency adequately accounted for any departures from its usual criteria and procedures).

³⁴ EPA Summary Judgment Motion at 9; EPA Summary Judgment Reply at 1.

* * *

Commenters reiterate that the flawed Proposed Rule must be withdrawn. At minimum, EPA must release the latest full version of OMEGA, place it in the SAFE rulemaking docket, and then reopen the formal comment period for at least 60 days so that the public may respond to this critical information. Finalizing the Proposed Rule without these steps would be arbitrary, capricious, and unlawful. Independently, the IQA and its implementing guidance direct EPA to disclose the latest full version of the OMEGA model and cease exclusively relying on the patently deficient CAFE model. Commenters respectfully request that EPA act expeditiously on both fronts.

Please contact Erin Murphy, emurphy@edf.org, 202-572-3525, if you have any questions regarding this comment.

Respectfully submitted,

CENTER FOR BIOLOGICAL DIVERSITY
ENVIRONMENTAL DEFENSE FUND
NATURAL RESOURCES DEFENSE COUNCIL
PUBLIC CITIZEN, INC.
UNION OF CONCERNED SCIENTISTS

**Attachments to the Supplemental Comment and Request for Correction
on EPA's and NHTSA's Proposed SAFE Rule
Submitted May 31, 2019**

Submitted by Center for Biological Diversity; Environmental Defense Fund; Natural Resources Defense Council; Public Citizen, Inc.; and Union of Concerned Scientists

Attn: Docket No. EPA-HQ-OAR-2018-0283, Docket Nos. NHTSA-2018-0067, 2017-0069

Documents

NRDC & EDF, *Complaint for Declaratory and Injunctive Relief*, Dkt. 1, *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (filed Dec. 3, 2018)

EPA, *Answer*, Dkt. 26 (filed Feb. 13, 2019)

NRDC & EDF, *Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment and Motion to Expedite*, Dkt. 40 (filed Apr. 8, 2019)

Declaration of Margo Oge, Dkt. 42

Declaration of Dr. Nicholas Lutsey, Dkt. 43

Declaration of Dr. Nicholas Lutsey, Exhibit A, Dkt. 43-1

Declaration of Dr. Nicholas Lutsey, Exhibit B, Dkt. 43-2

EPA, *Memorandum of Law in Support of EPA's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment*, Dkt. 47 (filed May 3, 2019)

Declaration of William Wehrum, Dkt. 48

Declaration of William Charmley, Dkt. 49

NRDC & EDF, *Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment and Motion to Expedite*, Dkt. 50 (filed May 13, 2019)

Supplemental Declaration of Margo Oge, Dkt. 52

Supplemental Declaration of Margo Oge, Exhibit A, Dkt. 52-1

Supplemental Declaration of Margo Oge, Exhibit B, Dkt. 52-2

Declaration of Dr. Dave Cooke, Dkt. 53

Declaration of Dr. Dave Cooke, Exhibit A, Dkt. 53-1

EPA, *Reply Memorandum of Law in Further Support of EPA's Cross-Motion for Summary Judgment*, Dkt. 54 (filed May 23, 2019)

Supplemental Declaration of William Charmley, Dkt. 55

Memorandum from Alison Cullen, Chair, *SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons regarding Preparations for Chartered SAB Discussions of EPA Planned Agency Actions and their Supporting Science in the Spring 2018 Regulatory Agenda* (Apr. 25, 2019)