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VIA ELECTRONIC SUBMISSION

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

RE: Supplemental Comment of Environment America, Environmental Defense Fund, Sierra Club, 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)

Environment America, Environmental Defense Fund, Sierra Club, and Union of Concerned Scientists (“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 supplemental comment underscores that EPA and NHTSA’s dissemination in the Proposed Rule of unreviewed, novel sales and scrappage modules, as well as the analysis based on these modules, remains in clear violation of the Information Quality Act and implementing regulations and policies¹—notwithstanding a July 2019 post-hoc peer review of these two modules

¹ See 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); Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies* (2002) [hereinafter “OMB Guidelines”]; Office of Management and Budget, *Final Information Quality*

conducted by reviewers under NHTSA’s direction (“July 2019 Peer Review Update”). The agencies must withdraw these modules, related analysis, and the proposal to weaken existing vehicle greenhouse gas emission (“GHG”) and fuel economy standards. Before proceeding with the Proposed Rule or any rulemaking or significant analysis that relies on sales and scrappage modules, the agencies must fulfill applicable substantive and procedural peer review requirements.

Because this supplemental comment contains materials “of central relevance to the rulemaking” that emerged after the close of the public comment period, it must be considered as part of this ongoing rulemaking.²

I. Background

The Proposed Rule’s reasoning and recommendations relied on modeling that included numerous new, precedent-setting modules that had not been subject to peer review. As detailed in comments submitted in October 2018,³ EPA and NHTSA violated applicable peer review requirements by disseminating the unreviewed, novel modules—including a new sales module, scrappage module, fleet share module, and safety model (which estimated per-mile fatality rates for the fleet)—as well as the analysis based on these modules in the Proposed Rule and supporting documents. These modules played a major role in driving the results of the analysis.⁴ The Proposed Rule’s reliance on these modules in evaluating potential alternatives was arbitrary, capricious, and unlawful.

Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005) [hereinafter “OMB Bulletin”]; Office of Management and Budget, *Memorandum on Improving Implementation of the Information Quality Act*, M-19-15 (April 24, 2019) [hereinafter “OMB Memo”]; EPA, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008 (Oct. 2002) [hereinafter “EPA Guidelines”]; EPA, *Peer Review Handbook*, EPA/100/B-15/001 (Oct. 2015) [hereinafter “EPA Handbook”]; Department of Transportation, *Information Dissemination Quality Guidelines* (Aug. 2002) [hereinafter “DOT Guidelines”].

<https://www.transportation.gov/regulations/dot-information-dissemination-quality-guidelines> (issuing information quality guidelines consistent with OMB Information Dissemination Guidelines).

² 42 U.S.C. § 7607(d)(4)(B)(i); *see also id.* § 7607(d)(7)(A) (providing that such material forms part of the administrative record for judicial review); 5 U.S.C. section 553 (c) (“consideration of the relevant matter presented”); Proposed Rule, 83 Fed. Reg. 42,986, 43,471 (Aug. 24, 2018) (citing 49 C.F.R. § 553.23 (committing that “[I]ate filed comments will be considered to the extent practicable”).

³ *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 EPA & NHTSA’s Proposed SAFE Rule, Appendix A, Section VI(D) at 190-99 (Oct. 26, 2018) [hereinafter “NGO Comments”].

⁴ *See, e.g.*, NGO Comments at 193-96 (detailing that the modules are subject to heightened peer review requirements because they are highly influential scientific assessments or, at minimum, influential scientific information); *see also* Comments of the Association of Global Automakers, Docket ID NHTSA-2018-0067-12032, Appendix A at A-24 (noting that when the scrappage model is disabled (or turned “off”), “the non-rebound fatality costs and non-fatal crash costs are higher in Preferred Alternative as compared to the augural standards,” demonstrating “the importance of the [scrappage] module on driving the results of the cost/benefit analysis”).

In July 2019, NHTSA issued a post hoc peer review of its sales and scrappage models.⁵ The results of these peer reviews documented pervasive, serious flaws in the modules, as detailed in our separate comments.⁶

This supplemental comment documents how EPA and NHTSA continue to violate the Information Quality Act and implementing rules with respect to the sales and scrappage modules, notwithstanding NHTSA's July 2019 Peer Review Update. In addition, there has still been no peer review of the fleet share module or the safety model, a further violation.⁷ Details, including specific violations, are set out below.

II. The July 2019 Peer Review Update was not conducted in advance of the Proposed Rule.

A basic principle for assuring the quality and credibility of influential scientific information relied on by the federal government is that such information must undergo peer review *before* it is disseminated or relied on. EPA and NHTSA violated that principle here. The agencies published the sales and scrappage models and related analysis with the Proposed Rule in August 2018, without having conducted any peer review of the models. NHTSA issued the July 2019 Peer Review Update eleven months after the Proposed Rule and nine months after closure of the public comment period. This belated review violates applicable requirements established by OMB, EPA, and Department of Transportation, which underscore the importance of peer review before scientific information is disseminated.

The OMB Peer Review Bulletin details the importance of early peer review, before publication of regulatory options, with language that exactly fits the prejudicial consequences of the agencies' failure here:

When an information product is a critical component of rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened. If review occurs too late, it is unlikely to contribute to the course of a rulemaking. Furthermore, investing in a more rigorous peer review early in the process may provide net benefit by reducing the prospect of challenges to a regulation that later may trigger time consuming and resource-draining litigation.⁸

⁵ NHTSA, Assessment of CAFE Model Vehicle Sales, Scrappage, and Labor Utilization used for SAFE NPRM (July 2019), Docket ID NHTSA-2018-0067-0055 [hereinafter "July 2019 Peer Review Update"].

⁶ See comments submitted on Aug. 23, 2019 to Docket No. NHTSA-2018-0067, NHTSA-2017-0069, and EPA-HQ-OAR-2018-0283 by Center for Biological Diversity, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, Public Citizen, Sierra Club, and Union of Concerned Scientists.

⁷ Procedural failures with respect to new modeling components are detailed in NGO Comments at 190-99.

⁸ OMB Bulletin, 70 Fed. Reg. at 2668 (quotation omitted). DOT has incorporated OMB's information quality control guidelines into its own information dissemination policies. NGO Comments at nn. 704-07.

More recently, OMB's April 2019 Memorandum specifically underscores the importance of peer review in advance of OIRA submission, noting that:

For the subset of scientific information that is “influential,” peer review is a required component of pre-dissemination review Proper peer review includes, *inter alia*, that agencies peer review complex models underlying economically significant regulations before submitting those draft regulations to OIRA under Executive Order 12866.⁹

EPA Peer Review Handbook similarly emphasizes the importance of peer review before publication of regulatory options.¹⁰ The Handbook details that all aspects of peer review, including identifying experts, setting deadlines, incorporating public comments, and preparing a post peer review report, should occur before the agency's work product is disseminated.¹¹

The events here illustrate the critical importance of pre-dissemination peer review. The pervasively flawed proposal rests on analysis from the un-peer reviewed and unsound sales and scrappage models, as well as the un-peer reviewed fleet share and safety modules. This flawed proposal would have been avoided had these models been peer reviewed at the legally required time.

The Proposed Rule and supporting materials published for the first time, relied upon, and disseminated the sales and scrappage modules and related analysis, as well as the fleet share and safety modules and analysis, even though none were peer reviewed. Interagency reviewers remarked on this deficiency, recommending that the administration at least conduct a peer review concurrent with publication of the Proposed Rule.¹² Without explanation or justification, the agencies failed to provide for peer review in advance of publication of the Proposed Rule or even before the end of the public comment period.¹³ The agencies' failure violates applicable peer

⁹ OMB Memo at 4.

¹⁰ EPA Handbook at 28-29 (“Sometimes peer review leads to recommendations for new information and analyses that would alter the work product and thus modify the scientific/technical basis for the action or rule it supports. For this reason, a completed peer review is desirable before issuing any regulatory proposal for public comment. . . . Because peer review comments on such work products could be of sufficient magnitude to warrant a revision to the proposed action or rule, every effort should be made to complete the peer review prior to the proposal stage.”).

¹¹ EPA Handbook, at 3-10.

¹² See Docket Entry: E.O. 12866 Review Materials for The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks NPRM, Docket ID EPA-HQ-OAR-2018-0283-0453, File: “EO 12866 Review Interagency review comments sent by OMB to EPA and NHTSA, Part 3 of 4 July 12,” at 804-06 (July 12, 2018) (“Interagency commenters recommended that DOT conduct a peer review of the new models concurrent with the publication of the NPRM and before the development of the final rule. Commenters recommend that DOT include the following draft charge questions for peer review of the new models in the Preamble of the rule. Commenters also recommend including these in any notice that DOT might publish for the peer view of the models.”).

¹³ EPA's disregard of applicable peer review procedures stands in unfortunate contrast to the agency's adherence to those procedures in its past rule makings establishing GHG emission standards for light and heavy duty vehicles and engines. See, e.g., 76 Fed. Reg. 74,853, 74,925-26 (Dec. 1, 2011) (peer review of tear down studies used to estimate

review rules and policies and renders the Proposed Rule’s underlying analysis and justification unreasonable, arbitrary, and capricious.¹⁴

III. The July 2019 Peer Review Update did not comport with public participation requirements.

Opportunities for public participation are a core component of peer review requirements of influential scientific information. The July 2019 Peer Review Update violated these requirements by failing to provide any opportunity for public engagement or participation.

OMB’s guidelines require that for dissemination of influential and highly influential scientific assessments,¹⁵ “[a]gencies shall establish a mechanism for allowing the public to comment on the adequacy of the peer review plans,” and “shall consider public comments” on such plans.¹⁶

Similarly, EPA maintains the importance of transparency and openness in peer review decisions, no matter if the peer review is for an influential or highly influential scientific assessments.¹⁷ The EPA Peer Review Handbook specifies that there be opportunity for public comment on the peer review plan; opportunity to comment on peer review methodology; opportunity to comment on choice of peer reviewers; opportunity to comment on the charge questions to peer reviewers; as well as opportunity for written and oral comment to the peer reviewers.¹⁸ As the Handbook explains, public comments “can provide important input to the identification and selection of peer reviewers, the refinement of charge questions to be addressed in peer review, and identification of technical issues to be considered by peer reviewers.”¹⁹

The agencies failed to fulfill their public participation requirements. NHTSA’s peer review of these two models states that DIGITALiBiz, Inc., “managed the peer review,” including recruiting and selecting reviewers, providing a peer review charge letter identifying specific questions to be addressed, collected peer reviewers’ responses, and provided the Volpe Center with a summary of reviewers’ comments and recommendations.²⁰ NHTSA and Volpe Center staff reviewed these comments, and only these comments, in preparing the July 2019 Peer Review Update. NHTSA

costs for light duty vehicle greenhouse gas emission controls); *id.* at 74,927 (peer review of indirect cost multiplier methodology); *id.* at 74,929-30 (peer review of Ricardo vehicle simulation studies used to estimate emission control synergies); *id.* at 75,401 (peer review of latest iteration of OMEGA model); 80 Fed. Reg. at 40,141, 40,177, 40,189, 40,191 (July 13, 2015) (peer review of Greenhouse Gas Emission model (GEM) used to develop standards and evaluate performance of heavy duty greenhouse gas emission standards for vocational vehicles and tractors). It similarly contrasts unfavorably with NHTSA’s past practice. *See, e.g.*, 76 Fed. Reg. at 75,213 (NHTSA peer review of ORNL study on monetizing economic externalities from petroleum consumption and imports); *id.* at 75,947 (NHTSA peer review of various safety studies).

¹⁴ NGO Comments at 196-97.

¹⁵ As detailed in earlier comments, the sales and scrappage modules are highly influential scientific assessments or, at minimum, influential scientific assessments. *See* NGO Comments at 193-96.

¹⁶ OMB Bulletin at 2677.

¹⁷ EPA Handbook at 86, 93-95 (Figure 1).

¹⁸ EPA Peer review Handbook at 25, 93-4.

¹⁹ *Id.* at 25.

²⁰ July 2019 Peer Review Update at 3.

never made public that it was conducting the July 2019 Peer Review Update, and there was no opportunity for public comment on the process. Indeed, NHTSA added the July 2019 Peer Review Update to the docket as a revision to the existing peer review, in such a way that it did not even trigger notice to those tracking the docket that a change or addition had occurred.

Even further, nowhere else in the entire peer review process does it suggest that the peer reviewers had access to or incorporated concerns from the public that were raised as part of comments on the Proposed Rule.²¹ The only reference to public participation in the July 2019 Peer Review Update describes how those comments “have sometimes conflated the model with inputs to the model.”²² This vague and incomplete reference to public comments is insufficient to satisfy peer review policies, which prescribe that agencies are also to provide peer reviewers with the public comments addressing significant scientific or technical issues.²³ Given the absence of any discussion of or citation to public comments in the peer review report, there is no indication this requirement was satisfied here.

IV. EPA failed to fulfill its independent peer review responsibilities.

EPA’s reliance on and dissemination of the new sales and scrappage models in the Proposed Rule and in evaluating the agency’s proposed greenhouse gas vehicle emission standards obliged EPA to confirm that any peer review adequately addressed applicable EPA requirements and was conducted in the context of EPA’s specific statutory authority.²⁴ EPA is responsible for ensuring proper peer review of all work products important to agency decision making, regardless of whether the analysis is developed by EPA or another organization.²⁵ In addition, as detailed in comments submitted earlier, EPA has an independent duty to ensure that any peer review conducted is appropriate in light of the specific Clean Air Act provisions applicable to EPA.²⁶

There is no indication that EPA worked with NHTSA in the development or implementation of NHTSA’s July 2019 Peer Review Update. Similarly, there is no indication that EPA ascertained the sufficiency of the peer review process conducted by NHTSA with respect to EPA’s distinct peer review requirements or EPA’s distinct statutory authority and responsibilities. Indeed, the July 2019 Peer Review Update does not even mention the Clean Air Act, let alone discuss or evaluate EPA authority under that statute.²⁷

²¹ See OMB Bulletin, 70 Fed. Reg. at 2672 (“When written public comments are received, the agency shall ensure that peer reviewers receive copies of comments that address significant scientific issues with ample time to consider them in their review.”); see also EPA Handbook at 5 (Fig. 2), 14, 35, 95.

²² July 2019 Peer Review Update at 1.

²³ See *supra* note 21.

²⁴ EPA Peer Review Handbook at 47-48; see also NGO Comments at 197-98.

²⁵ EPA Peer Review Handbook at 47-48.

²⁶ NGO Comments at 197-98.

²⁷ The only exception is mention of the Clean Air Act in the attached CV of one peer reviewer.

Notwithstanding the July 2019 Peer Review Update, EPA remains in violation of its independent peer review requirements. NHTSA's recent peer review does not absolve EPA of its own separate responsibilities.

V. These violations are prejudicial.

The agencies' continued failure to follow OMB's and their own requirements regarding peer review continues to deprive stakeholders of the benefit of careful scrutiny of these novel modeling tools and their application in the context of this major rulemaking. The eleventh hour post-dissemination peer review—after release of the modules, after reliance on those modules in the Proposed Rule, and after close of the comment period—conducted in violation of procedural requirements, does not cure the initial violation of dissemination of and reliance on unreviewed information in the Proposed Rule.

Because the July 2019 Peer Review Update occurred after the Proposed Rule, the Proposed Rule was informed by deeply flawed, erroneous analysis that would have been flagged—and now, belatedly, has been flagged²⁸—via a peer review process. The public, therefore, has been deprived of the opportunity to consider and debate a reasonable proposal, versus the critically flawed Proposed Rule. Similarly, the public is now deprived of a proper opportunity to raise the concerns documented in the updated peer review as part of the public comment process on the Proposed Rule.

Compounding this failure, the post-hoc July 2019 Peer Review Update was conducted without public input and participation, depriving stakeholders of additional important procedural protections, and depriving the reviewers of the opportunities for public interaction which are needed to optimize the review.²⁹ The public never had an opportunity to comment on the process, methodology, choice of reviewers, or charge questions, or provide direct comment to the reviewers. The apparent failure to provide public comments on the proposed rule to the reviewers further exacerbates this violation.

Finally, EPA's failure to independently carry out a peer review of these models further extends the agency's systemic failure in the Proposed Rule to apply its own expertise and judgment, to the detriment of proper application of the agency's vital Clean Air Act responsibilities and legal obligation to carry out those responsibilities.

VI. In light of these continued violations, the agencies must withdraw the modules, related analysis, and the Proposed Rule.

The agencies' clear violations require that they withdraw the improperly-disseminated modules, related analysis, and Proposed Rule. The agencies must conduct their peer review in compliance

²⁸ See comments submitted on Aug. 23, 2019 to Docket No. NHTSA-2018-0067, NHTSA-2017-0069, and EPA-HQ-OAR-2018-0283 by Center for Biological Diversity, Environment America, Environmental Defense Fund, Environmental Law & Policy Center, Public Citizen, Sierra Club, and Union of Concerned Scientists.

²⁹ See, e.g., EPA Handbook at 7, 14, 35, 57, 67.

with applicable procedural requirements before proceeding with any rulemaking or significant analysis that relies on these modules.

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Please contact Martha Roberts at mroberts@edf.org or 202-572-3243 if you have any questions regarding this comment.

Respectfully submitted,

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