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

United States Court of Appeals for the District of Columbia Circuit

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

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

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

FINAL REPLY BRIEF OF PETITIONERS NATIONAL COALITION FOR ADVANCED TRANSPORTATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NATIONAL GRID USA, NEW YORK POWER AUTHORITY, AND THE CITY OF SEATTLE, BY AND THROUGH ITS CITY LIGHT DEPARTMENT

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May 28, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY

2017 Determination	EPA, Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (Jan. 2017)
EPA	United States Environmental Protection Agency
Industry Petitioners	National Coalition for Advanced Transportation, Consolidated Edison Company of New York, Inc., National Grid USA, New York Power Authority, and the City of Seattle, by and through its City Light Department
Report	Technical Assessment Report
Revised Determination	83 Fed. Reg. 16,077 (Apr. 13, 2018)
Section 12(h)	40 C.F.R. § 86.1818-12(h)

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent U.S. Environmental Protection Agency's ("EPA") and Intervenors' arguments—both that this Court lacks jurisdiction and that the Revised Determination should, regardless, be upheld on the merits—stand or fall based on EPA's assertion that its Revised Determination[1] was merely a decision to initiate a rulemaking to "consider revising" its greenhouse gas standards for model year 2022-2025 light-duty vehicles. EPA Br. 22. That assertion cannot be reconciled with EPA's regulations or the Revised Determination itself.

The Revised Determination is much more than a statement of intent to conduct a new rulemaking, and is materially different from a decision to reconsider an existing rule. That is because EPA's Mid-Term Evaluation regulations ("Section 12(h)")[2] *require* EPA to make a definitive, substantive determination regarding whether its existing 2022-2025 standards are "appropriate under" Clean Air Act Section 202(a). EPA must make that determination "*based upon*" *the administrative record before the agency*, including a draft Technical Assessment Report ("Report")—which was issued by EPA in 2016, and it must explain its determination "in detail." If EPA determines the standards are not appropriate—as it did in the Revised Determination—Section 12(h) *requires* EPA "to revise the standards, to be

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[1] 83 Fed. Reg. 16,077 (Apr. 13, 2018) ("Revised Determination") (JA1-11).

[2] 40 C.F.R. § 86.1818-12(h).

either more or less stringent as appropriate"—meaning, *in accordance with its Section 12(h) determination*. In short, the Revised Determination is a final agency action precisely because of the unique requirements EPA established in Section 12(h). It is also final because it unequivocally and conclusively rescinds EPA's January 2017 final determination ("2017 Determination"), which EPA agrees was a final agency action.

Industry Petitioners' standing is plainly evident. Their members include at least one company directly regulated by the standards and many others whose economic interests are adversely affected by the Revised Determination. EPA argues this Court cannot redress those injuries because EPA could revise the standards regardless of the Revised Determination, and because the agency will proceed with its proposed revisions even if it loses this case. But vacatur of the Revised Determination unquestionably would at least partially redress Industry Petitioners' injuries: It would eliminate the *legal requirement* under Section 12(h) that EPA undertake a rulemaking to revise the standards and would reinstate EPA's 2017 Determination that the existing standards should be maintained. That alone is sufficient for standing, but vacatur *should* also cause EPA to change course regarding its pending rulemaking; at a minimum, EPA would face the additional challenge of defending its proposed rollback of the standards in light of the reinstated 2017 Determination.

EPA's desire to evade review is understandable, given the Revised Determination's patent flaws. EPA had ample time to try to gather support for its Revised Determination, but instead issued an 11-page decision that mostly parrots certain stakeholder comments and dwells on purported uncertainties. This violated Section 12(h), which requires the agency to make its determination "based upon" the Report and other record material. Instead, the Revised Determination directly contradicts the Report and provides no reasoned analysis or record basis justifying EPA's reversal of its 2017 Determination. It is arbitrary and capricious and contrary to law and must be vacated.

ARGUMENT

I. PETITIONERS' CASE IS JUSTICIABLE

Contrary to EPA's and Intervenors' arguments, the Revised Determination is a final agency action and this challenge is ripe.[3] Industry Petitioners' standing is clear. EPA fails to address that Industry Petitioners include at least one member directly regulated by the 2022-2025 standards. *See* Industry Pet'rs Br. 8. Where a petitioner "is 'an object of the [agency] action … at issue'… there should be 'little question'" regarding standing. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)).

[3] To avoid repetitive arguments, for more detail, Industry Petitioners would refer the Court to State Petitioners' reply brief sections addressing finality and ripeness (Sections I.B, I.D).

Moreover, EPA does not seriously contest Industry Petitioners' arguments and declarations that the Revised Determination results in economic injury. *See* Industry Pet'rs Br. 8-10. Instead, EPA asserts that any such injuries are not redressable because (1) the Revised Determination was not a "legal predicate" for EPA's proposed revision of the standards, and (2) this Court cannot provide any remedy that would change EPA's plan to revise the standards. EPA Br. 32, 34-35. These arguments should be rejected.

First, it is irrelevant whether EPA *could have* used its Clean Air Act Section 202(a) authority to reconsider the standards. *Pursuant to Section 12(h)*, EPA reversed its 2017 Determination through the Revised Determination, finding the existing standards "not appropriate". Once it did, Section 12(h) imposed an independent requirement on EPA: to "initiate a rulemaking to *revise the standards, to be either more or less stringent as appropriate*." 40 C.F.R. § 86.1818-12(h) (emphasis added). Revision of the standards "as appropriate" plainly means *consistent with the agency's Section 12(h) determination*. Although EPA has yet to determine "the appropriate degree and form of changes to the program," 83 Fed. Reg. at 16,087 (JA11), it is clear EPA will weaken the standards, consistent with the Revised Determination. *See* Industry Pet'rs Br. 8-10; 83 Fed. Reg. at 16,087 (JA11); EPA Br. 59-64. Further, the Revised Determination *rescinded* the 2017

Determination, which maintained the existing standards.[4] Accordingly, by operation of Section 12(h)'s legal requirements, the Revised Determination resulted in EPA's initiation of a rulemaking to weaken the standards.

Second, this Court has ample authority to redress Industry Petitioners' injuries. Vacatur of the Revised Determination would eliminate the *legal requirement* under Section 12(h) that EPA undertake rulemaking to revise the standards. Vacatur would also reinstate the 2017 Determination that the standards are "appropriate" and therefore should be maintained. Thus, vacatur would "relieve a discrete injury," which is all that is required for standing. *Energy Future Coal. v. EPA*, 793 F.3d 141, 144-45 (D.C. Cir. 2015) (citation omitted). Further, while vacatur may not automatically eliminate EPA's pending proposal, EPA would have considerable difficulty reconciling that proposal with a reinstated 2017 Determination and vacatur *should* change EPA's decisionmaking on the standards going forward. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998).

II. EPA'S REVISED DETERMINATION VIOLATED THE SECTION 12(H) REGULATIONS

Section 12(h) provides that EPA "*shall* make the [Mid-Term Evaluation] determination … *based upon* a record that includes the following: (i) *A draft*

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[4] EPA's withdrawal of the 2017 Determination—which itself was a final agency action—in the Revised Determination, 83 Fed. Reg. at 16,077 (JA1), is irreconcilable with EPA's characterization of the Revised Determination as non-final and inconsequential.

Technical Assessment Report addressing issues relevant to the standard for the 2022 through 2025 model years." 40 C.F.R. § 86.1818-12(h)(2)(i) (emphasis added). As EPA explained, the Report's purpose is to "address[] [technical] issues relevant to the standard," *id.*, to "inform EPA's determination on the appropriateness of the [greenhouse gas] standards," 77 Fed. Reg. 62,624, 62,784 (Oct. 15, 2012) (JA513). While Section 12(h) allows EPA to *also* base its decision on "other materials the Administrator deems appropriate," 40 C.F.R. § 86.1818-12(h)(2)(iv), it does not permit the agency to simply ignore the Report. At the very least, Section 12(h) requires EPA to analyze the Report and provide a reasoned explanation for any disagreements with its conclusions. Because the Report does not support EPA's determination that the standards are not appropriate, EPA entirely disregarded the Report instead.

EPA claims (at 60) it did not ignore the Report, but cannot point to any evidence supporting that assertion. Outside the historic background section, the Revised Determination includes only four cursory references to the Report: three brief mentions in EPA's summary of comments *by others*, 83 Fed. Reg. at 16,082-83 (JA6-7), and one in which EPA vaguely states that the U.S. energy security situation is different now than in 2016, *id.* at 16,085 (JA9). At the same time, the Revised Determination entirely fails to address the Report's extensive analysis of technical issues of central importance to the Mid-Term Evaluation. For example,

the Revised Determination's treatment of electric vehicle technologies is not based on *any* technical analysis—and the Revised Determination fails to address the treatment of these technologies in the Report, the Technical Support Document, and the other record analyses on which EPA based its 2017 Determination. Industry Pet'rs Br. 13-16. EPA's reply offers no meaningful response. Instead, EPA and Intervenors appear to argue that Section 12(h)'s requirements are satisfied so long as EPA's determination was somehow based on an overall record that *contained* the Report, even if the agency did not actually *analyze* or *use* the Report itself to make its decision. *See* EPA Br. 43-44, 60; Intervenors Br. 35-36. That is directly contrary to the plain language and intent of Section 12(h).

III. EPA'S REVISED DETERMINATION IS ARBITRARY AND CAPRICIOUS

EPA's reply offers little or no response to Industry Petitioners' arguments that the Revised Determination was arbitrary and capricious. Instead, the agency focuses on urging this Court to limit itself to an "Extraordinarily Deferential" review, because the Revised Determination allegedly was merely a decision to initiate a separate rulemaking. EPA Br. 49-51 (emphasis omitted). But both the premise and conclusion of this argument are incorrect.

First, as set forth above, because of Section 12(h)'s unique requirements, the Revised Determination is fundamentally different from a decision to start a new

rulemaking outside of the Mid-Term Evaluation, or a generic decision to reconsider an existing rule. *Supra* at 1.

Further, the Revised Determination is subject to the Administrative Procedure Act's arbitrary and capricious standard of review, *see* 5 U.S.C. § 706(2)(A), and it is not EPA's prerogative to invent a new, more deferential standard. EPA's determination that the existing standards are "not appropriate"—and its withdrawal of its prior, contrary determination—is inherently substantive, final, and hugely consequential because it requires EPA to revise the standards, eliminating regulatory stability and causing major economic and other impacts. Accordingly, contrary to EPA's current position, there are compelling arguments that a decision to *upset* the existing standards must be based on an analysis that is at least as rigorous—and subject to a standard of review that is at least as demanding—as a decision to leave them in place. Certainly, nothing in the Administrative Procedure Act or Section 12(h) suggests the rigor of EPA's analysis and documentation, or the standard of review, should be lesser.

Under the governing arbitrary and capricious standard, EPA "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Further, EPA was required to provide a "more detailed

justification" to explain its 180-degree reversal from the 2017 Determination. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

As Industry Petitioners' opening brief explained, the Revised Determination is arbitrary and capricious because it lacks support in the record and does not provide the reasoned explanation required to justify reversal of the 2017 Determination. Industry Pet'rs Br. 13-16. Specifically, Industry Petitioners detailed how EPA's treatment of electric vehicle technologies played a central role in the Revised Determination, yet that treatment is untethered to any record information or independent analysis by EPA. Further, the Revised Determination does not address EPA's previous technical analyses on electric vehicle technologies, or the extensive public comments that Industry Petitioners and others submitted, which provided evidence regarding improvements in electric vehicle technologies, costs, and consumer demand. *Id.* Tellingly, EPA's reply brief fails to respond to these arguments.

CONCLUSION

This Court should vacate EPA's Revised Determination.

Dated: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of the Court's Per Curiam Order filed January 11, 2019 (Doc. #1768141) because it contains 1,932 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) of the and Circuit Rule 32(e)(1).

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

/s/ Robert A. Wyman, Jr.
Robert A. Wyman, Jr.

CERTIFICATE OF SERVICE

I, Robert A. Wyman, Jr., hereby certify that on May 28, 2019, the foregoing has been electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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