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February 21, 2017

Scott Pruitt
Administrator
Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Avenue, N.W.
Washington DC 20460

Attention: Docket ID No. EPA-HQ-OAR-2015-0827

RE: Petition for Reconsideration and Request to Withdraw Final Determination on the Appropriateness of the Model Year 2022-2025 Light-duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (January 12, 2017)

Dear Administrator Pruitt:

The Association of Global Automakers, Inc. (Global Automakers)[1] respectfully petitions the United States Environmental Protection Agency (EPA) to reconsider its final Determination on the Appropriateness of the Model Year 2022-2025 Light-duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (the "Determination"), and requests that the Determination be withdrawn. As explained below, EPA's premature Determination suffers from a multitude of procedural and substantive flaws. Most importantly, it is inconsistent with the coordinated process to which EPA committed in 2012 to ensure the development of "One National Program" to regulate fuel economy and greenhouse gas (GHG) emissions in coordination with the National Highway Traffic Safety Administration (NHTSA). Consequently, we are requesting that EPA withdraw the Determination and reopen the record so that EPA's rulemaking concerning GHG emission standards for model years (MY) 2022-2025 can be aligned with fuel economy rulemaking currently underway at NHTSA for those years.

[1] The Association of Global Automakers represents international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Our member companies have invested $56 billion in U.S.-based facilities, directly employ nearly 100,000 Americans, and sell 47 percent of all new vehicles purchased annually in the country. Combined, our members operate more than 300 production, design, R&D, sales, finance and other facilities across the United States. Working with industry leaders, legislators, and regulators in the United States, Global Automakers aims to create public policies that improve motor vehicle safety, encourage technological innovation, and protect our planet. Our goal is to foster an open and competitive automotive marketplace that encourages investment, job growth, and development of vehicles that can enhance Americans' quality of life. For more information, please visit www.globalautomakers.org.

Association of Global Automakers, Inc. 1050 K Street, NW, Suite 650 • Washington, DC 20001 TEL 202.650.5555 GLOBALAUTOMAKERS.ORG

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A. Background

On January 12, 2017—just one week before the end of the previous administration—EPA published its final Determination concerning whether the GHG emissions standards currently on the books for MY 2022-2025 remain appropriate. This Determination was part of a "Midterm Evaluation" of those standards, a key protective mechanism that was included, at the insistence of the auto industry as a condition of its support of these regulations, in the 2012 joint EPA and NHTSA rule setting fuel economy and GHG emission standards covering MY 2017 through 2025.[2] Given that NHTSA is statutorily prevented from promulgating fuel economy standards governing more than a five-year period, and that the EPA standards were being set more than ten years into the future, having an objective and data-driven Midterm Evaluation is necessary to ensure that the future standards are feasible, cost-effective, and achieve the goals of the two relevant statutes under the One National Program.

Throughout the process of the Midterm Evaluation, both EPA and NHTSA made several commitments to the stakeholders. First, the agencies promised to remain aligned from both a procedural and substantive standpoint.[3] As was the case with the 2012 rulemaking, during the Midterm Evaluation the agencies were to jointly issue a proposed rulemaking/determination and a final rulemaking/ determination. This was necessary to ensure that One National Program is maintained and to protect manufacturers from having to comply with multiple inconsistent standards.

Second, EPA and NHTSA consistently stated that the final NHTSA rule and EPA determination were expected by April 1, 2018,[4] with a proposed rule and a proposed determination expected in the summer of 2017.[5] This timeline would allow the agencies to account for the most up-to-date and robust information concerning the light-duty fleet and the costs and effectiveness of the technologies needed to meet the standards. In developing information for the record, in allocating scarce automotive engineering

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[2] *See* 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). The State of California has its own GHG emission standards for light duty vehicles, but has amended its regulations to include a "deemed-to-comply" provision whereby automakers could show compliance with its state GHG emission standards by complying with EPA GHG regulations. Together, the California regulations and the EPA/NHTSA standards are referred to as the "One National Program."

[3] *See* 77 Fed. Reg. at 62,633 (stating that EPA and NHTSA will act jointly in their proposed and final rulemaking in the Midterm Evaluation "[i]n order to align the agencies' proceedings for MYs 2022–2025 and to maintain a joint national program.")

[4] *Id.*

[5] *See* https://www.epa.gov/sites/production/files/2016-10/documents/grundler-sae-naipc-2015-09-17-presentation.pdf at 24 (indicating that the EPA Proposed Determination and NHTSA notice of proposed rulemaking would be released mid-2017 and the final determination made in April 2018).

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resources, and in the expenditure of considerable sums, the industry relied upon this schedule and these repeated representations.

Finally, both EPA and NHTSA committed to a collaborative process that would fully account for the input of all stakeholders. To achieve this, the agencies stated that they would provide periods of public comment on the draft Technical Assessment Report (TAR) that EPA and NHTSA compiled in collaboration with the California Air Resources Board (CARB), and a separate period of comment with respect to EPA's and NHTSA's proposals concerning the MY 2022-2025 standards.[6] Given that the agencies' actions on this matter would affect billions of dollars of investments on the part of automakers as well as the types of vehicles that would be made available to customers for years (if not decades) to come, it is critically important that the agencies get it right.

Despite this carefully constructed (and fully promised) process, EPA unilaterally reversed course 22 days after the Presidential Election. On November 30, 2016, EPA abruptly announced that it was abandoning its previously committed-to plan on the Midterm Evaluation and published a lengthy "Proposed Determination" concerning the appropriateness of the MY 2022-2025 GHG standards. Signaling its new intent to rush through a final Determination before the end of the Obama Administration, EPA provided stakeholders with just 30 days from the release of the Proposed Determination on EPA's website to provide comments (which was only 24 days from the date the Proposed Determination was published in the Federal Register[7]). EPA was informed by many stakeholders that this comment period was far too short for an action of this magnitude and included a holiday period when many automakers are closed. Nevertheless, EPA's Final Determination was released on January 12, 2017.

When EPA announced the Proposed Determination, it styled its action as a "proposed adjudicatory determination."[8] EPA therefore took the position that its Determination could escape both the procedural requirements of Section 307 of the Clean Air Act[9] and the rulemaking provisions of the Administrative Procedures Act (APA).[10] In the Final Determination and Response to Comment, EPA rejected the argument made by Global Automakers and many other stakeholders that the Determination amounted to a rulemaking because it is a prospective action setting agency policy.[11] Consistent with its position that the Determination is not a rulemaking, EPA has not published the Determination in the Federal Register.

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[6] 77 Fed. Reg. at 62,784.
[7] 81 Fed. Reg. 87,927 (Dec. 6, 2016).
[8] See Proposed Determination at ES-2 and 2 n.2.
[9] 42 U.S.C. § 7607(d)
[10] 5 U.S.C. § 553
[11] *See* EPA Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation at 11, n.20.

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B. EPA Has Ample Authority to Reconsider the Determination

Regardless of whether the Final Determination is considered a rule or an adjudication, this EPA has the authority to withdraw and reconsider it. In the event that the Determination is an adjudication (as the prior EPA claimed), then the agency has inherent authority to reconsider that decision. "It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."[12] This is especially true where the underlying determination has "serious procedural and substantive deficiencies."[13] Unless a statute expressly limits an agency's authority to reconsider its decisions—which is not the case here—then the agency may freely do so as long as reconsideration occurs within a reasonable time after the first decision and notice of the agency's intent to reconsider is given to the parties.[14]

In the event that the Determination did amount to a rulemaking, then it is subject to withdrawal and reconsideration for two separate and independent reasons. First, the Federal Register Act requires that all documents of "general applicability and legal effect" be published in the Federal Register.[15] The EPA Final Determination has not been published in the Federal Register in contravention of this clear requirement. Thus, under President Trump's Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review,[16] if viewed as a rule the Final Determination can and should be withdrawn by the new Administration.

Second, an agency has inherent power to withdraw and reconsider a rule that suffers from fatal legal and procedural flaws.[17] Adhering to the proper procedures is a fundamental prerequisite for valid rulemaking.[18] Here, the Determination is invalid as a rule because EPA did not follow any of the procedural requirements set forth in Section 307(d) of the Clean Air Act. EPA did not convene a hearing to allow interested persons to comment on the Proposed Determination, and did keep the record of the proceedings open for 30 days to provide an opportunity for interested persons to submit rebuttal and supplementary information to the

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[12] *Dun & Bradstreet Corp. Found. v. United States Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991). *See also ConocoPhillips Co. v. United States EPA*, 612 F.3d 822, 832 (5th Cir. 2010) ("Embedded in an agency's power to make a decision is its power to reconsider that decision."); *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989) (holding that Bureau of Alcohol, Tobacco, and Firearms had the implied authority to correct the erroneous approval of firearms import application).

[13] *Belville Mining Co. v. United States*, 999 F.2d 989, 998 (6th Cir. 1993).

[14] *Dun & Bradstreet*, 946 F.2d at 193.

[15] 44 USC 1505(a)(2).

[16] 82 Fed. Reg. 8346 (Jan. 24, 2017).

[17] *Citizens Against the Pellissippi Parkway v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004)

[18] *United States v. Utesch*, 596 F.3d 302, 312 (6th Cir. 2010) (stating that a "reviewing court must focus not merely on the ultimate rule but on the process of an administrative rulemaking; otherwise, an agency could always violate the APA's procedural requirements based on the representation that it would have adopted the same rule had the proper process been followed.")

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record.[19] Presumably, the prior EPA ignored these requirements because to follow them would have prevented the agency from finalizing the Determination before the end of the Obama Administration. But politics is not a reason for running roughshod over important procedural protections found in the Clean Air Act.

C. EPA Should Withdraw the Determination and Reopen the Rulemaking Record to Maintain the One National Program EPA Promised

EPA's Determination is a significant action by the agency that will have far-reaching ramifications for the industry and the automobile driving public. EPA readily concedes that the MY 2022-2025 standards will increase the prices of new motor vehicles by a substantial amount (according to EPA's own estimates), and will impact the types of vehicles sold in the U.S. An action of this magnitude requires a thoughtful and collaborative decision-making process. Here, however, EPA opted for political expediency instead, and jammed through a Final Determination in the waning days of the lame-duck Administration.

The EPA Determination suffers from many procedural and substantive flaws, any one of which would justify withdrawing the rule and reopening the rulemaking record. Among them are:

- Failure to follow EPA regulations requiring coordination with NHTSA. The Midterm Evaluation was designed so that the actions of EPA and NHTSA would be carefully coordinated every step of the way. As explained in the preamble to the 2012 rulemaking, "[i]order to align the agencies' proceedings for MYs 2022–2025 and to maintain a joint national program, if the EPA determination is that its standards will not change, NHTSA will issue its final rule concurrently with the EPA determination."[20] This requirement is codified at 40 C.F.R. § 86.1818-12(h)(1)(vii), which requires EPA's Midterm Evaluation to account for "[t]he impact of the greenhouse gas emission standards on the Corporate Average Fuel Economy standards and a national harmonized program." Without providing any justification for its doing so, EPA violated this central tenet of the Midterm Evaluation by finalizing its Determination more than a year before NHTSA's rulemaking is expected to be completed and acted contrary to its own regulations. NHTSA is currently in the middle of its rulemaking process for MY 2022-2025 fuel economy standards, and its decision will be based on more up-to-date information than EPA's. Consequently, there is a risk that NHTSA will reach a different conclusion from EPA concerning appropriate standards for MY 2022-2025. This is the antithesis of the One National Program that EPA agreed to.

- Needlessly accelerating the timeline for the GHG Midterm Evaluation. Prior to November 2016, EPA had repeatedly represented that it would propose its determination/rulemaking in the summer of 2017 and finalize its actions by April 2018. Based on these representations, Global Automakers and other

[19] 42 U.S.C. § 307(d)(5).
[20] 77 Fed. Reg. at 62,633.

members of the auto industry commissioned several studies concerning the baseline light duty fleets and the technologies necessary to meet the current MY 2022-2025 standards. EPA was informed that these studies will be important for its determination but would not be complete until the promised mid-2017 timeframe. Additionally, EPA was urged to delay its actions so that it could account for the most up-to-date information concerning the technologies needed to meet the standards, their costs, and their impacts on consumers—as NHTSA is doing with its rulemaking. EPA ignored these calls and finalized its determination based on a record that was far from complete solely to rob the incoming Administration of an opportunity to have input on this important matter.

- Failure to provide an adequate period for public comment. The Proposed Determination and the accompanying Technical Support Document consisted of almost 1,000 pages, and cited almost 1,100 references, many of which are new or significantly revised since the earlier Draft TAR. Additionally, EPA conducted 102 new runs of the computer models it uses to assess the effectiveness of fuel saving technologies. Thirty days is an insufficient time period for stakeholders to fully review, analyze, and prepare detailed comments on an action as significant and complex as EPA's Determination – especially in light of the intervening national holidays. EPA offered no reasoned explanation as to why it was short-circuiting the comment period on such an important agency action.

- Failure to address the GHG emission program as a whole. In its rush to finalize its Determination, EPA answered only half the question, *i.e.*, whether the numeric standards expressed in the footprint-based curves remain appropriate. However, the GHG regulations also include program flexibilities that automakers rely on to meet the standards. These flexibilities provide incentives for the early adoption of advanced fuel-saving technologies and help manufacturers smooth out annual variability in compliance over several model years. They are an important aspect of the One National Program, and they provide real and lasting environmental benefits. EPA's failure to look at the entire program as a whole was inconsistent with the very purpose of the Midterm Evaluation.

- Failure to respond adequately to comments concerning consumer acceptance, cost and technology effectiveness. EPA received more than 100,000 public comments on the Proposed Determination.[21] Many of the comments from industry focused on the extent to which lack of consumer acceptance may impact the ability to achieve the standards, as well as the costs and effectiveness of the necessary technologies. The fact that EPA finalized its Determination a mere ***13 days*** after the close of the comment period demonstrates that the agency could not have adequately responded to all of these comments. Indeed, a review of the final Determination and the Response to Comments reveals that EPA did not provide adequate responses to the many comments given.

[21] *See* Determination at 1.

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EPA's determination as to the appropriateness of the GHG emission standards for MY 2022 through 2025 was a significant action that will have wide-ranging implications for the automobile industry and the car-buying public. It was therefore important that EPA reach its decision based on an open and collaborative process, and only after fully considering all of the most up-to-date information concerning the costs and feasibility of the technologies necessary to meet the standards. Rather than adhering to such a process that it had agreed to and promised in 2012, EPA rushed through a Final Determination at the very end of the previous Administration. Therefore, we respectfully request that EPA: (a) withdraw the Determination, (b) reopen the record on the Midterm Evaluation, and (c) reset the timetable for EPA's actions so that they align with NHTSA's rulemaking.

Thank you for your prompt consideration of this matter.

Sincerely,

John Bozzella
President and CEO
Association of Global Automakers

cc: Secretary Elaine Chao, DOT
Kevin Green, DOT
Bill Charmley, EPA
Chris Grundler, EPA
Michael Olechiw, EPA
Rebecca Yoon, NHTSA
James Tamm, NHTSA
Alberto Ayala, CARB