U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Operating efficiently and effectively

Concerns About the Process Used for the SAFE Vehicles Rule Demonstrate the Need for a Policy on EPA's Role in Joint Rulemakings

Report No. 21-E-0125 **April 20, 2021**

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Abbreviations

ADP	Action Development Process
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy
EPA	U.S. Environmental Protection Agency
GAO	U.S. Government Accountability Office
GHG	Greenhouse Gas
NHTSA	National Highway Traffic Safety Administration
OAR	Office of Air and Radiation
OGC	Office of General Counsel
OIG	Office of Inspector General
OMB	Office of Management and Budget
OP	Office of Policy
Pub. L.	Public Law
SAFE	Safer Affordable Fuel-Efficient
U.S.C.	United States Code

Cover Photo: Some vehicles are subject to the Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks. (EPA photo)

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U.S. Environmental Protection Agency
Office of Inspector General

21-E-0125
April 20, 2021

At a Glance

Why We Did This Evaluation

We conducted this evaluation to determine whether the U.S. Environmental Protection Agency's actions on the final Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks were consistent with requirements pertaining to transparency, record keeping, and docketing and followed the EPA's process for developing final regulatory actions.

The EPA and the National Highway Traffic Safety Administration finalized the SAFE Vehicles Rule on April 30, 2020. The agencies have different statutory authorities for vehicle rules related to greenhouse gas emissions and fuel-economy standards.

This evaluation addresses the following:

- *Operating efficiently and effectively.*

This evaluation addresses these top EPA management challenges:

- *Complying with key internal control requirements (data quality; policies and procedures).*
- *Integrating and leading environmental justice.*

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Concerns About the Process Used for the SAFE Vehicles Rule Demonstrate the Need for a Policy on EPA's Role in Joint Rulemakings

What We Found

The EPA's actions in the final SAFE Vehicles Rule undercut the rule's quality.

Although the EPA and NHTSA jointly issued the SAFE Vehicles Rule, the agencies' technical personnel did not collaborate during final rule development, undercutting the joint character of the rulemaking. Furthermore, the EPA did not follow its established process for developing regulatory actions, did not complete major Action Development Process milestones, or did not document who decided to skip these milestones and why. In addition, NHTSA performed all major technical assessments for the rule, while the role of EPA technical personnel was limited to providing advisory input to NHTSA for some aspects of the analysis. The EPA did not conduct a separate analysis related to executive orders on the impacts of modified standards on vulnerable populations.

Former EPA Administrator Scott Pruitt decided that the SAFE Vehicles Rule would be based solely on NHTSA modeling and analysis and that NHTSA would draft the majority of the preamble text. One senior EPA official cited NHTSA's statutory deadline for establishing its standards as the impetus for its lead role in developing the rulemaking. This approach bypassed aspects of the EPA's normal rulemaking process. It also diverged from the more collaborative precedent set by the agencies' prior joint rulemakings, as well as circumvented Office of Air and Radiation technical personnel feedback prior to the final rule being circulated for interagency review. Furthermore, technical personnel were confused about the proper contents of the docket, and congressional and tribal stakeholders raised transparency concerns after the final rule was published. While joint rulemaking is infrequent, the process should be improved by clearly defining the EPA's responsibilities when working with a partner agency.

Recommendations and Planned Agency Corrective Actions

We recommend that the Office of Air and Radiation docket its interpretation of whether the EPA docket for Clean Air Act joint rulemaking actions reflects that the partner agency is an "other agency" for purposes of the Act's docketing requirements. We recommend that the Office of Air and Radiation and the general counsel docket any comments generated by the EPA and NHTSA during interagency review from January 14, 2020, to March 30, 2020. We recommend that the Office of Air and Radiation and the Office of Policy document decisions regarding Action Development Process milestones and determine the EPA's role in joint rulemakings, including addressing executive orders on children's health, tribal consultation, and environmental justice. One recommendation is resolved with corrective actions pending, while three recommendations are unresolved.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

April 20, 2021

MEMORANDUM

SUBJECT: Concerns About the Process Used for the SAFE Vehicles Rule Demonstrate the Need for a Policy on EPA's Role in Joint Rulemakings
Report No. 21-E-0125

FROM: Sean W. O'Donnell

TO: Victoria Arroyo, Associate Administrator for Policy
Office of the Administrator

Joseph Goffman, Acting Assistant Administrator
Office of Air and Radiation

This is our report on the subject evaluation conducted by the Office of Inspector General of the U.S. Environmental Protection Agency. The project number for this evaluation was OA&E-FY20-0269. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

The Offices of Policy and Air and Radiation are responsible for issues discussed in this report.

In accordance with EPA Manual 2750, the Office of Air and Radiation provided acceptable planned corrective actions and estimated milestone dates for Recommendation 3. This recommendation is resolved.

Action Required

Recommendations 1, 2, and 4 are unresolved. The resolution process, as described in the EPA's Audit Management Procedures, begins immediately with the issuance of this report. Furthermore, we request a written response to the final report within 60 days of this memorandum. Your response will be posted on the OIG's website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at www.epa.gov/oig.

cc: Melissa Hoffer, Acting General Counsel

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Chapter 1
Introduction

Purpose

The Office of Inspector General conducted this evaluation to determine whether the actions of the U.S. Environmental Protection Agency on the final Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, known as the SAFE Vehicles Rule, were consistent with requirements pertaining to transparency, record keeping, and docketing, and followed the EPA's process for developing final regulatory actions.

Top Management Challenges

This evaluation addresses the following top management challenges for the Agency, as identified in OIG Report No. 20-N-0231, *EPA's FYs 2020–2021 Top Management Challenges*, issued July 21, 2020:

- Complying with key internal control requirements (data quality; policies and procedures).
- Integrating and leading environmental justice.

Background

The EPA is charged with regulating greenhouse gas, or GHG, emissions from new motor vehicles as air pollutants under Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a). In 2009, then-President Barack Obama announced the *National Fuel Efficiency Policy* to establish a harmonized national program of new standards for light-duty vehicles that reduce GHG emissions and improve fuel economy. Consistent with that policy, the EPA and the U.S. Department of Transportation's National Highway Traffic Safety Administration, or NHTSA, published their first joint rulemaking in 2010. During the promulgation of that rulemaking, the U.S. Government Accountability Office reviewed the process being used by both agencies and recommended that the agencies formalize the process. The EPA agreed with the recommendations, but we found no internal or external guidance formalizing the process for promulgating a joint rulemaking.

Regardless of whether the EPA coordinates with another agency to develop and issue a rulemaking, the EPA is the exclusive agency charged with implementing Section 202(a) of the CAA. The EPA's Action Development Process ensures that Agency rulemaking actions "are of consistently high quality," according to the EPA's *Action Development Process: Guidance for EPA Staff on Developing Quality Actions* (March 2018), also known as the *ADP Guidance.* The *ADP Guidance* notes that "much of the EPA's environmental success and organizational credibility is directly linked to the quality of" the EPA's regulation development. In light of the EPA's statutory charge and the stated importance of developing quality regulations, internal regulatory development guidance is

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equally relevant in the joint rulemaking context as it is in rulemakings exclusive to the EPA.

GHG and Vehicle Fuel Economy Standards

Federal standards regulate the GHG emissions from and the fuel economy of new passenger cars and light trucks. These standards include the light-duty vehicle GHG emission standards promulgated by the EPA and the Corporate Average Fuel Economy, or CAFE, standards promulgated by NHTSA (Table 1).

Table 1: GHG and CAFE Standards

GHG standards	Congress designed the CAA to protect public health and welfare from different types of air pollution caused by a diverse array of pollution sources. In addition, Congress drafted the Act with general authorities that can be used to address pollution problems that emerge over time. The April 2007 Supreme Court decision in *Massachusetts v. EPA* held that the EPA has the authority under Section 202(a)(1) of the CAA, 42 U.S.C. § 7521(a)(1), to regulate GHG emissions from new motor vehicles as air pollutants.
CAFE standards	The Energy Policy and Conservation Act directs NHTSA to set the "maximum feasible" average fuel economy level, taking into account four statutory factors—technological feasibility, economic practicability, the effect of other government standards on fuel economy, and the need of the nation to conserve energy. NHTSA has discretion over how to balance these factors. In 2007, Congress enacted the Energy Independence and Security Act of 2007 (Pub. L. 110-140), which amended the Energy Policy and Conservation Act and mandated phasing in increased CAFE standards to reach 35 miles per gallon for passenger cars and light trucks by 2020. Beginning with model year 2011, the Energy Independence and Security Act mandated NHTSA to consult with both the EPA and the U.S. Department of Energy when prescribing CAFE standards.

Source: OIG summary of GHG and CAFE standards. (EPA OIG table)

Joint Rulemaking History

Since 2010, the EPA has worked jointly with NHTSA on five rulemakings to align GHG standards with CAFE standards. Three of these rulemakings, including the SAFE Vehicles Rule, have pertained to passenger cars and light trucks.

After the proposal phase of the first joint rulemaking in 2010 (Figure 1), the GAO reviewed, among other items, the design of the standards that NHTSA and the EPA proposed and how the two agencies collaborated to set standards. The GAO noted that NHTSA and the EPA shared resources and expertise to jointly set CAFE and GHG standards. As a result of these efforts, the GAO concluded that each agency had significant input into the development of both sets of standards. The GAO recommended NHTSA and the EPA document and publish the process used in the joint rulemaking to establish a roadmap for any future rulemaking efforts, facilitate future collaboration, and increase transparency. The GAO also

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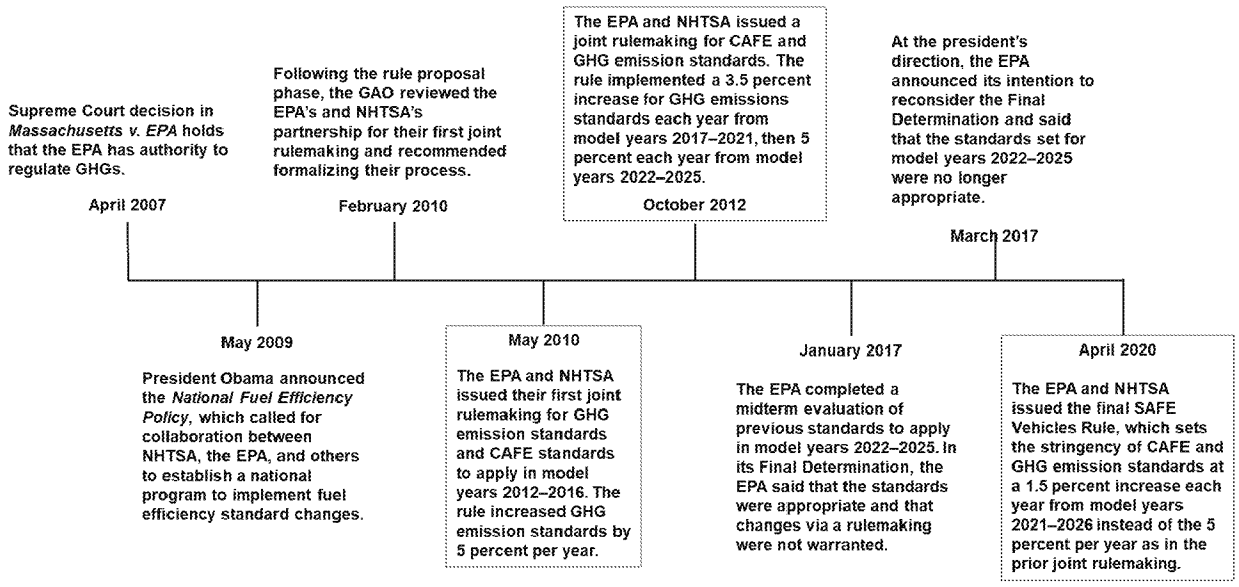
recommended that NHTSA and the EPA enter into a Memorandum of Understanding in which the agencies agree to continue their enhanced partnership in any future CAFE and GHG rulemakings. NHTSA and the EPA agreed with the recommendations and committed to working together to document their collaborative rule development process. Documents indicate that the agencies developed a draft response with several practices for joint and coordinated work. The GAO's website shows these recommendations as closed upon implementation.

Despite not formalizing a process for joint rulemaking, the agencies worked collaboratively on another passenger car and light trucks rulemaking in 2017 (Figure 1), as well as on heavy-duty vehicle rulemakings, prior to the final SAFE Vehicles Rule published in 2020.

Figure 1: Events surrounding three joint rulemakings on passenger cars and light trucks



Source: OIG summary. (EPA OIG image)

Note: Green boxes denote joint rulemakings on passenger cars and light trucks between the EPA and NHTSA.

EPA's Regulatory Development

The EPA is one of the most active regulatory agencies in the federal government, and writing regulations is one of the most significant tools the EPA has to protect human health and the environment. The EPA designed its ADP over 30 years ago to equip rule writers with the tools necessary to write a regulation. Per the *ADP Guidance*, the ADP serves as a comprehensive framework to ensure the use of quality information to support EPA actions and an open process for action development.

> Developing environmental regulations is one of the Agency's principal tasks, and much of the EPA's environmental success and organizational credibility is directly linked to the quality of this work.
>
> —EPA's *ADP Guidance*

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The ADP includes four major milestones typically required for complex actions, such as the final SAFE Vehicles Rule:

- **Early Guidance**. Initial direction from senior management, including policy priorities and expectations of the workgroup.

- **Analytical Blueprint**. A workgroup's plan for conducting analyses to support action development.

- **Options Selection.** Identification of significant issues by the workgroup, as well as identification of a range of options to resolve each issue. Senior management then decides which options would best achieve the goals of the action.

- **Final Agency Review**. The last point for internal EPA review of an action, which confirms that all issues have been resolved or elevated for resolution. The action package is ready for Office of Management and Budget review, if required, or signature, if the workgroup decides that all EPA and external requirements have been met.

The *ADP Guidance* encourages using a staff workgroup to share information and draft the key rulemaking materials associated with the milestones or to seek waivers for individual milestones if the workgroup agrees the milestone is not needed. While the ADP is the EPA's established process for developing actions, neither the *ADP Guidance* nor any other internal guidance defines joint rulemaking or describes how to approach action development in a joint rulemaking context.

The lead EPA program office conducting the rulemaking spearheads action development and charters the workgroup. The Office of Air and Radiation was the lead EPA program office for the final SAFE Vehicles Rule and the prior joint rulemakings with NHTSA. According to the *ADP Guidance*, the Office of General Counsel should participate in the development of rules, such as the SAFE Vehicles Rule, that may require extensive cross-agency involvement, new science, or nonroutine application of existing science or that have the potential for precedent-setting implementation issues, policy implications, or economic considerations.

The associate administrator of the EPA's Office of Policy oversees the ADP, and staff within the OP's Office of Regulatory Policy and Management manages the process for the Agency and the day-to-day operations and information systems that underpin the process. The Office of Regulatory Policy and Management helps to ensure that the EPA uses the most appropriate analytic information to determine regulatory policy, serves as the liaison to other federal agencies for all

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actions, and manages ADP infrastructure such as the tracking system described below.

The ADP includes a Regulatory Steering Committee, which is a standing body with representation from each program office and region, the OGC, and cross-media offices such as the EPA's Office of Children's Health Protection. The *ADP Guidance* requires that program offices evaluate impacts on children's health and environmental justice communities. Similarly, the *ADP Guidance* requires the lead program office to identify key external stakeholders, including tribal governments, and make plans for appropriate consultation.

Executive Orders and Rulemaking

Several executive orders play a central role in federal regulatory development. Specifically, the EPA is charged with administering all or part of the executive orders in Table 2.

Table 2: Executive orders pertaining to federal regulatory development

	Provides that significant regulatory actions be submitted for interagency review to the OMB and that comments by the OMB or other agencies are addressed. After the publication of an action, the federal agency promulgating the action and the OMB make available to the public certain documents and information related to the action and interagency review exchanged between them during interagency review. All documents submitted regulations signed by the EPA administrator must be included in the EPA's ADP tracking database.
Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, February 11, 1994	Focuses federal attention on the environmental and human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection.
Executive Order 13045 *Protection of Children From Environmental Health Risks and Safety Risks*, April 21, 1997	
Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, November 6, 2000	Applies to rules with tribal implications and states that, to the extent practicable and permitted by law, the Agency cannot promulgate some rules unless certain conditions are met. Consultation with tribal officials is required when agencies are developing policies that have "substantial direct effects" on tribes and tribal interests.

Source: EPA summary of executive orders. (EPA OIG table)

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A significant regulatory action, as defined by Executive Order 12866, is any action that is likely to result in a rule that may:

- Have an annual effect on the economy of $100 million or more or adversely affect, in a material way:
    - The economy.
    - A sector of the economy.
    - Productivity.
    - Competition.
    - Jobs.
    - The environment.
    - Public health or safety.
    - State, local, or tribal governments or communities.
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.
- Materially alter the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof.
- Raise certain novel legal or policy issues.

Economically significant regulatory actions are a subset of significant regulatory actions that meet the first criteria. These regulatory actions require a more detailed assessment of the likely benefits and costs, as well as a similar analysis of potentially effective and reasonably feasible alternatives. Per Executive Order 12866, the final SAFE Vehicles Rule is an economically significant regulatory action.

Rulemaking Record Keeping and Tracking

The Federal Records Act, 44 U.S.C. § 3101, requires agencies to make and preserve records containing adequate and proper documentation of their decisions. Guidelines from the National Archives and Records Administration define characteristics of trustworthy records. Additionally, Section 6.2 of the EPA's *Interim Records Management Policy* requires the Agency to document the formulation and execution of basic policies and decisions.

The EPA developed the ADP Tracker system in 2012 to help the Agency manage and track rulemaking actions, milestones, workgroups, and workflow. While the OP oversees the tracking system as the overall process manager for the ADP, the OP shares system data entry with program offices. According to the 2013 ADP Tracker data entry guidance, the lead office for developing an action is ultimately responsible for the accuracy, consistency, and

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completeness of the data in the ADP Tracker. The OP is responsible for entering process management data, items for which it is the decision-maker, and interactions with the OMB. Additionally, a 2013 memorandum to the EPA's Regulatory Steering Committee specified that lead program office staff are required to upload key documents supporting the four major ADP milestones. In 2018, then-Acting Administrator Andrew Wheeler emphasized timely and accurate reporting in the Agency's regulatory management system in an internal Agency memorandum.

In addition to the ADP Tracker, the EPA maintains email records on rulemakings in the Agency's Capstone system. Under Capstone, Agency employees have 90 days from the date an email is created or received to delete or "cull" any junk or personal email no longer needed. After the 90-day culling period, employees' emails will be preserved for ten years and then deleted, unless subject to a litigation hold or other preservation obligation. Additionally, emails created or received by senior leaders, such as assistant and deputy assistant administrators, designated as Capstone officials are saved as permanent records and then transferred to the National Archives and Records Administration after 15 years.

Docketing

A rulemaking docket typically contains materials relating to each stage or phase in the development of a rule. The EPA's rulemaking dockets include paper and electronic documents that form the basis of the EPA's decisions in proposing, amending, repealing, or promulgating a rule. Specific docketing requirements apply to certain actions under Section 307(d) of the CAA. Among other things, this provision addresses the location of dockets, public availability of docket materials, and the materials to be included in dockets. The provision also specifies that the "promulgated rule may not be based … on any information or data which has not been placed in the docket as of the date of such promulgation."

Additionally, for any rulemaking sent to the OMB for review under Executive Order 12866, the agency must identify and make available to the public (1) the draft regulation and certain other documents sent to the OMB for review, such as certain analyses and assessments; (2) the substantive changes between the draft regulation sent to the OMB for review and the regulation subsequently announced; and (3) the changes made at the suggestion or recommendation of the OMB. The EPA implements these provisions by placing the materials in the rulemaking docket.

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The documents in a rulemaking docket may include but are not limited to:

- Regulatory text.
- Background documents.
- Information received from members of the public.
- Supporting materials for statutory and executive order reviews, such as a Regulatory Impact Analysis, which is required for economically significant rules per Executive Order 12866.

According to EPA docketing guidance, a rulemaking docket should generally not include documents containing predecisional, deliberative information, or communications, unless such information is included in the scope of material to be docketed pursuant to Section 307(d) of the CAA or Executive Order 12866.

Responsible Offices

The OP and the OAR are responsible for the issues discussed in this report.

Scope and Methodology

We conducted this evaluation from August 2020 to March 2021 in accordance with the *Quality Standards for Inspection and Evaluation* published in January 2012 by the Council of the Inspectors General on Integrity and Efficiency. Those standards require that we perform the evaluation to obtain sufficient, competent, and relevant evidence to provide a reasonable basis for our findings, conclusions, and recommendations based on our objectives. We believe that the evidence obtained provides a reasonable basis for our findings, conclusions, and recommendations.

Our review focused on processes to promulgate the final SAFE Vehicles Rule. We did not evaluate activities related to the proposed rule and did not assess the accuracy or appropriateness of modeling, analysis, data, or other inputs used in developing the joint rulemaking. Given our oversight authority, we focused on the EPA's role and processes in working with NHTSA. Additionally, the following specific concerns raised by a member of Congress further refined our scope:

- The OAR drafted comments to NHTSA identifying errors and inaccuracies, hand carried hard-copy comments to NHTSA, and did not docket those comments.
- The agencies made significant changes after the final rule was signed but before publishing it in the *Federal Register*.

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To address our objectives, we reviewed relevant guidance, policies, statutes, and executive orders. We also reviewed the Federal Records Act, the EPA's *Interim Records Management Policy*, the National Archives and Records Administration's *Document Drafting Handbook*, and the EPA's 2018 *ADP Guidance*. We obtained information on the final SAFE Vehicles Rule from the EPA's ADP Tracker system. We also accessed materials from EPA and NHTSA websites and each agency's rulemaking docket. We reviewed written exchanges between the two agencies during the development of the final rule, including the EPA's original text and suggested revisions to the final rule preamble. We also reviewed a February 2010 GAO report on the EPA's and NHTSA's partnership. Because there is no formal guidance on developing joint rulemakings and the ADP is the EPA's established, comprehensive process for developing actions, we used it as a basis to evaluate the development of the final SAFE Vehicles Rule. In addition, we reviewed prior joint rulemakings between the two agencies.

We interviewed the EPA's workgroup chair for the rulemaking, OAR technical staff and managers, and OAR senior officials on the process to develop the joint rule with NHTSA. We also interviewed assigned staff attorneys within the OGC, the former general counsel, and the former acting general counsel. We interviewed OP personnel and the former OP associate administrator. We also interviewed several EPA staff and managers about executive orders related to impacts to vulnerable populations, including environmental justice and tribal coordinators for the OAR and the Agency's Office of Children's Health Protection.

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Chapter 2
Final SAFE Vehicles Rule Concerns Indicate Improvements Needed for Developing Joint Rules

The EPA and NHTSA jointly issued the SAFE Vehicles Rule. The agencies' technical personnel, however, did not collaborate during final rule development, undercutting the joint character of the rulemaking. Furthermore, the EPA did not follow its established process for developing regulatory actions, did not complete major ADP rulemaking milestones, and did not document who decided to skip these milestones and why. In addition, NHTSA performed all major technical assessments for the rule; the role of EPA technical personnel was limited to providing advisory input to NHTSA for only some aspects of the analysis. The EPA also did not conduct analysis related to executive orders on the impacts of modified GHG standards on vulnerable populations. In the EPA's prior joint rulemakings with NHTSA, each agency conducted modeling and analysis and drafted preamble text related to its separate statutory authority. An EPA rule workgroup would typically:

- Seek early guidance from senior managers to establish policy priorities and communicate expectations for the workgroup, including how to address any issues related to environmental justice and children's health.
- Complete an analytic blueprint spelling out workgroup plans for data collection and analyses.
- Consult with key stakeholders potentially affected by an action, including state and tribal representatives.
- Develop options for senior management consideration.
- Establish a docket for rulemaking transparency.

Former EPA Administrator Scott Pruitt decided that the SAFE Vehicles Rule would be based solely on NHTSA modeling and analysis and not on that of the EPA's scientists, and that NHTSA would draft the majority of the preamble text. One senior EPA official cited NHTSA's statutory deadline for establishing CAFE standards as the impetus for its lead role in developing the rulemaking. This approach bypassed aspects of the EPA's normal ADP. It also diverged from the more collaborative precedent set by the agencies' prior joint rulemakings, as well as circumvented OAR technical personnel feedback on modeling, input data, and the majority of the preamble text prior to the final rule being circulated by the OMB for interagency review.

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Furthermore, OAR technical personnel were confused about the proper contents of the docket, and congressional and tribal stakeholders raised transparency concerns after the final rule was published.

The GAO reviewed the first joint rulemaking between the EPA and NHTSA and recommended capturing best practices for future efforts. While joint rulemaking is infrequent, the process should be improved by clearly defining the EPA's anticipated role and responsibilities when working with a partner agency. The EPA administrator has broad discretion in the rulemaking process, but this clarification would, at minimum, establish a baseline of expectations.

EPA and NHTSA Technical Personnel Did Not Collaborate

As noted in Chapter 1, the EPA's *ADP Guidance* does not prescribe how to approach action development in a joint rulemaking context. Given each agency's unique statutory authority, we would expect, consistent with past practice, each agency to write regulations related to its statutory authority and then jointly develop the remaining sections. While the former occurred, collaboration between the EPA and NHTSA was less extensive than in prior joint rulemakings, such as that for model years 2012–2016, which included parallel modeling and analysis as shown in Table 3.

Table 3: Comparison of collaboration in prior joint rule and final SAFE Vehicles Rule

Activity	Final Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Rule (2010)		Final SAFE Vehicles Rule (2020)	
	NHTSA	EPA	NHTSA	EPA
Performed modeling and analysis	✓	✓	✓	
Wrote preamble text related to executive orders	✓	✓	✓	
Wrote preamble and regulatory text for standards	✓	✓	✓	✓

Source: OIG analysis. (EPA OIG table)

Then-Administrator Pruitt decided that NHTSA would perform all modeling and analysis on behalf of both agencies and have a lead role in developing the final SAFE Vehicles Rule. The role of EPA technical personnel was to review the modeling and analysis results, which formed the basis of the Agency's regulatory text. One senior EPA official suggested that NHTSA's statutory deadline for establishing CAFE standards motivated this decision. Notably, in prior joint rulemakings, each agency performed modeling and analysis related to its individual standards. The agencies then coordinated their standards based on the results. In contrast, for the SAFE Vehicles Rule, the OAR's technical staff and resources were not fully utilized to develop GHG standards. Instead of applying

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OAR modeling tools previously used to develop and evaluate GHG standards, NHTSA modified its CAFE standards modeling tool to perform the joint analysis. Furthermore, in part because NHTSA did not timely share information and EPA leadership shared rulemaking and analysis on a limited basis with OAR technical personnel, OAR technical personnel were unable to fully collaborate on rule development.

NHTSA submitted approximately 1,000 pages of the final SAFE Vehicles Rule to the OMB for interagency review on January 14, 2020. Because of the lack of interagency collaboration at the technical level, OAR technical personnel reported to their leadership that NHTSA had not shared 650 of those approximately 1,000 pages with them prior to submitting the rule to the OMB.

> From October 2019 through March 2020, no one at the EPA ever saw NHTSA's model or input files until they were posted online.
>
> —OAR manager

OAR technical personnel reviewed the document that the OMB distributed for interagency review. According to OAR comments on the text and at in-person management briefings, the document, drafted primarily by NHTSA, contained numerous errors and inaccuracies. These written comments, provided to NHTSA on February 5, 2020, spanned a range of issues from edits for clarity to substantive factual inaccuracies and "unnecessary denigration" of prior EPA work. OAR technical personnel received a second draft of the rule on March 24, 2020, including an additional approximately 700 pages of text; reviewed the draft; and returned their comments to OAR management on March 26, 2020. Based on our analysis, 93 percent of the comments made on the March version directly referred back to changes that the OAR suggested in February.

In 2019, OAR technical personnel reported that the continued failure to correct errors could leave the rule legally vulnerable. The EPA's senior leadership was aware of the type and scope of technical personnel's comments, and then-Administrator Wheeler ultimately signed the rulemaking with many comments unaddressed by NHTSA. Had the two agencies collaborated more closely on modeling, analysis, and preamble text prior to interagency review, OAR technical comments and legal defensibility concerns might have been addressed earlier in the process, thereby improving confidence in the rule's quality.

Final SAFE Rule Did Not Follow the ADP, Including Assessing Potential Impacts on Vulnerable Populations

One way the Agency develops quality rulemakings is through the implementation of its ADP, which the EPA developed over 30 years ago. According to OAR technical personnel, the workgroup, as a whole, "was not involved" in the final rule or utilized in the way it normally would be. For example, OAR technical personnel said that the workgroup did not complete any major milestones called

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for in the ADP. The justification for this was that the EPA was only responsible for drafting the portions of the rule related to its statutory authority.

> The ADP serves as a comprehensive framework to ensure the use of quality information to support EPA actions and an open process for action development. The *ADP Guidance* encourages using a staff workgroup to share information and draft key rulemaking materials. It also includes four major milestones typically required for actions, such as the final SAFE Vehicles Rule.

The OAR staff who would typically be responsible for executive order analyses said that EPA senior leadership did not instruct them to do any executive order analyses related to children's health, environmental justice, or tribal consultation for the final SAFE Vehicles Rule. Staff also noted that there was little time to conduct reviews on this portion of the preamble text and that they were not charged with making such reviews a priority. However, in prior joint rulemakings, each agency was responsible for determining the potential impacts of the rule's respective standards on vulnerable populations. Absent any independent EPA analysis pursuant to the executive orders, we share concerns expressed to us by some EPA personnel that the Agency did not fully utilize its established process for regulatory development or its technical personnel familiar with environmental justice, children's health, and tribal consultation to determine the standards' potential impact on vulnerable populations.

Finally, the *ADP Guidance* notes that the establishment of a docket is an important step in the process. While the EPA does have a docket for the final SAFE Vehicles Rule, the docket does not contain the same information or level of detail as NHTSA's docket for the same rule and the EPA's docket in the prior joint rulemaking. We note specific docketing concerns below.

Not Following the ADP Created Concerns Regarding Record Keeping, Docketing, and Final Rule Text Changes

Record Keeping

Federal and EPA record-keeping requirements apply to regulatory decisions and reporting actions in a management system. Additionally, a 2013 memorandum to all Regulatory Steering Committee members required uploading materials associated with the four major milestones into ADP Tracker. For the final SAFE Vehicles Rule, the EPA did not document in the ADP Tracker the decision or rationale for skipping ADP milestones as a result of then-Administrator Pruitt's direction that NHTSA be the lead rule-writer. We also noted an instance of "inauthentic" documentation generated by a Department of Transportation contractor. Authenticity is one of the characteristics of trustworthy records, according to the National Archives and Records Administration.

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Not Documenting Decisions to Skip ADP Milestones

The ADP is presented as a step-by-step guide, but it is not intended to be a rigid process. The *ADP Guidance* allows for adjustments depending on the circumstances and notes that adjustments should be documented through waivers approved by senior management in cases where the rule workgroup deems that a step is unnecessary. While the *ADP Guidance* allows for the use of waivers, then-Acting Administrator Wheeler, in an August 2018 memorandum, said, "I do not intend to waive ADP milestones for … those actions reflecting the Administrator's top priorities and requiring extensive cross-office coordination." The memorandum then reiterated the ADP requirements for requesting waivers, suggesting that the administrator's memorandum only spoke to intent and did not prohibit waivers.

> "Flexibility is often appropriate during the application of the ADP when developing a quality action, and the workgroup and lead [assistant administrator]/[regional administrator] should work out details of the process for each action in consultation with the Office of Policy."
>
> —*ADP Guidance*

Products of major ADP milestones that document regulatory decisions and actions, such as overall policy direction and regulatory options selection, can be considered records, which are required to be retained per the Federal Records Act. Although the ADP Tracker is not designated as a records management system, inputs to the ADP Tracker may include records, such as the rationale to skip major decision points through an approved waiver. When the OIG requested documentation from the Agency regarding the decisions to skip milestones, the Agency was unable to provide responsive documentation. Therefore, unless records of such decisions or actions were otherwise put into a records management system, the EPA did not meet federal and Agency record-keeping requirements to document regulatory decisions and actions in a management system. As a result, the Agency's rulemaking and other internal stakeholders lack a complete picture of the rule's actions, milestones, and workflow—goals that the ADP Tracker was developed to address.

One Instance of an Inauthentic Record Noted

Guidelines from the National Archives and Records Administration define "authenticity" as one of the four characteristics of "trustworthy" records. Per the National Archives and Records Administration, authenticity means that items can be proven to be what they claim to be, have been created or sent by the persons claiming to have created or sent them, and have been created or sent at the claimed time.

A Department of Transportation contractor erroneously selected the EPA as the contractor's agency when uploading the final SAFE Vehicles Rule

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preamble into the OMB's system for review and comment. This raises concerns about whether users can trust information in the OMB's system, since the entry was not, as claimed, created by the EPA. Additionally, OP staff responsible for marshaling the final rule through the ADP wrote that they were confused because they did not know who uploaded the final rule preamble. OAR senior officials said that NHTSA generally uploaded materials on behalf of both agencies during this rulemaking. NHTSA did not upload documents on behalf of both agencies in prior joint rulemakings.

Docketing and Changes to Final Rule Text

EPA's Hand-Carried Documents Were Not Docketed

The CAA requires the EPA administrator to docket written comments from other agencies on rules submitted to the OMB for interagency review (see sidebar). 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 NHTSA as a coauthor both before and after initiating interagency review. Using this interpretation, NHTSA would not be considered an "other agency" for the purposes of the docketing provision. The OGC based its interpretation upon the notion that, as joint authors, the two agencies operated in such close coordination as to merit treatment as a single agency for purposes of CAA docketing requirements.

> "The 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 the proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and **all such written comments thereon**, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation." (Emphasis added.)
>
> —CAA § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii)

On February 5, 2020, OAR technical personnel commented on approximately 1,000 pages of rule text that NHTSA submitted to the OMB for interagency review. The EPA technical personnel had not seen or jointly worked with NHTSA on the majority of the rule text—or the Regulatory Impact Analysis—prior to NHTSA providing them to the OMB for interagency review. The EPA's comments noted numerous factual inaccuracies, unnecessary denigration of the EPA's work, and clarifying language resulting from the lack of collaboration between the two agencies.

EPA senior leaders said they agreed with NHTSA's request that the EPA not send its comments electronically because of NHTSA's concerns about leaks and, instead, printed hard copies of these comments, hand carried the copies, and reviewed them during in-person meetings with NHTSA. The comments between the EPA and NHTSA were not included in the EPA docket.

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According to the OGC's interpretation of CAA docketing requirements, the comments between the EPA and NHTSA on the draft final rule circulated by the OMB for interagency review did not need to be docketed because the two agencies were joint authors of the rule. The former OAR deputy assistant administrator we interviewed said that this approach was suggested by NHTSA. OAR senior leaders said this approach maintained version control and encouraged the deliberative process, which they said had broken down between the EPA's and NHTSA's technical personnel. Senior leaders said that they felt the need to manage—at their levels—communications between the two agencies to avoid miscommunications and contentious interactions at the technical level. Conversely, OAR technical personnel perceived this approach as circumventing their role in the rulemaking as the subject matter experts on content.

In this context, the EPA's docketing decision is questionable. For the portions of the rule that OAR technical personnel did not jointly draft or review prior to interagency review, we do not agree that NHTSA and the EPA should be considered as a single agency. The EPA's comments on new material as well as NHTSA's responses should be included in the docket in the same way as responses of other interagency reviewers. Furthermore, the OAR should docket or otherwise publicize its interpretation of the CAA's docketing requirements at the outset of joint rulemakings to increase transparency.

OAR technical personnel also said that extensive senior leadership involvement created uncertainty in what should be the proper contents of the docket. Interviewees and written materials noted that this lack of information about the contents of the docket created transparency concerns, as the current docket would not include the same type of information the EPA docketed for prior joint rules with NHTSA.

Additionally, in contrast to other joint rulemakings, the then-OAR assistant administrator told Agency personnel that only five senior-level EPA officials were authorized to communicate with the OMB on the rule. While limiting the number of people coordinating with the OMB is common for rulemakings, senior leadership involvement in this activity is unusual. Typically, EPA staff and managers would be responsible for submitting relevant documents to the OMB and the docket. In this case, EPA staff and managers passed documents to senior leadership to submit to the OMB, and EPA staff gathered materials shared by Agency leadership with the OMB during interagency review and added materials to the docket as appropriate. As noted in the OGC's written docketing explanation, EPA staff were relying on senior management and NHTSA to ensure that the EPA docket was complete and that it would be evident from the EPA docket that the EPA was not the agency transmitting documents to the OMB for interagency review.

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We concluded that, since the hand-carried comments shared in-person with NHTSA were emailed internally among EPA staff, they were captured as records within the Agency's Capstone system. Moreover, the Capstone system automatically retains records for senior executives. The former OAR deputy assistant administrator we interviewed, a Capstone official, provided us emails showing that comments were received electronically.

Changes Made to the Final Rule Post-Signature Met Federal and Internal Requirements

The National Archives and Records Administration's *Document Drafting Handbook* notes how to make changes to correct both substantive and nonsubstantive errors to signed documents before publication in the *Federal Register*. Per the *Handbook*, minor corrections to a document filed for public inspection are made through a letter detailing the change, whereas extensive changes may require the document to be withdrawn and resubmitted after making corrections. The *Handbook* does not define "minor corrections" or "extensive changes." The EPA's *ADP Guidance* states that proposed "substantive changes" should be submitted by the lead assistant administrator with concurrence from the OGC and the OP through a memorandum to the EPA administrator. The EPA administrator must then approve those changes before transmitting the action to the *Federal Register*.

Interviewees said, and documentation indicated, that within days of the publication of the final SAFE Vehicles Rule, external stakeholders alerted OAR technical personnel to discrepancies between preamble and statutory language, some of which had been previously noted by OAR technical personnel. As a result, in accordance with the procedures outlined for "substantive changes" in the *Handbook*, the then-OAR assistant administrator drafted a corrections memorandum and transmitted it through the OGC and the OP, which then-Administrator Wheeler signed to initiate the annotated changes. The memorandum was then placed in the docket to document the corrections to "identified inadvertent errors." Such errors corrected by the memorandum include:

- Incorrect coefficients for the GHG standards, both in the preamble and the regulations.
- Incorrect minimum fuel economy standards in the regulations.
- Incorrect preamble text describing credits.
- Incorrect values in seven preamble tables.
- Unclear captions for tables and other items that should be improved for clarity.

Given that both the *ADP Guidance* and the *Document Drafting Handbook* contemplate the possibility of making changes post-signature and prescribe how to make such changes, the final SAFE Vehicles Rule corrections were

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not unprecedented. Furthermore, the EPA personnel interviewed said that changes at this stage are not unusual for a rulemaking of this size. EPA personnel also believed that there was no need for a new notice-and-comment period to make the changes as they were not outside the scope of the original intent of the rulemaking and were necessary to fix inadvertent contradictions between preamble and regulatory language. Furthermore, whether the changes made to the rulemaking after publication were "substantive changes" or "minor corrections," the EPA took the more rigorous approach to correct those errors.

Conclusion

Then-Administrator Pruitt designated NHTSA as lead rule-writer and analyst for the final SAFE Vehicles Rule, relegating the Agency's technical personnel to the role of after-the-fact reviewers more so than real-time partners in the modeling and analysis. This resulted in poor collaboration between NHTSA and the EPA, lack of adherence to the EPA's ADP, and reduced overall transparency in the approach used to promulgate the final rule because of record-keeping and docketing concerns. Documenting and consistently addressing expectations for the EPA's role in future joint rulemakings should improve the quality of the EPA's actions.

Recommendations

We recommend that the assistant administrator for Air and Radiation:

1. In coordination with the Office of General Counsel, docket for the final Safer Affordable Fuel-Efficient Vehicles Rule and commit to docketing for future joint rulemaking actions covered by Clean Air Act § 307(d), 42 U.S.C. § 7607(d), whether the EPA docket for the joint rulemaking action reflects an interpretation that the partner agency is an "other agency" for purposes of the docketing requirements of Clean Air Act § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii). This docketed information should include whether written comments on the action by either partner agency during interagency review and responses to such comments are part of the docket, if applicable.

2. In coordination with the Office of General Counsel, docket any written comments received from the National Highway Traffic Safety Administration regarding the draft final Safer Affordable Fuel-Efficient Vehicles Rule during interagency review from January 14, 2020, to March 30, 2020, and docket the EPA's written responses to such comments.

3. In coordination with the Office of Policy, formally document decisions to not complete Action Development Process milestones, including early guidance, analytic blueprint, options selection, and final agency review.

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We recommend that the associate administrator for Policy:

4. In coordination with program offices, develop a policy for the Agency's role in a joint rulemaking. The policy could build upon earlier recommendations from the U.S. Government Accountability Office and include:

    - Expectations for addressing executive orders.
    - Expectations for completing Action Development Process milestones or documenting decisions to skip milestones.
    - A description of the rulemaking major process steps and deliverables, including timing.
    - A description of interagency roles, responsibilities, and interactions, including resolving conflict.
    - Identification of other stakeholders.
    - Best practices that may have more general applicability and should be updated as appropriate to reflect process improvements.

Agency Response and OIG Assessment

The Agency provided corrective actions for Recommendations 1, 3, and 4 and completion dates for Recommendations 1 and 3. The Agency disagreed with Recommendation 2. Recommendation 3 is resolved with corrective actions pending, and we require more specific details to resolve Recommendations 1 and 4. The Agency's full response is in Appendix A.

For Recommendation 1, the Agency's proposed corrective action to docket a memorandum describing the EPA's interpretation of Clean Air Act § 307(d), 42 U.S.C. § 7607(d), at the time of the SAFE Vehicles Rule satisfies the first part of the recommendation. However, the Agency did not, per the rest of the recommendation, commit to docketing for future joint rulemaking actions whether the EPA docket reflects an interpretation that the partner agency is an "other agency" for purposes of the docketing requirements of Clean Air Act § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii). The docketed information should include whether written comments on the joint rulemaking action by either partner agency during interagency review and responses to such comments are part of the docket, if applicable. This recommendation is unresolved.

The EPA disagreed with Recommendation 2. In its response, the EPA stated that its interpretation during the SAFE Vehicles Rule was that NHTSA, as the coauthor in the joint rulemaking, was not an "other agency" for purposes of the docketing requirements under Clean Air Act § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii), and that the docket was not required to include written comments on the action by either coauthor agency during interagency review or responses to such comments. The EPA also stated that its interpretation for the SAFE Vehicles Rule was consistent with previous Agency practices for such joint

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rulemakings and that the SAFE Vehicles Rule was signed by both NHTSA and EPA administrators as a joint rule.

While we agree that the EPA's actions related to docketing for the SAFE Vehicles Rule were consistent with previous EPA practices for similar joint rulemakings, the process undertaken to promulgate the SAFE Vehicles Rule varied considerably from prior joint rulemakings. As we noted above, OAR personnel were not provided or consulted on significant portions of the rule, including regulatory and preamble text and the Regulatory Impact Analysis, prior to NHTSA's submittal to the OMB for interagency review, pursuant to Executive Order 12866. The EPA received this content for the first time during interagency review. The EPA's extensive comments on this content, including on factual accuracy and denigration of the Agency's previous work, demonstrate that the two agencies did not operate as a single author prior to submitting the rule to the OMB. Moreover, as an agency within the Department of Transportation, there is no dispute that NHTSA is in fact an "other agency." This recommendation is unresolved.

For Recommendation 3, the EPA agreed to submit a memorandum to the rule file explaining that, during the SAFE Vehicles Rule, time did not allow for early guidance, analytic blueprint, options selection, and final agency review to occur in the traditional way and that these milestones are "moot" for purposes of the ADP. The EPA added that the Federal Records Act and its implementing regulations and the Agency's *Interim Records Management Policy* do not impose a requirement to create and maintain documentation of what internal ADP steps and milestones the EPA followed or waived, and the reasons for this, within the ADP Tracker database. Therefore, the absence of entries in the ADP tracker is not a records deficiency. We disagree that "decisions to follow or waive internal procedural steps are not 'regulatory decisions'" for purposes of records management. By definition, these internal steps are meant to shape the regulations promulgated by the Agency. Nevertheless, the corrective action provided satisfies Recommendation 3 to formally document that ADP steps were not completed. This recommendation is resolved.

For Recommendation 4, the Agency agreed to discuss roles and expectations with partner agencies should the EPA enter into another joint rulemaking. This does not satisfy the recommendation to develop a formal policy for the Agency's role in a joint rulemaking generally. This recommendation is unresolved.

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Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS

Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Potential Monetary Benefits (in $000s)
1	18	In coordination with the Office of General Counsel, docket for the final Safer Affordable Fuel-Efficient Vehicles Rule and commit to docketing for future joint rulemaking actions covered by Clean Air Act § 307(d), 42 U.S.C. § 7607(d), whether the EPA docket for the joint rulemaking action reflects an interpretation that the partner agency is an "other agency" for purposes of the docketing requirements of Clean Air Act § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii). This docketed information should include whether written comments on the action by either partner agency during interagency review and responses to such comments are part of the docket, if applicable.	U	Assistant Administrator for Air and Radiation		
2	18	In coordination with the Office of General Counsel, docket any written comments received from the National Highway Traffic Safety Administration regarding the draft final Safer Affordable Fuel-Efficient Vehicles Rule during interagency review from January 14, 2020, to March 30, 2020, and docket the EPA's written responses to such comments.	U	Assistant Administrator for Air and Radiation		
3	18	In coordination with the Office of Policy, formally document decisions to not complete Action Development Process milestones, including early guidance, analytic blueprint, options selection, and final agency review.	R	Assistant Administrator for Air and Radiation	6/30/21	
4	19	In coordination with program offices, develop a policy for the Agency's role in a joint rulemaking. The policy could build upon earlier recommendations from the U.S. Government Accountability Office and include: • Expectations for addressing executive orders. • Expectations for completing Action Development Process milestones or documenting decisions to skip milestones. • A description of the rulemaking major process steps and deliverables, including timing. • A description of interagency roles, responsibilities, and interactions, including resolving conflict. • Identification of other stakeholders. • Best practices that may have more general applicability and should be updated as appropriate to reflect process improvements.	U	Associate Administrator for Policy		

[1]C = Corrective action completed.
R = Recommendation resolved with corrective action pending.
U = Recommendation unresolved with resolution efforts in progress.

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Appendix A

Agency Response to Draft Report

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 19, 2021

MEMORANDUM

SUBJECT: Joint Agency Response to Office of Inspector General Draft Report. *Concerns on the Process Employed for the SAFE Rule Demonstrate the Need for a Policy on the EPA's Role in Joint Rulemakings (OA&E-FY20-0269)*

FROM: Joseph Goffman GOFFMAN JOSEPH Digitally signed by JOSEPH GOFFMAN Date: 2021.03.19 09:16:24 -04'00'
Acting Assistant Administrator
Office of Air and Radiation

Vicki Arroyo Arroyo, Victoria Digitally signed by Arroyo, Victoria Date: 2021.03.19 10:23:54 -04'00'
Associate Administrator
Office of Policy

Melissa Hoffer Melissa A. Hoffer Digitally signed by Melissa A. Hoffer Date: 2021.03.19 12:53:49 -04'00'
Acting General Counsel

TO: Patrick Gilbride
Environmental Research Programs Directorate
Office of Audit and Evaluations
Office of Inspector General

On behalf of EPA's Office of Air and Radiation, Office of Policy, and Office of General Counsel, thank you for the opportunity to respond to the issues and recommendations in the subject draft report. Below we provide important policy clarifications and corrective actions with estimated completion dates as requested.

The EPA is charged with regulating greenhouse gas emissions from new motor vehicles as air pollutants under Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a). In 2012, the EPA and the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) published their joint rulemaking to set greenhouse gas and

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corporate average fuel economy (CAFE) standards for light duty vehicles for model years 2017 and later. In 2017, former EPA Administrator Pruitt initiated a joint rulemaking with NHTSA to revisit the GHG and CAFE standards. This rulemaking resulted in the Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks Final Rule (SAFE part 2), which was published on April 30, 2020 and became effective on June 29, 2020. The events and issues outlined in the draft report occurred over the past several years, before the arrival of current EPA senior
leadership.

As members of EPA's new senior leadership team, we value transparency in the rulemaking process, understand the importance of an accurate and complete public rulemaking docket, and support the purpose and goals of EPA's internal Action Development Process (ADP). We believe that EPA's regulatory actions should be developed based on sound policy, analytical, and scientific foundations, and should be informed by the full capability of technical staff. We appreciate the OIG's thorough review of the SAFE part 2 process and provide the agency's responses to OIG's specific recommendations below. As requested, the relevant offices have coordinated and combined our responses into this memorandum.

Recommendation 1: In coordination with the Office of General Counsel, docket for the final Safer Affordable Fuel-Efficient Vehicles Rule and commit to docketing for future joint rulemaking actions covered by Clean Air Act § 307(d), 42 U.S.C. § 7607(d), whether the EPA docket for the joint rulemaking action reflects an interpretation that the partner agency is an "other agency" for purposes of the docketing requirements of Clean Air Act § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii). The docketed information should include whether written comments on the action by either partner agency during interagency review and responses to such comments are part of the docket, if applicable.

Response 1: EPA agrees to draft a memorandum describing EPA's interpretation of Clean Air Act Section 307(d) at the time of the Safer Affordable Fuel-Efficient Vehicles (SAFE part 2) rulemaking and add that memorandum to the SAFE part 2 rulemaking docket. If EPA undertakes any future joint rulemakings under Clean Air Act Section 307(d), EPA agrees that, as it considers agency policies for joint rulemaking, it will consider docketing requirements concerning interagency review under CAA 307(d), and evaluate the best way to notify the public of EPA's legal interpretations or policies about those docketing requirements.

Planned completion date: The new memorandum will be added to the SAFE part 2 docket by the end of Q3 FY2021.

Recommendation 2: In coordination with the Office of General Counsel, docket any written comments received from the National Highway Traffic Safety Administration regarding the draft final Safer Affordable Fuel-Efficient Vehicles Rule during interagency review from January 14, 2020, to March 30, 2020, and docket the EPA's written responses to such comments.

Response 2: EPA's interpretation of Clean Air Act 307(d) for the SAFE part 2 rulemaking was consistent with previous EPA practices for such joint rulemakings. SAFE part 2 was signed

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by both the NHTSA and EPA Administrators as a joint rule. EPA's interpretation of Clean Air Act 307(d) during the SAFE part 2 rulemaking was that the co-author in the joint rulemaking, NHTSA, was not an "other agency" for purposes of the docketing requirements under Clean Air Act § 307(d)(4)(B)(ii), 42 U.S.C. § 7607(d)(4)(B)(ii), and that the docket was not required to include written comments on the action by either co-author agency during interagency review or responses to such comments. Therefore, EPA disagrees with OIG's recommendation to docket the written comments and responses to such comments from the SAFE part 2 rulemaking between NHTSA and EPA as docketing these materials would be inconsistent with EPA's interpretation of Clean Air Act § 307(d)(4)(B)(ii) for the SAFE part 2 rulemaking.

Recommendation 3: In coordination with the Office of Policy, formally document decisions to not complete Action Development Process milestones, including early guidance, analytic blueprint, options selection, and final agency review.

Response 3: EPA is not required to create and maintain documentation of what internal Action Development Process (ADP) steps and milestones EPA followed or waived, and the reasons for this, within the Office of Policy's ADP Tracker database. The Federal Records Act and its implementing regulations impose no such requirement, and thus, the absence of entries in the ADP Tracker is not a per se records deficiency in contravention of the Federal Records Act. Similarly, the Agency's Interim Records Management Policy does not impose such requirements either. Decisions to follow or waive internal procedural steps are not "regulatory decisions." EPA believes that there are adequate and appropriate records, both in the docket for the rule and in EPA's formal recordkeeping systems, that pertain to the regulatory decisions made regarding the SAFE part 2 rulemaking. To respond to this recommendation, EPA agrees to submit a memorandum to the rule file explaining that, during the SAFE part 2 rulemaking, time did not allow for early guidance, analytic blueprint, options selection, and final agency review to occur in the traditional way. Therefore, these milestones are considered "moot" for purposes of the ADP.

Planned Completion Date: EPA will submit the memorandum to the rule file by end of Q3, FY2021.

Recommendation 4: In coordination with program offices, develop a policy for the Agency's role in a joint rulemaking. The policy could build upon earlier recommendations from the U.S. Government Accountability Office and include:

- **Expectations for addressing executive orders.**
- **Expectations for completing Action Development Process milestones or documenting decisions to skip milestones.**
- **A description of the rulemaking major process steps and deliverables, including timing.**
- **A description of interagency roles, responsibilities, and interactions, including resolving conflict.**
- **Identification of other stakeholders.**
- **Best practices that may have more general applicability and should be updated as appropriate to reflect process improvements.**

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Response 4: EPA agrees to have discussions with partner agencies to clarify roles and expectations should the agency enter into another joint rulemaking in the future.

If you have any questions regarding this response, please contact William Charmley, Director of the Assessment and Standards Division, Office of Transportation and Air Quality at 734-214-4466.

cc:
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Appendix B

Distribution

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