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November 22, 2005

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400 Seventh Street, SW
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Washington, D.C. 20590-001
(Also filed through website)

RE: Comments on Proposed Light Truck Corporate Average Fuel Economy Standards for MY 2008-2011 and on Draft Environmental Assessment
[DOT DMS Docket Number 2005-22223]

This letter contains the comments of the Attorneys General of the States of California, Massachusetts, New York, Connecticut, New Jersey, and Maine, and the Corporation Counsel for the City of New York regarding the proposed light truck corporate average fuel economy standards for model years 2008-2011 and on the Draft Environmental Assessment filed with those proposed standards.

For the first time since the inception of the Energy Policy and Conservation Act ("EPCA" or "the Act"), 42 U.S. C. §§ 6201 et seq. and 49 U.S.C. §§ 32901 et seq., in the 1970s, the National Highway Traffic and Safety Administration ("NHTSA") has proposed a significant overhaul in how it categorizes different sizes of trucks in determining standards and requirements for the corporate average fuel economy ("CAFE") requirements under EPCA. In proposing the new standards and in setting the CAFE standards for light trucks for MY 2008-11, NHTSA failed to consider alternative approaches that would have promoted energy conservation, made meaningful contributions to increased fuel economy, and encouraged technological innovation. In addition, NHTSA failed, in all respects, to consider the environmental consequences of its proposed overhaul of light truck standards, failed to consider the changes in the environment since its last Environmental Impact Statement in the 1980s, and failed to evaluate the impact of carbon dioxide ("CO2") emissions despite identifying the threat of CO2 and global climate change as new information concerning the environment. Finally, despite the direction of an Executive Order to restrict the regulatory preemption of state law, NHTSA contends that its

CAFE standards preempt California's regulation of greenhouse gas emissions. NHTSA's statements on preemption are irrelevant to the proposed rule and are wrong on the law. We believe that the NHTSA can and must do more to help the nation conserve energy and protect the environment, beginning here with full compliance with the National Environmental Policy Act ("NEPA") and proper deference to the State's authority to regulate emissions.

INTRODUCTION

The Attorneys General and Corporation Counsel submit these comments pursuant to their independent authority under their state Constitutions, common law, and statutes to represent the public interest. These comments are made on behalf of the Attorneys General and Corporation Counsel and not on behalf of any other agency or office.

California has been the nation's leader in the regulation of auto emissions since before the passage of the Clean Air Act. The California Attorney General has participated in issues concerning auto emissions as well as fuel economy standards since the inception of both the Clean Air Act and EPCA. States other than California have authority pursuant to Section 177 of the Clean Air Act to adopt motor vehicle emission standards set by California. Many of the states joining this letter have long made use of this authority, and in some cases are required as a matter of state law to follow California's lead. *See, e.g.*, Mass. G.L. c. 111, §142K; N.J. Stat. Ann. § 26:2C-8.15 et seq.

COMMENTS

In *Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1324 (D.C. Cir. 1986), the court set forth the statutory framework for the establishment of mandatory CAFE standards for "light trucks." In the wake of the 1973-1974 Arab oil embargo, Congress enacted EPCA to enhance the supply of fossil fuels in the United States through increased production and energy conservation programs. See 42 U.S.C. § 6201. Title III of EPCA required the Department of Transportation ("DOT") to establish mandatory CAFE standards for passenger cars and for lightweight vehicles, termed "light trucks," which include vans, pickups and jeeps. 49 U.S.C. §§ 32901 et seq.

The CAFE standards set a minimum performance requirement in terms of an average number of miles a vehicle travels per gallon of gasoline or diesel fuel. Individual vehicles and models are not required to meet the mileage standard; rather, each manufacturer must achieve an average level of fuel economy for all specified vehicles manufactured in a given model year.

Section 502(b) of the Act directs the Secretary of DOT ("Secretary") to prescribe, by rule, standards for light trucks. The Secretary may set separate standards for different classes of light trucks, and they "shall be set at a level which the Secretary determines is the maximum feasible average fuel economy level which such manufacturers are able to achieve in each model year

. . . . " 49 U.S.C. § 32902(a). Congress directed the Secretary to consider four factors in determining the "maximum feasible" fuel economy level:

(1) technological feasibility;
(2) economic practicability;
(3) the effect of other Federal motor vehicle standards on fuel economy; and
(4) the need of the Nation to conserve energy.

Id. § 32902(f). NHTSA has interpreted these factors as follows:

"[T]echnological feasibility" means that consideration must be given to whether particular methods of improving fuel economy will be available for commercial application in the model year for which a standard is being established. This does not mean that the technology must be available or in use when a standard is proposed or issued. "Economic practicability" is interpreted to require a consideration of whether the implementation of projected fuel economy improvements is within the economic capability of the industry. "The effect of other Federal motor vehicle standards on fuel economy" requires an analysis of adverse effects on fuel economy of compliance with emission, safety, noise, or damageability standards. Finally, "the need of the Nation to conserve energy" requires consideration of the consumer cost, national balance of payments, environmental, and foreign policy implications of our need for large quantities of petroleum, especially imported petroleum. 42 Fed.Reg. 63,184, 63,188 (1977).

I. National Environmental Policy Act

NEPA requires all federal agencies, such as NHTSA, to analyze the environmental impacts of proposed major actions in order to promote better environmental decision-making. "NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321). "[T]he comprehensive 'hard look' mandated by Congress and required by the statute . . . must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). Accordingly, environmental documents must contain a "reasonable, good faith and objective presentation" of the issues. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), *modified*, 867 F.2d 1244 (9th Cir. 1989) (internal quotation omitted).

NEPA applies to major federal actions that have the potential to significantly impact the environment. 42 U.S.C. § 4332. NHTSA acknowledges that the new standards are covered by NEPA. It has determined, however, following an environmental assessment, that the proposed standards pose no "significant" impact to the environment. NHTSA, therefore, did not proceed with a full environmental impact statement, which would include a much broader consideration

of alternatives to the proposed standards. NHTSA's determination, however, cannot take place without consideration of the underlying legal requirements related to the mileage standards and "consideration of the consumer cost, national balance of payments, environmental, and foreign policy implications of our need for large quantities of petroleum, especially imported petroleum," as required by the regulations. 42 Fed. Reg. 63,184, 63,188 (1977).

Under NEPA, determination of whether an action may have a significant impact is factual and depends upon all relevant circumstances. *See, e.g., National Audubon Society v. Department of the Navy,* 422 F.3d 174, 185 (4th Cir. 2005)(review encompasses a thorough investigation into the environmental impacts and a candid acknowledgment of the risks entailed); *River Road Alliance, Inc. v. Corps of Engineers of United States Army*, 764 F.2d 445, 450 (7th Cir. 1985), *cert. denied,* 475 U.S. 1055 (1986)("So varied are the federal actions that affect the environment–so varied are the environmental effects of those actions–that the decided cases comprise a distinctly disordered array. . . The heterogeneity of the cases makes generalization difficult.") Where parties raise a substantial question as to whether a project may have a significant environmental impact, an EIS must be prepared. *See Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1150 (9th Cir. 1998). In reviewing an agency's decision not to prepare an environmental impact a statement, the court makes four related inquiries. "(1) whether the agency took a 'hard look' at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." *Sierra Club v. Peterson,* 717 F.2d 1409, 1413 (D.C.Cir.1983); *see also Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21 (1976); *National Audubon,* 422 F.3d at 185; *Anderson v. Evans,* 371 F.3d 475, 486 (9th Cir. 2004); *Stewart Park & Reserve Coalition, Inc. v. Slater,* 352 F.3d 545 (2d Cir. 2003). A court may defer to an agency decision to proceed without preparing an EIS only when that decision is "fully informed and well considered." *LaFlamme v. Federal Energy Regulatory Commission,* 852 F.2d 389, 398 (9th Cir. 1988).

Here, NHTSA asserts, without quantitative or even qualitative analysis, that the proposed standards will, at least marginally, increase fleet average mileage and benefit safety. That assumption of environmental benefit, however, is incorrect. In fact, the proposed standards create incentives to build larger, less fuel-efficient models, which will jeopardize air quality and the climate, and may place pedestrians, bicyclists, and other drivers at greater risk. In addition, the proposed standards are the first major change in how classes of light trucks are evaluated since the passage of EPCA, yet NHTSA has failed to consider the environmental impact of its choices or the possibility of making other choices. Next, circumstances have changed significantly since NTHSA last did an EIS concerning light truck mileage standards (including higher gas prices, heightened concerns about reliance on foreign oil, climate change, and substantial advances in hybrid technology). Those changes require a full evaluation of environmental impacts, not a cursory review. Finally, NHTSA acknowledges in the

environmental assessment ("EA") that CO2 emissions from cars could contribute to climate change. The EA reports on amounts of CO2 emissions and then completely fails to discuss the environmental implications of the emissions. *See* EA at 32. Because NHTSA has never evaluated the impact of CO2 emissions, this is "new information" which must now be analyzed. We address each of these issues below.

A. Impacts of Proposed Standards on Average Mileage, and Alternatives

NHTSA describes the proposed light truck standards as "[r]eforming the CAFE program," and "enabling it to achieve larger fuel savings while enhancing safety and preventing adverse economic consequences." The proposed standards are based on vehicle size, multiplying the wheelbase by its track width. Under the current standard, all light trucks must meet an overall mileage average. The proposed standards divide light trucks into six categories, with different (or no) mileage standards for each category. NHTSA contends that the new approach will lessen incentives to downsize vehicles in order to meet standards (lighter trucks get better mileage, so the current standards, according to NHTSA, encourage production of lighter trucks at the expense of larger trucks). NHTSA apparently seeks to promote larger vehicles because it believes larger vehicles are safer. As a result, it appears that the new incentives are designed to encourage production of larger vehicles, which tend to generate greater profit, and lower average mileage, per unit.

NHTSA does not disguise the fact that it is proposing the standards to benefit General Motors, Ford, and Chrysler, which make more larger, lower mileage models than their foreign competitors. *E.g.*, Notice of Proposed Rulemaking at 36 ("One factor [underscoring the need for CAFE reform] is the fiscal problems reported by General Motors and Ford . . . ."). NHTSA concludes that the current standards (undifferentiated, fleet-wide averages) encourage downsizing of vehicles and offering smaller, lighter vehicles to offset sales of larger vehicles. NHTSA concludes that these incentives undercut the financial condition of the American car makers and reduce the safety of the vehicles.

NHTSA has concluded that creating six different light truck sub-classes will encourage more larger light trucks, increase safety, and benefit the financial condition of the U. S. automakers. We note that NEPA requires an EIS even where the significant impacts on the environment are arguably beneficial. *See* 40 C.F.R. § 1508.27(b)(1); *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). Here, it is not clear that the proposed changes are beneficial. In fact, NHTSA has not evaluated the impact of the change in incentives on the environment or public safety, nor has it considered the large number of alternative approaches to the proposed standards. It simply asserts that the proposed standards will result in a marginal increase in average mileage. The proposed standards, as NHTSA acknowledges, promote increased production of larger vehicles, including the largest category, which have no average mileage requirements at all. Without evaluation, NHTSA's

conclusion that the proposed standards increase mileage and, therefore do not have an impact on the environment as compared to the existing standards cannot be supported. *See, e.g., Ocean Advocates v. U.S. Army Corp. of Engineers,* 361 F.3d 1108, 1124 (9th Cir. 2004)(conclusory determination of no impacts does not support decision to forego EIS, and EIS required where substantial questions raised re possible environmental degradation); *NRDC v. Herrington*, 768 F.2d 1355, 1430 (D.C. Cir. 1985).

In addition, NHTSA has not considered the possible increase in emissions or use of fuel, or lost opportunities for conservation created by establishing further incentives for production of larger trucks. It has not evaluated whether the incentives to build larger trucks will reduce the overall average mileage standards across the fleet. It has not evaluated the relationship of the huge increases in the cost of fuel to the new standards. It has not evaluated the increased safety issues posed by larger vehicles to pedestrians, bicyclists, motorcyclists, and occupants of smaller trucks and cars. *See, e.g., Sports Utility Vehicles and Older Pedestrians*, 331 British Medical Joural 787-788 (Oct. 8, 2005)("the evidence shows that SUVs represent a significantly greater hazard to pedestrians than ordinary cars"). It has not evaluated the advances in safety for lighter materials. *See, e.g.,* Lovins, *Winning the Oil Endgame*, 52 et seq. (2004). It has not evaluated any number of alternative approaches to the standards, such as creating two categories rather than six, creating categories based on horsepower rather than size, or categorizing by passenger capacity, to name just a few. *See* 40 C.F.R. § 1502.14 (evaluation of alternatives is the heart of an EIS); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (alternatives must be considered in EA). It has not considered the impact of encouraging the American automakers to continue a manufacturing strategy that has failed to produce profits, allowing foreign manufacturers to continue to make greater progress with lighter more fuel efficient vehicles that use available technologies such as hybrids. It has not considered the impact of off-the-shelf technology, such as the use of hybrids, in increasing mileage averages. Perhaps most important, NHTSA has not considered the impact of exacerbated and accelerated climate change caused by increased CO2 emissions.

NHTSA's choice of standards has significant environmental impacts, none of which it has evaluated in the EA. Its conclusory statements about size, safety, and its expectation that the proposed standards will not reduce average fleet mileage, and its failure to consider alternative standards fail to meet the obligations of NEPA. The proposed standards represent a significant change, including a change in incentives for automakers, with a panoply of potentially significant environmental impacts which must be considered in an environmental impact statement.

B. Changed Circumstances

From 1996 to 2001, Congress precluded any changes in the CAFE standards. During that period, NHTSA did not evaluate environmental impacts. In fact, NHTSA has not issued an EIS for its annual standards since the early 1980s. Each year, NHTSA has issued its light truck

mileage standard for the new model year and issued an EA, concluding that its modest change to the standard as compared the previous year precludes the need for environmental review. It has now been two decades since NHTSA has evaluated the environmental impact of its mileage standards. The environment itself, and the information about the environment in relation the mileage standards, has changed profoundly.

Promulgation of the mileage standards is an annual event. It is understandable and appropriate that NHSTA relies on environmental evaluation done in years past. Over time, however, the environmental documentation and evaluation become dated. Twenty years after the last EIS, the environmental documentation and evaluation must be supplemented. Under NEPA, if there is new information sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, the NEPA documents–here the EIS–must be updated. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

The world is a different place than it was in early 1980s. Concerns about terrorism, dependence on foreign oil, increased consideration of conservation, worries about domestic supply, new information about the impact of oil extraction on the environment, the huge increase in the cost of gasoline, and growing evidence of global warming impacts have changed the environment and need to be considered in promulgating new light truck CAFE standards. NEPA requires meaningful consideration of the environmental impacts of the proposed action, in relation to the existing environment, and the extraordinary changes that have taken place during the past twenty years since NHTSA last considered environmental impacts in any meaningful way under NEPA. Clearly, it is time for NHTSA to provide a full EIS. *See* 40 C.F.R. § 1502.9(c)(EIS required where significant new circumstances or information relevant to environmental concerns and bearing on proposed action or its impacts).

C. Global Warming

In considering the environmental impacts of the project not previously considered, as required by the Supreme Court in *Marsh*, potentially the most profound impact is that of CO2 emissions on climate change. NHTSA has never evaluated the impact of its standards on those emissions and on climate change more broadly.[1]

This year, the EA for the proposed light truck standards includes the first statement acknowledging the issue, or at least the possibility of the issue: "CO2 is one of the main

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[1]While CO2 impacts are outside of the expertise of NHTSA and not directly the purpose of the CAFE standards, NHTSA, as the lead agency under NEPA has an obligation to evaluate the environment and environmental impacts broadly. *See*, e.g., 40 C.F.R. §§ 1501.7 (scoping) and 1502.6 (interdisciplinary prepartion).

products of motor vehicle exhaust and . . . in recent years *it has started to be viewed as an issue of concern for its global climate change potential.*" EA at 18 (emphasis added). Unfortunately, this statement mischaracterizes the state of climate science. There is overwhelming consensus in the scientific community that CO2 emissions cause global warming and that emissions from mobile sources are very significant contributors of CO2.

The United Nations Framework Convention on Climate Change ("UNFCCC"), to which the United States is signatory, defines climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." According to the Intergovernmental Panel on Climate Change, established by the United Nations to assess scientific, technical and socio-economic information relevant for the understanding of climate change and its potential impact, there is an international scientific consensus that CO2 emissions are causing and will continue to cause global warming. IPCC Third Assessment Report - Climate Change 2001. The National Academy of Science of the United States, along with the National Scientific Academies of Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, and the United Kingdom, issued a joint statement in June, 2005 (attached as Ex. A) that

> there is now strong evidence that significant global warming is occurring. The evidence comes from direct measurements of rising surface air temperatures and subsurface ocean temperatures and from phenomena such as increases in average global sea levels, retreating glaciers, and changes to many physical and biological systems. It is likely that most of the warming in recent decades can be attributed to human activities. This warming has already led to changes in the Earth's climate.

NAS Statement, June 2005. This is consistent with NAS's earlier determination. In 2001, at the request of the White House, the NAS analyzed some of the key findings of the IPCC's Third Assessment Report. National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (2001). The NAS ascertained: "The IPCC's conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations accurately reflects current thinking of the scientific community on this issue." *Id.* 3. The NAS report concluded that "[d]espite uncertainties, there is general agreement that the observed warming is real and particularly strong within the past 20 years." *Id.*

After publication of the NAS Report and pursuant to its obligations under the UNFCCC, the United States submitted the *U.S. Climate Action Report 2002* to the Secretariat of the UNFCCC.[2] EPA served as the lead agency in the preparation of the *Climate Action Report* and

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[2] On June 12, 1992 at the Earth Summit in Rio de Janiero, President George H.W. Bush signed UNFCCC and on October 15, 1992 the Senate ratified it. The objective of UNFCCC is

coordinated the involvement of a dozen other federal agencies and the Executive Office of the President. *See* 66 Fed. Reg. 15470 (March 19, 2001) (EPA soliciting public comment on all aspects of the Report); 66 Fed. Reg. 57456 (Nov.15, 2001)(EPA soliciting comment on draft *Climate Action Report*). The *Climate Action Report* concludes that the dominant source of human-caused climate change is CO_2 emissions and that "the long lifetimes of greenhouse gases [such as CO_2] in the atmosphere and the momentum of the climate system are projected to *cause climate to continue to change* for more than a century." *Climate Action Report* at 82 (emphasis added).

In an essay entitled, "The Scientific Consensus on Climate Change," University of California History and Science Professor Naomi Oreskes reviewed 928 peer reviewed scientific papers concerning climate change and published between 1993 and 2003. Her conclusion is that there is remarkable scientific consensus on the reality of anthropogenic climate change. 306 Science 1686 (Dec. 3, 2004) (the full list of articles reviewed is attached to these comments as Ex. 1). The American Meteorological Society, the American Geophysical Union, and the American Association for Advancement of Science, among many, many other scientific organizations have all concluded that the evidence of human induced warming is compelling. E.g., American Meteorological Society, *Bull. Am. Meteorol. Soc.* 84, 508 (2003); American Geological Union *EOS* 84 (51), 574 (2003). In an April 2004 article, leading NASA and Department of Energy scientists stated that emissions of carbon dioxide and other heat-trapping gases have warmed the oceans and led to an energy imbalance that is causing, and will continue to cause, significant warming, increasing the urgency of reducing CO_2 emissions. J. Hansen, *et al*, *Earth's Energy Imbalance: Confirmation and Implications*, Sciencexpress, April 28, 2004 (available at http://pubs.giss.nasa.gov/abstracts/2005/HansenNazarenkoR.html).

Evidence of climate change resulting from anthropogenic CO2 emissions is substantial. Impacts that have occurred, are occurring, and will occur, include: temperature increases, heat waves, loss of Arctic ice and habitat, loss of Antarctic ice, melting of glaciers and related glacial lake outburst flows, loss of snowpack in California and elsewhere, changes in precipitation patterns, increased hurricane intensity, sea level rise and coastal flooding, public health harms such as increased heat-related illness and smog, harm to habitats, and the potential for substantial

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"to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner." Art. 2. UNFCCC requires each party to communicate to the treaty conference information related to that party's implementation of UNFCCC, Art. 4.2(b); 12.1, and to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." UNFCCC, Art. 4.2(a).

social upheaval resulting from significant environmental changes. *See, e.g.*, World Meteorological Organization (2005) WMO Statement on the Status of the Global Climate in 2004. WMO-No. 983 (Geneva) 12 pp; *Climate Change 2001: Synthesis Report* ("IPCC 2001") at 12-13; ACIA, Impacts of a Warming Arctic: Arctic Climate Impacts assessment. Cambridge University Press (2004) at 22; *Recent Warming of Arctic May Affect Worldwide Climate*, Goddard Institute for Space Studies (Oct. 23, 2003) (connecting global warming with melting arctic ice cap); http://www.gsfc.nasa.gov/topstory/2003/1023esuice.html#addlinf; Arctic Ice Cap Will Melt Completely in 100 Years, http://www.greenhousenet.org/news/AUG-03/arctic-ice.html (Norwegian expert links melting of arctic ice cap to carbon dioxide emissions that cause global warming); A. J. Cook, A. J. Fox, D. G. Vaughan, J. G. Ferrigno, *Retreating Glacier Fronts on the Antarctic Peninsula over the Past Half-Century,* Science, Vol 308, Issue 5721, 541-544 , 22 April 2005; http://www.nrmsc.usgs.gov/research/glaciers.htm; K. Hayhoe, *et al.*, *Emissions Pathways, Climate Change, and Impacts on California*, Proceedings of the National Academy of Sciences, vol. 101, no. 34 (August 24, 2004), at 12426; United States Global Climate Research Program (USGCRP), *Preparing for a Changing Climate: California* (2002) at 4-1-34 and 4-1-35; Paul R. Epstein, *Is Global Warming Harmful to Health?*, Scientific American (Aug. 2000) at 50-51. http://www.med.harvard.edu/chge/sciam.pdf; Thomas R. Karl & Kevin E. Trenberth, *Modern Global Climate Change*, 302 Science 1719, 1720-21 (Dec. 5 2003) ("Basic theory, climate model simulations and empirical evidence all confirm that warmer climates, owing to increased water vapor, lead to more intense precipitation events, even when total precipitation remains constant, and with prospects for even stronger events when precipitation amounts increase"); http://yosemite.epa.gov/oar/globalwarming.nsf/content/ImpactsStateImpactsNY.html; *See* Peter H. Gleick and Edwin P. Maurer, Assessing the Costs of Adapting to Sea Level Rise (Pacific Institute, 1980) at 5 (a one meter sea level rise threatens $48 billion of commercial, industrial and residential structures in the San Francisco Bay). http://www.pacinst.org/reports/sea_level_rise/sea_level_rise_report.pdf; C. Rosenzweig and W. Solecki, eds., *Climate Change and a Global City* (2001) at 33; C.D. Thomas et al., *Extinction Risk from Climate Change: the Potential Consequences of Climate Variability and Change* (Metro East Coast Contribution to the National Assessment of the Potential Consequences of Climate Variability and Change for the United States) (July 2001) at ix-xiv, available at http://metroeast_climate.ciesincolumbia.edu; K. Emmanuel, 436 Nature 686-688 (Aug. 2005) (increase in hurricane intensity related to climate change); P.J. Webster, et al., *Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment*, 309 Science, 5742, 1844-1846 (Sept. 16, 2005).

NHTSA contends that CO2 emissions are reduced by its proposed standards. This assertion–that NHTSA does not support–is unlikely to be accurate, given the stated purpose of the rule to help the manufacturers of the largest vehicles. Even assuming the assertion is true, NHTSA cannot contend that there is no environmental impact from its proposed action because it has never evaluated the impacts of CO2. Without an EIS setting forth alternatives to the proposed standards, the public and the decision-makers have no ability to evaluate the impact on

CO2 emissions of the proposed standards in comparison to what exists and what may be possible. The current draft EA simply reports the amounts of CO2 emissions from light trucks without discussion of impacts. In essence, the issue of CO2 impacts is new information, and, in light of the overwhelming scientific consensus linking CO2 emissions to climate change, the agency has a duty to supplement its environmental evaluation to discuss this issue. *See Marsh,* 490 U.S. at 374. We note that vehicles on average each produce 5.7 tons of CO2 per year. In the United States, vehicles are responsible for approximately 40% of all U.S. CO2 emissions, and the U.S. is responsible for 24%of the world's CO2 emissions. Thus, U.S. vehicles are responsible for about 10% of the entire world's CO2 emissions. Any change in vehicle CO2 emission can have enormous consequences.

State-by-state impacts are also large. In California alone, vehicles generate over 174 million tons of CO2 annually. A ten percent reduction through increased average mileage would remove over 17 million tons of CO2 annually, equivalent to over 3 million cars, just for California vehicles.

NHTSA has identified a profound impact directly related to its CAFE standards, and then failed to provide any evaluation of the impact on the environment as required by NEPA, and failed to present alternatives to its proposed rule. NHTSA must provide a full EIS to discuss this most significant impact. *See Friends of the Earth, Inc. v. Watson*, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005) (plaintiffs established injury for standing purposes in alleging impacts of global warming from projects funded by Export-Import Bank of the United States).

II. Preemption

As part of its discussion of the proposed standards, NHTSA states, "[w]e reaffirm our view that a state may not impose a legal requirement relating to fuel economy, whether by statute, regulation, or otherwise, that conflicts with this rule." Notice of Proposed Rulemaking at 150, 70 Fed. Reg. 51414, 51457 (Aug. 30, 2005). It goes on to state, "[s]ince the way to reduce carbon dioxide emission is to improve fuel economy, a state regulation seeking to reduce those emissions is a 'regulation related to fuel economy standards or average fuel standards.'" Id. This is a direct attack on California's greenhouse gas emission regulations, promulgated under the Pavley law, CA Health and Safety Code § 43018.5. In addition, in light of the fact that many states, including Vermont, New York, Massachusetts, New Jersey, and Connecticut, have adopted or committed to adopting similar standards, NHTSA's preemption statements reflect an attack on the regulations and authority of many states.

NHTSA's statement asserting that its fuel economy standards under EPCA somehow preempt California's greenhouse gas emission regulations promulgated under its State law authority, consistent with its authority under the federal Clean Air Act, is wholly irrelevant to the proposed standard and to the model year requirements. The statement has no effect on the

proposed standard, and has no effect on California's greenhouse gas emission regulations. NHTSA has not indicated any way in which the California greenhouse gas regulations affect its proposed standards or NHTSA's thinking on the proposed standards. NHTSA does not need to make a statement concerning preemption, and should remove the statement from the Notice.

Because NHTSA has presented its view that the California greenhouse regulations are preempted, we are compelled to respond. The California Attorney General will be filing legal briefs from the case in California federal court shortly, and will supplement this comment letter with copies of those pleadings when they are available. Other state commenters will file an amicus brief, whcih will also be provided. In summary, NHTSA far overstates the extent of its preemption provision under EPCA, and its relation to the Clean Air Act. It is axiomatic that congressional intent to preempt must be clear and manifest, and that courts should be reluctant to find preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). EPCA's preemption provision states that a "State may not adopt or enforce a law or regulation related to fuel economy standards for automobiles covered by an average fuel economy standard . . . ." 49 U.S.C. § 32919(a). Under Supreme Court precedent, the phrase "related to" is construed narrowly in the context of preemption, looking to congressional objectives and their relation to the state law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). Under the Clean Air Act, Congress gave California the specific authority to promulgate its own, more stringent, auto emissions standards. 42 U.S.C. § 7543(b)(3). In fact, Congress ratified and strengthened the California waiver provision and affirmed the California authority "to afford the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare," in 1977–two years after the EPCA preemption provision was enacted. H.R. Rep. No. 95-294, at 301-02 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1381. In enacting California's authority, Congress unequivocally understood that California's regulation of vehicle emissions would affect fuel economy. Congress discussed the issue specifically, quoting a National Academy of Sciences report, stating that "[t]he improved technology required to meet emissions standards may assist in improving fuel economy. . . ." H.R. Rep. No. 95-294 at 244-51. The congressional record is replete with references to the relationship of the California emissions authority and fuel economy standards. The two laws operate side-by-side, and California's actions with respect to vehicle emissions under the Clean Air Act can affect, but are not preempted by, EPCA and the fuel economy standards.

Finally, NHTSA's preemption statements appear in the Notice of Proposed Rulemaking under the heading, "Executive Order 13132 Federalism." *Id.* at 149. Executive Order 13132 is designed to protect states from overreaching by the federal government. As the Order states, "the national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government." Exec. Order No. 13132, 64 Fed. Reg. 43256. The Order counsels

the federal government to "where possible, defer to States to establish standards." *Id.* The Order states that "any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated."

NHTSA should take this opportunity to embrace the purpose and spirit of Executive Order 13132 and remove its unnecessary and inappropriate statements concerning preemption of California's greenhouse gas regulations.

CONCLUSION

CAFE standards have a profound and significant impact on America's environment. It has been twenty years since NHTSA has produced an EIS evaluating that impact. The environment, the need for conservation, and the science related to the impacts of car emissions has changed tremendously in the past twenty years. In addition, NHTSA has made a significant and far-reaching proposal to change how light truck standards are set. NHTSA has identified, but not analyzed the impacts of CO2 emissions on global climate change. NEPA requires, at this juncture, a full evaluation of the environmental impacts of the proposed standards, with particular evaluation of new information gained over the past twenty years, including global warming impacts. Finally, we strongly urge NHTSA to remove its inappropriate comments concerning preemption of state law; they have no purpose relevant to the proposed rule, are incorrect, and offend our federal structure.

Thank you for the opportunity to submit these comments.

Sincerely,

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