December 8, 2016

Gina McCarthy  
Administrator  
Environmental Protection Agency  
Office of the Administrator 1101A  
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Washington DC 20460

Christopher Lieske  
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Submitted electronically to www.regulations.gov  
Docket ID No. EPA-HQ-OAR-2015-0827


Subjects:
(1) Request for Withdrawal of the Above-Referenced Proposed Determination; or  
(2) If Request (1) is Denied, Request for Extension of the Public Comment Period on the Above-Referenced Proposed Determination to 120 Days

Dear Administrator McCarthy and Mr. Lieske:

I am writing on behalf of the Alliance of Automobile Manufacturers (“Alliance”), an
association representing 12 leading manufacturers of cars and light trucks,\(^1\) to request that EPA withdraw its Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation ("Proposed Determination")\(^2\). If EPA declines to grant our request for withdrawal, we respectfully request an extension of the comment period on the Proposed Determination from the current 30 days to a total of at least 120 days. The bases for these requests are set forth below.

**Background: The Midterm Evaluation Rule and EPA Actions to Date**

The Midterm Evaluation ("MTE") process is codified in EPA regulations at 40 C.F.R. 86.1818-12(h). This regulation provides that EPA will conduct a review of the appropriateness of the model year 2022-2025 motor vehicle greenhouse gas standards that were promulgated in 2012, based on an administrative record. The purpose of the MTE is to ensure that the assumptions underlying the model year 2022-2025 standards remain valid, taking into account various relevant factors listed in the regulation and in the preamble to the regulation. The MTE was put in place because standards for motor vehicle fuel economy and greenhouse gas emissions\(^3\) had never before been set so far into the future.\(^4\) The regulation put in place by EPA at 40 C.F.R. 86.1818-12(h) reflected a general consensus among the stakeholders that a checkpoint was needed to review the relevant data and ensure that the most temporally distant standards continued to make sense in light of more recent developments. This process reflected principles of good government by enabling all the parties to have a transparent assessment of how circumstances may have changed in the interim, without prejudging or predisposing any particular outcome.

As part of the 2012 joint final rule, EPA committed to publish a draft Technical Assessment Report ("TAR") no later than November 15, 2017 and to accept public comments on it. There is no date by which EPA is required to issue a Proposed Determination on the appropriateness of the model year 2022-2025 greenhouse gas ("GHG") standards, only the date by which a

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\(^1\) Alliance members are BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Cars USA. For additional information, please visit [http://www.autoalliance.org](http://www.autoalliance.org).

\(^2\) Even though the Alliance disagrees with EPA's assertion that the Proposed Determination is an "adjudication" and not a rulemaking, we will not debate that issue in this letter but instead will address it in our formal comments which will be submitted on or before the comment deadline.

\(^3\) EPA's motor vehicle greenhouse gas standards are issued jointly in conjunction with closely-related motor vehicle fuel economy standards issued by the National Highway Transportation Safety Administration, under an arrangement that is often referred to as the "National Program" or "One National Program." See, e.g., "EPA and NHTSA Propose to Extend the National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks," EPA-420-F-11-038, November 2011, found at [https://nepis.epa.gov/Exe/ZyPDF.cgi/P100CV1J.PDF?Dockey=P100CV1J.PDF](https://nepis.epa.gov/Exe/ZyPDF.cgi/P100CV1J.PDF?Dockey=P100CV1J.PDF).

\(^4\) The process set forth in EPA's rules was based on an attempt to balance competing goals in an effort to determine the optimal timing for a Midterm Evaluation. On one hand, it was desirable to allow for the passage of as much time as possible in order to allow for the collection of relevant data closer to the model year 2022-2025 period. On the other hand, the Midterm Evaluation had to be completed in time for EPA to promulgate new standards for the 2022 model year if necessary. The timing was designed to facilitate a thorough assessment on a complex administrative record and provide full and fair opportunity to public stakeholders to participate transparently in the process.
Final Determination must be issued. The deadline for a decision on the appropriateness of the model year 2022-2025 GHG standards is April 1, 2018. The Final Determination is final agency action that is subject to judicial review. If EPA’s Final Determination is that the model year 2022-2025 GHG standards are no longer appropriate, EPA committed to undertake rulemaking to promulgate revised standards for those model years.

EPA released the draft TAR in July 2016. In spite of the fact that this timing could have allowed for a generous public comment period without endangering the regulatory deadlines for the Midterm Evaluation, EPA only allowed a 60-day period for the public to review and comment on over 1,200 pages of TAR material. EPA rejected requests from the Alliance and others to extend the comment period to 120 days, which would have been a far more appropriate interval for the development of comments given the volume of material involved, not to mention the magnitude of the standards.

When I testified before the House Energy and Commerce Committee on September 22, 2016 concerning the MTE, I made it clear that the draft TAR comment period was inadequate and that the Alliance would need considerably more time to assess, analyze, comment and develop the administrative record.

The Alliance believes considerably more technical work needs to be done, both in more accurately projecting the level of technology that will be required for compliance and in developing an understanding of consumer acceptance of those technologies, before the agencies move forward with either a proposed determination or NPRM. The Draft TAR largely ignores consumer acceptance (a 27-page chapter in a 1,200-page document) and contains several technical and modeling errors that lead to an overly optimistic view of both technology effectiveness and cost to manufacturers and ultimately consumers. Thus, the Alliance continues to conduct an extensive review of this vast technical report and currently expect it will be necessary to submit additional comments after the September 26th deadline. We hope the agencies will fulfill their commitment to continue to consider new data and information after the approaching deadline and, specifically, we look forward to working with the agencies to better inform the MTE by improving agency modeling efforts as well as understanding the challenges related to consumer acceptance.

Consequently, the Alliance submitted comments to the draft TAR totaling 214 pages on September 26, 2016. Keep in mind, EPA personnel made representations to the industry that there would be ample time for further information exchange and dialogue after the close of the formal TAR comment period. In her joint response (with NHTSA) to the Alliance on August 22, 2016 explaining why the request for an extension of the TAR comment period was denied, EPA Assistant Administrator Janet McCabe stated that:
The agencies will continue to consider relevant new data and information that comes to light beyond the Draft TAR and welcome ongoing feedback as we continue to update our assessments to inform the EPA Proposed Determination and the NHTSA NPRM, and we will make every effort to also consider public comments submitted after the close of the comment period.

More specifically, EPA told the Alliance and its member companies that it planned to publish the Preliminary Determination around mid-summer of 2017, which would allow for several more months of agency/industry interaction. This was reinforced by a timeline that was published on EPA’s website and reprinted below. The timeline, under the heading of “MTE Schedule” clearly indicated that the Proposed Determination would be published sometime in the middle of 2017, with the Final Determination coming by April 2018, consistent with the regulations and EPA’s representations to Congress, the public and other stakeholders.

On November 30, 2016, EPA abruptly changed course. With no advance warning other than morning phone calls to some industry representatives, EPA removed the above timeline from its website and issued a 268-page Proposed Determination, along with a 719-page Technical Support Document. EPA further announced that there would be a 30-day period for the public to comment on the roughly one thousand pages of material it had just released. Instead of having several more months to provide information for the administrative record and engage in a collaborative dialogue with EPA prior to the issuance of a Proposed Determination, the Alliance and its members were immediately and unexpectedly faced with the task of assembling separate comments on a Proposed Determination in an unreasonably short period of time. Of course, the
lengthy documents published by EPA in support of its Proposed Determination could not have been prepared overnight; they clearly had been under development for quite some time. In the weeks and months leading up to November 30, EPA representatives had numerous opportunities to inform the industry of its plans to take this action, but instead the agency chose to make a surprise announcement to the industry and other stakeholders.

**EPA’s Early Action Conflicts with the Long-Standing Commitment to a Single National Program**

The Alliance initially observes that this November 30 action by EPA conflicts with the agencies’ commitment to a harmonized single national GHG/Fuel Economy program in which EPA and NHTSA, along with California’s Air Resources Board (“ARB”), would issue their draft TAR and subsequent MTE determinations at the same time. Such an approach allows for the review and comment on one determination, which simplifies the process for all involved.

Indeed, the preamble to the 2012 GHG Final Rule stated:

> In order to align the agencies’ proceedings for MYs 2022–2025 and to maintain a joint national program, EPA and NHTSA will finalize their actions related to MYs 2022–2025 standards concurrently.\(^5\)

Clearly, EPA and NHTSA now are on different tracks. As the Alliance has stated publicly, and reiterate here, the two pillars of the joint 2012 GHG and Fuel Economy Rule, since the beginning, have been the concept of One National Program and the equally important commitment to a rigorous, fact-based MTE. EPA’s early action has compromised both pillars: there is now neither a harmonized, single national program, nor the appearance of a credible review.

By unilaterally issuing the Proposed Determination, EPA has ignored its own representation to all stakeholders that throughout the TAR and MTE process, all communication and action taken by the agencies and industry were to be (and for industry’s part, have been) in coordination with each other.

Insofar as EPA’s final determination and NHTSA’s not-yet-proposed-or-final-rule are to be the “final” MTE actions, EPA’s Proposed Determination precedes NHTSA’s corresponding decision and final rule which not only flatly contradicts the agencies’ 2012 commitment to undertake these actions concurrently but also fails to account for NHTSA’s different approach, which has yet to be publicly released.

The Draft TAR revealed significant differences between EPA and NHTSA with respect to their analyses of costs, technology pathways and other factors. This raises the prospect that

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NHTSA’s eventual notice of proposed rulemaking may be substantially different and not at all harmonized with EPA’s determination. The other prospect is that NHTSA may feel unduly constrained to align itself with EPA’s determination regardless of the existence of facts and analyses that would suggest the need for a different outcome. Either way, the process now bears no resemblance to the coordinated effort that was envisioned for the midterm evaluation.

EPA now has put industry in the highly untenable position of having to comment on the Proposed Determination based on data from only one agency without being able to review and assess data updates and determinations by the other agency. As amply documented in the administrative record, many of the Alliance’s previous comments were directed at these differences (and indeed, these differences are behind our pending harmonization petition to the agencies).

All along, the two key elements underlying the auto industry’s efforts to cooperate with EPA, NHTSA and ARB on the joint 2012 GHG and Fuel Economy Rule have been: 1) the concept of maintaining a harmonized National Program; and, 2) the equally important commitment to a rigorous fact-based midterm evaluation. EPA now has jeopardized both elements by abandoning a coordinated process in favor of unilateral action, and by undermining the credibility of the midterm evaluation.

**Primary Request: Withdraw the November 30 Preliminary Determination and Resume the Midterm Evaluation Process**

In creating the Midterm Evaluation process, EPA stated that it would be “a collaborative, data-driven, and transparent process…” 81 Fed. Reg. 49,219 (July 27, 2016); see also 77 Fed. Reg. 62,784 (Oct. 15, 2012). EPA’s recent actions, particularly the November 30 Proposed Determination, are wholly inconsistent with the notion of a “collaborative, data-driven, and transparent process.” There is no legitimate justification for leading the industry and the public to believe that the process would follow a published timeline, then precipitously abandoning that timeline and accelerating the process without warning. On the contrary, such actions are the antithesis of “collaborative” and “transparent.” Moreover, from a regulatory perspective, there is no change of circumstances that would compel a sudden need to finalize standards that take effect beginning in the 2022 model year. Under the 2012 joint final rule, an EPA Final Determination is not due until April 2018, almost 17 months from now. This means that there is more than enough time to allow for several additional months of record development ahead of the issuance of a reissued Proposed Determination, while remaining comfortably ahead of the regulatory deadlines set forth for the MTE. Indeed, in light of the truncated comment process on the draft TAR (itself 16 months ahead of schedule), and in light of the “MTE Schedule” that had been posted on the EPA website, the Alliance and its members had every reason to expect that there would be time to submit additional material to EPA. The Alliance and its members were in the process of preparing additional information for submittal to the Midterm Evaluation docket when we got word that the process was being short-circuited on November 30.
EPA’s stunning change of course also belies its promise to “make every effort to also consider public comments submitted after the close of the comment period.” EPA created an expectation that further comments would be accepted, then reversed course and brought the entire comment process to a sudden and unexpected end. Even the published timeline on the agency’s own website remained unchanged until the day before the agency’s announcement. At a minimum, EPA’s actions in this matter create the appearance of an agency that is uninterested in a full, open and fair consideration of all data and information bearing upon the model year 2022-2025 standards, and that pre-determined the outcome of the Midterm Evaluation before allowing the process to play out as intended. The only way that EPA can hope to undo this appearance is to withdraw its November 30 Proposed Determination and resume the Midterm Evaluation process as previously envisioned.

In light of the above, the Alliance formally requests that EPA withdraw the Proposed Determination and all related materials published on its website on November 30. The Alliance further requests that the Midterm Evaluation process be reinstated in a manner that is more consistent with the timeline previously published by EPA.

**Secondary Request: Extend the Comment Period on the Proposed Determination to 120-Days**

If EPA does not grant the Alliance’s primary request of withdrawing the November 30 Proposed Determination and resuming the Midterm Evaluation process, the Alliance formally requests that EPA extend the public comment period on the Proposed Determination from 30 days to at least 120 days from the date of publication in the Federal Register.

A comment period of only 30 days is wholly insufficient to ensure that the EPA conducts the Midterm Evaluation as “a collaborative, data-driven, and transparent process that will be a holistic assessment of all of [the] factors considered in standards setting, and the expected impact of those factors on manufacturers’ ability to comply.” 81 Fed. Reg. 49,219 (July 27, 2016); see also 77 Fed. Reg. 62,784 (Oct. 15, 2012). This timetable also threatens to deprive stakeholders of a meaningful opportunity to comment on the Proposed Determination, as EPA regulations and the Clean Air Act (CAA) require. The EPA Midterm Evaluation is subject to the procedural requirements in section 307(d) of the CAA, 42 U.S.C. § 7607(d). Those requirements apply to, among other things, “promulgation or revision of regulations under [section 202 of the CAA, 42 U.S.C. § 7521].” 42 U.S.C. § 7607(d)(1)(K). Under Section 307(d), interested parties must have an opportunity to submit both written and oral comments at a hearing, and the record must be kept open for thirty days after opportunity for oral comments. 42 U.S.C. § 7607(d)(5). See § 40 C.F.R. § 86.1818-12(h)(2)(iii) (requiring the Administrator to take into account “[p]ublic comment on whether the standards established for the 2022 through 2025 model years are appropriate under section 202(a) of the Clean Air Act”). See also Bell Lines, Inc. v. United States, 263 F. Supp. 40, 46 (S.D. W.Va. 1967) (“The thrust of our decision is that the requirements of the Administrative Procedure Act are fundamental to due process and that all administrative decisions shall include such findings and conclusions as are reasonably necessary to intelligently inform the parties involved of the
purport thereof, as well as the reasons therefor.

As noted above, the Proposed Determination spans nearly 1,000 pages. It incorporates the findings of 1,099 separate studies. The sheer volume of new information in the Proposed Determination alone justifies this extension request. The public, key stakeholders and the Alliance’s members require adequate time to understand the agency’s technical model updates, assess the new conclusions, and respond to the request for comment.

In addition to the agency’s abrupt short-circuiting of the Midterm Evaluation schedule, other factors militate in favor of a longer comment period including:

- The comment period begins before the EPA has published the Proposed Determination and the associated Technical Support Document (“Final TAR”) in the Federal Register, which is the conventional and accepted means by which federal agencies notify interested parties of agency actions requiring public comment. For instance, the EPA published its Notice of Availability of Midterm Evaluation Draft Technical Assessment Report for Model Year 2022-2025 Light Duty Vehicle GHG Emissions and CAFE Standards in the Federal Register and appears to have tied the length of the comment period to the Federal Register publication date. See 81 Fed. Reg. 49,217 (July 27, 2016). It is unclear whether posting the Proposed Determination on the EPA’s website will sufficiently notify the public or is legally adequate. The Alliance is concerned that running the comment clock from the date of the website posting will further hamper meaningful opportunities for comment and represents an arbitrary departure from the EPA’s ordinary process for soliciting comment.

- The comment period includes a major holiday period during which most manufacturers are closed and/or critical staff are on vacation, which will further hamper stakeholders’ ability to meaningfully evaluate and comment upon the Proposed Determination. As a practical matter, this means that the Alliance has effectively only three weeks to comment on a massive proposal.

- The 30-day comment period for the Proposed Determination is half as long as the 60-day comment period applicable to comments on the Draft TAR. See 81 Fed. Reg. 49,217 (comment period ran from July 27, 2016 to September 26, 2016). Yet the EPA has described the Draft TAR as merely “a technical report, not a decision document,” (Draft TAR, p. 1-2) suggesting that the comment period for the Draft TAR would be comparatively short compared to more significant forms of agency action. See EPA Midterm Evaluation Website, https://www3.epa.gov/otaq/climate/mte.htm. The proposal constitutes a proposed action encompassing a much broader set of issues warranting comment. Accordingly, against the 60-day benchmark of the Draft TAR, EPA
should provide more, not less time to comment on its proposed action.

- EPA declined to meet with the Alliance to discuss our comments or address our concerns with the Draft TAR. This takes on special importance in that many of our comments were dismissed by EPA due to the purported lack of sufficient supporting information. More information or clarification of our comments could have been easily communicated before the Proposed Determination was finalized.

The Alliance also is concerned that the Proposed Determination and the Final TAR were not submitted for review by the Office of Management and Budget (OMB). EPA has said the Technical Support Document accompanying the Proposed Determination serves as the Final TAR. As noted above, EPA’s proposed action qualifies as rulemaking. Notice of a significant rulemaking document entering the OMB process is a strong indicator for stakeholders to finish work and prepare for a comment period. The purpose of OMB review is to ensure that agency decisions having major effects on the U.S. economy have benefit from input from the Office of Information and Regulatory Affairs within OMB. See Executive Order 12866, Sec. 6 (describing procedures for OIRA review of “significant regulatory action,” defined as “any regulatory action that is likely to result in a rule that may [h]ave an annual effect on the economy of $100 million or more”). Plainly, the agency’s decision is economically consequential by this standard. Also, in contrast to the process followed with the Proposed Determination, the related Draft TAR was submitted to OMB for review. It is illogical that EPA would feel required to submit the Draft TAR for OMB review and then subsequently fail to submit a related proposed decision document for review.

Additionally, the Alliance notes that California’s ARB is pursuing its own midterm evaluation on an accelerated schedule. EPA and NHTSA should seek to be more transparent about their efforts to coordinate with ARB and should ensure the midterm determinations performed by the federal agencies and ARB are substantively and procedurally aligned. Since the ARB Midterm Review has been moved to February 2017 from December 2016, we fully expect EPA will include any relevant information presented at that ARB hearing in the EPA Final Determination or Notice of Proposed Rulemaking.

Finally, EPA’s issuance of a Final Determination by January 20, 2017 (which appears to be the agency’s intent), will not just be premature but will constitute a predetermination and flatly contradicts both EPA’s and NHTSA’s commitment in 2012 to undertake these actions.

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concurrently after a rigorous fact-based midterm evaluation.

Thank you for your prompt consideration of these important requests.

Sincerely,

Mitch Bainwol  
President and CEO  
Alliance of Automobile Manufacturers  

cc:  
Bill Charmley, EPA  
Chris Grundler, EPA  
Janet McCabe, EPA  
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