ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*, ALLIANCE OF AUTOMOBILE MANUFACTURERS, *et al.*, *Movant-Respondent-Intervenors.*	No. 18-1139 (consolidated with lead case No. 18-1114 and Nos. 18-1118 & 18-1162)

PETITIONERS' RESPONSE TO MOTIONS TO DISMISS OF RESPONDENTS AND MOVANT-INTERVENORS

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GLOSSARY

§12(h)	40 C.F.R. § 86.1818-12(h)
CARB	California Air Resources Board
EPA	Environmental Protection Agency
MY	Model Year
NHTSA	National Highway Traffic Safety Administration
TAR	Technical Assessment Report

INTRODUCTION

The Environmental Protection Agency's (EPA's) April 13, 2018 determination that its light-duty vehicle emissions standards under the Clean Air Act were "not appropriate" violated EPA regulations setting forth detailed preconditions for such a determination – and arbitrarily overturned a prior, lawful decision finding the standards "appropriate." Contrary to what EPA's and Industry Movant-Intervenors' submissions claim, the April 2018 decision has immediate legal consequences that harm Petitioners. The motions to dismiss should be denied.

BACKGROUND

1. Section 202(a) of the Clean Air Act requires EPA to reduce motor vehicle greenhouse gas emissions that "may reasonably be anticipated to endanger public health and welfare." 42 U.S.C. § 7521(a). *See Massachusetts v. EPA*, 549 U.S. 497, 532-33 (2007). In 2010, EPA promulgated emissions standards for model year (MY) 2012-2016 light-duty vehicles in a joint rulemaking with the National Highway Traffic Safety Administration (NHTSA), which promulgated fuel-economy standards under 49 U.S.C. § 32902(a). 75 Fed. Reg. 25,324 (May 7, 2010).

In 2012, in another joint rulemaking and with the support of the auto industry, EPA promulgated greenhouse gas emissions standards for MY2017-2025. 77 Fed. Reg. 62,623 (Oct. 15, 2012). EPA found that the standards would "reduce

[greenhouse gas] emissions by the equivalent of approximately 2 billion metric tons," and would have net benefits of $326 to $451 billion, over the vehicles' lifetimes. Appendix (A) at 72. The standards' stringency increases annually through MY2022-2025. A78-79.

2. The 2012 final rule also bound EPA to undertake a unique regulatory process called the "Mid-Term Evaluation" to decide whether to initiate any rulemaking to change the MY2022-2025 standards. 40 C.F.R. § 86.1818-12(h) ("§12(h)," A47). The Mid-Term Evaluation regulations balance automakers' desire for a one-time systematic and exhaustive review of the MY2022-2025 standards by a date certain (April 2018) with the interest of many other stakeholders (including Petitioners) in safeguarding the emission reductions projected to result from the standards established in 2012. EPA reconciled these interests by binding itself to make any decision – whether to retain the standards as "appropriate" or to start a rulemaking to change them after a finding that they were "not appropriate" – based on detailed findings on specific, enumerated factors and a "comprehensive and robust evaluation." A82.

Consequently, the 2012 rule established a special process to govern the evaluation. EPA committed itself to prepare a draft Technical Assessment Report (TAR) addressing issues relevant to the MY2022-2025 standards, §12(h)(3); solicit public comment on the TAR and other relevant materials, §12(h)(2); and determine

by April 2018 "whether the [existing MY2022-2025] standards" remained "appropriate," §12(h). Further, that determination must be "based upon a record that includes" the TAR and public comments thereon, §12(h)(2)(ii)-(iii), and EPA must "set forth in detail the bases for [its] determination …, including [EPA's] assessment of [enumerated] factors." §12(h)(4); *see also* §12(h)(1).

If EPA determined that the existing MY2022-2025 standards remained "appropriate," those standards would remain in place. But if it found the existing standards "not appropriate," the regulations required that EPA "shall initiate a rulemaking to revise [them]." §12(h). This regime reflected the consensus of the federal and state agencies, automakers, and other stakeholders that any decision to retain or change the standards would have to be made through what the preamble repeatedly called a "collaborative, robust and transparent process," A74, 76, 81, 87, including opportunity for public review and comment on technical information and explicit, detailed agency findings, before EPA could propose any changes to the regulations.

The Mid-Term Evaluation was to reflect close coordination between EPA, NHTSA, and the California Air Resources Board ("CARB"), which has statutory authority to adopt its own emissions standards for new motor vehicles. A87-88; *see also* 42 U.S.C. § 7543(b). The "decision making required of the Administrator" in the Mid-Term Evaluation was "intended to be *as robust and comprehensive as that*

in the original setting of the MY2017-2025 standards," A81 (emphasis added), with "analyses and projections" that would be "similar" in rigor to the 2012 rulemaking itself, including "appropriate peer review," and modeling "available to the public to the extent consistent with law," *id*.

3. In July 2016, EPA published a 1,215-page TAR jointly with NHTSA and CARB. *See* A50 (Executive Summary); EPA-HQ-OAR-2015-0827-0926 (full document). Employing "a collaborative, data-driven, and transparent process," the three agencies assembled updated data and analysis from a "wide range of sources," including "research projects initiated by the agencies, input from stakeholders, and information from technical conferences, published literature, and studies published by various organizations." TAR 2-2. "[W]here possible, each agency … made the results of a variety of projects available to the public." TAR 2-2. EPA contributed "a major research benchmarking program for advanced engine and transmission technologies," and studies employing EPA's vehicle emissions model, both of which generated multiple peer-reviewed research papers and studies. TAR 2-2 to 2-3. NHTSA and CARB similarly conducted their own new research. TAR 2-3 to 2-10. The TAR also incorporated the results of a 2015 National Academy of Sciences study "timed to inform the mid-term evaluation by considering technologies applicable in the 2020 to 2030 timeframe." TAR 2-4.

Based on this thorough and public analytical process, the TAR found that "a wider range of technologies exist[s] for manufacturers to use to meet the MY2022-2025 standards, and at costs that are similar or lower than those projected" when those standards were promulgated. A54. After considering 200,000 public comments on the TAR, EPA issued a Proposed Determination that the MY2022-2025 standards remained "appropriate." 81 Fed. Reg. 87,927 (Dec. 6, 2016). This proposal was supported by an additional 718-page technical support document, drawn from the TAR and comments thereon. *See* App. 66 (TSD Executive Summary); EPA-HQ-OAR-2015-0827-5941 (full document).

On January 12, 2017, after considering more than 100,000 additional comments, EPA issued a Final Determination that the MY2022-2025 standards remained "appropriate under section 202(a)(1) of the Clean Air Act." A13, 17 ("Final Determination"). EPA explained that: the auto industry was "thriving," with seven uninterrupted years of growth including "record sales in 2016"; technologies to reduce emissions had advanced more rapidly than anticipated in 2012, and at "reasonable cost – less than projected in the 2012 rulemaking"; "technology adoption rates and the pace of innovation have accelerated even beyond what EPA expected" in 2012; the standards could be met "through a number of technology pathways reflecting predominantly the application of technologies already in commercial production"; the standards had not impaired

industry growth; and the standards would impose only reasonable consumer costs that would be more than offset by decreased fuel costs. A20, 23, 37, 39, 41. "[T]he record clearly establishes," EPA concluded, that "it will be practical and feasible for automakers to meet the MY2022-2025 standards at reasonable cost that will achieve the significant GHG emissions reduction goals of the program, while delivering … significant benefits to public health and welfare, and without having material adverse impact on the industry, safety, or consumers." A45.[1]

4. Following the presidential transition, EPA and NHTSA jointly announced in March 2017 that EPA planned to reconsider the 2017 Final Determination. 82 Fed. Reg. 14,671 (Mar. 22, 2017). In August 2017, the agencies explained that the reconsideration would be "conducted in accordance with the regulations EPA established for the Mid-Term Evaluation," and sought public comment. 82 Fed. Reg. 39,553. But the notice stated that the TAR – the technical report supporting the 2017 Final Determination –was "not being reopened for comment." *Id.*

On April 13, 2018, EPA Administrator Scott Pruitt published an 11-page decision that reversed and withdrew the 2017 Final Determination. A1 ("Revised Determination"). The Revised Determination came without any technical report or other supporting analysis.

[1] One of the Intervenors filed, but then voluntarily dismissed, a petition for review of the Final Determination. *Alliance of Auto. Mfrs. v. EPA*, No. 17-1086 (dismissed on March 29, 2017).

The Revised Determination represented a largely unexplained turnabout from the 2017 Final Determination. Administrator Pruitt pronounced that "many of the key assumptions EPA had relied upon" the previous year were "optimistic or have significantly changed and thus no longer represented realistic assumptions," and that existing emissions standards for MY2022-2025 "present[ed] challenges for auto manufacturers due to feasibility and practicability," and raised "potential concerns" on safety and consumer costs. A3. EPA declared that unspecified and undisclosed new information – a "significant record … developed since the January 2017 Determination" – had undermined its prior decision. *Id.*

The Revised Determination did not explain the rationale for departing from the detailed data and technical analysis that formed the basis of the 2017 Final Determination. *See* § 12(h)(2). For example, while the Revised Determination briefly asserts that gas prices were lower than had been anticipated in 2012, A3, 4, 9, 12, it nowhere acknowledges that the TAR and the 2017 Final Determination had determined that the current MY2022-2025 standards would continue to be effective and cost-beneficial even under fuel-price scenarios substantially *lower* than those considered in the Revised Determination, *see* A23; TAR 3-4 to 3-5, nor did it provide a reasoned basis for reaching a different conclusion.

Similarly, the Revised Determination vaguely adverted to new information or possible doubts about other factors such as technology, costs, and safety, but

provided virtually no explanation why the contrary conclusions in the 2017 Final Determination – which were far more extensive and were subjected to peer and public review – were flawed. Nonetheless, the Revised Determination declared that "the current GHG program for MY2022-2025 vehicles presents difficult challenges for auto manufacturers and adverse impacts on consumers," and that the "standards are not appropriate," thereby "conclud[ing] EPA's [Mid-Term Evaluation] under [§] 12(h)." A12. Heralding the Revised Determination on his official Twitter account, Administrator Pruitt explained that EPA "plans to roll back Obama Admin fuel standards," which were "not appropriate & needed to be revised" and were "too high." A89, 91.

5. On August 24, 2018, EPA published a notice of proposed rulemaking to dramatically weaken greenhouse gas emissions standards for MY2021-2026. 83 Fed. Reg. 42,986. The "preferred alternative" under the proposal is to freeze emissions standards at MY2020 levels, thereby repealing all further year-to-year emissions reductions currently required for subsequent model years. *Id.* at 42,995. The proposal sets out seven other action alternatives that also represent substantial reductions in stringency as compared to current law. *Id*. at 43,197-43,206.

ARGUMENT

I. THE MOTIONS INACCURATELY CHARACTERIZE EPA'S REVISED DETERMINATION.

Petitioners challenge EPA's Revised Determination because it: (1) violates extant regulations mandating that the agency compile, take public comment on, and consider a rigorous technical record to support the Administrator's determination of the "appropriateness" of the standards, and publish a "detailed" assessment of each factor informing that determination; (2) lacks adequate explanation and support in the record; and (3) arbitrarily withdraws EPA's exhaustively supported 2017 Final Determination. The Revised Determination has important legal consequences, harms Petitioners, and warrants judicial review now.

The motions to dismiss rest on facile claims that the Revised Determination is nothing more than a standard-issue "decision to engage in further rulemaking" (EPA Mot. 1, 6), that determines no "relevant rights or obligations," EPA Mot. 7, 10; *see also* Respondent-Intervenor Mot. at 9-16. The movants, however, ignore the distinctive regulatory requirements applicable here and the concrete adverse consequences of EPA's violation of those requirements.

First, the Revised Determination culminates a special process required by the 2012 regulations, regulatory requirements EPA has never even proposed to repeal and still purports to have followed. Those regulations were designed to force EPA to consider whether the emissions standards should be changed while

simultaneously enhancing the stability of the existing program by ensuring that no change to the standards would be proposed, much less finalized, absent a prior, robust supporting analysis. The regulations require a multi-stage, multi-agency process with several rounds of public comment; detailed technical analysis with peer review and public vetting of a formal agency technical report; and a "detailed" explanation by the Administrator of the basis for his ultimate determination as to "each of the factors" set forth in the regulation. §12(h). This process was meant to ensure that *any* decision – whether to retain the 2012 standards, to weaken them, or to strengthen them – would be based upon that full, publicly-vetted technical record and formal, explicit findings. EPA's threshold arguments for dismissal, which characterize its decision to revise the standards as merely the beginning of a rulemaking process, ignore the agreed-upon regulatory framework and seek to place EPA's shirking of it beyond judicial scrutiny. *See Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("[A]n agency is not free to ignore or violate its regulations while they remain in effect.") (citation omitted).

Second, the Revised Determination would still have significant legal consequences even if, as EPA's motion claims (Mot. 10), the agency had made no decision whether to revise the regulations (or even in which direction to do so). *But see supra*, p. 8. The Revised Determination indisputably has the immediate

legal consequence of *obligating* EPA to initiate a rulemaking to revise the ostensibly "not appropriate" standards. *See* §12(h) ("shall").

Third, the Revised Determination explicitly "withdraws" the Final Determination, a concededly reviewable final agency action. As explained below, that unsupported withdrawal of EPA's exhaustively documented decision is itself a significant and consequential agency action subject to judicial review.

I. THE REVISED DETERMINATION IS REVIEWABLE NOW.

A. The Revised Determination is a Final Agency Action.

The Revised Determination is a "final action," 42 U.S.C. § 7607(b)(1), because it represents "the consummation of the agency's decisionmaking process," and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). This definition of finality is "pragmatic," *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016), and not "confined to the specific facts of prior circuit cases," *Friedman v. FAA*, 841 F.3d 537, 543 (D.C. Cir. 2016).

The Final Determination consummates the decisionmaking process required by the 2012 regulations, which prescribe a special process for determining whether any change for MY2022-2025 is warranted. The Revised Determination reaches a "definitive conclusion," *Scenic Am., Inc. v. DOT*, 836 F.3d 42, 56 (D.C. Cir. 2016), pursuant to §12(h), that the current MY2022-2025 standards are not appropriate

and should be revised, and withdraws a recent, contrary agency decision that rested on a massive record reflecting two years of analysis and public input. That another rulemaking will follow does not change the fact that the Revised Determination culminated a discrete and consequential administrative process that the agency bound itself to conduct. *See Nat'l Treasury Empls. Union v. FLRA*, 745 F.3d 1219, 1222 (D.C. Cir. 2014) ("[F]or purposes of judicial review a final agency action need not be the last administrative action contemplated by the statutory scheme."); *accord EDF, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 (D.C. Cir. 1971); *Role Models Am., Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003).

The Revised Determination is also "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. First, as noted, EPA was required to make public crucial information as part of the Mid-Term Evaluation process (including the technical basis for the agency's "appropriateness" determination and a "detailed" assessment of listed factors), but it has not done so. This failure to make information available as required is a final deprivation of Petitioners' legal rights.

Second, EPA has decided – purportedly based on the closed 2016-17 administrative record prescribed by §12(h) – that the standards are "not appropriate." That decision does not itself "revise the existing vehicle emissions standards," EPA Mot. 10, but it does require EPA to initiate a rulemaking "to

revise" the standards EPA has formally found "not appropriate." §12(h). Those legal consequences are sufficient in this unique context to make an action final and challengeable. *See Hawkes*, 136 S. Ct. at 1814 (highlighting legal effect on the agency); *see also Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 806 (D.C. Cir. 2006) (action challengeable if it has "binding effects on . . . the agency" with force of law); *Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d at 1006; *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1207 (D.C. Cir. 1996).

That EPA might later reverse the Revised Determination and again conclude that the standards *are* appropriate does not strip the operative §12(h) determination of its consequences now. *Contra* EPA Mot. 10. The possibility of reconsideration "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes*, 136 S. Ct. at 1814. In addition, parties opposed to the current standards could seek to use this unusual "not appropriate" determination to compel agency action to change those standards, and such parties – or EPA itself – could cite the Revised Determination as an alleged basis to alter the burden EPA must meet to justify such a change.

The Revised Determination also "alters the legal regime" to which EPA is subject, *Bennett*, 520 U.S. at 169, because it "withdraws" the Final Determination. *See Hawkes*, 136 S. Ct. at 1814 (observing that, if a decision in one direction has legal consequences, "[i]t follows" that a decision in the opposite direction also has

legal consequences); EPA Mot. 4 (acknowledging that the Final Determination itself was final and reviewable).

The practical effects of the Revised Determination (including the "withdrawal") also favor review. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-37 (D.C. Cir. 1986) (discussing fact-specific, "flexible and pragmatic" finality analysis). The detailed process and assessment the 2012 regulations require must occur *before* a revisory rulemaking can begin. The Revised Determination itself violates EPA's obligations timely to provide the public with that information, independent of further rulemaking proceedings. *See* §12(h)(4). Instead, for example, here EPA told the public it was not taking comment on the existing TAR, 82 Fed. Reg. 39,553, but then reversed its Final Determination, without analysis, based on "new information" not made available to the public for comment, but allegedly contradicting the existing TAR. Because the §12(h) regulations demand that the public process, including the building of a technical record supporting the determination, *precede* any decision to begin a new standard-setting rulemaking, the possibility that similar issues will be addressed in that new rulemaking does not cure EPA's violation. Were it otherwise, the negotiated, agreed-upon procedures and limitations that bound the Mid-Term Evaluation would be meaningless.

The withdrawal of the Final Determination also has significant consequences because it could allow EPA improperly to avoid its burden to explain reversals on

matters of fact, policy, and law. *E.g.*, *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). Notably, EPA's motion has not disavowed the possibility that the agency would seek in a future rulemaking to avoid its duty to explain the reasons for changing its position by claiming that the Revised Determination, including the withdrawal of the Final Determination, had effectively erased the latter and its technical support. That possibility is not cured by the commitment to "consider any comments" (EPA Mot. 9) that are submitted in the new, standard-weakening rulemaking. An agency's need to respond to public comments is distinct from its obligation to explain reversals of *its own* recent findings and judgments. *See*, *e.g.*, *Fox*, 556 U.S. at 516 (agency changing course must provide reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by the prior policy"). To the extent EPA's withdrawal of the Final Determination purports to reduce that obligation, the Revised Determination has yet another significant legal consequence that supports its reviewability.

EPA's authorities (Mot. 10-11) do not support its argument. Decisions to commence administrative reconsideration, *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017), to issue a notice of proposed rulemaking, *Murray Energy v. EPA*, 788 F.3d 330, 334 (D.C. Cir. 2015), or to include "unembellished snippets" in a preamble about how the agency might read a statute in the future, *NRDC v.*

EPA, 706 F.3d 428, 432 (D.C. Cir. 2013), are readily distinguishable from the distinctive decision at issue here. None of these cases involved a regulatory framework at all comparable to the Mid-Term Evaluation, in which the agency bound itself to a specific, structured, formal, and discrete decision-making process, creating reliance interests for all of the parties affected, and contemplating a closed record, public comment and binding determination supported by detailed agency findings.

Reviewability is not defeated here because the 2012 preamble described only a finding that the standards are "appropriate" as a final action. EPA Mot. 4 (citing 77 Fed. Reg. at 62,784-85). As an initial matter, even an agency's adamant characterization of its own action as nonfinal is not determinative. *See, e.g.*, *Hawkes*, 136 S. Ct. at 1813-15. And there is special reason to reject that position here because the 2012 preamble did not envision a Revised Determination. In 2012, the federal agencies, CARB, industry and other stakeholders, all intent on regulatory certainty, contemplated that there would be only *one* Mid-Term Evaluation, performed in compliance with the 2012 regulations. They did not contemplate the extraordinary sequence of events here: a final, robust, regulation-compliant and reviewable determination of "appropriateness," followed 15 months later by an 11-page "withdrawal" that followed none of the elements of the requisite decisionmaking process, relied on alleged technical information and

analysis the agency had never presented for public review and comment, and made none of the detailed assessments the regulations require.

Finally, EPA's invocation of "ongoing statutory authority" (Mot. 1-2) to reconsider its rules is inapplicable here because the regulations (which, again, EPA has not even proposed to rescind) establish a special, structured process for reconsidering the standards. Federal agencies must "follow their own rules," even when they "limit otherwise discretionary actions." *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003).

B. This Case is Ripe for Review.

EPA is equally mistaken in its claim that the petitions are not ripe because EPA has merely decided to "initiate a rulemaking" to revise the standards, and that Petitioners' concerns can be addressed in a challenge to a final rule revising the standards.

There are two factors in a prudential-ripeness inquiry: "fitness of the issues for judicial decision" and "hardship to the parties of withholding" a decision. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632 (D.C. Cir. 2017). The "fitness" factor asks "whether [the issue presented] is purely legal, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Ciba-Geigy*, 801 F.2d at 435 (citations omitted).

The issues presented are fit for judicial resolution based on the record before the Court. Petitioners seek review of the "purely legal" issues of whether the Revised Determination conforms to applicable regulations and is supported by the administrative record. *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007). Whether EPA complied with the §12(h) regulations and engaged in reasoned decisionmaking are properly addressed based upon the record that was before the Administrator and is now before the Court. EPA has "completely and finally implemented its procedures" under §12(h), and there is no reasonable "possibility that further agency action will alter [petitioners'] claim[s] in any fashion." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1999). The issues presented are fit for review and "can never get riper." *Id. Cf. Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998).

Withholding review would cause hardship to Petitioners, denying them the benefit of the regulatory requirements they are seeking to enforce. The §12(h) regulations require that any decision to revise the emissions standards be based on a full, publicly vetted record and detailed reasoning before any new rulemaking to amend the standards; the process is intended to make public the specific information that *informs* and *justifies* EPA's decision whether to revise the standards, as well as any further rulemaking to revise the standards. §12(h)(1); A76. To withhold review until *after* publication of a final revision of the standards

would flout that design, would prevent parties from timely accessing and using information required by regulation to be made public, and would effectively immunize the Revised Determination from judicial review. Indeed, EPA's current position would foreclose *any* review – or at least any review at a meaningful time – of EPA's April 2018 decision.

C. Petitioners Have Standing.

Finally, EPA (Mot. 14-18) asserts that the same considerations that purportedly render the Revised Determination nonfinal and unripe deprive Petitioners of standing. EPA is wrong.

First, Petitioners have standing due to injuries they and their members suffer from the deprivation of information required to be made public under the Mid-Term Evaluation regulations. Those regulations require that the technical information underlying the agency's decision be set out for public review and comment before any new rulemaking can begin, §12(h)(2)-(3), and that the Administrator provide a "detailed" assessment of each of the enumerated factors, §12(h)(4). These regulations protect the interests of stakeholders in the 2012 rulemaking in a "transparent" and "robust" public process, and they create a legal right to information before any rulemaking to change the standards can begin, the deprivation of which confers standing. *See FEC v. Akins*, 524 U.S. 11, 24-25 (1998).

By abandoning those requirements, EPA deprived Petitioners and the public of critically important information about the bases for EPA's decision, including the ostensibly "new" information EPA cited as grounds for overturning its prior decision reaffirming the standards. *See* pp. 7-8, *supra*. EPA's decision thus harms Petitioners by depriving them of information they are entitled to and which is "concrete and specific to the work in which they are engaged." *Action Alliance v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986) (informational standing based on denial of information guaranteed in agency regulations); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016).

At present, Petitioners and their members are engaged in the work of commenting on EPA's proposal to revise the greenhouse-gas standards, *without* the benefit of EPA's "detailed" technical analysis of the basis for finding the existing standards not appropriate. *See* A163, 173-74, 176. Absent the 2012 regulations, Petitioners would not be entitled to that granular analysis until a change to the rule was finalized. But the regulations demand more—EPA must show its work *before* even proposing a new rule to revise the standards, thereby allowing Petitioners to consider that work (and rebut it, as appropriate) in their comments on the proposed rule. Whether or not Petitioners may complain of this injury in an eventual challenge to a final rulemaking rolling back the standards, they have standing *now* to challenge the actual injury they suffer from EPA's failure to comply with its

own regulations. The notice of proposed rulemaking has not redressed that injury; while lengthy, that notice does not include the detailed and specific analysis required by §12(h) either.

Petitioners also have a legally cognizable interest in analyzing the detailed information required by the 2012 regulations that is independent of the ongoing rulemaking process. Whether through independent academic research, *see* A199-203, 190-92, or dissemination of the information to others, *see* A167-69, 171-72, 174, 176-77, 214-15, Petitioners have an interest in using the information in their work, and their members are harmed by EPA's failure to perform the detailed and specific analysis required by the 2012 regulations. *See also* A97-98, 105, 112-13, 130-31, 260-61.

In addition, weakening emission standards would harm Petitioners' members' health and welfare, *e.g.*, A95-97, 135-39, 103-05, 144-47, 151-54, 234-35, 228, 119, 124, 243, 248, and limit members' options to purchase low-emitting vehicles, A207-09, 222-23, 253-54, 219.

Petitioners have "concrete interests," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992), in maintaining the more protective, existing emissions standards, which the §12(h) regulations guaranteed would be dislodged only if certain regulatory preconditions were met. Petitioners have standing on that basis to challenge EPA's unlawful and unreasoned Revised Determination, which

violated (while purporting to comply with) those regulatory constraints, imperiling Petitioners' concrete health, environmental, and consumer interests. To establish standing in this procedural context, Petitioners need not demonstrate the "precise extent" by which EPA will weaken the standards, *see Lujan*, 504 U.S. at 565,[2] and they may enforce the required procedures bearing on their concrete interests "even though [they] cannot establish with any certainty" that adhering to proper procedure will yield a favorable result, *id.* at 572 n.7; *see Am. Rivers v. FERC*, 895 F.3d 32, 42 (D.C. Cir. 2018) (discussing redressability of procedural injuries). EPA *already* has unlawfully removed an important precondition to weakening the standards. Petitioners are further injured by the Revised Determination if it in any way limits the option of leaving the standards as they are, or in any way lessens EPA's duty to explain policy changes or choices. *See supra*, p. 15.

EPA thus is wrong to contend that a ruling declaring the Revised Determination unlawful would not redress Petitioners' injuries because the agency "would retain its clear statutory authority to proceed with further analysis and rulemaking to revise the existing vehicle standards as appropriate." Mot. 18. EPA has no authority to proceed until it has lawfully discharged the obligations imposed

[2] None of EPA's cited cases (Mot. 16-17) involved a formal legally-prescribed process comparable to §12(h) or an express agency finding, based on a prescribed and closed administrative record, that the preexisting regulatory status quo was "not appropriate."

by the regulations that EPA adopted and did not rescind (and, in fact, purported to follow, see 83 Fed. Reg. at 16,087).

Speculation that EPA might attempt to revise the standards under a *different* procedural course and different rationale – without regard to the §12(h) framework – does not defeat Petitioners' injuries, as EPA's new rulemaking is in fact explicitly premised on the Revised Determination. 83 Fed. Reg. at 42,987-88. In any event, if EPA were to initiate a new rulemaking outside the §12(h) framework, it would have to rescind the §12(h) regulations after notice and comment, or at least provide a reasoned explanation for jettisoning the "collaborative, robust and transparent process" agreed to by stakeholders and established in the 2012 regulations. Moreover, an order setting aside the Revised Determination would preclude EPA from relying on the "withdrawal" of the Final Determination as a basis for avoiding its obligation to confront fully its prior record, findings and judgments. *Supra*, p. 15.

CONCLUSION

The motions to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response complies with the word limit prescribed in Fed. R. App. P. 29(d)(2) and that, according to Microsoft Word, the portions of this document that are properly counted under the rule contain 5,042 words.

/s/ *Sean H. Donahue*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2018, the foregoing Response and accompanying Appendix were filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ *Sean H. Donahue*