



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

December 22, 2016

OFFICE OF
AIR AND RADIATION

Mr. Mitch Bainwol
President and CEO
Alliance of Automobile Manufacturers
803 7th Street, N.W.
Washington, D.C. 20001

Dear Mr. Bainwol:

Thank you for your letter dated December 8, 2016, to U.S. Environmental Protection Agency Administrator Gina McCarthy, regarding the Midterm Evaluation Proposed Determination. In your letter, you request that the EPA either withdraw the Proposed Determination or extend the comment period to at least 120 days. The Administrator has asked that I reply on her behalf.

The EPA has considered your request, as discussed below. The EPA continues to believe that the Proposed Determination and the associated 30-day comment period remain appropriate and, therefore, the EPA is denying both the request for withdrawal and the request for an extension of the comment period. In summary, as discussed further below, the EPA regulations governing the Midterm Evaluation set forth a process where the EPA moves forward with a Proposed Determination on the appropriateness of the model year 2022-2025 (MY) greenhouse gas (GHG) emissions standards and only if the determination is that the standards should be changed, is the EPA required to conduct a rulemaking. The regulations make it clear that a Proposed Determination not to amend the MY2022-2025 standards is not a rulemaking. The analysis for the Proposed Determination is consistent with the analysis presented in the July 2016 Draft Technical Assessment Report (TAR), updated to reflect information we received through public comments, and is directly responsive to those comments. The EPA believes the comment period for the Proposed Determination is sufficient in light of the limited new data and information presented therein, and the extensive comments we received on the Draft TAR, which formed the technical underpinnings of the Proposed Determination. The Administrator has moved forward with the Proposed Determination based on an extensive technical record developed over several years of research, analysis, and public input, with the recognition that lead time and regulatory certainty are critical to the auto industry.

Your letter states that the EPA is not following the process envisioned for the Midterm Evaluation. The Midterm Evaluation process the EPA has followed, including the Proposed Determination and associated comment period, is fully consistent with the EPA regulations governing the Midterm Evaluation. The regulations at 40 CFR 86.1818-12(h)(2) specify that the determination shall be “based upon a record that includes the following:

- A draft Technical Assessment Report addressing issues relevant to the standard for the 2022 through 2025 model years;
- Public comment on the draft Technical Assessment Report;

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 50% Postconsumer content)

- Public comment on whether the standards established for the 2022 through 2025 model years are appropriate under section 202(a) of the Clean Air Act; and
- Such other materials the Administrator deems appropriate.”

The EPA released the Draft TAR, jointly with the National Highway Traffic Safety Administration and the California Air Resources Board, in July 2016 and the Administrator has considered public comments on the Draft TAR in making her Proposed Determination that the standards remain appropriate under section 202(a) of the Clean Air Act. The EPA is now seeking public comment on the Proposed Determination, as required by the regulations.

In your letter you assert that the Proposed Determination is subject to the procedural requirements enumerated in section 307 of the Clean Air Act, specifically citing to section 307 (d) (1) (K) which applies to the “promulgation or revision of regulation under section [202] and test procedures for new motor vehicles under section [206], and the revision of a standard under section [202 (a)(3)]. You note that section 307 mandates specific rulemaking procedures, including opportunity for a public hearing, which were not afforded here. The EPA disagrees that the Proposed Determination is a rulemaking covered by section 307 requirements. The Proposed Determination is not a promulgation or revision of a section 202 regulation (and also is not a revision of a test procedure, or a revision of a section 202 (a)(3) standard). We proposed to make a finding that it is appropriate (within the meaning of section 202 (a)(1) of the Act) to retain the MY 2022-2025 standards unaltered in all respects. Such a finding – not to engage in any rulemaking -- is simply not the promulgation or revision of a regulation. It is well established law that “(n)ot modifying a rule is not the same as ‘formulating, amending, or repealing a rule’, the [Administrative Procedure Act] definition of ‘rule making’. 5 U.S.C. § 551(5).” *ICORE, Inc. v. FCC*, 985 F. 2d 1082, 1075 (D.C. Cir. 1993) (emphasis original). The facts in *ICORE* were like those here: “when the FCC in 1990 reviewed the promised NECA study and adopted its conclusion that *no* new transition rule was needed, it did not thereby adopt a new rule.” (985 F. 2d at 1075) (emphasis original).

The structure of the EPA Midterm Evaluation regulations also makes clear that a Proposed Determination not to amend the MY 2022-2025 standards is not rulemaking. The regulation states that “[i]f the Administrator determines that the standards are not appropriate, the Administrator shall initiate a rulemaking to revise the standards.” Section 86.1818-12 (h). The implication is that a decision not to amend is not rulemaking. The distinction between an action determining not to amend the standards and a rulemaking to change them is confirmed by the language of the 2012 preamble adopting that regulation, which states that “[i]f based on the evaluation, the EPA decides that the GHG standards are appropriate under section 202(a), the EPA will announce that final decision and the basis for EPA’s decision” but that “[w]here the EPA decides that the standards are not appropriate, the EPA will initiate rulemaking to adopt standards that are appropriate under section 202(a)...” 77 FR 62624, 62784 (Oct. 15, 2012). The EPA thus does not accept the argument that the Proposed Determination is the revision or promulgation of a Clean Air Act Section 202 standard.

The EPA also does not agree with the Alliance’s claim that the Proposed Determination was required to undergo OMB review because it exceeds the threshold under Executive Order 12866 of a “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.” The 2012 rulemaking that established the model year 2017-2025 standards was subject to interagency review as required by Executive Order 12866, but since the Proposed Determination is not a rulemaking and the EPA is not proposing to change the standards for model years 2022-2025, it is not subject to interagency review.

With regard to coordination with the NHTSA and CARB, the EPA Midterm Evaluation regulation gives the EPA the exclusive authority to determine the appropriateness of EPA's model year 2022-2025 greenhouse gas standards. While this is an EPA proposed decision, we consulted with our partners at NHTSA and CARB regarding its contents, and developed the Draft TAR, which serves as a technical underpinning of the Proposed Determination, jointly with NHTSA and CARB. This coordination is in keeping with maintaining a single national car program which, from the beginning, has been critically important to the automotive industry and something to which the EPA, NHTSA and CARB have been, and continue to be, fully committed.

Again, thank you for your letter. I appreciate the opportunity to be of service and hope this response has been helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read "Janet G. McCabe".

Janet G. McCabe
Acting Assistant Administrator