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Attn: Docket Nos. EPA-HQ-OAR-2018-0283/ NHTSA-2018-0067

Re: Supplemental Comment and Request for Correction regarding the Proposed “Safer Affordable Fuel Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks.” 83 Fed. Reg. 42986 (Aug. 24, 2018)

The States of New York, Colorado, Connecticut, Delaware, Maine, Maryland, New Jersey, Oregon, Vermont, Washington, and the Commonwealths of Massachusetts and Pennsylvania (State Commenters) respectfully submit this supplemental comment and request for correction on the Environmental Protection Agency’s (EPA) and National Highway Traffic Safety Administration’s (NHTSA) (collectively referred to as “the agencies”) proposed rule entitled “The Safer Affordable Fuel Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42986 (Aug. 24, 2018). This supplemental comment and correction request are made in response to EPA’s and NHTSA’s recent, and very belated, responses to Freedom of Information Act (FOIA) requests that New York sent to the agencies in early September of 2018.

New York’s FOIA requests asked the agencies to provide all agency records substantiating the agencies’ asserted compliance with the state consultation requirements in Executive Order 13,132 (64 Fed. Reg. 43255, (Aug. 4, 1999)) in developing the proposed rule. The Executive Order requires that when, as here, agencies propose through rulemaking to preempt state law, they must, inter alia, consult with state officials “early in the process of developing the proposed regulation.” (64 Fed. Reg. at 43258.) Contrary to the statement in the proposal that “[t]he agencies complied with Order’s requirements” (83 Fed. Reg. at 43476), the FOIA responses now confirm that the agencies have not complied with the Executive Order. The agencies should accept this supplemental comment into their rulemaking dockets because

the delay in submitting the comment is attributable entirely to the agencies' late responses to the FOIA requests. Had EPA and NHTSA complied with their legal obligations under FOIA, then State Commenters would have been able to submit this comment prior to the close of the comment period on the proposed rule on October 26, 2018. However, the agencies failed to comply with FOIA, forcing New York to file a lawsuit to obtain a court order compelling responses. (*New York v EPA, et al.* S.D.N.Y Case No. 1:19-cv-00712-KPF.) NHTSA provided its response on May 29, 2019, while EPA provided its response on July 9, 2019.

This supplemental comment augments the comment submitted by State Commenters along with other states and cities on October 26, 2018, disputing the agencies' assertion that they had complied with Executive Order 13,132 in developing the proposed rule. (83 Fed. Reg. at 43476.) As the October 26, 2018 comment letter observed, the agencies failed to provide any explanation or to refer to any documents to substantiate their assertion that they consulted with our states regarding their preemption proposals as mandated by the Executive Order. The letter also noted that our states and other commenters were unaware of any effort by EPA or NHTSA to consult with states about the agencies' preemption proposals. The agencies' recent FOIA responses now confirm that neither EPA nor NHTSA consulted with our states "early in the process of developing their preemption proposals," nor have they consulted with our states about the preemption proposals at any subsequent time. Thus, the agencies' assertions that they complied with Executive Order 13,132 in developing the proposed rule are false. State Commenters therefore request that the agencies withdraw the proposed rule and fully comply with the Executive Order's consultation requirement before issuing any further proposed rule(s) of a similar effect.

In addition to this supplemental comment, State Commenters hereby submit to EPA and NHTSA a request for correction under the Information Quality Act ("IQA") and the agencies' respective guidelines for information quality and corrections.¹ The IQA requires that information disseminated to the public by federal agencies meet standards of "quality, objectivity, utility and integrity" and that agencies allow "affected persons to seek and maintain correction of information" that fails to comply with relevant information-quality standards. (IQA, Section 515(b)(2)(A) and (B).) The recent FOIA responses confirm that EPA and NHTSA are unable to substantiate the claim that they consulted with our states about their proposals to preempt our states from maintaining our respective Advanced Clean Cars standards for model years 2021 and beyond. Thus, the assertion of compliance with Executive Order 13,132 is inaccurate and must be corrected for the benefit of all stakeholders, including, but not limited to, reviewers at the

¹ See Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 Appendix C; ENVTL. PROT. AGENCY, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (2002); U.S. DEP'T OF TRANSP., *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Department of Transportation* (2002); see also, Office of Management and Budget *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* (67 Fed. Reg. 8451 (Feb. 22, 2002).)

Office of Information and Regulatory Affairs, states affected by the preemption proposal, and members of the public.

The bases for this supplemental comment and request for correction are described further below.

BACKGROUND

Section 177 of the Clean Air Act authorizes “any State which has plan provisions approved under this part” to adopt California motor vehicle emission standards subject only to two conditions: 1) the standards must be identical to California standards for which a waiver has been granted for the particular model year; and 2) California and any adopting state must have adopted the standards at least two years before commencement of such model year. (42 U.S.C. § 7407.) Our States have all adopted California’s Advanced Clean Cars standards for the 2021-2025 model years, which are now threatened by the agencies’ preemption proposals. We are relying on these standards both to meet state greenhouse gas reduction targets and to reduce vehicle emissions of oxides of nitrogen, particulate matter and volatile organic compounds in order to attain and/or maintain compliance with national ambient air quality standards for ozone pollution.

EPA and NHTSA have proposed three separate preemption actions in the proposed rule that would prevent our states from implementing and enforcing our Advanced Clean Cars standards for model years 2021-2025, including: 1) NHTSA’s proposed regulation purporting to find that California’s motor vehicle greenhouse gas emission standards and zero emission vehicle standards are preempted, thereby precluding our states from adopting, implementing, or enforcing our own corresponding standards; 2) EPA’s proposed revocation of California’s Clean Air Act preemption waiver for California’s model-year 2021-2025 motor vehicle greenhouse gas emission standards and zero emission vehicle standards, which would have the effect of also preempting our states’ authority to continue to implement and enforce those standards; and 3) EPA’s proposed “new interpretation” of Section 177 which would still preempt our states’ authority to continue to implement and enforce California’s model year 2021-2015 motor vehicle greenhouse gas emission standards even in a scenario where California’s corresponding standards are not preempted and remain in effect.² EPA and NHTSA acknowledge the federalism implications of these proposals, and concede that the consultation requirements in Executive Order 13,132 are applicable here. (83 Fed. Reg. at 43476.)

Because the proposed rule’s assertion of compliance with Executive Order 13,132 includes no explanation or reference to supporting evidence, New York sent FOIA requests to EPA and NHTSA to ascertain what evidence the agencies were relying on to support their

² As stated in the October 26, 2018 comment letter, these preemption proposals are all *ultra vires*, arbitrary and capricious actions that will not withstand legal challenge. Nonetheless, EPA and NHTSA still have a duty to consult with states regarding the federalism implications of their proposals.

assertion of compliance. The agencies' FOIA responses, copies of which are attached hereto, fail to provide any evidence of the consultation mandated by the Executive Order:

EPA's FOIA Response: EPA did not provide or identify any responsive records. Its response, which took over ten months to formulate, consisted of just two sentences: "There may be records that respond to the subject matter of your request in the publicly available rulemaking docket, which may be accessed and searched at <https://www.regulations.gov/docket?D=EPA-HQ-OAR-2018-0283>. EPA conducted a reasonable search and did not locate any additional responsive records, beyond those records that are publicly available on EPA's rulemaking docket." Our diligent search of EPA's rulemaking docket, however, reveals that there are no agency records evidencing that EPA consulted with our states, or any other states, "early in the process of developing" EPA's proposed waiver revocation or its proposed new interpretation of Section 177.

NHTSA's FOIA Response: NHTSA responded by providing 44 pages of materials, all of which post-date the proposed rule's publication, and none of which evidence any consultation with our states regarding NHTSA's preemption proposal. The materials include several letters from states and municipalities requesting an extension of the comment period and NHTSA's letters denying the requests; comment letters from municipalities and states both opposing and supporting the proposed rule and NHTSA form letters acknowledging receipt of those comments; and copies of some of the envelopes which contained the comment letters. NHTSA's response also advised New York that "the NHTSA docket for the Notice of Proposed Rulemaking for the SAFE Vehicles Rule contains a number of documents reflecting input and communications from individuals and entities, including states," and that Section VI of the proposed rule "contains an extensive discussion of federalism and preemption matters pertaining to the proposed rule." However, neither the agency records produced by NHTSA nor the rulemaking docket or proposed rule section cited by NHTSA provide any evidence that NHTSA consulted with our states, or any other state, "early in the process of developing" its proposed preemption regulation.

SUPPLEMENTAL COMMENT

EPA's and NHTSA's recent FOIA responses confirm the accuracy of what State Commenters pointed out when commenting on the proposed rule in October 2018: neither agency consulted with our states regarding the federalism impacts of their preemption proposals "early in the process of developing the proposed regulation." This failure to consult unequivocally violates the requirements of Executive Order 13,132; thus the proposed rule's recitation that the agencies complied with the Executive Order is false and misleading. While the agencies' FOIA responses point to communications to and from states after publication of the proposed rule in the Federal Register, none of those communications evidence consultation regarding preemption as required by the Executive Order. Those communications reflect merely that the agencies are employing a notice and comment process. Executive Order 13,132's requirement for consultation with state officials "early in the process of developing the proposed regulation," however, is over and above the minimum due process mandated by the

Administrative Procedure Act.³ State Commenters therefore request that the agencies withdraw the proposed rule and fully comply with the Executive Order before issuing any further proposed rule(s) of a similar effect. The devastating impacts these preemption proposals would have on the health and safety of our residents, and their severe incursion into our states' authority and our ability to exercise that authority to protect our residents, demand nothing less.

REQUEST FOR CORRECTION

Under the Information Quality Act (IQA), as implemented through Guidelines published by the Office of Management and Budget (OMB) and the agencies, State Commenters include with this supplemental comment a request for correction, asking that the agencies resolve the factual inaccuracy and misleading representation in their statement of compliance with Executive Order 13,132. The EPA and DOT guidelines require that all information disseminated by the agencies meet a standard for objectivity, which requires information to be "accurate, clear, complete, and unbiased." (EPA Guidelines, *supra* note 1, at 15; DOT Guidelines, *supra* note 1, at 15.) EPA's Guidelines (at page 15) and DOT's Guidelines (at page 12) also make clear that Federal Register publication of a rulemaking proposal, such as the proposal at issue here, constitutes dissemination of information to the public. Because EPA and NHTSA cannot identify any information or documents to show that they consulted with our States early in the process of developing their preemption proposals, or at any other time, their assertion of compliance with Executive Order 13,132 is not accurate.

The inaccurate language is located in in Section XII, subsection G of the proposed rule in the paragraph discussing Executive Order 13,132. The final sentence of the paragraph states that "[t]he agencies complied with [the] Order's requirements." 83 Fed. Reg. at 43476. This statement is false and is therefore inconsistent with the IQA and the OMB and agency guidelines, and must be corrected. The correction should state that "the agencies did not comply with the Executive Order 13,132's requirements." This correction is necessary for the benefit of all stakeholders, including, but not limited to, reviewers at the Office of Information and Regulatory Affairs, states affected by the preemption proposal, and members of the public, as well as to create an accurate record for any reviewing court.

Given the agencies' delays in responding to the FOIA Requests that they received in September 2018, the comment period for the rulemaking proposal ended before State Commenters had the necessary information to request this correction. Therefore, State Commenters could not have made this request prior to the close of the comment period and the agencies should give this request full consideration.

Thank you for your attention to these matters. Please contact the undersigned if you have any questions or wish to discuss these issues.

³ As stated in the October 26, 2018 comment letter, the agencies' rulemaking process fails to comply with the Administrative Procedure Act in various respects.

Respectfully submitted,

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