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Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards
Dockets: EPA–HQ–OAR–2009–0472 and NHTSA-2009-0059

Administrator Jackson and Acting Administrator Medford:

The American Petroleum Institute (API) respectfully submits these comments on the Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Proposed Car Rule), 74 Fed. Reg. 49454 (September 28, 2009), issued jointly by the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA).

The American Petroleum Institute (API) appreciates the opportunity to provide comments on the above referenced proposed rulemaking. API is a national trade association representing nearly 400 member companies involved in all aspects of the oil and natural gas industry. API members are dedicated to meeting environmental requirements while developing and supplying economic energy resources for consumers. API members provide the fuels that keep America running.

These comments arise in the unique context of two separate agencies, proposing to take two separate actions, under two different statutes, but through a single set of regulatory requirements to accomplish a single set of results – that is, the improvement of new car and light duty truck fuel economy, which, in turn, will reduce greenhouse gas (GHG) emissions. API recognizes EPA's desire to act quickly to address GHG emissions from mobile sources, and further recognizes NHTSA's urgent need to set new fuel economy standards, since those standards must be promulgated at least 18 months before the affected model year (in this case the 2012 model year). 49 U.S.C. § 32902(g)(2).

However, and even though the direct emissions reductions and fuel economy costs and benefits of the proposed EPA action and the proposed NHTSA fuel economy standards are nearly identical, the

proposal entirely ignores the fact that the EPA regulations, if finalized, would have dramatically broader and more costly effects than the NHTSA rule. Unlike NHTSA action to raise corporate average fuel economy (CAFE) standards, new EPA standards promulgated under the Clean Air Act (CAA) would have regulatory impacts reaching far beyond the automotive industry and would trigger EPA regulation of GHG emissions from millions of sources never previously subject to regulation of GHG emissions, including millions of sources not previously subject to any CAA regulation at all.

Thus, while API has only very focused objections to NHTSA increasing CAFE standards in the manner proposed, *see* Part IV *infra*, API strongly objects to EPA finalizing its proposed rule under CAA section 202 authority. API urges EPA to assess and address the dramatically adverse impacts of its proposal under CAA section 202 before finalizing its rule. EPA *must* assess and appropriately minimize these impacts, within this rulemaking if EPA is to promulgate section 202(a) standards that are not flawed as a matter of law.

First, EPA must acknowledge that only pollutants for which a National Ambient Air Quality Standard (NAAQS) has been set trigger Prevention of Significant Deterioration (PSD) permitting requirements.

Second and alternatively, EPA has the full authority and discretion to defer finalizing CAA section 202(a) standards at this time. If it did so, NHTSA still could finalize its regulations, and all of the emissions reductions benefits of the proposal would be realized, but the adverse PSD consequences would be avoided. Furthermore, this path would give EPA the necessary time to conduct a sufficient review and analysis of the actual impacts and costs of its section 202(a) rulemaking – an analysis that EPA plainly has not yet performed and which is a necessary but not yet present component of the CAA section 202(a) rulemaking record. And it would allow EPA more time to mitigate the adverse impacts that would result from a finalized Car Rule. Even if EPA proceeds to issue a positive endangerment determination under CAA section 202(a) in the next few weeks or months, EPA would be well within the scope of its legal authority and discretion to wait until a later time to issue section 202(a) standards. And, in fact, EPA would abuse its discretion and act arbitrarily if it did not conduct the proper analysis before finalizing any standards.

I. EPA Cannot Finalize the 202 Rule Before Evaluating and Addressing Its Impacts on Stationary Sources

EPA has stated – albeit in different rulemaking proceedings – that the effect of the Proposed Car Rule goes far beyond cars. EPA has repeatedly stated that this rulemaking alone will trigger PSD permitting requirements for GHG emissions at millions of stationary sources throughout the United States that had never before been subject to CAA regulation. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (Proposed PSD Tailoring Rule), 74 Fed. Reg. 55292, 55294 (October 27, 2009); Prevention of Significant Deterioration: Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program (PSD Interpretive Memo Reconsideration), 74 Fed. Reg. 51535, 51547 (October 7, 2009). EPA frankly recognizes the consequences that it would trigger by finalizing the Proposed Car Rule:

> [T]he administrative burdens would be immense, and they would immediately and completely overwhelm the permitting authorities. [P]ermitting authorities would receive approximately 40,000 PSD permit applications each year—currently, they receive approximately 300—and they would be required to issue title V permits for approximately some six million sources—currently, their title V inventory is some 15,000 sources. These increases are measured in orders of magnitude.

Proposed PSD Tailoring Rule, 74 Fed. Reg. at 55295. Thus, as EPA itself has stated, finalizing the Proposed Car Rule under CAA section 202(a) would trigger PSD requirements that constitute "absurd results," "run contrary to expressed congressional intent for the PSD and title V provisions, and, in fact, severely undermine both programs." *Id.* at 55303.

a. EPA's Proposed Rule Unlawfully Fails to Analyze Its Effects

Despite the dramatically adverse consequences that EPA has stated will follow from its Proposed Car Rule, EPA has done nothing in the proposal or in the accompanying regulatory impact analysis to quantify, much less justify, these costs and burdens. Neither EPA's preamble, nor its proposed rule, nor its regulatory impact analysis mention the PSD ramifications, much less provide the necessary thorough consideration of them. This is not only remarkable; it is unlawful. EPA's statements make plain that the impacts on stationary sources are the *most* significant effect of the Proposed Car Rule. Given the failure to assess the true and full impacts of the rule, finalizing this proposed rule would violate a host of statutes governing agency decision making.

The Paperwork Reduction Act requires EPA to seek approval from the Office of Management and Budget ("OMB") prior to engaging in rulemaking that will involve information collection requirements. 44 U.S.C. §§ 3501-3521. In the Proposed Car Rule, EPA estimates that "the total annual burden associated with this proposal is about 39,900 hours and $5 million, based on a projection of 33 respondents." 74 Fed. Reg. at 49628. However, EPA has estimated that the new PSD and Title V requirements triggered by the Proposed Rule will cost more than $54 billion. EPA, Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule, Attachment C, at 8 (September 2009). The Agency should resubmit the information collection approval request to OMB with a proper and fully inclusive analysis. Otherwise, the Agency will lack authority to collect information from stationary sources for PSD and Title V GHG emissions permitting.

In addition, the Regulatory Flexibility Act ("RFA") requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. §§ 603(a) & 605(b). A small entity is defined as a small business, small organization, or a small governmental jurisdiction. 5 U.S.C. § 601(6). EPA declined to conduct a regulatory flexibility analysis of the Proposed Car Rule, "because [it] propos[es] to certify that the rule would not have a significant economic impact on a substantial number of small entities." 74 Fed. Reg. at 49629. But EPA only accounted for light-duty motor vehicle manufacturers when making this assertion, and made no mention of the millions of small businesses, hospitals, schools, small government entities, and others that will be dramatically impacted by PSD regulation of GHGs, which EPA itself has stated will be the consequences of finalizing the Proposed Car Rule.

The Proposed Car Rule's only oblique reference to the regulatory consequences of the rule on stationary sources is a short paragraph at 74 Fed. Reg. 49629. In it, EPA "recognizes that some small entities continue to be concerned about the potential impacts of the statutory imposition of PSD requirements that may occur given the various EPA rulemakings currently under consideration concerning greenhouse gas emissions." *Id.* Yet, rather than actually account for these impacts, EPA claims to use "the discretion afforded to it under section 609(c) of the RFA to consult with OMB and SBA, with input from outreach to small entities, regarding the potential impacts of PSD regulatory requirements as that might occur as EPA considers regulations of GHGs. Concerns about the potential impacts of statutorily imposed PSD requirements on small entities will be the subject of deliberations in that consultation and outreach." *Id.*

There is no policy justification, and no legal basis, for this approach. EPA states in the Proposed Car Rule that "potential impacts" of PSD regulation of GHGs "may occur" due to some current, unnamed EPA rulemaking. Elsewhere the Agency has been more straightforward:

> EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, *as a result, trigger PSD* and title V applicability requirements for GHG emissions. When the light-duty vehicle rule is finalized, the GHGs subject to regulation under that rule *would become immediately subject to regulation under the PSD program.*

74 Fed. Reg. at 55294 (emphasis added). If EPA chooses to treat the PSD trigger as fact in the Proposed PSD Tailoring Rule, it must be treated similarly in the Proposed Car Rule, and EPA should accurately account for all direct small business impacts in a regulatory flexibility analysis. Furthermore, EPA's suggestion that it could "certify that the rule would not have a significant economic impact on a substantial number of small entities," 74 Fed. Reg. at 49629, is irrational and unsupportable. EPA has outlined the dramatic effects of GHG PSD regulation in the Proposed PSD Tailoring Rule, and it has attributed that regulation to this Proposed Car Rule.

EPA's reliance on Section 609(c) of the RFA to avoid the required analysis is equally illogical. That section authorizes EPA to forgo the statutory requirement to "prepare and make available for public comment an initial regulatory flexibility analysis" describing the rule's impact on small entities. 5 U.S.C. § 603(a). The RFA directs that this analysis "shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule." Thus, 609(c) does not exempt EPA from these clear mandates—rather, Section 609's small entity outreach "requirements apply *before* the EPA proposes a rule." *West Va. Chamber of Comm. v. Browner*, 166 F.3d 366, 1998 WL 827315, *3 (4th Cir. 1998).

Finally, EPA has attempted to evade the cost-benefit analysis required by Executive Order 12866, by ignoring what it has identified as the principal cost of the Proposed Car Rule. Nowhere in the Proposed Car Rule does it account for the more than $50 billion in permitting costs that, according to EPA, will follow from its proposed rule.

b. <u>EPA May Not Shunt Comments Regarding the Effects of its Proposed Car Rule to the Proposed Tailoring Rule</u>

Although EPA has mostly avoided addressing the PSD consequences of its Proposed Car Rule, its one reference suggests that it is pushing off comment on these consequences to the Proposed PSD Tailoring Rule docket: "Concerned small entities should direct any comments relating to potential adverse economic impacts on small entities from PSD requirements for GHG emissions to the docket for the PSD tailoring rule." 74 Fed. Reg. at 49629. But EPA may not ignore these comments, which are properly addressed to the Proposed Car Rule as well.

First, the Proposed PSD Tailoring Rule identifies the Proposed Car Rule as the regulatory action that triggers the PSD requirements imposed on small businesses. 74 Fed. Reg. at 55294. In fact, the Proposed PSD Tailoring Rule suggests that it "does not impose any new burden" and instead "provides temporary regulatory relief." EPA, Regulatory Impact Analysis for the Proposed Greenhouse Gas Tailoring Rule at 4 (September 2009). Thus according to the Proposed Car Rule, the Proposed Car Rule imposes no burdens on small businesses, and all comments should be directed to the Proposed PSD Tailoring Rule – but according to the Proposed PSD Tailoring Rule, the Proposed Car Rule imposes all the burdens on small businesses, and the Proposed PSD Tailoring Rule only relieves them. This raises the disturbing possibility that EPA is trying to avoid *ever* calculating, accounting for, or addressing the

consequences of imposing PSD requirements for GHGs. It appears that EPA is engaging in a regulatory shell game, which is not sustainable as a matter of law or policy.

Second, it is not at all clear that the Proposed PSD Tailoring Rule can relieve all the burdens on small emitters. The Proposed PSD Tailoring Rule directly conflicts with clear statutory language and is therefore unlikely to survive judicial scrutiny. The CAA will likely be interpreted to forbid the threshold raising proposed by that rule, because the CAA directs that PSD regulation apply to "any . . . source with the potential to emit two hundred and fifty tons per year or more" of a PSD pollutant. 42 U.S.C. § 7479(1). *See* Center for Biological Diversity Comments on EPA's Advance Notice of Proposed Rulemaking at 24 ("The EPA has no authority . . . to designate a 'de minimis' level of GHG emissions that is higher than the 250 ton per year threshold. . . . The PSD threshold requirements do not present one of those rare cases in which congressional intent differs from the plain meaning of the statutory language.")

Furthermore, EPA must consider the impact of its rule on larger emitters that will, for the first time, be subject to BACT controls and permitting requirements for GHGs. EPA has repeatedly acknowledged that imposing BACT controls for GHGs presents special problems, and it must consider those problems when it imposes them upon regulated entities. And the permitting requirements that will delay the smallest projects will delay major sources as well, because those sources have never previously needed permits for GHG emission increases.

Finally, while the Proposed Car Rule could trigger PSD requirements for GHGs nationwide, the Proposed PSD Tailoring Rule will not ameliorate the harm of these requirements on sources in states that administer their own PSD programs, or in state programs that refer to the federal definition of "regulated pollutant," which would require permitting even if the Proposed PSD Tailoring Rule was finalized. As EPA notes: "the lower thresholds remain on the books under State law, and sources therefore remain subject to them as a matter of State law." Proposed PSD Tailoring Rule, 74 Fed. Reg. at 55343. And EPA's attempts to retroactively revise its State Implementation Plans for states are also unlikely to withstand judicial scrutiny. Thus, EPA cannot shunt all discussion of the Proposed Car Rule's impact into the Proposed PSD Tailoring Rule, because the tailoring rule will not blunt the impact of the Proposed Car Rule in many areas of the country. In sum, EPA must consider the consequences of its Proposed Car Rule within this rulemaking.

II. EPA's View that Issuance of the Proposed Car Rule Automatically Triggers PSD Based Solely on Emissions of GHGs Is Inconsistent with the Plain Meaning of the CAA and EPA's Regulations

EPA could properly decline to consider the PSD impacts of the Proposed Car Rule in this rulemaking docket *only* if those impacts would not, in fact, result from the Rule. EPA has stated that PSD requirements will be triggered when the Proposed Car Rule first subjects GHG emissions from cars to control—that is, model year 2012. *See* PSD Interpretive Memo Reconsideration, 74 Fed. Reg. at 51545–46. But EPA can interpret the statute and regulations to largely avoid that result.

The immense burdens associated with PSD permitting that the Agency states would follow from issuance of the Proposed Car Rule is not mandated by the Clean Air Act or the PSD regulations but rather is the result of *EPA's interpretations* of the statute and regulations. EPA's textual analysis, however, skips a crucial step, which is whether the PSD program is actually applicable under the plain language of the statute and regulations to sources that are major only by virtue of GHG emissions or to increases in GHG emissions when a criteria pollutant is not otherwise experiencing a significant increase.

The first step in PSD applicability analysis for a new source or a modified existing source is whether Part C of the statute or Section 52.21 of the regulations applies. CAA Sections 161 and 165 precondition applicability of the PSD program to those areas designated as attainment or unclassifiable under Section 107 for a NAAQS. Specifically, Section 161 states that EPA is to promulgate regulations "to prevent significant deterioration of air quality *in each region ... designated pursuant to section 107 [NAAQS designations] as attainment or unclassifiable.*" 42 U.S.C. § 7471 (emphasis added). Section 165(a) prohibits construction of a major emitting facility "in any area *to which this part applies*" unless the PSD permit requirements are met. 42 U.S.C. 7475(a) (emphasis added). The applicability of the PSD program in a given area must be based on the attainment status of the area for the pollutant in question. The Clean Air Act designates an area as "attainment" if it "meets the national primary or secondary ambient air quality standard for the pollutant," and designates an area "unclassifiable" if it "cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. 7407(d)(1)(A). Thus, under the Clean Air Act, an area can only be designated as attainment, non-attainment, or unclassifiable in relation to a NAAQS.[1] So, the Act's plain language indicates that the PSD pre-construction permit program only applies to sources that emit threshold levels of a pollutant for which the source's location is in attainment with a NAAQS. Consequently, PSD permitting requirements can only be triggered in the first instance by pollutants for which there is a NAAQS.

EPA's regulations contain the same geographic limitations. Section 52.21(a)(2) of the regulations similarly provides "applicability procedures" for PSD, stating that PSD applies to "the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source *in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.*" *Id.* (emphasis added). These provisions clearly indicate that an area must be designated as attainment or unclassifiable with the NAAQS for a pollutant before PSD applies.

It is only in defining and requiring "best available control technology" that the statute imposes requirements on pollutants "subject to regulation." CAA §§ 165(a)(4), 169(3). Thus, while BACT may well apply to pollutants subject to regulation, BACT is only required if the PSD program itself is otherwise applicable. Accordingly, if a source makes a modification that increases emissions significantly of a NAAQS pollutant, all pollutants "subject to regulation" must be controlled. Nothing in the statute or regulations, however, requires a source that is major to be subject to the significance levels for non-NAAQS pollutants if there is no significant increase of a NAAQS pollutant for which the source is designated attainment or unclassifiable.

This plain language reading is also consistent with the holding in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), where the court found that location is the key determinant for PSD applicability and rejected EPA's contention that PSD should apply in all areas of the country, regardless of attainment status. EPA had argued that PSD permitting requirements should apply not only to attainment areas for a given pollutant, but to anywhere that a new emitting facility would "adversely affect the air quality of an area to which" PSD requirements apply. *Id.* at 364. The court held that this interpretation violated the CAA's plain language. *Id.* at 364–68. The court stated: "The plain meaning of the inclusion in [42 U.S.C. § 7475] of the words 'any area to which this part applies' is that Congress intended location to be the key determinant of the applicability of the PSD review requirements." *Id.* at 365.

[1] It is noteworthy that even classifying a region as "unclassifiable" requires determining whether one can measure if the pollutant exceeds "the national primary or secondary ambient air quality standard for the pollutant." *Id.*

In its regulatory response to the *Alabama Power* decision, EPA gave this ruling limited effect by an interpretation of PSD requirements in the Preamble to the 1980 PSD regulations. 45 Fed. Reg. 52675, 52676 (Aug. 7, 1980). The 1980 Preamble stated that PSD requirements still apply to any area that is "designated . . . as 'attainment' or 'unclassifiable' for *any* pollutant for which a national ambient air quality standard exists." This is inconsistent with the Clean Air Act, which compels the contrary interpretation that PSD is triggered only when a *major source* is located in an attainment area or unclassifiable area for the pollutant that the source will emit *in major amounts*.

EPA's 1980 interpretation has attracted little scrutiny because, to date, it has had negligible practical import. But now, this interpretation could trigger a host of absurd results that contravene congressional intent. EPA has itself recognized that the practical result of the 1980 interpretation is not desirable, specifically soliciting comment on an approach in which BACT would be applied to GHGs only in those cases where PSD permits are otherwise required for a source (i.e., where a source is triggering PSD for a NAAQS pollutant). Proposed PSD Tailoring Rule, 74 Fed. Reg. at 55,327. EPA thus can follow a straightforward, legally sound way of remedying the administrative and legal problems presented by the Proposed Car Rule by administering the statute under its plain terms.

To give effect to unambiguous terms of the statute (and regulations), therefore, EPA cannot require a source to undergo PSD permitting solely on the basis of emissions of a pollutant for which there is no NAAQS. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984) (agency must give effect to the unambiguously expressed intent of Congress).

III. EPA Should Exercise its Discretion to Defer Promulgation of a Section 202 Rule

EPA has clear legal authority to defer action on this rule, and should do so because the potential economic consequences of the rule are unprecedented and the environmental benefits of adding its imprimatur to the NHTSA rule are nearly nonexistent.

a. EPA Is Not Compelled to Act at This Time, and Should Exercise Its Discretion to Defer Finalizing New GHG Emissions Standards for Mobile Sources

EPA would be on solid legal ground in delaying taking final action on a section 202 rule at the present time. Courts generally apply a "rule of reason" in assessing delay in agency decision-making. *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). Although decisions related to human health and welfare can be made at a reasonably faster rate than economic regulations, courts also consider the "effect of expediting delayed action on agency activities of a higher or competing priority," the "nature and extent of the interests prejudiced by delay" and the potential for impropriety in the agency's inaction. *Id.* The complexity of environmental regulation also justifies lengthy agency deliberation. *See Sierra Club v. Thomas*, 828 F.2d 783, 799 (D.C. Cir. 1987) ("Given the complexity of the issues facing EPA and the highly controversial nature of the proposal, agency deliberation for less than three years – little more than one year since the close of the public comment period – can hardly be considered unreasonable."). Given the extraordinary complexity of evaluating the effect, burden, and cost of potential stationary source regulations that could result from EPA finalizing the current proposal with respect to mobile sources, under EPA's current interpretation of the CAA and its regulations, there are sound reasons for delaying a final rule at the present time if EPA does not first adopt the interpretation of the CAA and its regulations explained above, which would mitigate the effects of the section 202 rule on stationary sources. The most fundamental reason is that EPA should conduct the necessary analysis of the effects of its regulations before finalizing them. And, nothing would be sacrificed in terms of increased energy savings or reduced emissions because NHTSA

has the current statutory authority to finalize its proposal to increase CAFE standards and reduce fuel use and GHG emissions in the manner set forth in the Proposed Car Rule.

CAA section 202(a) does not compel EPA to establish standards for GHG emissions at any particular time. In *Massachusetts v. EPA*, the Supreme Court emphasized that EPA has significant discretion about the timing of any CAA section 202 regulations. The Court stated that if EPA makes a positive endangerment finding, "the CAA requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles," but "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." (Slip op. at 30). This is consistent with the general "rule of reason" that courts employ in assessing delay in agency decision-making. *Telecommunications Research*, 750 F.2d at 80.

Two lower courts have recognized EPA's discretion to delay both an endangerment finding and greenhouse gas regulation. *See* Petition for Writ of Mandamus to Compel Compliance With Mandate, Dkt. No. 03-1361 (D.C. Cir.). The D.C. Circuit rejected the petition in a *per curium* order (D.C. Cir. June 26, 2008). In a concurring opinion, Judge Tatel observed that "nothing in section 202, the Supreme Court's decision in *Massachusetts v. EPA*, or our remand order imposes a specific deadline by which EPA must determine whether a particular air pollutant poses a threat to public health or welfare." Slip op. at 2. As recognized in the opinion, the court has "often allowed delays significantly beyond a year, especially where, as here, the issue facing the agency was both complicated and controversial." *Id.* Similarly, the Northern District of California also rejected a petition for mandamus seeking compliance with the Supreme Court's mandate. *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, 2008 U.S. Dist. LEXIS 27794 at *10-11 (N.D. Cal. Mar. 28, 2008). Consistent with the D.C. Circuit's conclusion, the California court recognized that "[t]he Supreme Court was careful not to place a time limit on the EPA, and indeed did not even reach the question whether an endangerment finding had to be made at all. The notion that this Court would fill the void by ordering the EPA, by writ of mandamus, to immediately respond to the Supreme Court's decision is so far afield from notions of comity and propriety that it need not be seriously considered." *Id.*

EPA and NHTSA repeatedly emphasize in the joint proposal the "discretion" they enjoy with respect to the establishment of fuel economy or GHG emissions regulations, the consideration and weighing of relevant factors, and many other matters. *See, e.g.*, 74 Fed. Reg. at 49461 n. 19 (EPCA "gives NHTSA discretion to decide how to balance the statutory factors); 49463 (same); 49463 (NHTSA "discretion to decide what weight to give each of the competing policies and concerns and then determine how to balance them).[2] Yet despite EPA's emphasis on its discretion and the courts' clear acknowledgement of EPA's latitude as to timing, content and coordination of any section 202(a) regulations, EPA's proposal does not adequately acknowledge and certainly does not explain or justify the base decision to proceed with any section 202(a) regulations at all at the present time. EPA discusses at length both the legal basis for exercising discretion and its thinking process in exercising that discretion as to a whole variety of topics including the weighting of various statutory, economic or

[2] *See also* 49464 ("EPA is afforded considerable discretion under section 202(a) when assessing issues of technical feasibility and availability of lead time to implement new technology"); 49464 ("EPA has the discretion to consider different standards for appropriate groupings of vehicles"); 49464 ("EPA has the discretion to consider and weigh various factors along with technological feasibility, such as the cost of compliance, lead time necessary for compliance, safety and other impacts on consumers, and energy impacts associated with use of the technology") (citations omitted); 49465 ("CAA section 202(a) does not specify the degree of weight to apply to each factor, and EPA accordingly has discretion in choosing an appropriate balance among factors"); 49466 ("EPA has the discretion to take into consideration NHTSA's CAFE standards in determining appropriate action under section 202(a)"); 49509 ("Administrator has significant discretion in how to structure the standards that apply to the emission of the air pollutant or air pollutants at issue" under section 202(a)).

technological criteria. *Id.* But EPA has not adequately recognized, explained or justified the basic exercise of discretion to proceed with section 202(a) regulations at the present time. The proposal largely assumes the need for EPA to proceed with a section 202(a) rulemaking now – assuming it finalizes a positive endangerment determination – with barely a nod to the discretion EPA has and the decision it must make as to whether to proceed with section 202(a) regulations at all right now. That lack of acknowledgement or explanation for EPA's decision to proceed is arbitrary and capricious and does not constitute reasoned decision-making.

Second, even to the extent EPA asserts that isolated sentences (or perhaps the totality) of the proposal constitutes an explanation for why it has decided to issue regulations under section 202 at the present time, that explanation is inadequate as a matter of law. As described in Part I, it fails to take account of the potential consequences on stationary sources of the regulations EPA proposes to adopt. And, it attempts to claim as benefits of the section 202(a) rules benefits that would be brought about in full by NHTSA's adoption of increased CAFE standards under its own authority. The purported 202(a) benefits cannot properly justify EPA regulation under section 202(a) once EPA properly acknowledges and accounts for the enormous costs and burdens that may be imposed – and which EPA elsewhere has acknowledged – as a result of promulgating standards under section 202(a).

In exercising its discretion to proceed with a section 202(a) rulemaking, EPA of course must set forth reasons for its decisions. In the Proposed Car Rule, EPA and NHTSA state in general terms that "it is in the Nation's interest for the two agencies to work together in developing their respective proposed standards, and they have done so." 74 Fed. Reg. at 49466. While API certainly agrees that it is a good thing for agencies to work together and to harmonize regulations to the extent possible, that is not the same as a justification for proceeding with duplicative and unnecessary regulations in the first place – particularly where, as here, EPA has the legal authority and the discretion not to proceed with section 202(a) regulations at the present time, and by proceeding EPA believes it will trigger massive and costly consequences, particularly for stationary sources.

Furthermore, EPA has done nothing in the proposal to justify the exercise of its discretion in favor of regulation by balancing the benefits of the proposed regulations with their true burdens and costs – including resulting impacts on stationary sources. Instead, as noted above, neither the Proposed Car Rule, nor the PSD Interpretive Memorandum Reconsideration, nor the proposed endangerment determination, nor the Proposed PSD Tailoring Rule, considers the costs of regulating carbon dioxide under the CAA. Instead each proposal states that it is not the right one for consideration of the real impacts of regulating stationary source emissions of GHGs.

Even though the section 202(a) proposal concerns regulation of mobile source GHG emissions, it is *this* proposal which, if finalized, would (either when finalized or when the new 202 rules take effect in 2012) regulate GHG emissions and thus, under EPA's flawed interpretation, lead to PSD consequences for stationary sources. As a result, it is in *this* rulemaking that EPA must evaluate and consider those consequences. EPA not only has the discretion to do so, it must do so if it intends to make a decision to proceed that is not arbitrary and capricious and is based on an adequate record.

b. There Are Numerous Compelling Reasons to Defer the Section 202 Rule

As noted above:

- **Adding EPA's imprimatur to nearly identical NHTSA fuel economy standards will not achieve any marginal environmental benefit.**

- **NHTSA standards without this duplicative reliance on the CAA will not trigger PSD results that EPA has labeled "absurd, "impossible," and "contrary to expressed congressional intent."**
- **The fact that the timing of the 202 Rule is discretionary means that EPA's proposed PSD Tailoring Rule cannot be justified under the "absurd results" doctrine, and if the PSD Tailoring Rule is rejected the full range of "absurd" and "impossible" results *will* then flow from promulgation of the 202 rule.**

Further considerations also support this conclusion:

- **Ongoing congressional and international deliberations may impact the validity of, or perceived necessity for, the proposed rule.**

While NHTSA's authority to promulgate CAFE standards is clear, EPA's authority to pursue fuel economy standards under CAA section 202 is currently a matter of significant national debate. It makes little sense to push this joint rulemaking forward relying on dual statutory pillars when one of those pillars may be yanked out at any time due to congressional action or an international accord on GHG emissions. As long as there is little or no environmental benefit to adding EPA authority to NHTSA's unquestioned authority, EPA should pause to consider the consequences of these national and international discussions and activity.

- **EPA should follow regular procedures for promulgating its rules.**

Reports of a deal between EPA, NHTSA, automakers and the State of California indicate the EPA is committed to finalizing this proposed rule and that automakers will not speak in opposition to it no matter what the impacts to other industries. *See* May 18, 2009 letter from Alliance of Automobile Manufacturers to DOT and EPA ("If EPA proposes national GHG standards and NHTSA proposes CAFE standards for MY 2012-2016 as substantially described in the May, 2009 Notice, and the agencies adopt standards as substantially proposed, the Alliance will not contest these rules."). This deal has not been made part of the rulemaking record, nor does the record provide any explanation as to what compromises the parties to the deal have made. The public has had no opportunity to comment on the agreement, and EPA is proceeding on this predetermined nonpublic agreement in violation of procedural guarantees provided by law.

IV. Comments on Fuel Requirements in the Proposed Car Rule

a. Fuel Specification Changes

The proposed rule and Draft Technical Support Document outline several options available to automakers in achieving fuel economy improvements. One of the options is Gasoline Direct Injection (GDI) with lean burn technology. EPA and NHTSA state that sulfur specification below 15 parts per million (ppm) is a key technical requirement to enable lean burn GDI. The Alliance of Automobile Manufacturers is currently advocating a maximum allowable sulfur concentration of 10 parts per million to enable Lean Burn GDI[3]. However, EPA and NHTSA analyses did not consider lean burn GDI technology for the 2012-2016 timeframe of this rulemaking because of the cost and short compliance timeframe. Likewise, EPA should ensure that fuel specification changes should not be considered in this rulemaking without adequate consideration for the associated impacts on the refining industry. Since lean burn GDI technology is not necessary or even expected to be developed in order to comply with this rulemaking, a sulfur specification change is unnecessary.

[3] http://www.autoalliance.org/files/NationalCleanGasolineJune09.pdf

Long lead-times are necessary for fuel specification changes, in part because of the time required to make new capital investments in refineries. EPA recognized this fact in the Tier 2 Vehicle and Gasoline Sulfur Program which counted five years from the time the rule was signed until lower sulfur fuel was required, and was phased in over two years. This proposed rule will be implemented from 2012 to 2016, which does not leave adequate lead-time for refinery modifications to enable vehicle technologies that necessitate any fuel specification changes.

The Draft Technical Support Document considers the cost of various technological options automakers may pursue to reduce tailpipe GHGs and estimates that lean burn GDI is clearly one of the most expensive options. Moreover, this analysis does not consider the additional costs to the refining industry. These refinery capital investments are significant, because the cost of removing sulfur becomes more expensive with each incremental reduction in the sulfur level. There are also impacts on production capacity of refineries, as the removal of sulfur is energy intensive and effectively consumes a portion of the petroleum feedstock. The GHG impact associated with higher energy and hydrogen consumption at refineries should also be considered. Potential impacts on fuel supply and fuel prices are not considered in the EPA /NHTSA analysis, but had they been, they would have further demonstrated that fuel specification changes should not be considered as a part of this rulemaking.

b. Ethanol Blended Certification Fuel

EPA requires that fuel economy testing be performed with a standard fuel to control testing variability resulting from different fuel specifications. E-10 fuel was deemed "substantially similar" to gasoline in 1979 and is now the dominant fuel in the marketplace. The Renewable Fuel Standard ensures full E-10 gasoline market saturation within about three years. The complete market saturation necessitates a change in reference fuel specification used in the vehicle certification process. API supports a certification fuel which is blended with 10 volume percent ethanol to more accurately represent the fuel that vehicles will be operated on for the entirety of their expected useful life. The EPA Compliance and Innovative Strategies Division of the Office of Air and Radiation acknowledges that it is desirable to use a test fuel that is representative of commercially available fuels[4]. API also supports a California Air Resources Board certification fuel which is blended with ten volume percent ethanol. EPA should make this change effective beginning with the 2012 model year – the first year covered by this rulemaking.

EPA is currently considering an application from Growth Energy and other ethanol industry groups to issue a "substantially similar" waiver to allow ethanol blends up to 15 volume percent. Should EPA grant this waiver request, or any waiver request allowing more than ten volume percent ethanol, EPA should change the certification reference fuel to match the maximum allowable blend percentage to be considered substantially similar to gasoline. The volume requirements of the Renewable Fuel Standard ensure that the maximum amount of ethanol deemed substantially similar to gasoline will be the prevalent fuel in the marketplace. The ethanol concentration of the certification reference fuel should match the fuel that vehicles are expected to use.

c. Flexible Fuel Vehicle Credits

In Section III (C)(2)(b), EPA proposes that emissions standards for Flexible Fuel Vehicles (FFVs) be based on their actual carbon dioxide emissions in 2016 and later. The manufacturer would also be required to demonstrate that the alternative fuels are actually being used in the vehicles. EPA considers two methods for compliance, a top down approach based on aggregate data from the Department of Energy's Energy Information Administration, or a survey program based on data

[4] http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480688aa02

recorded in on-board systems and transmitted back to the manufacturer. The NPRM does not dictate the details on the second option, but requires that the program be based on sound statistical methodology. API supports the concept of basing fuel emissions standards on actual emissions, but questions the delay until 2016. The DOE EIA top down data approach to compliance does not necessitate any equipment changes and can be implemented much sooner than 2016. Fuel economy credits for FFV production were originally designed to stimulate ethanol production. The Renewable Fuel Standard requires 36 billion gallons of ethanol per year by 2022 and far exceeds any ethanol market stimulation created by FFV manufacturing. The NPRM proposes to continue a program of FFV credits until 2016. This program should be eliminated within a much shorter time frame.

d. Dedicated Alternative Fuel Vehicles

The proposed rule also considers the averaging of dedicated alternative fuel vehicles, and proposes a multiplier that would count each vehicle as more than one vehicle in the manufacturer's fleet average. The multiplier would over-count all electric, plug-in hybrid and fuel cell vehicles in the range of 1.2 to 2 times when calculating fleet average carbon dioxide levels. EPA believes this creates an incentive to produce these vehicles and paves the way for greater and / or more cost effective emission reductions from future vehicles. The multiplier benefit would exist until 2016 and be phased out in 2017. EPA also proposes to calculate electric vehicles as having zero emissions of carbon dioxide. EPA acknowledges that upstream emissions from electricity generation are not being counted, and justifies the unscientific approach as a way to promote advanced technologies with the future promise of reducing carbon dioxide. API believes these methodologies are contrary to proper scientific accounting of GHGs and also contrary to the intent of the rule to reduce GHG emissions. This approach distorts the market for developing transportation fuel alternatives by incentivizing a particular technology whose future potential cannot be accurately measured against the future potential of advanced biofuels or other carbon mitigation strategies. A recent study by the National Academy of Sciences[5] quantifies the costs of electricity generation and questions the purported benefits of electric powered vehicles. A 2005 study by Argonne National Laboratory[6] also recognizes the potential GHG impacts of electrifying the vehicle fleet. These studies show that the impacts on greenhouse gases and other pollutant emissions from electric vehicles are significant and should be quantified. Fuel economy calculations for dedicated alternative fuel vehicles should be based on a sound scientific approach, not a policy approach. API requests that EPA remove the multiplier and establish a method of determining the actual GHG impact from dedicated alternative fuel vehicles.

API appreciates the opportunity to comment on this proposal and appreciates the consideration given to our industry. Please contact Michele Schoeppe at 202-682-8251 or Al Mannato at 202-682-8180 if you have any questions about these comments.

Regards,

Kyle Isakower, Director of Policy Analysis

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[5] http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12794

[6] http://www.transportation.anl.gov/pdfs/TA/339.pdf