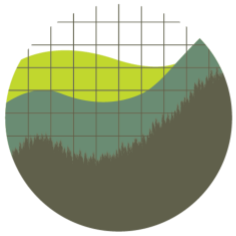

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

August 4, 2020

VIA ELECTRONIC SUBMISSION

Attn: Tad Wysor, wysor.tad@epa.gov
Re: Proposed Vehicle Test Procedure Adjustments for Tier 3 Certification Test Fuel Docket ID No. EPA–HQ–OAR–2016–0604

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] submits the following comments on the Environmental Protection Agency's Proposed Rule[2] ("Proposed Rule") adjusting the test procedures to calculate greenhouse gas emissions ("GHG emissions") and fuel economy rates for the GHG and CAFE programs and the Fuel Economy and Environment Label upon adoption of Tier 3 certification test fuel ("Tier 3 fuel"). Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy. We write to make the following comments:

- EPA should finalize the Proposed Rule as proposed.
- If EPA decides not to finalize the Proposed Rule and to instead forgo the GHG emissions test adjustment, EPA is required to publish a new proposal for public comment, which provides a rationale for that decision as well as an analysis of the costs and benefits of that decision.

The Proposed Rule (i) multiplies GHG emissions test results by a factor of 1.0166 and (ii) replaces the current CAFE rate test formula "R factor" of 0.6 with a new "R_a factor" that is slightly higher.[3] The adjustment is meant to ensure that GHG emissions and CAFE rates calculated using Tier 3 fuel are consistent with results generated using the earlier certification test fuel ("Tier 2 fuel") so that the stringency of GHG emissions and CAFE standards remains the same.[4] Finalizing the adjustment is necessary to maintain such consistency and stringency.

[1] This document does not purport to present New York University School of Law's views, if any.
[2] Vehicle Test Procedure Adjustments for Tier 3 Certification Test Fuel, 85 Fed. Reg. 28,564 (May 13, 2020) [hereinafter "Proposed Rule"].
[3] *Id.* at 28,573, 28,576.
[4] *Id.* at 28,564.

But EPA also "requests comment on whether the Agency should consider a regulatory approach" where it does not adopt the adjustment for CO_2.[5] If it does decide to forego the adjustment, EPA also requests comment on whether it can do so without "complet[ing] additional analysis, likely in the form of a Supplemental Notice of Proposed Rulemaking (SNPRM)."[6] For the following reasons, EPA should not forgo the adjustment.

I. The adjustment is necessary to maintain the stringency of GHG emissions standards for automakers and adhere to EPA's statutory purpose and prior statements

Compared to Tier 2 Fuel currently in use by carmakers to measure GHG emissions, Tier 3 fuel on average leads to 1.66% fewer GHG emissions per gallon.[7] This means that if EPA decides not to proceed with the adjustment, automakers will be able to claim that their vehicles produce 1.66% fewer CO_2 emissions per gallon without making any actual technological improvements. In light of the recent Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule requiring automakers to reduce car and light-duty truck GHG emissions by 1.5% each year,[8] failing to finalize the adjustment will effectively allow automakers to delay all GHG emissions improvements by one year, even though EPA has recognized that such improvements are necessary to reduce CO_2 emissions,[9] prevent adverse health impacts from pollution,[10] and take steps towards combatting climate change.[11] Accordingly, choosing not to make the adjustment will erase one year's worth of advancement in these areas, resulting in significant harms to human health and the environment.

Not finalizing the adjustment and thereby reducing the stringency of GHG emissions standards for automakers will directly contravene both the statutory purpose of the Clean Air Act and EPA's own prior statements. The Clean Air Act, which governs EPA's test procedures to measure GHG emissions, was passed for the following purposes:

> "(1) protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; and
> "(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution."[12]

[5] *Id.* at 28,566.
[6] *Id.*
[7] *Id.* at 28,573.
[8] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,175 (Apr. 30, 2020) [hereinafter "SAFE Rule"].
[9] *Id.* at 25,055–56 (demonstrating that compared to no increase in GHG emissions stringency, a 1.5% increase in GHG emissions stringency for MY 2021 will lead to lower CO_2, CH_4, and N_2O emissions)
[10] *Id.* at 25,083–84 (demonstrating that compared to no increase in GHG emissions stringency, a 1.5% increase in GHG emissions stringency for MY 2021 will lead to fewer emissions-related deaths, lower rates of respiratory and cardiovascular hospital admissions, and fewer work-days lost).
[11] *Id.* at 25,251 (noting that a 1.5% increase in GHG emissions stringency "will result in reductions in climate change-related impacts and most air pollutants compared to the absence of regulation.").
[12] 42 U.S.C. § 7401(b).

Not making the adjustment will delay measures to reduce air pollution harmful to human health, therefore violating Congress' explicit mandate to EPA to prioritize these factors.

Furthermore, altering the stringency of GHG emissions standards for automakers will directly contradict EPA's own prior commitment to maintain the stringency of such standards upon transitioning to use of Tier 3 fuel. When EPA finalized the Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emissions and Fuel Standards Rule in 2014 which mandated the adoption of Tier 3 fuel for all emissions testing ("2014 Rule"), EPA indicated that this transition should "not affect the stringency of the CAFE or GHG standards and that the labeling calculations would be updated in a future action to reflect the change in test fuel properties."[13] EPA only delayed adoption of a test adjustment to maintain the stringency of GHG emissions standards in the 2014 Rule because it lacked sufficient data at the time to assess how Tier 3 fuel would alter GHG emission rates.[14] Now that EPA has conducted research on this and concluded that Tier 3 fuel leads to 1.66% fewer GHG emissions per gallon,[15] it must proceed with the adjustment.

II. Deciding to abandon the adjustment without an additional SNPRM would be arbitrary and capricious under the Administrative Procedure Act

If EPA abandons the adjustment, it is required to assess the harms of such a departure from its suggested course of action, which it has not done at all in the Proposed Rule. When promulgating regulations, agencies must rationally consider "any important aspect of the problem."[16] This inquiry must include a consideration of the costs associated with the regulation.[17] In its Proposed Rule, EPA argues that proceeding with the GHG emissions test adjustment "should not on average result in any significant changes in the emissions or fuel consumption benefits originally projected for the GHG or CAFE programs, nor any changes in the projected technology costs of the standards to manufacturers," given that the adjustment would preserve the stringency of "current GHG . . . standards."[18] But EPA provides no discussion of the impact on costs and benefits that would result if EPA determines it will not proceed with the adjustment. A rule altering the stringency of GHG standards would certainly affect the costs and benefits. In particular, reducing the stringency of GHG emissions standards by 1.66% will likely lead to more pollution-related health problems and climate change-related damage to the environment,[19]

[13] Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emissions and Fuel Standards, 79 Fed. Reg. 23,414, 23,531–32 (Apr. 28, 2014) [hereinafter "2014 Rule"].
[14] *See id.* at 23,531.
[15] Proposed Rule, 85 Fed. Reg. at 28,573.
[16] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[17] S*ee* Exec. Order 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993); Michigan v. EPA, 135 S. Ct. 2699, 1706–07 (2015) (holding that cost is "a centrally relevant factor when deciding whether to regulate and that an agency fails to engage in reasoned decisionmaking as required by the Administrative Procedure Act if it gives "cost no thought *at all*.").
[18] Proposed Rule, 85 Fed. Reg. at 28,566.
[19] *See* SAFE Rule, 85 Fed. Reg. at 25,251 (indicating that no increase in GHG emissions stringency would result in more climate-change related impacts and more air pollution); *see also* S. William Becker & Mary D. Becker, *The*

which EPA has not assessed or rationalized at all in the Proposed Rule. By not addressing these potential impacts, EPA will have failed to consider "an important aspect of the problem" if it decides not to make the adjustment.

Similarly, not making the adjustment would be arbitrary and capricious because the Proposed Rule does not provide any rationale to support such a decision. In order to provide interested parties an opportunity to "comment meaningfully upon [an] agency's proposals," a proposed rule must include "an accurate picture of the reasoning" underpinning such options.[20] A "reasoned analysis" such as this is particularly crucial when an agency "changes course" from its "prior policies and standards"[21] and finalizes a regulation that is "totally inconsistent" with a previous regulation.[22] In particular, when deviating from a previous action, an agency must "display awareness that it *is* changing its position" and "show that there are good reasons for the new policy."[23] This requirement helps ensure "that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal."[24]

If EPA choses to forgo the adjustment, EPA will have failed to comply with these requirements. In the Proposed Rule, EPA provides no reasoning to support its potential decision to not make the adjustment. Furthermore, EPA does not provide a "reasoned analysis" (let alone any analysis) to justify such a drastic departure from its previous commitment in the 2014 Rule to maintaining the stringency of GHG emissions standards.[25] Accordingly, if EPA decides not to make the adjustment and does not initiate a SNPRM, it will have prevented interested parties from providing meaningful comment on this choice, thereby failing to provide adequate notice.

Devastating Impacts of the Trump Proposal to Roll Back Greenhouse Gas Vehicle Emissions Standards 10 (Apr. 29, 2019), http://eelp.law.harvard.edu/wp-content/uploads/FINALGHGREPORT.WORD_.pdf (explaining that the agency had underestimated agency estimates for the increases in GHG emissions in the SAFE rule); Marianne Lavelle, *Trump's Auto Efficiency Rollback: Losing the Climate Fight, 1 MPG at a Time*, INSIDE CLIMATE NEWS (Aug. 2, 2018), https://insideclimatenews.org/news/02082018/trump-fuel-efficiency-standards-rollback-climate-change-epa (arguing that EPA's original SAFE Rule proposal offers "a low estimate of emissions" and a "dramatically lower estimate . . . of the 'social cost of carbon'"); Policy Integrity Comments on The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Oct. 26, 2018), https://policyintegrity.org/documents/Emissions_Standards_EPA_NHTSA_Comments_Oct2018.pdf. (making same point).

[20] Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530 (D.C. Cir. 1982).
[21] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).
[22] Huntington Hosp. v. Thompson, 319 F.3d 74, 75 (2d Cir. 2002).
[23] FCC v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009).
[24] Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 446 (D.C. Cir. 1982).
[25] *See* 2014 Rule, 79 Fed. Reg. at 23,532.

III. Abandoning the adjustment without an additional SNPRM would violate notice-and-comment requirements

According to the logical outgrowth doctrine, any changes an agency makes to a proposed rule must be "in character with the original scheme" and "a logical outgrowth" of the notice already provided to avoid a new notice and comment period.[26] An agency decision fails to satisfy this logical outgrowth test "if the final rule deviates too sharply from the proposal."[27] Simply inviting interested parties to submit alternative proposals that differ from the agency's proposed action and suggesting that the agency's final rule may vary from its proposal does not adequately apprise interested parties of the agency's intention to abandon its proposal.[28] Additionally, a final agency decision that "repudiate[s]" its proposal "and adopts its inverse" without giving the public a chance to comment on it instead does not provide adequate notice and violates the logical outgrowth doctrine.[29]

Here, deciding to reverse course and not make the adjustment would deviate dramatically from EPA's "original scheme" to maintain the stringency of GHG emissions standards for automakers and would require a new proposal. Although EPA requests comment on whether it should consider not making the adjustment, there is such a lack of detail in the discussion of this possibility that the request cannot alone adequately give notice to interested parties of EPA's position on that option or of the ramifications of that option. In other words, choosing to forego the adjustment with so little advance warning would be an impermissible "surprise switcheroo" on interested parties.[30] As explained above, EPA is required to provide notice of its position on the agency's authority to forgo the adjustment and to provide an analysis of the impact of forgoing the adjustment. As the Proposed Rule has none of that information, interested parties will be prevented from providing "sufficient comment on the rule" and "understanding the effect of the final rule" if EPA abandons the adjustment.[31] Accordingly, EPA is required to initiate a new notice and comment period if it chooses to forgo the adjustment.

While some recent cases have held that a final agency decision still satisfies the logical outgrowth doctrine even if it entirely withdraws the proposed action described in the initial notice,[32] these cases are distinguishable from the current facts on both procedural and substantive

[26] Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).
[27] Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983).
[28] Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986).
[29] Envtl. Integrity Project v. EPA, 425 F.3d 992, 998 (D.C. Cir. 2005); *see also* Ctr. for Sci. in the Pub. Interest v. Perdue, 438 F. Supp. 3d 546, 559 (D. Md. 2020) (explaining that a fundamentally different option was not adequately noticed).
[30] *See id.* at 996.
[31] Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1116 (D.C. Cir. 2019) (holding that the agency's notice was insufficient because it did not provide the necessary tools and information to allow interested parties to assess the impact of the proposal until after the rule was finalized).
[32] *See* Idaho Conservation League v. Wheeler, 930 F.3d 494, 508 (D.C. Cir. 2019) (noting that a "logical outgrowth of a proposal is . . . surely to refrain from taking the proposed step") (quoting New York v. EPA, 413 F.3d 3, 44 (D.C. Cir. 2005)); *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 175 (2007) ("Since the proposed

grounds. First, in *Idaho Conservation League v. Wheeler* the agency's decision to withdraw the proposed regulation at issue was bolstered by an earlier writ of mandamus specifying that the agency "retain[ed] discretion to promulgate a rule or decline to do so."[33] Here, no case explicitly acknowledges any authority to forgo the adjustment,[34] suggesting that it is not as clear under these circumstances that abandoning the initial proposal "has always been a foreseeable possibility."[35] Second, in contrast to both *Idaho Conservation League* and *Long Island Care at Home, Ltd. v. Coke*, the Proposed Rule is not a standalone regulation addressing a novel issue for the first time.[36] Instead, the Proposed Rule is part and parcel of an earlier final rule that makes the adjustment necessary.[37] In this sense, the Proposed Rule is more similar to a follow up rule than an entirely new regulation in itself. And the implications of forgoing the adjustment need to be vetted through public comment.

Additionally, the facts here are distinguishable from cases where courts have held that a final rule can deviate from the proposed rule insofar as the initial notice expressly "ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change."[38] In those cases, the "particular change[s]" the agencies hinted at in the proposed rules (and ultimately settled on in the final rules) were mere modifications to the initial proposed actions, not total abandonments of the regulations and the broader goals they sought to achieve.[39] Furthermore, in cases where courts have rejected the logical outgrowth argument, the proposed rules included at least *some* additional information explaining why the change was warranted.[40] By contrast, EPA suggests here that it might not finalize any adjustment to the GHG

rule was simply a proposal, its presence meant that the Department was *considering* the matter; after that consideration the Department might choose to adopt the proposal or to withdraw it.").

[33] Idaho Conservation League, 930 F.3d at 508.

[34] *See* Proposed Rule.

[35] Idaho Conservation League, 930 F.3d at 508.

[36] *See id.* at 500–01; Long Island Care at Home, Ltd., 551 U.S. at 174–75.

[37] *See* 2014 Rule at 23,531–32.

[38] CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009) (summarizing the outcomes in City of Portland v. EPA, 507 F.3d 706 (2007) and Owner-Operated Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188 (2007)).

[39] *See* Owner-Operated Indep. Drivers Ass'n, 494 F.3d at 209–10 (upholding as a logical outgrowth the final rule's modification of the length of one required split-berther period for truckers, based in part on the fact that this decision was still in keeping with the "central premise" of the regulation that truck drivers should get 8 hours of uninterrupted sleep per day); City of Portland, 507 F.3d at 709, 715 (suggesting that EPA's final decision to remove the option for uncovered finished water storage facilities to implement a risk management plan was in keeping with the overall purpose of EPA's regulation "to combat microbial contamination in drinking water, including Cryptosporidium" and its general concerns "about contamination occurring in uncovered finished water facilities").

[40] *See* United States Telecomm. Ass'n v. FCC, 825 F.3d 674, 712 (2016) (holding that notice requirements were satisfied for FCC's final rule even though it deviated from its proposed rule because the proposed rule expressly requested comment on whether FCC should make such change "in order to 'ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange practices'") (citation omitted); Citizens Telecomms. Co. of Minn., LLC v. FCC, 901 F.3d 991, 1006 (8th Cir. 2018) (holding that notice requirements were satisfied for FCC's final rule which deviated from its proposed rule because the change was foreshadowed by a request for comment on "how close competition must be" to impose competitive pressure on supply in light of FCC's own analysis that competitive supply within at least half a mile "has a material effect on prices") (citation omitted).

emissions test at all, which would contravene its own professed objective to maintain the stringency of these standards.[41] EPA's request for comment on whether it should abandon the adjustment does not include any additional information indicating why it might be considering this course of action.[42] Accordingly, EPA cannot rely on this line of cases to support a final decision to abandon the adjustment.

Conclusion

The adjustment that EPA sets forth is a sound policy that holds automakers to the same level of GHG emissions stringency, protects consumers by ensuring they receive consistent GHG emissions information across model years, and is consistent with EPA's own previous commitments and statutory purpose under the Clean Air Act. Choosing not to finalize the adjustment will increase GHG emissions that are harmful to human health and the environment. If EPA does abandon its adjustment, it must initiate a SNPRM that includes an assessment of the costs of the decision and provides an analysis that supports its decision to change course.

Respectfully,

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[41] Proposed Rule at 28,564, 28,566.
[42] *Id.* at 28,566.