

Case No. 18-1114 (and consolidated cases)

State of California, *et al.*,
Petitioners,

v.

United States Environmental Protection Agency, *et al.*,
Respondents,

**Association of Global Automakers, Alliance of Automobile
Manufacturers, Inc.,**
Intervenors.

On Petition for Review of Final Action of the United States
Environmental Protection Agency

**Brief of the State of Colorado as *Amicus Curiae*
in Support of Petitioners**

PHILIP J. WEISER
Attorney General of Colorado
ERIC R. OLSON
Solicitor General
1300 Broadway, 10th Floor
Denver, Colorado 80203
(720) 508-6548
Eric.Olson@coag.gov
Attorneys for the State of
Colorado

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
INTEREST OF THE <i>AMICUS</i> STATE	4
ARGUMENT	5
I. Climate Change Harms Colorado.....	7
A. Colorado Faces Great Risk from Climate Change.....	8
B. Greenhouse Gas Pollutants Cause Significant Increases in Criteria Pollutants in Colorado.....	10
II. Colorado Has a Strong Interest in the Federal Rulemaking Process Following Established and Predictable Rules	11
III. Public Statements by the United States’ Largest Automaker Cast Doubt on EPA’s Claims	14
CONCLUSION	15
CERTIFICATE OF SERVICE.....	17
CERTIFICATE OF COMPLIANCE	17

TABLE OF AUTHORITIES

CASES

<i>Am. Radio Relay League, Inc. v. FCC</i> , 524 F.3d 227 (D.C. Cir. 2008).....	12
<i>Dominion Transmission, Inc. v. Summers</i> , 723 F.3d 238 (D.C. Cir. 2013).....	11
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	12
<i>Nat’l Lifeline Ass’n v. FCC</i> , No. 18-1026, 2019 WL 405020 (D.C. Cir. Feb. 1, 2019)	15

REGULATIONS

5 COLO. CODE REGS. § 1001-24 (2018).....	13
83 Fed. Reg. 16,077 (Apr. 13, 2018).....	14

OTHER AUTHORITIES

2018 Colorado Climate Plan	8
Ford, Bill & Hackett, Jim, <i>A Measure of Progress</i> , Medium (Mar. 27, 2018).....	15
Liu, Z. et al., <i>Climate Change and Wildfire Risk in an Expanding Wildland–Urban Interface</i> , 30 LANDSCAPE ECOLOGY 1943 (2015).....	9
November 2016 Proposed Determination.....	10
Pall, Pardeep et al., <i>Diagnosing Conditional Anthropogenic Contributions to Heavy Colorado Rainfall in September 2013</i> , WEATHER AND CLIMATE EXTREMES (2017).....	9
Rykowski, Richard, <i>The Benefits of Protective Advanced Clean Car Standards in Colorado</i> (May 2018)	10, 11
Weiser, Philip J., <i>Towards a Constitutional Architecture for Cooperative Federalism</i> , 79 N.C. L. REV. 663 (2001)	6
Wobus, Cameron et al., <i>Projected Climate Change Impacts on Skiing and Snowmobiling</i> , 45 GLOBAL ENVTL. CHANGE 1 (2017)	9

INTEREST OF THE *AMICUS* STATE

Greenhouse gas emissions cause real impacts in Colorado.

Colorado, like Petitioner States, have a strong interest in ensuring that the regulations governing these emissions are based on sound science and follow the well-established procedures required by the Administrative Procedure Act.

Colorado, as *amicus*, supports Petitioner States in their request to vacate EPA's Revised Determination¹ and reinstate the 2017 Determination.

Fed. R. App. P. 29(a)(2) and Circuit Rule 29(b) give Colorado the right to file an *amicus* brief without leave of court or consent of the parties.

¹ Defined terms used in this brief are the same as used in the Brief for State Petitioners.

ARGUMENT

Greenhouse gas emissions harm the citizens of Colorado by contributing to climate change and directly increasing emissions of criteria pollutants identified in the Clean Air Act. By seeking to roll back the emissions standards without following the rule of law, EPA's Revised Determination will cause more greenhouse gas emissions, increasing the severity of climate change and polluting our state.

Climate change creates substantial risk to our land, air, and water through shifts in snowmelt, stressed ecosystems, and extreme weather events. Climate change also impacts our state's economy, threatening the thriving outdoor recreation and agricultural economies in Colorado.

The criteria pollutants, particularly nitrogen oxides (NO_x) and volatile organic compounds (VOC), emitted in Colorado during the refining of gasoline contribute to ozone formation. EPA's proposed rollback will cause more of these emissions to occur, because more gasoline will be refined. These VOC and NO_x emissions particularly affect Colorado because a significant portion of Colorado exceeds national ambient air quality standards for ozone.

In addition, Colorado has a strong interest in a federal rulemaking process that follows established and predictable rules. The Clean Air Act was enacted, and continues to be administered, with a requirement of cooperative federalism, giving substantial freedom to the states to determine how to best address their air quality concerns. *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–73 (2001) (discussing the important discretion accorded to states under cooperative federalism regulatory programs like the Clean Air Act).

EPA's approach in this case of hastily and secretly changing the established procedures governing emissions standards poses a significant risk of undermining the states' reliance on orderly, science-based federal regulations. Colorado, like most other states, decided to rely on the federal vehicle emissions standards rather than adopting the California standards under Section 177 of the Clean Air Act. The abrupt and arbitrary switch of EPA causes states like Colorado to scramble to evaluate, and in Colorado's case adopt, California's approach.

In addition, public statements by America's largest automaker undercut EPA's stated basis for the Revised Determination, providing further support that this hasty conclusion is arbitrary and capricious.

Because the federal government has not followed the requirements of the Administrative Procedure Act in arbitrarily changing course on fuel emissions standards, Colorado supports the Petitioners and respectfully request that the court vacate EPA's Revised Determination and reinstate the 2017 Determination.

I. Climate Change Harms Colorado

Colorado faces significant impacts from climate change. Colorado has an environment that is particularly sensitive to changes in climate, relying extensively on snowpack to provide water to its residents. In addition, Colorado faces the risk of more extreme storms, forest fires, and disruption to its outdoor recreation and agricultural economies due to climate change

A. Colorado Faces Great Risk from Climate Change

In 2018, the state of Colorado published an updated Colorado Climate Plan. The plan was developed collectively by the Department of Natural Resources, the Colorado Department of Public Health and Environment, the Colorado Energy Office, the Colorado Department of Transportation, the Colorado Department of Agriculture, the Office of Economic Development and International Trade, and the Department of Local Affairs, with input from key stakeholders. It begins:

Colorado has warmed substantially in the last 30 years and even more over the last 50 years. Future estimates project temperatures rising an additional 2.5 F to 5 F by 2050, meaning the warmest summers from our past may become the average summers in our future. With increasing temperatures come shifts in snowmelt runoff, water quality concerns, stressed ecosystems and transportation infrastructure, impacts to energy demand, and extreme weather events that can impact air quality and recreation.²

Additionally, the most recent National Climate Assessment, led by the National Oceanic and Atmospheric Administration, reported that

² 2018 Colorado Climate Plan at 4, <https://drive.google.com/file/d/164o4R6DBNII8KyCvxhy5R9oD7fmPPx9Q/view>.

“as a harbinger, the unusually low western U.S. snowpack of 2015 may become the norm” —an outcome with potentially severe consequences to any economic sector dependent on snow or water.³ This reduction in snowpack and higher temperatures will cause Colorado to face shorter ski seasons, with significant economic impact to the state.⁴ Other studies predict that Colorado will face temperature increases and spikes, more frequent and more dangerous wildfires,⁵ and more extreme weather events like the 2013 Colorado Front Range floods, which caused extensive loss of life and property.⁶

³ USGCRP, *Climate Science Special Report: Fourth National Climate Assessment*, Volume I (2017), <https://science2017.globalchange.gov/chapter/8/>.

⁴ Cameron Wobus et al., *Projected Climate Change Impacts on Skiing and Snowmobiling*, 45 GLOBAL ENVTL. CHANGE 1 (2017).

⁵ Z. Liu et al., *Climate Change and Wildfire Risk in an Expanding Wildland–Urban Interface*, 30 LANDSCAPE ECOLOGY 1943–1957 (2015).

⁶ Pardeep Pall et al., *Diagnosing Conditional Anthropogenic Contributions to Heavy Colorado Rainfall in September 2013*, 17 WEATHER AND CLIMATE EXTREMES 1–6 (2017).

B. Greenhouse Gas Pollutants Cause Significant Increases in Criteria Pollutants in Colorado

In addition to the consequences of climate change, Colorado also faces direct consequences from an increase in criteria pollutants⁷ with the rollback of the federal vehicle standards.

EPA created the Inventory, Costs and Benefit Tool, a model “to project the emissions and fuel consumption impacts” of the emissions standards.⁸ A recent report uses this same EPA Inventory, Costs and Benefit Tool to calculate Colorado-specific emissions increases associated with the proposed rollback of the 2022–2025 emissions standards.⁹ Using this model, a Colorado fleet, and controlling for where gasoline is refined, flat-lining emission standards to the 2020

⁷ Criteria pollutants are pollutants specifically identified in the Clean Air Act that can harm health, the environment, and cause property damage.

⁸ November 2016 Proposed Determination at A-147, <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockkey=P100Q3DO.pdf>.

⁹ Richard Rykowski, *The Benefits of Protective Advanced Clean Car Standards in Colorado* (May 2018), https://www.edf.org/sites/default/files/content/The_Benefits_of_Protective_Clean_Car_Standards_CO.pdf.

model year would increase annual emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NOx) in Colorado in 2030 by 438 tons and 105 tons, respectively.¹⁰ By 2040, these annual emissions would increase even more (627 tons of VOCs, 195 tons of NOx) due to this flat-lining.¹¹

These impacts are real and significant to Colorado and prevent Colorado from ensuring that its residents are free from harmful emissions specifically identified in the Clean Air Act.

II. Colorado Has a Strong Interest in the Federal Rulemaking Process Following Established and Predictable Rules

“Air quality regulation under the CAA is an exercise in cooperative federalism.” *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). Colorado relies on this cooperative approach to air quality regulation and has a State Implementation Plans to regulate air quality that EPA has reviewed and approved.

¹⁰ *Id.* at 33.

¹¹ *Id.*

For those areas like vehicle emissions which EPA regulates on a national level, Colorado depends on EPA to implement the Clean Air Act using sound, science-based approaches. *See Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007) (holding EPA’s refusal to regulate greenhouse gases arbitrary and capricious because not based on scientific judgment) When EPA does so, like it did with the jointly developed standards, Colorado chooses to rely on those protections and not take additional steps available under the Clean Air Act to protect their citizens and environment. Colorado did not exercise its rights under Section 177 of the Clean Air Act to impose more stringent emissions standards on Colorado vehicles.

However, in order for the scientific basis of EPA rulemaking to be evaluated by states, the basis must be disclosed. It is a core requirement of the Administrative Procedure Act that an agency disclose what it is relying on: “Under APA notice and comment requirements, among the information that must be revealed for public evaluation are the ‘technical studies and data’ upon which the agency

relies in its rulemaking.” *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quotation and citation omitted).

EPA’s failure here to follow notice and comment generally, or the specific procedures set forth in Section 12(h), directly impacts Colorado’s ability to evaluate the claimed basis for the regulation and undermines the cooperative federalism the Clean Air Act requires. It also prevents all interested parties, including the states, from contributing their substantial expertise on air quality to help EPA evaluate alternatives using sound science and real-world experience.

Because of this unorderly and secret process engaged in by the recent EPA, Colorado recently devoted considerable resources to implement the regulatory actions required to adopt California’s more stringent emissions standards as permitted by Section 177 of the Clean Air Act. Colorado Low Emission Automobile Regulation, 5 COLO. CODE REGS. § 1001-24 (2018). This effort took significant state resources and is directly responsive to EPA’s failure to act appropriately in this proceeding.

EPA's Revised Determination undermines the cooperative federalism at the core of the Clean Air Act. It creates additional work for the states and creates unnecessary regulatory uncertainty for its citizens and businesses.

III. Public Statements by the United States' Largest Automaker Cast Doubt on EPA's Claims

EPA claims that a “significant record”—which it is keeping secret—demonstrates strong support for the rollback of emissions standards and that “[b]ased on our review and analysis of the comments and information submitted, and EPA’s own analysis,” existing emission standards “present[] challenges for auto manufacturers”. 83 Fed. Reg. 16077, 16078 (Apr. 13, 2018). As explained at length in the State Petitioner’s brief, pp. 33–51, this failure to disclose this information violates the Administrative Procedure Act.

Additionally, public statements by Ford Motor Company, America’s largest auto manufacturer, casts significant doubt on EPA’s conclusion. Ford’s senior leadership published a recent article where

Ford made clear that “We support increasing clean car standards through 2025 and are not asking for a rollback.”¹²

This direct contradiction between what EPA says automakers want and what America’s largest automaker says that it wants provides strong support that the proposed rollback is arbitrary and capricious. The rule of law requires that regulatory actions be the product of “reasoned decisionmaking.” *Nat’l Lifeline Ass’n v. FCC*, No. 18-1026, 2019 WL 405020 at *6–8, (D.C. Cir. Feb. 1, 2019) (holding agency action arbitrary and capricious that “depart[ed] from its prior ... policy without reasoned explanation”). The failure to act on such a basis in this case requires that this action be reversed by this Court.

CONCLUSION

EPA’s proposed rollback threatens the cooperative federalism of air quality regulation in the United States. It causes direct injury to Colorado’s environment and increases exposure to the risks of climate

¹² Bill Ford & Jim Hackett, *A Measure of Progress*, Medium (Mar. 27, 2018), <https://medium.com/cityoftomorrow/a-measure-of-progress-bc34ad2b0ed>.

change. EPA's secret process does not follow the law, conflicts with sound science, and its stated basis is directly contradicted by public statements by America's largest automaker.

Colorado respectfully requests that Petitioner's request to vacate the Revised Determination and reinstate the 2017 Determination be granted.

PHILIP J. WEISER
Attorney General of Colorado

/s/ *Eric R. Olson*

*ERIC R. OLSON

Solicitor General

1300 Broadway, 10th Floor
Denver, Colorado 80203
(720) 508-6548

Eric.Olson@coag.gov

Attorneys for the State of
Colorado

**Counsel of Record*

CERTIFICATE OF SERVICE

I certify that on February 14, 2019, this document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: February 14, 2019

Respectfully submitted,

/s/ Eric R. Olson

Eric R. Olson

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,868 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

Dated: February 14, 2019

Respectfully submitted,

/s/ Eric R. Olson

Eric R. Olson