ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF CALIFORNIA, *et al.*, *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*, ALLIANCE OF AUTOMOBILE MANUFACTURERS, *et al.*, *Movant-Respondent-Intervenors.*	No. 18-1114 (consol. with Nos. 18-1118, 18-1139 & 18-1162)

INITIAL REPLY BRIEF OF PUBLIC INTEREST ORGANIZATION PETITIONERS

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GLOSSARY

APA	Administrative Procedure Act
EPA	Environmental Protection Agency
Industry Reply Br.	Reply Brief of Petitioners National Coalition for Advanced Transportation, Consolidated Edison Company of New York, Inc., National Grid USA, New York Power Authority, and the City of Seattle, by and through its City Light Department
JA	Joint Appendix
Pub. Int. Br.	Brief of Public Interest Organization Petitioners
Report	Technical Assessment Report
Section 12(h)	40 C.F.R. § 86.1818-12(h)
State Br.	Brief for State Petitioners

SUMMARY OF ARGUMENT

The Revised Determination purported to "withdraw" the agency's Original Determination that its greenhouse-gas emission standards for model year 2022-25 passenger cars and light trucks remained "appropriate" under the Clean Air Act. The Original Determination was undisputedly a final action, *see* EPA Br. 29-30, and its explanation of why those standards remained appropriate set a legal and factual baseline (current as of 2017) for any possible future action. A rulemaking to revise the standards therefore must justify a departure not only from EPA's 2012 rationale for *setting* the standards but also from its 2017 rationale for *reaffirming* them. The Revised Determination is EPA's attempt to rid itself of the latter duty, and bury the extensive record undergirding the Original Determination, without providing the detailed information required by 40 C.F.R. § 86.1818-12(h) ("Section 12(h)") or the reasonable explanation required by the Administrative Procedure Act ("APA").

Public Interest Petitioners have standing to sue based on injuries traceable to the Revised Determination and redressable by its vacatur. First, petitioners suffered informational injuries from the moment EPA failed to disclose information to which Section 12(h) entitled the public in conjunction with a determination that the existing standards are "not appropriate." That injury does not turn on the substantive errors in the Revised Determination or the outcome of an EPA

rulemaking. Moreover, to the extent the Revised Determination finally withdrew the Original Determination, it injured petitioners' health, environmental, and consumer interests.

On the merits, the Revised Determination violated Section 12(h) and the APA. EPA did not disclose or solicit public comment on technical information and analysis informing its "not appropriate" finding; adequately assess each Section 12(h) factor; or disclose "in detail" the basis for the assessments. EPA also flouted principles of reasoned decisionmaking by uncritically parroting comments of certain automakers, ignoring petitioners' comments, and failing to justify a departure from the contrary legal and factual findings supporting the Original Determination.

ARGUMENT

I. PUBLIC INTEREST PETITIONERS HAVE STANDING TO SUE.[1]

Section 12(h) mandates that, "[n]o later than April 1, 2018," EPA must "*set forth in detail* the bases for [any] determination" that greenhouse-gas emission standards for model years 2022-25 "are not appropriate" "in light of the record then before the Administrator." §12(h) (emphasis added). Petitioners claim EPA violated Section 12(h) by, *inter alia*, not disclosing detailed information in

[1] Public Interest Petitioners incorporate by reference the discussions of finality and ripeness in other petitioners' briefs. *See* State Reply Br., Pt. I; Industry Reply Br., Pt. I. The injuries described herein "constitute a material hardship," *Cobell v. Jewell*, 802 F.3d 12, 21 (D.C. Cir. 2015), that makes this dispute ripe for judicial review.

conjunction with the Revised Determination. That violation deprived petitioners of information "specific to the work in which they are engaged." *Action All. of Senior Citizens v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986). For example, EPA secreted its own staff's contemporaneous analysis of "[t]he cost on the producers … of new motor vehicles" of achieving the existing standards, § 12(h)(1)(ii)—an analysis EPA still has not disclosed, and for which petitioners would have multiple uses. *See* Pub. Int. Br. 5–8; *NRDC v. EPA*, S.D.N.Y. No. 1:18-cv-11227 (compl. filed Dec. 3, 2018) (suit to force disclosure of this analysis under Freedom of Information Act).

EPA responds (Br. 37) that it *did* provide the detailed information demanded by Section 12(h). But this Court "must assume *arguendo* the merits of [a] legal claim" when considering a party's standing to press it. *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007).

EPA's other standing arguments are irrelevant to informational injury. Such an injury does not turn on whether the Revised Determination is a "binding decision to weaken the standards" or "a 'critical legal predicate' … to exercise rulemaking authority." EPA Br. 32. Injuries stemming from violation of EPA's Section 12(h) disclosure obligation are neither "speculative [nor] contingent on future events," *ibid.*; both violation and injury occurred the moment the Revised Determination issued. Section 12(h)'s disclosure obligation is distinct from EPA's obligation to "initiate a rulemaking" in the wake of a "not appropriate" determination. § 12(h).

Disclosures required to initiate a rulemaking to revise emission standards, *see* 42 U.S.C. § 7607(d)(3), are different in time and in kind from disclosures mandated by Section 12(h). EPA does not argue otherwise.

To be sure, EPA's failure to disclose required information may yet form the basis of a procedural challenge to an upcoming rule weakening emission standards. But that does not vitiate the harm that petitioners already suffer. Indeed, petitioners have alleged (Br. 7) informational injuries due to work independent of EPA's rulemaking process.

EPA is wrong to suggest (Br. 37) that informational injury would not likely be redressed by vacating the Revised Determination. On remand, EPA could opt either to issue another revised determination, using proper procedures and disclosing the information required under Section 12(h); or to stand pat. If EPA decided not to act, petitioners' informational interests would be satisfied by the detailed information the agency had disclosed in connection with its final Original Determination.

EPA's violation of Section 12(h) and the APA also caused other concrete and particularized injuries. Pub. Int. Br. 8-9. EPA responds (Br. 34) that petitioners have not suffered those harms *yet* because the agency has not promulgated the rule weakening its standards. But that response assumes that the Original Determination, with its well-documented factual findings and legal conclusions, still constitutes a baseline from which EPA must justify a departure. That

assumption is consistent with the agency's position (Br. 21-31) that the Revised Determination is not a final action; after all, no non-final agency action can revoke an earlier final action. However, insofar as the Revised Determination *did* withdraw the Original Determination (as it purported to do), the Revised Determination itself directly and concretely injured petitioners' interests in preserving the existing standards.

II. THE REVISED DETERMINATION IS UNLAWFUL.

The Revised Determination violates EPA's bedrock duties to follow its own regulations and make decisions that are both reasonable and reasonably explained.

A. EPA violated Section 12(h).

The Revised Determination flouted Section 12(h)'s requirements that EPA (1) disclose and solicit public comment on the information and analyses informing the Administrator's "appropriate[ness]" determination, and (2) describe "in detail" the basis for the determination. These requirements unambiguously apply whether EPA finds the standards appropriate or not.

EPA analogizes (Br. 22-23) its decision here to an advance notice of proposed rulemaking. But Section 12(h) is not satisfied by such "a generalized and tentative undertaking." *Consumer Fed'n v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298, 1305 (D.C. Cir. 1993). Section 12(h) requires "detailed" factfinding on specific issues based on a closed record reflecting public comment, and a definitive

agency position based on that record on whether extant standards are appropriate. Despite counsel's suggestion (Br. 56) that EPA might have bypassed the process entirely, the agency has not even proposed such a course. Instead, EPA expressly proceeded under Section 12(h) and must abide by its terms. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

1. EPA's determination must be based "upon a record that includes" a "draft Technical Assessment Report addressing issues relevant" to the standards and "[p]ublic comment on the draft Technical Report." §12(h)(2). Yet EPA did not publish, or seek comment on, what it called the "significant record that has been developed since the January 2017 [Original] Determination" that justified the April 2018 Revised Determination. 83 Fed. Reg. 16,077, 16,078 (Apr. 13, 2018); *see also* 83 Fed. Reg. 42,986, 42,988 (Aug. 24, 2018) (describing Revised Determination as resting on "more recent information" that showed standards are "no longer appropriate").

EPA contends (Br. 43-44) that it satisfied these requirements when it published and received public comment on a Technical Assessment Report in 2016. But EPA cannot piggyback on the *Original Determination's* compliance with Section 12(h) to support a new and contrary Section 12(h) determination. EPA's 2016 Technical Assessment Report undermines the Revised Determination, and the agency did not prepare a report supporting its about-face. Assuming

arguendo that EPA enjoys an implicit authority to "reconsider" its Section 12(h) determination, the agency cannot jettison Section 12(h)'s processes when it does. No implied reconsideration power could allow EPA to bypass central features of Section 12(h) the second time around. EPA likewise errs in arguing (Br. 47) that a "significant new record" postdating the January 2017 Original Determination is simply "other materials," §12(h)(2)(iv), that need not be disclosed or subjected to comment. EPA's construction of that residual clause is manifestly unreasonable.

2. The Revised Determination unlawfully failed to supply EPA's "detail[ed]" assessment of specified factors. *See* State Br. 40-51. Section 12(h) demands such a detailed assessment to support the agency's determination—not a mere promise to provide details later, as EPA contends (Br. 52-56). Nor can the casual, threadbare Revised Determination be defended as a fastidious call for more data. An agency may, of course, "consider the utility of gathering additional information," EPA Br. 55, but rote references to uncertainty do not obviate the duty to grapple with "'the evidence which *is* available,'" *Mississippi v. EPA*, 744 F.3d 1334, 1358 (D.C. Cir. 2013) (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 52 (1983) ("*State Farm*")) (emphasis added). In particular, EPA did not explain how uncertainty could warrant *withdrawing* the agency's richly supported "appropriate" finding from 15 months earlier and substituting a "not appropriate" finding.

B. EPA violated the APA.

EPA's merits defense largely falls back upon the agency's finality arguments. EPA does not refute petitioners' demonstrations that the Revised Determination ignored specific, detailed and recent EPA findings. *Compare, e.g.*, State Br. 41-45 (citing specific evidence and findings on factors in Section 12(h)(1)(i) and (iii)) *with* EPA Br. 59-61 (discussing these factors without addressing this record evidence). EPA offers no response whatsoever to many of petitioners' key points. *See, e.g.*, State Br. 46-47 (discussing EPA's unreasoned reliance on gasoline prices); Pub. Int. Br. 15-16 (same).

EPA asserts (Br. 58-59) that, "because all factual matters remain under active deliberation," it was "not obligated" to provide a "point-by-point refutation of prior technical findings." But the Revised Determination formally determined that EPA's standards are "not appropriate" and purported to withdraw a contrary determination that rested on detailed factfinding. If that withdrawal is effective, normal requirements to explain reversals necessarily apply. EPA barely mentions the purported "withdrawal" of the (concededly final) Original Determination and fails to explain how a subsequent non-final action could have withdrawn it.

EPA's brief relies heavily on unanalyzed comments of certain automakers in lieu of detailed, record-based agency factfinding. These manufacturers are not the only "important stakeholders" (Br. 60), and EPA was not entitled to treat their

allegations as automatically establishing the inappropriateness of existing standards. That, for example, EPA received "comments recommending that it revisit" its prior analysis on vehicle affordability (Br. 61), is not a reasoned basis for reversal.

EPA needed to explain why those comments were persuasive in the face of detailed contrary evidence in the Technical Assessment Report and the Original Determination. *See* 5 U.S.C. § 706 (requiring judicial review of "whole record"); *State Farm*, 463 U.S. at 43–44. EPA arbitrarily ignored detailed comments providing substantial grounds for finding the standards appropriate. *See* Pub. Int. Br. 17-18. EPA's characterization of the Revised Determination as an informal adjudication does not erase the agency's APA obligation to address comments that "called into doubt" the agency's position. *See Butte County v. Hogen*, 613 F.3d 190, 195 (D.C. Cir. 2010); *see also, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416-19 (1971) (reviewing informal adjudication). Not only did the Revised Determination endorse comments of certain automakers without independent analysis, it also gave no explanation why EPA found submissions of petitioners and other commenters unpersuasive.

CONCLUSION

The Revised Determination should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Initial Reply Brief of Public Interest Petitioners complies with the word limit prescribed in Fed. R. App. P. 32(a)(7)(B) and this Court's order of January 11, 2019 (ECF 1768141). According to Microsoft Word, the portions of the brief that are subject to the word limit contain 1963 words.

May 6, 2019 /s/ *Sean H. Donahue*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2019, the foregoing Initial Reply Brief of Public Interest Petitioners was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ *Sean H. Donahue*