Attorneys General of New York, California, Delaware, the District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Vermont, Virginia, and Washington

May 2, 2018

<u>Via Federal eRulemaking Portal</u>
Kerry Kolodziej
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United States Department of Transportation
National Highway Traffic Safety Administration
1200 New Jersey Ave., SE
Washington, DC 20590

Re: Comments on Notice of Proposed Rulemaking
Docket No. NHTSA–2018-0017

Dear Counsel Kolodziej:

The undersigned Attorneys General submit these comments in response to the National Highway Traffic Safety Administration's (Highway Administration) request for comments on its Notice of Proposed Rulemaking, 83 Fed. Reg. 13,904 (April 2, 2018) (Notice), which proposes a civil penalty rate of $5.50 for every tenth of a mile per gallon (mpg) that a vehicle manufacturer fails to meet the applicable Corporate Average Fuel Economy (CAFE) standard.

Pursuant to the 2015 amendments to the 1990 Federal Civil Penalties Inflation Adjustment Improvements Act (Inflation Adjustment Act), the Highway Administration adjusted the CAFE penalty from $5.50 to $14 per tenth of a mpg, which went into effect in August 2016. 81 Fed. Reg. 43,524 (July 5, 2016). In response to an industry petition, the Highway Administration subsequently determined that the adjusted penalties would apply beginning in model year 2019. 81 Fed. Reg. 95,489 (Dec. 28, 2016). However, in July 2017, the Highway Administration reversed course and indefinitely suspended the $14 per tenth of a mpg penalty. 82 Fed. Reg. 32,140 (July 12, 2017). The States of New York, California, Vermont, and Maryland and the Commonwealth of Pennsylvania petitioned the Court of Appeals for the Second Circuit for review of this rule. *See State of New York et al. v. National Highway Traffic Safety Administration et al.*, Case No. 17-2806 (2d Cir. filed Sept. 11, 2017). On April 23, 2018, the Second Circuit issued an order vacating the July 12, 2017 suspension rule, *see id*., Doc. No. 194, thereby reinstating the adjusted $14 civil penalty.

The undersigned Attorneys General urge the Highway Administration to abandon its current proposal and instead maintain the original $14 CAFE penalty reinstated by the Second Circuit. We also urge the agency to maintain the $25 maximum for discretionary increases of the penalty.

The agency's argument that the 2015 amendments to the Inflation Adjustment Act (2015 Act) do not apply to the civil monetary penalties for CAFE violations is meritless. That position reverses not only the agency's recent 2016 rulemaking implementing the required

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adjustments, *see* 81 Fed. Reg. at 46,524, but also the agency's rulemaking from over twenty years ago applying the Inflation Adjustment Act to the then $5 CAFE penalty. 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997). As the Supreme Court has held, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change[.]" *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"); *see also FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515* (2009) (when an agency deviates from a prior rule, it must provide a "reasoned explanation" for the change and "show that there are good reasons"). An agency's failure to do so is arbitrary and capricious. *State Farm,* 463 U.S. at 56.

The agency's arguments in support of its predetermined conclusion fail this test. As a procedural matter, the Highway Administration chose not to apply for a reduced inflation adjustment under the procedures set forth in the Office of Management and Budget's (OMB) guidance, and the time for doing so has long passed. As discussed below, the substance of the agency's arguments ignores basic canons of statutory construction; flouts the statutory purposes of both the 2015 Act and the Energy Policy and Conservation Act (EPCA) 49 U.S.C. § 32901 *et seq.*; and disregards the comprehensive, robust, and well-supported factual and technical record—which the Highway Administration itself helped create—regarding the achievability and social benefits of the currently promulgated CAFE standards and the augural CAFE standards for model years 2022-25.

In particular, the agency's attempt to significantly lower the CAFE penalty and the penalty's statutory maximum ignore the important role of the adjusted penalties in ensuring that automakers meet the CAFE standards from 2019 onwards. These standards will deliver enormous social benefits in terms of reducing carbon dioxide emissions, the main driver of climate change; protecting our national security by decreasing our dependence on foreign oil imports; reducing emissions of the criteria pollutants that cause air pollution and worsen public health; and providing consumers with savings at the gas pump.

Statutory Background

The Corporate Average Fuel Economy Standards

In response to the energy crisis of the 1970s, Congress enacted EPCA, a comprehensive energy policy that also included an effort to reduce the country's fuel consumption. Title III of EPCA established the CAFE standards and directed the Secretary of Transportation to adopt regulations to implement these standards, a responsibility the Secretary delegated to the Highway Administration. In 2007, Congress reinforced the importance of the role of fuel economy as part of the country's overall energy policy when it passed the Energy Independence and Security Act (EISA); Title I of EISA is entitled "Achieving Energy Security Through Increased Fuel Economy." Pub. L. No. 110-140, 121 Stat. 1499, Title I.

To deter auto manufacturers from violating the CAFE standards, EPCA also imposed a civil monetary penalty for every tenth of a mpg by which the average fuel economy of a manufacturer's fleet of vehicles falls short of the applicable CAFE standard for the model year, multiplied by the number of vehicles in that manufacturer's fleet. 49 U.S.C. § 32912(b). EPCA set the initial penalty at $5. Although EPCA authorizes the Highway Administration to increase the fuel economy penalty if the agency determines that the increase will result in substantial energy conservation for automobiles and will not have a substantial deleterious impact on the economy of the country, a state, or a region of a state, 49 U.S.C. § 32912(c), the Highway Administration has never exercised this authority. The only adjustment the Highway Administration has ever made, from $5 to $5.50 in 1997, was in response to an earlier amendment to the Inflation Adjustment Act. As a result, the real value of the penalty had been steadily eroded by inflation; before the 2016 adjustment, it had already lost approximately 75% of its original value.

The 2015 Amendments to the Inflation Adjustment Act

As part of the Bipartisan Budget Act of 2015, Congress addressed the problem of outdated penalties by amending the Inflation Adjustment Act to restore the deterrent effect of civil monetary penalties and thereby promote compliance with the law. Pub. L. No. 114-74, 129 Stat. 584, § 701 (Nov. 2, 2015), *codified at* 28 U.S.C. § 2461 note. In passing the original Act, Congress expressly found that "the impact of many civil monetary penalties has been and is diminished due to the effect of inflation," and that "by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties." 28 U.S.C. § 2461 note, sec. 2(a)(3).

In the 2015 Act, Congress required agencies to implement an initial "catch-up" adjustment to their penalties by August 1, 2016. 28 U.S.C. § 2461 note, sec. 4(b)(1)(A)-(B). The catch-up amount was based on the change in the Consumer Price Index (CPI) between the year the particular civil monetary penalty was established and October 2015. *Id*. sec 5(b)(2). That catch-up adjustment was capped at 150% of the level in effect on November 2, 2015. *Id*. sec. 5(b)(2)(C). Congress also directed the Office of Management and Budget (OMB) to issue guidance to agencies on implementing the inflation adjustments no later than February 29, 2016. *Id*. sec. 7(a).

Under the 2015 Act, an agency could seek a reduced catch-up adjustment only if the agency determined, in a final rulemaking, that increasing the civil monetary penalty by the otherwise required amount would have a negative economic impact, or that the social costs of increasing the civil monetary penalty by the otherwise required amount outweighed the benefits. *Id.* sec. 4(c)(1)(A), (B). OMB also has to concur in the proposed reduced catch-up adjustment. *Id.* sec. 4(c)(2). OMB guidance directed "[a]gencies seeking a reduced catch-up adjustment determination" to submit notices of proposed rulemaking to OMB "no later than May 2, 2016." Memo (M-16-06) from OMB Director (Feb. 24, 2016) (annexed hereto as Exhibit A). OMB cautioned that it expected approval of reduced catch-up determinations to be "rare." *Id.*

Congress also mandated subsequent annual adjustments in January of each year to maintain the effectiveness of civil penalties against inflation. 28 U.S.C. § 2461 note, sec. 4(a). These subsequent catch-up adjustments are mandatory, not discretionary, and no administrative process exists for an agency to avoid or reduce an annual adjustment.

Administrative Background

The Interim Final Rule

In July 2016, in accordance with the 2015 Act, Highway Administration made the initial catch-up adjustment, increasing the fuel economy civil penalty from $5.50 to $14 for each tenth of a mpg by which a manufacturer falls below the applicable fuel economy standard for that model year, which is then multiplied by the number of automobiles to which the standard applies. 81 Fed. Reg. 46,524 (July 5, 2016). Since applying the CPI multiplier to the penalty would have resulted in a nominal increase to the current civil penalty of greater than 150%, 81 Fed. Reg. 43,526, the adjusted penalty was capped at 250% of $5.50 penalty, resulting in an adjusted penalty of $14. *Id*. 81 Fed. Reg. 43,526.

The original $5 penalty set in 1975 had been stripped of more than three-quarters of its real value by inflation, and even with the adjustment to $14, the penalty retains only two-thirds of its real value.

Applying the same formula and the 150% cap, the Interim Final Rule also adjusted the maximum civil penalty amount for each tenth of a mpg from $10 to $25.

As part of its Interim Final Rule, the Highway Administration carried out an analysis of the economic impact of the adjustment in CAFE penalties and found that the adjustment would not be "economically significant," 81 Fed. Reg. at 43,527—i.e., that it is not likely to have an annual effect on the economy of $100 million or more or adversely affect in a material way, among others, the economy or a sector of the economy. Exec. Order No. 12866, 58 Fed. Reg. 51735, § 3(f)(1) (Oct. 4, 1993).

The Final Rule

After publication of the Interim Final Rule, the Alliance of Automobile Manufacturers and the Association of Global Automakers jointly petitioned the Highway Administration for reconsideration of the Interim Final Rule, requesting, among other things, that the agency not apply the inflation adjustment to model years 2014-2018 because production for those model years was already complete, or the manufacturers had already set their compliance plans. 81 Fed. Reg. 95489 (Dec. 28, 2016).

The Highway Administration decided that raising the penalty retroactively, or for years for which manufacturers had already set compliance plans, would not serve the penalty's purpose of discouraging non-compliance. *See* 49 CFR 578.2 (section addressing penalties states that a "purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law"); *United States* v. *General Motors,* 385 F. Supp. 598, 604 (D.D.C. 1974), *vacated on other grounds,* 527 F.2d 853 (D.C. Cir. 1975) ("The policy of the Act with regard to civil penalties is clearly to discourage noncompliance"). Accordingly, the Highway Administration issued a Final Rule granting the petition to this extent and held that the inflation-adjusted CAFE penalties would apply beginning with model year 2019. The agency maintained the inflation-adjusted $14 CAFE penalty. 81 Fed. Reg. at 95490.

The July 12, 2017 Delay of the Final Rule

On July 12, 2017, the Highway Administration reversed course and published a notice announcing that it was indefinitely delaying the effective date of the Final Rule while it reconsidered the penalty rate, and that during the period of reconsideration, the $5.50 penalty would be in effect. 82 Fed. Reg. 32139 (July 12, 2017). The States of New York, California, Maryland and Vermont, the Commonwealth of Pennsylvania, and three environmental organizations filed a lawsuit challenging the Highway Administration's delay rule. On April 23, 2018, the United States Court of Appeals for the Second Circuit issued an order vacating the delay rule.

Discussion

I. The Highway Administration's Proposed Reduction of the CAFE Penalty Is Prohibited by the Plain Language of the Controlling Statutes

The Highway Administration has no authority to reduce the CAFE penalty of $14 to $5.50. The 2015 amendments to the Inflation Adjustment Act compelled the Highway Administration to update the $5.50 penalty for inflation according to an expressly defined schedule. The agency complied with the 2015 Act when it set the $14 amount in August 2016. The agency's proposal to now reduce this penalty would violate the Act's clear timetable and formula for adjustment. No other statute grant the agency authority to take action to reduce the amount of the CAFE penalty as the Highway Administration now seeks to accomplish.

The 2015 Act mandated that federal agencies update their civil penalties to account for inflation according to a defined schedule: agencies were required to establish an initial "[c]atch up adjustment" that "shall take effect not later than August 1, 2016," with subsequent annual adjustments. 28 U.S.C. § 2461 note, sec. 4(a)-(b). Once the agency applied the catch-up adjustment, the 2015 Act granted the Highway Administration no further authority to reduce the penalty, as the agency now attempts. To the contrary, beyond compelling an initial catch-up increase by August 2016, the only further adjustment that the 2015 Act permits is the mandatory annual increase to account for inflation.

Although the 2015 Act allowed the Highway Administration to institute an initial increase of less than the full amount, contingent on findings about economic impact, that provision was available only for "the first adjustment" that had to come into effect by August 2016. 28 U.S.C. § 2461 note, sec. 4(c). Congress plainly intended that, if the Highway Administration intended to obtain an exception to the full scheduled penalty increase—as the agency now seeks to do—it would have to do so before the 2016 deadline, not years after that deadline in a subsequent rulemaking. That reading of the statute is confirmed by guidance from OMB, whose approval was required under the Act for any exception: that guidance required agencies to submit a notice of proposed rulemaking to seek an exception to OMB "no later than

May 2, 2016." Nothing in the 2015 Act can be read to authorize the Highway Administration to seek an exception now, in a rulemaking nearly two years after the 2016 deadline, after the mandatory first catch-up adjustment has been promulgated, and after the $14 penalty has become effective.

Nor do the CAFE provisions of EPCA provide any authority for the agency to reduce a penalty that has come into effect. To the contrary, EPCA grants the Highway Administration a limited, discretionary authority to "prescribe by regulation a *higher*" penalty amount, but does not give the agency discretion to diminish the amount of a penalty in effect. *See* 49 U.S.C. § 32912(c) (emphasis added). Now that the Second Circuit has vacated the unlawful suspension of the new penalty, it is beyond dispute that the $14 penalty is effective. To adjust the penalty downwards, the Highway Administration would have to have some source of statutory authority to reduce the civil penalty amount. But Congress has not provided any such authority.

The Highway Administration is wrong to suggest that some purported "inherent authority" to reconsider final rules allows it to reduce the penalty amount, notwithstanding the strict timetable and mandates of the 2015 Act. *See* 83 Fed. Reg. at 13908, n.22. The agency's position contradicts the settled principle that, while an agency may repeal or amend a rule to the extent that doing so is consistent with its statutory authority, an agency has no "'inherent' power to reconsider final rules it has published in the Federal Register." *See NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004). Especially because Congress here has set forth a "highly circumscribed schedule" for agency action, the Highway Administration cannot rely on any "general rulemaking authority" that would conflict with the 2015 Act's schedule for making the increased catch-up penalty effective. *See NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992).

II. The Highway Administration's Proposed Reinterpretation of Its Statutory Obligations Is Meritless

As discussed above, the Highway Administration deemed the original Inflation Adjustment Act applicable to the CAFE penalty over twenty years ago. In the 2015 Act, Congress amended the original Act to include certain federal civil penalties and exclude others from inflation adjustment, but left undisturbed the Highway Administration's longstanding interpretation that the language of the Inflation Adjustment Act—which is repeated in the 2015 Act—applies to the CAFE penalty. In the Notice, the agency has announced a new interpretation of 2015 Act that would exclude the CAFE penalty from its reach. Notice at 13,904-05.

The Notice seeks to justify the Administration's abandonment of its long-standing interpretation of the 2015 Act with a series of meritless arguments. First, it argues that the CAFE civil penalty does not fall under the 2015 Act's definition of a "civil monetary penalty" because the amount a manufacturer ultimately pays is calculated according to a formula that may include the application of credits, which is subject to the discretion of the manufacturer. Second, the Notice argues that Congress sought to implicitly exempt the CAFE Penalty from inflation adjustments. Third, the Notice argues that the 2015 Act and the EPCA actually *conflict*, and thus that the CAFE Penalty is exempt from the 2015 Act's mandate. Finally, the

Notice argues that increasing the penalty rate to $14 still would create a negative economic impact. Each of these arguments is incorrect.

A. The CAFE Civil Penalty is a "Civil Monetary Penalty" Under the 2015 Act

The Highway Administration's previous interpretation applying the Inflation Adjustment Act has stood undisturbed for so long because a plain language reading of the relevant provisions requires this interpretation.

The Inflation Adjustment Act defines a "civil monetary penalty" as "any penalty, fine, or other sanction" that (i) "is for a specific monetary amount as provided by Federal law," or (ii) "has a maximum amount provided for by Federal law." 28 U.S.C. 2461 note, sec. 3(2). The CAFE penalty falls within this definition. Congress expressly designated the CAFE penalty, which is monetary, as "a civil penalty." 49 U.S.C. § 32912. EPCA imposes a specific, monetary penalty for every tenth of a mpg "by which the average fuel economy standard" for a fleet falls below the applicable CAFE standard for that model year, multiplied by the number of vehicles in that fleet. 49 U.S.C. § 32912(b). The penalty was set at $5 in 1975, and the Highway Administration adjusted it to $5.50 in 1997 pursuant to the Inflation Adjustment Act. This "specific monetary amount as provided by Federal law" brings the CAFE penalties within the 2015 Act's definition of a "civil monetary penalty." 28 U.S.C. 2461 note, sec. 3(2). Similarly, the $10 cap on this tenth of a mpg penalty also brings the cap within the 2015 Act's scope: as a ceiling for a manufacturer's penalty, the $10 figure is "a maximum amount provided for by Federal law." *Id.*

In the Notice, the Administration suggests that the EPCA's use of a formula to calculate the penalties manufacturers pay somehow removes the CAFE Penalties from the scope of civil monetary penalties as defined by the 2015 Act. 83 Fed. Reg. 13909. It explains that the agency first produces a preliminary calculation by multiplying each tenth of a mile shortfall by the number of fleet vehicles a manufacturer produced in that fleet year, and then multiplies the total by $5.50. *Id.* The manufacturer can then elect how to satisfy its shortfall, whether by the use of credits or by paying the penalty. *Id.* at 13910. In short, the Highway Administration posits that because it must multiply the civil penalty amount by the extent of the violation to ascertain the total amount a manufacturer owes, and because the manufacturer has discretion to apply credits to offset a portion of the penalty, the $5.50 penalty is beyond the reach of the Inflation Adjustment Act and the 2015 Act.

But the fact that the agency must multiply the civil penalty amount by the extent of the violation to calculate the amount owed by a manufacturer does not transmute the $5.50 CAFE penalty into an unknowable quantity. Congress recognized that fact by referring to a "civil penalty" in the statutory text, and the Highway Administration throughout its Notice uses that same terminology. Nor does the availability of a credit mechanism that allows a manufacturer an alternate means to fully or partially comply with the CAFE standards have any bearing on the nature of the penalty—which is set at "a specific monetary amount as provided by Federal Law"—for a manufacturer's noncompliance with those standards. 28 U.S.C. 2461 note, sec. 3(2).

The Highway Administration understood this when it applied an earlier amendment to the Inflation Adjustment Act to the CAFE penalty. Pub. L. No. 104-134, § 31001, 110 Stat. 1321, 1321-373 (1996). It relied on the previous amendment's applicability to adjust the penalty from $5 to $5.50. *See* 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997). And other agencies have likewise concluded that a penalty calculated with a base rate, such as the CAFE penalty, falls squarely within the Inflation Adjustment Act's ambit.[1] That result makes sense: a total penalty reached by multiplying the base rate by the number of violations that are not offset by any credits will result in a specific dollars-and-cents figure that is just as concrete and specific as a fixed amount. *Cf. United States v. Vera*, 542 F.3d 457, 459 (5th Cir. 2008) (referring to statutory sentencing formula as "calculating the maximum term of supervised release"). And while EPCA permits manufacturers to use credits as a means of complying with the statute and to reduce the penalty amount they *actually* pay, *see* 49 U.S.C. § 32912(b)(3), that option does not alter the fact that the statute's monetary terms still dictate the *maximum* amount of the penalty, both per violation and in total.[2] Furthermore, when Congress adjusted the EPCA in 2007 to institute the credit system, it declined to override the Highway Administration's previous conclusion that the Inflation Amendments applied to the CAFE standard.

Indeed, the CAFE penalty's structure is not unique. Statutes and regulations often set a penalty rate that is multiplied by the number of violations, *i.e.*, where the total penalty amount depends on the number of violations committed. Some regulations also allow the agency to take into account mitigating factors that can potentially change the penalty amount the violator pays. For example, under the Clean Air Act, 42 U.S.C. § 7524(a) imposes a civil penalty on a per-motor-vehicle or per-day basis for violations of several different provisions of 42 U.S.C. § 7422(a).[3] The agency, however, can adjust the penalty based on the factors enumerated in § 7422(b) (for example, economic benefit resulting from violation; history of compliance; cooperation). Thus, as with the CAFE penalty, the final penalty paid by a violator is unknown at the time the agency finds the dealer or manufacturer to be in violation. Nevertheless, EPA interpreted the 2015 Act—the initial catch-up adjustment as well as the subsequent mandatory annual adjustments—to apply to § 7524 and the other civil penalty provisions of statutes

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[1] *See, e.g.*, 82 Fed. Reg. 61,140 (Dec. 27, 2017) (applying the 2015 Act to the Administrative Fines Program, see 11 C.F.R. § 111.43, which uses a multi-factor formula to calculate the penalty).

[2] Several of the penalties that Congress expressly excluded from the Amendments also are based on formulas, a further indication that Congress considered such formula-based penalties to be civil monetary penalties that would otherwise be covered by the Amendments. *See, e.g.*, 26 U.S.C. § 6689 (imposing a civil monetary penalty on taxpayers based on a multifactor formula).

[3] *See, e.g., id.* at § 7422(a)(1) (prohibiting the sale of a new motor vehicle or engine without an effective certificate of compliance); § 7422(a)(3)(A) (prohibiting the removal or rendering operative of any device installed in a motor vehicle or engine).

administered by EPA. *See* 83 Fed. Reg. 1190, 1193-94 (table setting forth adjusted civil penalties for statutes administered by EPA).

B. Congress Intended the Inflation Adjustment Act to Apply to the CAFE Penalty

The Highway Administration also argues that Congress intended to implicitly exempt the CAFE Penalty from inflation adjustments because EPCA gives the agency the discretion to enact non-inflationary increases to the CAFE penalty. The Administration argues that "Congress already adopted a specific scheme for increasing the civil penalty in 49 U.S.C. 32912(b) that requires a far more intensive and restrictive process than the summary approach in the [2015 Act]." 83 Fed. Reg. 13,910.

But this interpretation conflates EPCA's grant of *discretionary* authority to the Highway Administration to make increases to the penalty where doing so will increase energy conservation, with the Inflation Adjustment Act's *mandatory* direction to agencies to adjust their penalties for inflation. The agency's interpretation also ignores one of the problems Congress sought to solve with the 2015 Act, which was that agencies like the Highway Administration had failed to adjust civil monetary penalties for decades—*despite* having the ability to do so. Because of agency inaction, decades of inflation had eroded most of the original value of penalties like the CAFE penalty, which as a result had lost much of their deterrent effect. The 2015 Act expressly contemplates the coexistence of inflation adjustments and the discretionary adjustments provided for under EPCA § 32912(c) because the 2015 Act provides that an agency need not make inflation-based adjustments if it has implemented a discretionary adjustment equal to or greater than the annual inflation adjustment. *See* 28 U.S.C. § 2461 note, sec. 4(d). But when, as here, an agency fails to exercise its discretion to increase a civil penalty, Congress plainly intended the procedure in the 2015 Act to take precedence.

Moreover, the Notice's suggestion that Congress intended to *implicitly* exempt the CAFE penalty from the 2015 Act cannot be reconciled with the statute's *explicit* exemption of other civil penalties—a clear indication that Congress knew how to craft exemptions when it intended to do so. *See John Wiley & Sons v. DRK Photo*, 882 F.3d 394, 406 (2d Cir. 2018) (applying *expressio unius* canon). If Congress had intended to exempt the CAFE penalty from the 2015 Act, it would have so stated. Indeed, in light of the Highway Administration's previous application of Inflation Adjustment Act to the CAFE penalty, Congress was on notice that the agency would apply the 2015 Act to the penalty, yet still chose not to exempt the penalty.

In short, no exemption—either implicit or explicit—for the CAFE penalty exists in the 2015 Act. To the extent any ambiguity exists—and the States dispute that it does—because the penalty adjustments in the 2015 Act are both mandatory and were enacted more recently than EPCA, they should be given controlling effect. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982).

The fact that Congress made specific changes to the EPCA in 2007 that left the 1997 adjustment to $5.50 intact further reinforces the correctness of the Highway Administration's previous interpretation of the Inflation Adjustment Act. Public Law 110–140, Title I, 104(a), 121 Stat. 501 (2007). If Congress had wished to exempt the CAFE "civil penalty"—or had wished the Highway Administration to do so—Congress gave no hint of this wish in the 2007 adjustments.

Finally, the Notice expresses concern that increasing the CAFE penalty may result in the "imposition of a potentially massive increase in civil penalties," 83 Fed. Reg. 13911. This concern is based on industry comments suggesting that adjusted penalties could result in a yearly increase of $1 billion in costs. However, Congress provided agencies with a procedure to seek a reduced catch-up adjustment if the agency anticipated that the mandatory adjustment would lead to a negative economic impact, or that the social costs of adjusting the penalty would outweigh the benefits. *See* 2015 Act sec. 4(c)(1)(A), (B). OMB's guidance set a deadline of May 2, 2016 by which agencies had to apply for a reduced catch-up adjustment.

The Highway Administration did not apply for a reduced catch-up adjustment by the deadline. The 2016 Technical Assessment Report (TAR) jointly produced by the Highway Administration, EPA, and the California Air Resources Board (CARB) concluded that the model year 2022-25 greenhouse gas/CAFE standards were technologically feasible at reasonable cost for auto manufacturers. TAR at ES-2.[4] In other words, the Highway Administration's own earlier analysis indicates that the industry's $1 billion penalty estimates are unreasonable since any "massive" increase would be the result of the manufacturers' deliberate non-compliance rather than any inability to comply.

In sum, the Highway Administration's argument—that the Inflation Adjustment Act and the 2015 Act do not apply to the civil monetary penalty for CAFE violations—is contradicted by both the plain language and intent of the statute. Likewise, the Highway Administration's concern about "massive" penalties is belied by the factual record the agency itself helped create.

C. No Conflict Exists Between the Inflation Adjustment Act and EPCA Requiring Reducing the Civil Penalty Rate from $14 to $5.50.

Next, the Highway Administration proposes that, if—as is the case—the 2015 Act applies to the CAFE penalty, the agency nevertheless must continue to apply the outdated and heavily eroded $5.50 civil penalty rate "in order to comply with EPCA, which must be read

[4] EPA, Highway Administration, and CARB, *Draft Technical Assistance Report* (2016), available at https://www.epa.gov/regulations-emissions-vehicles-and-engines/midterm-evaluation-light-duty-vehicle-greenhouse-gas#TAR. The TAR was based on, among other things, input from stakeholders such as the auto manufacturers and state-of-the-art research. *Id.* The Highway Administration also performed multiple sensitivity analyses which demonstrated additional compliance pathways and found that manufacturers could achieve compliance largely through improved gasoline technologies that are already in commercial production, or could feasibly be in production by 2025, rather than extensive electrification of their fleets. *Id.*

harmoniously with the 2015 Act." 83 Fed. Reg. 13,905. The Highway Administration states that to satisfy EPCA's requirements for a non-inflationary penalty increase, the Highway Administration must apply the 2015 Act's "negative economic impact" provision, and reduce *the entire amount* of the inflationary adjustment otherwise required by the 2015 Act.[5] *Id*. The Highway Administration's proposed "harmonization" of EPCA and the Inflation Adjustment Act is flawed and should be abandoned.

First, EPCA and the 2015 Act do not conflict or require harmonization because they involve different subjects, and thus are not, as the Highway Administration states, *in pari materia*. As explained above, the Highway Administration has the authority under EPCA to enact non-inflationary increases of the CAFE penalty if it finds that such an increase will "substantially advance" energy conservation for automobiles and that the increase "will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State." 49 U.S.C. §§ 32912(c)(i), (ii). But EPCA's grant of *discretionary* authority to the Highway Administration to increase the CAFE penalty is separate from, and irrelevant to, the agency's *independent and mandatory duty* under the 2015 Act to adjust the CAFE penalty *for inflation*. The purpose of the 2015 Act is to adjust civil penalties to maintain their deterrent effect against inflation. Consequently—and in contrast to EPCA's framework for increasing the CAFE penalty—the 2015 Act provides a straightforward, ministerial procedure for adjusting penalties for inflation that does not require any factual showing by an agency. Thus, the two statutes do not conflict: they work differently because the statutes' purposes, and the types of penalty adjustments involved, are separate and distinct.

Similarly, the Highway Administration's consideration of the CAFE program's "constrained structure" and the agency's limited ability to compromise penalties are irrelevant to the Highway Administration's application of the adjustments mandated by the 2015 Act. 83 Fed. Reg. 13,912. In the 2015 Act, Congress did not direct agencies to consider their ability to compromise penalties when making the ministerial inflation adjustments to their civil penalties. Instead, Congress intended the Inflation Adjustment Act to apply broadly and uniformly to federal civil monetary penalties across all agencies unless specifically exempted, regardless of how the subject penalty programs are structured. Moreover, the Highway Administration's portrayal of its "constrained" ability to compromise credits disregards the CAFE program's numerous built-in compliance flexibility mechanisms which soften the sting of the penalties, including: (1) the manufacturers' ability to design fleets several years in advance to achieve

[5] *Id*. As the Highway Administration summarizes, "[t]o read these two provisions together harmoniously, NHTSA interprets the statutes to mean that the agency must be able to show that increasing the penalty as would be required by the 2015 Act will not have the adverse economic effects identified in the definition of 'substantial deleterious impact [under EPCA] . . . . Since NHTSA does not have sufficient evidence to make the requisite finding under EPCA that an increase in the CAFE penalty rate will not have a substantial deleterious impact on the economy, NHTSA is proposing to retain the $5.50 penalty rate pursuant to the negative economic impact exception to inflationary adjustments." 83 Fed. Reg. at 13,913-14.

compliance; (2) their ability to apply credits from over-compliance across fleets and model years; and (3) their ability to purchase credits from other manufacturers.

Even if the statutes do conflict—which they do not—the manner in which the Highway Administration proposes "harmonizing" the statutes would essentially rewrite the 2015 Act to exclude the CAFE penalty. The Highway Administration not only imports the EPCA factors into its interpretation of the 2015 Act, but also adopts EPCA's presumptions. As described above, EPCA only permits the Highway Administration to implement a discretionary, non-inflationary increase of the CAFE penalty if the agency first determines that the penalty increase "will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State." 49 U.S.C. §§ 32912(c)(1). The 2015 Act contains the *opposite* presumption: it requires agencies to implement an initial catch-up adjustment. It permits them to implement a reduced catch-up adjustment, but only if the agency determines that "(A) increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact; or (B) the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits;" and the Director of OMB concurs.[6] 28 U.S.C.A. § 2461 Sec. 4(c).

Thus, while EPCA *permits* a penalty increase only if the Highway Administration affirmatively finds the absence of an economic impact, the 2015 Act *requires* a penalty adjustment *unless* the agency affirmatively found—by May 2, 2016, a deadline that has long passed—that the adjustment would result in an economic impact and OMB concurs.[7] In other words, the statutory default position under EPCA is that the CAFE penalty remains the same; the default position under the 2015 Act is that the penalty tracks the rate of inflation. The Highway Administration's actions until 2017 demonstrate an understanding of this statutory default position, and it chose not to seek a reduced catch-up adjustment by the May 2, 2016 deadline. *See* 81 Fed. Reg. 43,524 at 43,525 (July 5, 2016) (discussing OMB guidance that discusses a reduced catch-up adjustment).

Nevertheless, the Highway Administration proposes replacing the 2015 Act's default presumption—that the penalty increases for inflation—with EPCA's default presumption, that the penalty remains the same. This approach does violence to both the letter and the objectives of the 2015 Act. On this basis, the Highway Administration makes the fallacious claim that because it has not determined that the catch-up adjustment mandated by the 2015 Act will not have a substantial deleterious impact on the economy, it somehow follows that the catch-up adjustment *will* have a negative economic impact within the meaning of the 2015 Act, and thus *no increase at all* is permitted. 83 Fed. Reg. 13,913-14. The agency applies this same approach to the other EPCA factors, and concludes that because it has *not* determined that the catch-up

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[6] The Highway Administration nowhere identifies a provision in the 2015 Act that authorizes an agency to eliminate or reduce a catch-up adjustment that it already made, as the Highway Administration has proposed to do here.

[7] As the Highway Administration itself acknowledges, the exception in the 2015 Act was to be rarely used. 82 Fed. Reg. 32,142 (July 12, 2017).

adjustment will *not* cause a significant increase in unemployment in a State or a region of a State, will not adversely affect competition, and will *not* cause a significant increase in imports, the Highway Administration must *not* implement the inflation adjustment mandated by Congress.

In sum, the Highway Administration's circular argument impermissibly inverts the presumption Congress built into the 2015 Act, namely that the catch-up adjustment is required *except* in the rare instance that an agency *affirmatively* finds that it would cause a negative economic impact. The Highway Administration has not made such a finding here. Nor has it even performed any analysis to determine whether the penalty increase would cause a negative economic impact.[8] For these reasons, the Highway Administration's attempt to invoke the "negative economic impact" provision is illogical and factually unsupported, and directly contravenes Congress's clear mandates and objectives in the 2015 Act. The Highway Administration should abandon this new interpretation of the 2015 Act and return to its original 2016 approach, which properly increased the penalty in full conformity with Congress's clear direction.

D. The $14 Penalty Mandated by Inflation Adjustment Act Would Not Create a "Negative Economic Impact" or Net Social Costs

Next, the Highway Administration states that, setting aside the EPCA factors, increasing the penalty rate to $14 still would create a "negative economic impact." 83 Fed. Reg. 13,916. The Highway Administration concludes that "the economic consequences described above [in the Federal Register notice] are a reasonable estimate of what would occur if the CAFE civil penalty was increased" to $14. *Id.* The Highway Administration does not specifically identify the "economic consequences" to which it refers, nor does the agency itself perform any analysis of the alleged impact of the penalty increase, including the benefits that a strengthened deterrent effect would bring to the CAFE program. Instead, it merely asserts, without data or analysis, that "the increase would result in an increase in manufacturers' compliance costs, many of which would be passed along to consumers." *Id.* The Highway Administration does not provide an estimate of the increased compliance costs, the number and types of vehicles affected, the average increased costs that consumers would bear, the price sensitivity of consumers of the affected vehicles, or how the cost increase compares to fuel cost savings and other benefits to consumers resulting from increased compliance. Yet the agency nevertheless proposes that the penalty increase mandated by the Inflation Adjustment Act—which does not fully restore the real value of the penalty Congress established in 1975—is one of the "rare" instances when a penalty increase falls within one of the exceptions in the 2015 Act. The Highway Administration then concludes that, instead of a reduced catch-up adjustment allowed in some circumstances, *no increase* is warranted, and that it should revert to the $5.50 penalty that predated the 2015 Act despite its substantially eroded value.

[8] As explained in the next section, the Highway Administration's vague reference to "economic consequences" is not sufficient to justify a finding that the catch-up adjustment would, in fact, cause a negative economic impact.

As an initial matter, the 2015 Act contains no provision authorizing an agency to do what the Highway Administration is proposing here, *i.e.,* to eliminate or reduce a catch-up adjustment that it already implemented based on "negative economic impact." OMB directed agencies seeking a reduced increase to submit their proposals—including their notices of proposed rulemaking—by no later than May 2, 2016. This deadline was material to the Act's goals of (1) restoring the deterrent effect of federal civil monetary penalties such as the CAFE program penalty, and (2) maintaining the deterrent effect of the penalties through subsequent annual adjustments. The Highway Administration never submitted a proposal for a reduced catch-up adjustment to OMB. Instead, it chose *not* to seek a reduced adjustment and implemented the full catch-up adjustment required by the 2015 Act. The statute does not provide a mechanism for the Highway Administration to reverse course two years after OMB's deadline, and more than twenty months after the deadline for implementing the initial catch-up adjustments, and retroactively seek a reduced catch-up adjustment or no catch-up adjustment at all. In addition, the Highway Administration's proposal to reduce the penalty it previously promulgated is too late for model year 2019 fleets, which are due to appear on dealer lots and the nation's roads in the next few months.

Moreover, the Highway Administration also has not identified any facts or analysis that would support its belated invocation of the "negative economic impact" provision. The agency does not specifically point to any such facts or analysis, but instead vaguely references "the economic consequences described above." 83 Fed. Reg. 13,916; *see also* 83 Fed. Reg. 13,905 (referencing without citation "information provided by commenters"). To justify its tentative decision to disregard the Act's mandate, the Highway Administration must provide the public with the facts and analysis upon which it relies. *State Farm*, 463 U.S. at 43 (agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made).[9] The Highway Administration has not done so.

The figures discussed elsewhere in the Notice–and the States are not certain if these are what the agency references—offer no support for the agency's proposal to reverse the $14 penalty the agency previously implemented. For example, the Highway Administration notes that "automakers have paid more than $890 million in CAFE civil penalties, up to and including model year (MY) 2014 vehicles." 83 Fed. Reg. 13,905-06. The Highway Administration appears to suggest that this shows that the previous penalty rates resulted in sizable overall penalties. However, from 1978 to 2014, approximately 537 million light-duty vehicles were sold in the United States, resulting in an average approximate penalty of $1.66 per vehicle.[10] This is a minuscule amount, given the price of vehicles, and certainly nowhere near the

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[9] *See* comments at docket numbers NHTSA-2017-0059-0011, NHTSA-2017-0059-0012 and NHTSA-2017-0059-0019.

[10] Bureau of Economic Analysis at https://www.bea.gov/national/xls/gap_hist.xlsx.

magnitude required to support a finding that a penalty increase would cause a negative economic impact.

Even the alarmist figures provided by industry do not support the Highway Administration's proposal. The Alliance of Automobile Manufacturers and the Association of Global Automakers claim to have determined that a penalty increase to $14 would result in, at most, $6.3 billion in increased penalty costs over a fourteen year period from 2019 through 2032 when applying a 3% discount rate.[11] While the undersigned Attorneys General believe that this estimate is almost certainly inaccurate, even these inflated projections average $450 million in increased penalty costs per year, or about $26 per vehicle (assuming 17 million new vehicles per year). Even if this entire amount were to be passed through to consumers, it represents about 0.17% of the cost of a $15,000 vehicle, 0.1% of the cost of a $25,000 vehicle, and 0.065% of the cost of a $40,000 vehicle. As other commenters make clear, industry's modeling and analysis rest on questionable assumptions and inputs, but it is striking that even industry's worst-case estimate does not forecast a substantial impact on vehicle prices, and certainly does not support the conclusion that the increase would result in a negative economic impact.

Remarkably, the Highway Administration does not analyze the obvious alternative available to manufacturers who want to avoid the higher penalty: compliance with the fuel economy standards. The goal of the CAFE program is for manufacturers to design their fleets to meet or exceed the CAFE standards, and the civil penalty increases mandated by the 2015 Act further this goal. As the Highway Administration found in the TAR, the auto industry had, on average, over-complied with the standards through Model Year 2014, the last year for which data was available. *See* TAR at ES-3. Moreover, several auto manufacturers last year announced plans to substantially bolster their hybrid and electric product lines, further improving compliance—or over-compliance—with the standards. For example, General Motors announced its commitment to abandon all gas- and diesel-powered vehicles in favor of an all-electric fleet, beginning with dramatic expansion of its long-range electric battery vehicles by 2023.[12]

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[11] NHTSA 2017-0059-0005 at p. 10.

[12] Paul A. Eisenstein, *GM Is Going All Electric, Will Ditch Gas- and Diesel-Powered Cars,* NBC News, available at https://www.nbcnews.com/business/autos/gm-going-all-electric-will-ditch-gas-diesel-powered-cars-n806806. Other manufacturers are also supplementing their hybrid and electric product lines. Daimler, which owns Mercedes-Benz, is investing $10.8 billion to bring more than 10 new electric cars to market by 2022. Reuters Staff, *Daimler Accelerates Electric Car Program*, March 29, 2017, available at http://www.reuters.com/article/us-daimler-agm/daimler-accelerates-electric-car-program-idUSKBN1700N7. Similarly, Volkswagen has said it will invest $20 billion to develop at least one battery-based electric offering for every model sold by VW, Audi, and its other brands. *See* Christoph Rauwald, *VW to Build Electric Versions of All 300 Models by* 2030, Bloomberg

Vehicle manufacturers that comply with the standards earn valuable credits that they can use to offset prior and future violations, or sell to other manufacturers, thus recouping part of the costs of compliance and blunting any potential economic harm caused by the CAFE penalties. Moreover, by partially restoring the real value of the CAFE program penalty, the 2015 Act will increase the value of these credits, thereby rewarding those manufacturers that comply with the standards, and making violations more expensive for those manufacturers that voluntarily choose not to comply with the CAFE standards. This is precisely what Congress intended when it amended the Inflation Adjustment Act to restore and maintain the deterrent effect of federal civil penalties—an outcome the Highway Administration entirely fails to address.

For all of these reasons, the Highway Administration should abandon its proposed reversal and instead maintain the existing $14 penalty that it implemented in 2016. The Highway Administration should also make the statutorily required annual adjustments for model year 2019 for 2017 and 2018, as it pledged to do in the Final Rule. 81 Fed. Reg. at 95,491 (Dec. 28, 2016).

If, however, the Highway Administration concludes that a negative economic impact would result from the $14 penalty—and the undersigned Attorneys General do not agree that such a reduced catch-up adjustment would be valid—the Highway Administration should reduce the catch-up inflation adjustment by as little as possible. Such a reduction, if necessary, should be based on an analysis of the relevant factors, including but not limited to an estimate of compliance costs, the number and types of vehicles affected, the average increased cost to consumers, and how that cost compares to fuel cost savings. Moreover, even a reduced catch-up adjustment would be subject to the mandatory annual adjustments.

II. The CAFE Civil Penalty Rate is Capped at $25, not $10

As discussed above in the Administrative Background, the Highway Administration agreed in its Interim Final Rule that the Inflation Adjustment Act applies to a variety of civil monetary penalties under EPCA, including the fuel economy penalty provisions in § 32912(b) and (c). 81 Fed. Reg. 43,526. In addition to applying the inflation adjustment to the current penalty, the Interim Final Rule also applied the inflation adjustment to the statutory maximum, adjusting it from $10 to $25. *Id*. This adjustment became effective in August 2016, has never been suspended or reversed, and remains in effect.

However, as a further justification for its decision to preserve the $5.50 civil penalty rate for CAFE violations, the Highway Administration asserts that the $10 maximum penalty set in

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News, September 11, 2017, available at https://www.bloomberg.com/news/articles/2017-09-11/vw-ceo-vows-to-offer-electric-version-of-all-300-models-by-2030. Last, Volvo announced that it will introduce only hybrid or battery powered car models starting in 2019. Jack Ewing, *Volvo, Betting on Electric, Moves to Phase Out Conventional Engines*, New York Times, July 5, 2017, available at https://www.nytimes.com/2017/07/05/business/energy-environment/volvo-hybrid-electric-car.html?_r=0.

49 U.S.C. § 32912(c)(1)(B) is not subject to the 2015 Act because "the $10 cap is not the maximum amount of a penalty that is 'assessed or enforced.' Rather, it is a limit on the amount that NHTSA can set for the civil penalty rate if the required determinations are made." 83 Fed. Reg. 13,916. As explained below, the Highway Administration assertion that that amount "is not the maximum amount of a penalty that is 'assessed or enforced"' is incorrect.

First, the Highway Administration provides no reasoned explanation for why now, almost two years after adjusting the civil penalties in EPCA for inflation, it has reversed course and proposed that the 2015 Act does not apply to the statutory maximum penalty.

The agency also ignores the plain language of the statute, as did with the base penalty amount. The dollar amount in § 32912(c)(1)(B), as the Highway Administration appears to agree, is the maximum penalty rate the agency may assess for each tenth of a mpg violation. This fact means that it squarely falls within the 2015 Act's definition of a civil penalty, which includes a "maximum amount of a penalty that is 'assessed or enforced.'" 28 U.S.C. 2461 note, sec. 3(2). While the $25 cap is not being assessed or enforced now, it may be in the future if the Highway Administration exercises its discretionary authority to increase the penalty to further energy conservation.

Moreover, to read the 2015 Act as *not* applying to the CAFE standards' statutory maximum would undermine the purpose of both the 2015 Act *and* EPCA. As discussed above, the Highway Administration's current analysis improperly fails to consider the overarching purpose of both statutes. In passing the Inflation Adjustment Act, Congress intended to "maintain the deterrent effect of civil monetary penalties and promote the compliance with the law." 28 U.S.C.A. § 2461, Sec. 2(b)(2).

The goal of EPCA is to reduce fuel consumption by increasing fuel economy,[13] and the CAFE penalties play a critical role in deterring non-compliance. *Id*. When penalties become too low relative to manufacturing cost, it becomes cheaper for manufacturers to pay penalties than to comply, thereby undermining EPCA's purpose. The recent compliance history of Mercedes-Benz and Jaguar illustrates this point. As shown below, both manufacturers fell below the required fleet standard every year from 2009 to 2015 and chose to pay the penalty rather than comply with the standard.

[13] The Ninth Circuit has held that while EPCA "gives NHTSA discretion to decide how to balance the statutory factors [technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy], that balancing may "not undermine the fundamental purpose of the EPCA: energy conservation." *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1195 (9th Cir. 2008).

Mercedes-Benz (Daimler)[14]

Year	2009	2010	2011	2012	2013	2014	2015
Standard	27.5	27.5	30	32.3	33.3	33.7	34.2
Performance	27.1	26.1	26.6	29.3	31.5	32.7	32.2

Jaguar Land Rover[15]

Year	2009	2010	2011	2012	2013	2014	2015
Standard	27.5	27.5	27.2	30.2	30.9	32.4	33.3
Performance	23.7	23.7	23.6	23.7	26.2	27	27.6

In contrast, however, Ford and General Motors, America's biggest auto manufacturers, were able to comply with the CAFE standards for passenger cars for 2009-2015, with the exception of one year for General Motors.

Ford[16]

Year	2009	2010	2011	2012	2013	2014	2015
Standard	27.5	27.5	29.8	33.2	32.9	34	35
Performance	31.5	32.6	32.7	35.7	36.4	36.4	35.8

GM[17]

Year	2009	2010	2011	2012	2013	2014	2015
Standard	27.5	27.5	29.8	32.3	33	33.9	34.8
Performance	31.3	30.8	31.2	32.8	33.6	34.4	34

Given that the Highway Agency already has found that future CAFE standards are technologically feasible at reasonable cost to manufacturers and consumers, TAR at ES-2, maintaining the real value of the CAFE penalties is vital to encouraging compliance with the standards.

III. If the Highway Administration Reduces the Existing $14 Penalty, It Must Comply with the National Environmental Policy Act

In the Notice, the Highway Administration erroneously concludes that "[u]nder all of the alternatives under consideration, the agency would maintain or increase the civil penalty amount for a manufacturer's failure to meet its fleet's average fuel economy target[.]" 83 Fed. Reg. 13,918 (emphasis added). This is incorrect. The Highway Administration previously

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[14] *See* www.nhtsa.gov/cafe_pic.html.

[15] *See* www.nhtsa.gov/cafe_pic.html.

[16] *See* www.nhtsa.gov/cafe_pic.html.

[17] *See* www.nhtsa.gov/cafe_pic.html.

increased the CAFE penalty rate to $14 in its July 2016 Interim Final Rule, which became effective in August 2016. As already noted, the United States Court of Appeals for the Second Circuit recently vacated the agency's attempt to suspend the penalty increase, thereby making clear that the $14 penalty remains in effect. Accordingly, the Highway Administration's new proposal in its Notice to institute a $5.50 penalty for CAFE violations represents not an "increase" in the penalty, but a significant *reduction*.

Given the stringency of the CAFE standards for model years 2022-25, some vehicle manufacturers may respond to weakened penalties by following Mercedes-Benz and Jaguar Land Rover's example: paying penalties as a cost of business, rather than investing in the technology required to comply with the standards. Thus, the Highway Administration's proposed penalty reduction would very likely result in decreasing fuel economy and a concomitant increase in the emission of greenhouse gases and conventional air pollutants. Accordingly, any proposal by the Highway Administration to reduce the existing $14 penalty to $5.50 (or any other amount) constitutes a major federal agency action with a likely significant impact on the environment requiring an environmental review that complies with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.

Conclusion

The Highway Administration's reversal of both its earlier 2016 rulemaking and its longstanding interpretation of the Inflation Adjustment Act as applicable to the CAFE penalty without any reasoned explanation or justification is arbitrary and capricious. The agency's argument that the Inflation Adjustment Act does not apply to the CAFE penalty is belied by the plain language of the statute and Congress's intent. Likewise, the agency's argument that lowering the CAFE penalty is necessary to "harmonize" the supposed conflict between the Inflation Adjustment Act and EPCA is unsupported by the language and purpose of the statutes themselves. And its assertion that the adjustment would result in a "negative economic impact" similarly lacks any factual basis. Together, the Highway Administration, EPA, and CARB have already determined that vehicle manufacturers can meet future, more stringent CAFE standards at reasonable cost to themselves and consumers. However, as the compliance records of Mercedes-Benz and Jaguar Land Rover demonstrate, maintaining the real value of CAFE penalties is critical to ensuring compliance with these standards. Current and future CAFE standards will result in significant climate change, national security, public health and consumer savings benefits which the Highway Administration, EPA, and CARB value at over $80 billion. Given that these benefits far exceed the cost of implementing the CAFE standards, it is vital that the Highway Administration maintain the deterrent effect of the CAFE penalties. And in the event that the agency decides to proceed with lowering the CAFE penalty, it must comply with NEPA.

Accordingly, we urge the Highway Administration to abandon its proposal to lower the $14 penalty for model year 2019. We further urge the Highway Administration to maintain the $25 cap for discretionary increases of the penalty and to implement the annual adjustments for 2017 and 2018 which were mandated by the 2015 Act, but which the agency has not yet adopted.

Respectfully submitted,

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