

May 8, 2020

***By Certified Mail***

Administrator Andrew R. Wheeler  
U.S. Environmental Protection Agency  
Office of the Administrator (1101A)  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

**Re: Notice of Intent to Sue for Failure to Publicly Docket Materials Related to Interagency Review of *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020)**

Dear Administrator Wheeler:

This letter provides notice, pursuant to 42 U.S.C. § 7604(b), that Environmental Defense Fund intends to sue you for failing to perform a nondiscretionary duty under the Clean Air Act.<sup>1</sup> Specifically, EPA has not performed its duty to place in the public rulemaking docket certain documents related to interagency review of *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks* (Rule), which was published on April 30.<sup>2</sup> The Rule drastically weakens our nation’s Clean Car Standards, reducing the required annual improvement in fleetwide greenhouse-gas emissions from around 5 percent to 1.5 percent. This will lead to serious adverse impacts on the global climate, human health, fuel costs, and energy security. EDF has projected, using EPA modeling tools, that the Rule could lead to 18,500 premature deaths, an additional 1.5 billion tons of climate pollution, and an additional \$244 billion paid by Americans at the gas pump.<sup>3</sup>

The Clean Air Act requires that all drafts of a final rule “submitted by the Administrator to the [White House] Office of Management and Budget for any interagency review process,” as well as “all ... written comments thereon [by other agencies], all documents accompanying such drafts, and written responses thereto [by EPA] shall be placed in the docket no later than the date of promulgation.”<sup>4</sup> While EPA did docket certain materials related to interagency review on May 1, 2020, public sources indicate that the Rule’s interagency review process was highly irregular and that EPA has not publicly docketed some of the required documents.

In particular, the attached letter from Senator Thomas Carper to EPA Inspector General Sean O’Donnell indicates that EPA was excluded from significant stages of the rulemaking and interagency review processes, and that EPA staff “were instructed not to submit materials to OIRA

---

<sup>1</sup> 42 U.S.C. § 7604(a)(2).

<sup>2</sup> 85 Fed. Reg. 24,174 (Apr. 30, 2020).

<sup>3</sup> See EDF Fact Sheet, *Trump Administration Moves Ahead with Harmful Clean Cars Rollback*, [https://www.edf.org/sites/default/files/Cars\\_Final\\_Rollback\\_Factsheet.pdf](https://www.edf.org/sites/default/files/Cars_Final_Rollback_Factsheet.pdf).

<sup>4</sup> 42 U.S.C. § 7607(d)(4)(B)(ii).

[the White House Office of Management and Budget’s Office of Information and Regulatory Affairs] as part of the inter-agency review.”<sup>5</sup> Instead, “hard copies of EPA’s technical feedback on the draft final rule”—which, according to the letter, the Department of Transportation prepared and submitted to OIRA without meaningful EPA input—were “provided to DOT outside the formal inter-agency review process.”<sup>6</sup> Senator Carper describes these actions as “unprecedented” and notes that they “would also seem to suggest the potential for an intent to run afoul of section 307 of the Clean Air Act.”<sup>7</sup> He notes that “multiple sources” informed him of these efforts to “conceal EPA comments that are critical of the draft [Rule].”<sup>8</sup>

These apparent efforts to shield certain materials from public view are all the more alarming given the fundamental concerns raised by materials that EPA actually did publish to its docket. For example, the first version of the Rule submitted to OIRA projected that the social costs of the proposed greenhouse gas standards significantly outweigh their benefits, even at an unreasonably high seven percent discount rate.<sup>9</sup> This version was so incomplete it prompted OMB to express in a subsequent email that “[i]t is not possible to do a meaningful review of this action at this time, because the document does not include the analysis of costs or the analysis of benefits,” and that “[w]e could not find anywhere in the preamble [to the draft Rule] where EPA explained why the ‘preferred alternative’ [to weaken the Clean Car Standards] was preferred.”<sup>10</sup> Just 12 days before the Rule was finalized, OMB continued to express serious concern about the Rule’s legality, noting the lack of “actual justification for the Final Rule” and the failure to explain “why it is proper as a matter of law.”<sup>11</sup> Especially in light of these serious concerns and irregularities, it is essential that EPA perform its duty to give the public full, fair and transparent access to all materials documenting the interagency review of the Rule.

In short, EPA impermissibly promulgated the Rule without publicly docketing all interagency review materials required by the Clean Air Act, thereby denying the public access to core information that is central to transparent decision-making. If EPA does not remedy this improper conduct and serious violation of law, EDF intends to sue the agency for failing to perform this clear, discrete, and important duty by the deadline prescribed in the Act.

If you believe any of the information above is in error or would like to discuss the matters identified in this letter for any reason, please contact Alice Henderson at (303) 447-7205 or [ahenderson@edf.org](mailto:ahenderson@edf.org).

---

<sup>5</sup> Letter from Sen. Thomas Carper to EPA Inspector General Sean O’Donnell, at 3 (Feb. 26, 2020), [https://www.epw.senate.gov/public/\\_cache/files/9/2/9225bb67-dff1-4711-aebe-2eea6fc7da76/649E0C532863CA79917CDE2593A14C62.02-26-20tctoepaigcarssecretsscience.pdf](https://www.epw.senate.gov/public/_cache/files/9/2/9225bb67-dff1-4711-aebe-2eea6fc7da76/649E0C532863CA79917CDE2593A14C62.02-26-20tctoepaigcarssecretsscience.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3–4 (noting that “a failure to include and eventually publicly release” EPA’s comments on the draft final rule “would ... be unlawful”); *see also id.* at 1 (asking Inspector General O’Donnell to “commence an investigation into whether EPA officials are improperly seeking to circumvent section 307 of the Clean Air Act, Executive Order 12866, and other rulemaking review and procedural requirements”).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> “Document submitted to initiate E.O. 12866 review, SAFE Vehicles Final Rule, RIN 2060-AU09” at 8, EPA-HQ-OAR-2018-0283-7664 (docketed May 1, 2020).

<sup>10</sup> “1-29-2020 and 1-31-2020 Interagency Comments” at 1, EPA-HQ-OAR-2018-0283-7664 (docketed May 1, 2020).

<sup>11</sup> “3-19-2020 Interagency Comments” at 1, EPA-HQ-OAR-2018-0283-7664 (docketed May 1, 2020).

Respectfully submitted,

---

Alice Henderson, Senior Attorney  
Jim Dennison, Legal Fellow  
Peter Zalzal, Lead Attorney  
Environmental Defense Fund  
2060 Broadway, Suite 300  
Boulder, CO 80302