



Is There Room for California in Clean Cars Regulations?

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California enjoys a unique status under the Clean Air Act (CAA)—a special provision allows it to create and enforce more protective standards for motor vehicles than the federal government, spurring much-needed action to develop cleaner cars.¹ The Trump administration removed this authority and now the Biden administration is systematically working to bring the state back in.

In 1967, Congress established in the CAA a dual system for regulating emissions from motor vehicles. Rather than preempt all state laws and create a single national system, Congress carved out a special role for California, which had already adopted its own standards for vehicle emissions and pollution control technology. Under this act, California could request a preemption waiver for state regulatory programs that affect vehicle emissions, engine standards, or heavy-duty equipment. California submitted its first request in 1968, and the two-standard system became the status quo for the next five decades. The Obama administration negotiated a unified set of standards for California and the federal government, but California was still legally permitted to develop more stringent standards.² This changed in 2019.

Under the Trump administration, the Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA) issued a joint rulemaking that resulted in the withdrawal of California's waiver, last granted in 2013. To withdraw the waiver, the agencies relied on novel legal interpretations of their respective statutory authorities, the CAA and the Energy Policy and Conservation Act (EPCA).³ This action was known as Part I of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, which set out "One National Program" (for fuel efficiency and greenhouse gas (GHG) emission standards. Instead of a unified California and federal system with opportunities for more stringent California standards, there would just be a federal system. Part II set the technical standards for the program.⁴

The Biden administration has proposed to rescind and replace both the Part I and Part II Rules. As Harvard Law's Environmental and Energy Law Program recently described,⁵ the Biden administration is taking quick action to put light duty vehicles on a path toward electrification and meaningful GHG

¹ 42 U.S.C. §§ 7401–7671.

² The Obama administration's Phase 1 (model years 2012–2016 for light-duty vehicles) and the Phase 2 (model years 2017–2025 for light-duty vehicles) standards were preceded by multiparty agreements, brokered by the White House, involving California, auto manufacturers, and the United Auto Workers union. RICHARD LATTANZIO, LINDA TSANG & BILL CANTIS, CONG. RSCH. SERV., R45204, VEHICLE FUEL ECONOMY AND GREENHOUSE GAS STANDARDS: FREQUENTLY ASKED QUESTIONS 9 (2021), <https://sgp.fas.org/crs/misc/R45204.pdf>. For additional background on the Obama-era standards, see generally *id.*

³ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

⁴ 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).

⁵ CARRIE JENKS & HANA VIZCARRA, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, EPA'S CLEAN CARS STANDARDS: SOLID FIRST STEPS TOWARD ELECTRIFICATION (Aug. 12, 2021), <https://eelp.law.harvard.edu/2021/08/epas-cars-rule-a-durable-framework-for-vehicle-ghg-emissions-reduction-and-building-toward-an-ev-future/>.



emission reductions. EPA proposed new federal GHG standards under the CAA in August,⁶ and NHTSA proposed new federal fuel economy standards in September.⁷

While replacing the Trump administration's complacent federal standards is important for making progress on climate change, allowing California to be more ambitious can encourage innovation and reduce emissions even further. The Biden administration has initiated steps to undo the Part I Rule: EPA requested comment on its announcement to reconsider the Part I Rule,⁸ and NHTSA issued a notice of proposed rulemaking (NPRM) reconsidering its position on EPCA preemption and repealing the interpretive statements made in the Part I Rule.⁹ As of this writing, neither agency has a subsequent action under interagency review.¹⁰ Until California has a waiver in place, the state cannot enforce its standards under the prior waiver and other states cannot follow California's GHG standards.¹¹

In this analysis, I review the steps the Biden administration is taking to restore California's waiver and explore how undoing the Trump administration's Part I Rule raises complex legal questions.

The Trump Administration's Part I Rule

A brief summary of the key arguments the Biden administration must now address is below. For more on the history of California's waiver and analysis of the Trump Administration's Part I Rule, see [Rethinking the "One National Program" for Clean Cars: Where Does the Biden Administration Go from Here?](#).

The Trump administration's Part I Rule, issued in September 2019, was a joint effort by EPA and NHTSA that set out new legal interpretations of the CAA and EPCA in order to revoke California's waiver for its GHG emission and Zero Emissions Vehicle (ZEV) standards. It also changed EPA's interpretation of CAA Section 177¹² to bar other states from adopting California's GHG standards.

⁶ Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 43,726 (proposed Aug. 10, 2021).

⁷ Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602 (proposed Sept. 3, 2021).

⁸ California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Comment, 86 Fed. Reg. 22,421 (notice issued Apr. 28, 2021).

⁹ Corporate Average Fuel Economy (CAFE) Preemption, 86 Fed. Reg. 25,980 (proposed May 12, 2021).

¹⁰ See *Regulatory Actions Currently Under Review by Agency*, OFF. OF INFO. & REG. AFFS., <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp> (last visited Oct. 5, 2021).

¹¹ Minnesota has announced its intent to follow California's standard and tied the "effective date" of the regulations to the reinstatement of California's waiver. See OAH 71-9003-36416, REPORT OF THE ADMINISTRATIVE LAW JUDGE (2021), https://mn.gov/oah/assets/9003-36416-mpca-clean-cars-minnesota-rules-report_tcm19-480433.pdf.

¹² Promulgated in 1977, Section 177 of the CAA permits states to "adopt and enforce" standards that are "identical to the California standards for which a waiver has been granted for [a given] model year." 42 U.S.C. § 7507.



The rule made four major determinations:

NHTSA determined that EPCA preempts California’s GHG and ZEV standards. EPCA preempts all state and local laws “related to” fuel-economy standards¹³ and does not have a parallel waiver provision to the one in the CAA.¹⁴ In the Part I Rule, NHTSA took the position that because California’s GHG standards *affect* fuel economy, they are sufficiently “related to” fuel economy and are therefore preempted.¹⁵ The agency relied on the “direct, scientifically recognized, mathematical relationship between combustion of gasoline . . . and the amount of carbon dioxide emitted at the vehicle’s tailpipe.”¹⁶ Using the same logic, NHTSA argued that California’s ZEV standards were also preempted because the ZEV standards “directly and substantially” affect fuel economy given that manufacturers are required to eliminate fossil fuel use in a portion of their fleet.¹⁷ Thus, NHTSA said that California’s GHG and ZEV standards were “void *ab initio* under the preemptive force of EPCA.”¹⁸

EPA determined that NHTSA’s preemption determination required EPA to withdraw California’s waiver. As a result of NHTSA’s preemption determination, EPA reasoned that because EPA and NHTSA undertake joint, harmonized rulemaking, EPA must revoke the state’s 2013 waiver for consistency.¹⁹ EPA relied in part on language from *Massachusetts v. EPA* that stated, “there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”²⁰ EPA asserted it could not maintain California’s 2013 waiver without creating inconsistency, stating that it would put the government “in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*.”²¹ Although that section of *Massachusetts v. EPA* has often been used to argue that NHTSA and EPA can work together to improve fuel economy and GHG standards, the Trump administration cited it as a reason for EPA to go along with NHTSA’s preemption determination and weaken GHG standards.

¹³ 49 U.S.C. § 32919(a) (“When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.”).

¹⁴ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,313 (Sept. 27, 2019).

¹⁵ *Id.*

¹⁶ Brief of Government Respondent at 40, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. Sept. 9, 2020).

¹⁷ SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,314.

¹⁸ *Id.*

¹⁹ *Id.* at 51,338 (“NHTSA’s determination renders EPA’s prior grant of a waiver for those aspects of California’s regulations that EPCA preempts invalid, null, and void, and, to the extent that administrative action is necessary on EPA’s part to reflect that state of affairs, EPA hereby withdraws that prior grant of a waiver on this basis.”).

²⁰ 549 U.S. 497, 532 (2007); *see also* SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,338.

²¹ Brief of Government Respondent, *supra* note 16, at 78.



In the alternative, EPA determined that CAA Section 209(b)(1) provided the authority to deny California’s waiver.²² EPA argued that it had the authority to reconsider its 2013 waiver decision based on a “statutorily implicit” ability to continually assess the validity of waivers.²³ Additionally, EPA reconsidered California’s 2013 waiver based on the agency’s new interpretation of one of the three criteria for waiver denial, reading “compelling and extraordinary conditions” in a new way. The agency interpreted the term “conditions” to only apply to regional and local conditions in California. Because GHGs “globally mix in the upper atmosphere” and other states also experience climate impacts, there could be no “‘particularized nexus’ to conditions unique to California.”²⁴

EPA determined that CAA Section 177 prevents states from adopting California’s GHG standards. Section 177 permits states to adopt and enforce certain California “standards relating to control of emissions” from new motor vehicles.²⁵ The Trump administration determined that the word “standards” is ambiguous and relied on the title of the provision to resolve that ambiguity. The title of the section is “New motor vehicle emission standards in nonattainment areas,” which refers to areas in noncompliance with at least one National Ambient Air Quality Standard.²⁶ Because GHGs are not criteria pollutants and a state can’t be in nonattainment for GHGs, the Trump Administration concluded that Section 177 is not designed to address global air pollution.²⁷ Therefore, EPA argued that the CAA authorizes states to adopt California’s criteria pollutant standards, but not its GHG standards. EPA’s Section 177 Determination does not extend to California’s ZEV standards, and EPA did not respond to comments noting this potential inconsistency.²⁸

Biden Administration Actions

On his first day in office, President Biden issued an executive order requiring EPA and NHTSA to review and potentially reconsider both SAFE rules.²⁹ In response, EPA and NHTSA issued separate notices teeing up questions on the Trump administration’s legal reasoning to withdraw the waiver. These separate actions are a change from the joint rulemaking process the agencies used for the Part I Rule.

²² Section 209(b)(1) states that EPA must grant a waiver unless the agency finds that: (a) California has determined that its standards are, in the aggregate, at least as protective as EPA’s standards, and this determination is arbitrary and capricious; (b) California “does not need such State standards to meet compelling and extraordinary conditions”; or (c) California’s standards are not “consistent with” the CAA’s provisions regarding technological feasibility (Section 202(a)). 42 U.S.C. § 7543(b)(1).

²³ Brief of Government Respondent, *supra* note 16, at 64. The government pointed to no specific statutory provisions but cited a Senate report on the matter. *Id.*

²⁴ *Id.* at 95–96 (citation omitted). Note also that the Chamber of Commerce and the National Automobile Dealers Association made this argument to the D.C. Circuit in 2011 when they petitioned that court for review of EPA’s decision to grant California’s waiver. *See* Chamber of Com. of the U.S. v. EPA, 642 F.3d 192, 198–99 (D.C. Cir. 2011). The court ultimately didn’t rule on the merits because it found it lacked jurisdiction. *Id.* at 199.

²⁵ 42 U.S.C. § 7507.

²⁶ *Id.*

²⁷ SAFE Vehicles Rule Part One, 84 Fed. Reg. 51,310, 51,351 (Sept. 27, 2019).

²⁸ Brief of State and Local Government and Public Interest Petitioners at 68 n.22, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. June 29, 2020).

²⁹ Exec. Order 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).



EPA issued its notice on April 28, 2021. Notably, EPA did not propose to revise its interpretation and reinstate California’s waiver. The notice requested comment on whether EPA properly considered and withdrew California’s 2013 waiver and announced it would later consider specific issues raised in petitions for reconsideration. NHTSA’s NPRM, released after EPA’s on May 12, 2021, proposes to reconsider the agency’s position on EPCA preemption and to repeal the interpretive statements made in the Part I Rule. The following section further describes both Biden administration actions.

EPA Request for Comment

In EPA’s request for comment, the agency explained that it now believes “there are significant issues” with the Part I Rule, including the time elapsed since EPA’s 2013 waiver decision, the novel interpretations set forth in the Part I Rule, and the consideration of environmental conditions in California and consequences of the waiver’s withdrawal.³⁰ The notice did not build on these points to give any further indication of the agency’s thinking. The notice only reviewed the agency’s legal determinations in the Part I Rule and laid out a series of questions for commenters. EPA received nearly 100,000 written comments on the notice.³¹

There are some interesting things to note about the notice aside from its form:

EPA’s proposed approach avoids a statutory no-man’s land by relying on petitions for reconsideration.

As I described in a [previous piece](#), the Trump administration’s revocation of California’s waiver raised new statutory questions—there is no language in the CAA that explicitly discusses EPA’s authority to reconsider or withdraw waivers, let alone re-issue a previously withdrawn waiver.³² The Trump administration had reconsidered California’s 2013 waiver, despite no clear authority to do so. In this April notice, EPA summarized the statutory, case law, and legislative history arguments made in the Part I Rule that the agency had used to support its authority to continually review and potentially withdraw waivers.³³ EPA did not respond to its prior arguments in this notice. If EPA revisits its prior waiver determination in order to *restore* California’s waiver, it could raise the same questions the agency faced during the Trump administration about what authority the agency is using for that reconsideration. Endorsing the arguments made in the Part I Rule, either implicitly or explicitly, could set a precedent for future administrations that EPA can always revisit a waiver. In a legal challenge, a court reviewing a theoretical new rule could interpret the CAA as permitting or even *requiring* EPA to accept authority that would allow it to withdraw a waiver at any time.

EPA is using petitions for reconsideration to avoid taking a position on whether the agency can revisit a waiver determination. EPA explained in the notice that it had received three petitions for reconsideration of the Part I Rule: one from California in October 2019; one from several states and cities in November

³⁰ California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Comment, 86 Fed. Reg. 22,421, 22,422 (proposed Apr. 28, 2021).

³¹ *Reconsideration of the Withdrawal of a Waiver for California’s Light-duty Vehicle ZEV and GHG Standards*, EPA, <https://www.regulations.gov/docket/EPA-HQ-OAR-2021-0257> (last visited Oct. 5, 2021).

³² LIA CATTANEO, HARV. L. SCHOOL. ENV’T & ENERGY L. PROGRAM, RETHINKING THE “ONE NATIONAL PROGRAM” FOR CLEAN CARS: WHERE DOES THE BIDEN ADMINISTRATION GO FROM HERE? 11 (2021), <https://eelp.law.harvard.edu/2021/03/rethinking-the-one-national-program/>.

³³ Reconsideration of a Previous Withdrawal of a Waiver of Preemption, 86 Fed. Reg. at 22,425–26.



2019; and one from several non-governmental organizations in November 2019.³⁴ Many of these petitions raised the same issues addressed in the subsequent litigation.³⁵ But under the Trump administration, EPA did not formally respond to the petitions and addressed the issues through litigation, which is now held in abeyance. In the April notice, EPA “granted the[se] petitions for reconsideration of SAFE I that were pending before the Agency.”³⁶ This allows EPA to use the petitions as authority for revisiting the determination, rather than arguing for some implicit statutory authority to revisit a waiver determination.

EPA reasoned that a new waiver is not required. As discussed in my previous analysis, it is unclear from the CAA and the Trump administration’s unprecedented revocation of an existing waiver whether the Biden administration can re-grant California’s 2013 waiver or whether California will need to submit a new waiver request. The agency’s reliance on the petitions for reconsideration make it clear that a reversal of the Part I Rule would reinstate the 2013 waiver. In the first substantive section of the notice, EPA notes that the California standards “will come into effect should EPA rescind this prior action.”³⁷

This draws from the Obama administration’s playbook. In 2009, the Obama administration withdrew the Bush administration’s 2008 denial of a California waiver request and reconsidered the decision after California’s governor petitioned the agency.³⁸ The Obama administration argued that the Bush administration had misapplied the statutory direction of Section 209(b).³⁹ EPA will likely use similar reasoning in the proposal. For example, EPA noted that “EPA’s decision to change course and withdraw [California’s] waiver . . . was based in large part on a new interpretation of section 209(b)(1)(B).”⁴⁰

EPA asserted its independent authority to grant the waiver—separate from NHTSA. Part of the reason why the agencies may be acting separately this time is that both may want to control the interpretation of their own statutes—for this rulemaking and future ones. During the Trump administration at least, EPA felt it had to coordinate its actions with NHTSA’s. In the joint 2019 Part I Rule, EPA and NHTSA coordinated a single action to “avoid inconsistency between their administration of their responsive statutory tasks” and consider the implication of the “preemptive effect of EPCA, and its implications for EPA’s waivers.”⁴¹ Now, the agencies will still likely rely on each other’s interpretations, but EPA and NHTSA are taking separate steps.

³⁴ *Id.* at 22,427–28.

³⁵ *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. filed Oct. 28, 2019). Many of the filings can be found at the following link: <http://climatecasechart.com/case/union-of-concerned-scientists-v-national-highway-traffic-safety-administration/>.

³⁶ *Reconsideration of a Previous Withdrawal of a Waiver of Preemption*, 86 Fed. Reg. at 22,427.

³⁷ *Id.* at 22,422.

³⁸ *Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32,744, 32,745 (July 8, 2009). For more information on this history, see CATTANEO, *supra* note 32, at 5, 10.

³⁹ *Notice of Decision Granting a Waiver of CAA Preemption for California’s 2009 and Subsequent MY GHG Standards for New Motor Vehicles*, 74 Fed. Reg. at 32,746.

⁴⁰ *Reconsideration of a Previous Withdrawal of a Waiver of Preemption*, 86 Fed. Reg. at 22,429.

⁴¹ *SAFE Vehicles Rule Part One*, 84 Fed. Reg. 51,310, 51,338 (Sept. 27, 2019).



Another reason for the decoupling is that NHTSA and EPA face different statutory requirements for lead time and technology availability when developing new standards. The more harmonization between the two agencies' actions, the more they will need to consider their respective limitations and adapt to each other.

NHTSA Notice of Proposed Rulemaking

Like EPA, NHTSA's NPRM announced that the agency had developed "substantial doubts about whether the SAFE I Rule was a proper exercise of the Agency's statutory authority."⁴² NHTSA received 445 comments on its notice.⁴³

NHTSA asserted that it cannot determine if EPCA preempts California's standards. Before this NPRM was released, there was a question of whether NHTSA would reverse its stance and find that EPCA does not, in fact, preempt California's standards. The NPRM did not answer the preemption question. Rather, NHTSA argued that "agencies have no special authority to pronounce on preemption absent delegation by Congress."⁴⁴ Without such clear instructions in EPCA, NHTSA argued that it had likely overstepped its authority in the Part I Rule.⁴⁵

This argument came directly from petitioners' briefs in the case challenging the Part I Rule that were filed during the Trump administration.⁴⁶ At the time, the Trump administration had responded in its briefs that the D.C. Circuit had not yet determined whether there is a different level of deference that should be owed to agency interpretations of express preemption provisions, so NHTSA's view should receive deference under *Chevron*.⁴⁷ Now, NHTSA's NPRM has abandoned the argument it made to the D.C. Circuit and has instead adopted the petitioners' opposing view.

NHTSA proposed to adopt a position of silence on whether EPCA preempts California's standards. In my prior analysis, I raised a question about how NHTSA could repeal the regulatory interpretation adopted under the Trump administration. If NHTSA were to repeal the Part I Rule, there would be no clear regulatory language to return *to* because in the Obama administration's 2012 rule, EPA and NHTSA punted on making an official preemption determination.⁴⁸ In this NPRM, NHTSA did not see this as a problem and chose to "return to a state of silence."⁴⁹ The agency did not express a view on whether EPCA preempts California's actions as regulations "related to" fuel economy.

This strategy gives the agency time to develop a stronger view and avoids immediate litigation over whether EPCA preempts California's standards. NHTSA could still determine after the comment period that it has authority to make a determination about preemption and that California's standards are not preempted. Indeed, NHTSA announced that the agency may subsequently announce its views on EPCA

⁴² Corporate Average Fuel Economy (CAFE) Preemption, 86 Fed. Reg. 25,980, 25,982 (proposed May 12, 2021).

⁴³ *Corporate Average Fuel Economy Preemption*, NHTSA, <https://www.regulations.gov/document/NHTSA-2021-0030-0001/comment/> (last visited Oct. 5, 2021).

⁴⁴ Corporate Average Fuel Economy (CAFE) Preemption, 86 Fed. Reg. at 25,985 (quoting *Wyeth v. Levine*, 555 U.S. 555, 577 (2009)).

⁴⁵ *Id.* at 25,985, 25,982.

⁴⁶ Brief of State and Local Government and Public Interest Petitioners, *supra* note 28, at 78–82.

⁴⁷ Brief of Government Respondent, *supra* note 16, at 36–37.

⁴⁸ CATTANEO, *supra* note 32, at 9.

⁴⁹ Corporate Average Fuel Economy (CAFE) Preemption, 86 Fed. Reg. at 25,982.



preemption.⁵⁰ But, barring a change in NHTSA’s position in the final rule, NHTSA is passing this decision to the courts—or Congress. NHTSA’s return to silence is a conservative decision that will preserve the status quo ante. This stance may also encourage Congress to address the EPCA preemption issue in legislation. Absent new legislation, the issue will likely be decided by the federal courts.

Conclusion

In these two notices, both EPA and NHTSA have moved the ball forward, though neither reveals the Biden administration’s preferred legal interpretations of EPA and NHTSA authority. The agencies are taking a systematic and relatively conservative approach to addressing the waiver in order to avoid litigation in the near term while still advancing strong federal standards. As these two notices move forward and the agencies take regulatory steps, it will be important to watch how the agencies sequence the rules related to the California waiver and EPCA preemption with respect to the other agency’s rulemakings and the finalization of new federal vehicle standards.

The development of the new federal standards can send an important market signal to industry. The agencies are also coordinating with California to build on the state’s agreement with major automakers made in the wake of the Trump administration’s actions.⁵¹ If the federal standards are strong and largely consistent with California’s goals, then the near term need for California to set more stringent standards is reduced. However, at this moment, the Trump administration’s legal interpretation remains. States looking to move forward in adopting California’s standards will not be able to enforce more stringent standards until the Biden administration reinstates the waiver, but the writing is on the wall.

⁵⁰ *Id.* at 25,982.

⁵¹ Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks, 86 Fed. Reg. 49,602, 49,604 (proposed Sept. 3, 2021).