

EPA's proposed Endangerment Finding rescission: Implications for state climate action

Sommer Engels, Erika Kranz, and Andrew Mergen

Sommer Engels is a clinical instructor in the Emmett Environmental Law & Policy Clinic at Harvard Law School.

Erika Kranz is a senior staff attorney with the Environmental & Energy Law Program at Harvard Law School.

Andrew Mergen is the faculty director of the Emmett Environmental Law & Policy Clinic at Harvard Law School.

This August, the U.S. Environmental Protection Agency (EPA) [proposed](#) to rescind the 2009 Endangerment Finding, the foundation for greenhouse gas regulation under the Clean Air Act (CAA). If the rescission is finalized and survives judicial review, EPA will largely be out of the business of regulating greenhouse gas emissions. Does this mean state regulations, legislation, and lawsuits will fill the void? Not if the administration has its way: early in his second term, President Trump issued an [executive order](#) directing the attorney general to “expeditiously take all appropriate action to stop the enforcement of State laws and continuation of civil actions” intended to respond to climate change. Consistent with that mandate, EPA’s proposed rule argues that even if EPA lacks authority to regulate greenhouse gas emissions, state efforts remain preempted. Whether the administration’s attempt to simultaneously disclaim and retain regulatory power will succeed remains to be seen: a final rule is not expected until the end of 2025 or early 2026, and litigation will surely follow.

The Endangerment Finding and EPA’s authority to address climate change

In 2007, the Supreme Court held in [Massachusetts v. EPA](#) that greenhouse gases are air pollution under [section 202\(a\)](#) of the CAA and thus within EPA’s regulatory authority. It remanded to EPA with instructions to decide whether sufficient information existed to make an endangerment finding—a finding that greenhouse gas emissions contribute to air pollution that may endanger public health or welfare. Two years later, EPA answered “yes.” That Endangerment Finding triggered EPA’s duty to promulgate greenhouse gas emission standards for motor vehicles, and standards soon followed for other industries.

For years, the Supreme Court’s determination that EPA had statutory authority to regulate greenhouse gas emissions meant that legal efforts to address climate change have focused on federal regulation. In [American Electric Power v. Connecticut](#), the Court held that the CAA and EPA’s associated exercises of regulatory authority “displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants.” Although the Court has not squarely addressed the question, the federal government has also argued that the CAA preempts *state* efforts—via regulation, litigation, or legislation—to abate greenhouse gas emissions.

EPA's proposed rescission

EPA's pending [proposal](#) to rescind the 2009 Endangerment Finding and to repeal all greenhouse gas emission standards for motor vehicles raises new questions about the viability of those state efforts. EPA's proposal advances two rationales: a primary legal rationale and a record-based alternative. EPA's legal rationale comprises [three interrelated arguments](#): first, that the reference to "air pollution" in section 202(a) refers only to local or regional pollutants; second, that section 202(a) requires EPA to evaluate emissions in isolation, by source category; and third, that regulating greenhouse gas emissions from motor vehicles would not meaningfully address underlying harms. On the record front, EPA contends that climate science is simply too "uncertain to establish a credible and reliable finding of actual risk."

States to the rescue?

If EPA uses some version of its proposed legal rationale to formally disclaim statutory authority to respond to climate change, can states step in? Not so fast, says EPA. Despite [acknowledging](#) that reconsideration of the Endangerment Finding could affect regulated entities with "reliance interests in national uniformity," EPA contends that the CAA's preemptive effect will remain strong. Per EPA, CAA section 209(a), which generally prohibits states from adopting emission standards for vehicles, and "other applicable sources of federal preemption" will continue to preempt state emission standards for new motor vehicles and engines. After all, EPA explains, it may still regulate pollutants for their local and regional effects, and some of those pollutants may also be greenhouse gases.

EPA's preemption discussion leaves much unexplained. EPA does not explain why, in its view, if the CAA does not authorize federal regulation of greenhouse gases for their climate warming potential, state efforts should nevertheless remain preempted. After all, when the government argues the CAA preempts state laws responding to climate change, it tends to say the state laws are preempted because the CAA gives EPA authority to set nationwide standards for greenhouse gas emissions. If that is no longer the case, then litigants are sure to argue that this basis of preemption of state law is untenable.

Litigants may also test EPA's related assertion that any federal common law claims will remain "preempted"—really, "[displaced](#)." As noted above, the Supreme Court concluded in [American Electric](#) that because the CAA provides the same relief—limits on greenhouse gas emissions from powerplants—that might have been available under federal common law, there is "no room for a parallel track." But if the tracks no longer run in parallel, litigants may urge that the basis for displacement falls away.

EPA makes no assertions about its proposal's effect on state "[climate superfund](#)" laws or state common law claims seeking to hold polluters financially responsible for climate damage. These categories may present a different preemption calculus because federal legislation can preempt state causes of action only through a showing of congressional intent, which is not required for displacement of *federal* common law claims. Indeed, [American Electric](#) left open the question whether a state lawsuit would remain available, even while holding that federal common lawsuits would not. Since then, lower courts across the country have reached different results, [some](#)

reasoning that the mere existence of federal common law implies that state law cannot stand in, and others concluding that [state law claims remain live](#) because they yield different relief than might be available under federal law.

We are at a moment of legal uncertainty. Industry defendants have asked the Supreme Court to [hear a case](#) this term and rule that state claims are unavailable; the Trump administration has [supported that request](#). At the same time, we await EPA's decision about whether and how to finalize its proposed rescission and on what grounds. In the end, perhaps only one point remains clear: the need for quick and meaningful action to curb emissions. EPA suggests otherwise, but the Intergovernmental Panel on Climate Change [recently warned](#) that "observed changes in the atmosphere, oceans, cryosphere and biosphere provide unequivocal evidence of a world that has warmed." If EPA has authority under the CAA to regulate greenhouse gases to respond to climate change, then that conclusion should be affirmed, and EPA should respond accordingly. If EPA now somehow lacks that statutory authority, then room may exist for states to pick up the mantle.