



## California's First Legal Battle over the New Car Rules

By Caitlin McCoy

California has already begun fighting the administration's efforts to weaken fuel economy and greenhouse gas emissions standards for cars and light trucks. In May 2018, a coalition of states led by California<sup>1</sup> filed a lawsuit against the Environmental Protection Agency (EPA) in the U.S. Court of Appeals for the D.C. Circuit.<sup>2</sup>

The states argue that EPA failed to follow its own procedures and to release sufficient technical information to support its decision to re-open the rulemaking process. With the focus on the impending final fuel economy and emissions rules, this case hasn't received much attention, perhaps because it involves a complex web of regulatory and administrative law issues. Now is a good time to understand what is happening in the California v. EPA case because it could influence the inevitable legal battle over the new vehicle standards when they are finalized.

### Background

In 2012, the Obama administration reached an agreement with the auto industry on a package of fuel economy and greenhouse gas standards for new cars and light trucks. There are two sets of nationwide performance standards: one set limits greenhouse gas emissions and the other regulates fuel economy. Although the emissions limits and the fuel economy rules have been promulgated together, first in 2010 and then in 2012, they are adopted by two separate agencies, authorized under different statutes, and serve discrete purposes.

The Corporate Average Fuel Economy (CAFE) standards are set by the National Highway Traffic Safety Administration (NHTSA), are expressed in miles per gallon, and establish an average fuel economy standard to be achieved by the fleet of vehicles produced by each auto manufacturer in a given model year. NHTSA is authorized to create these standards in five-year cycles by the Energy Policy and Conservation Act with the goal of improving vehicle energy efficiency.

EPA emissions standards limit the amount of pollution, like GHGs, new vehicles can emit and are expressed in grams per mile of a given pollutant. EPA is authorized to set these standards under the Clean Air Act for the purpose of protecting public health and welfare. EPA first set GHG

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<sup>1</sup> The other states are Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, as well as the District of Columbia.

<sup>2</sup> State of California, et al v. EPA, et al, (No. 18-01114) D.C. Cir. (May 1, 2018).



emissions standards for new vehicles in 2010 and there are no restrictions on the timelines for setting these standards.

When the package of CAFE and GHG emissions standards was adopted in 2012, it contained:

- CAFE standards for model years 2017-2021,
- Prospective CAFE standards for model years 2021-2025,
- GHG standards for model years 2017-2025

This package was structured to work with the five-year time limitation for CAFE standards, while accommodating the auto industry's need for a long-term planning horizon by providing notice of the trajectory of tightening CAFE standards over a nine-year period consistent with the GHG standards. Because the standards were developed so far in advance, EPA agreed to review the standards at a certain point to ensure that they were still technically and economically feasible. The EPA Administrator had to determine whether the standards for model year 2022-2025 remained "appropriate."<sup>3</sup>

EPA stipulated that this review process, called the "mid-term evaluation," would be finalized by April 1, 2018. The determination of whether the standards remained "appropriate" was to be done according to agreed-upon criteria, based on a "technical assessment report".<sup>4</sup>

The criteria for the appropriateness determination included the availability and effectiveness of emissions reduction technology, the economic cost to producers and consumers, the feasibility of the standards, the impact of the standards on emissions, oil conservation, energy security, and fuel savings, the impact of the standards on the auto industry, the impact of the standards on auto safety, the impact of the emissions standards on CAFE standards and the national harmonized program, and other relevant factors.

After an opportunity for public comment, the EPA Administrator was to publish a determination and "set forth in detail the bases for the determination required by [12(h)], including the Administrator's assessment of each of the factors listed" in the mid-term evaluation.<sup>5</sup>

EPA began its mid-term review in 2015. After collaboration with NHTSA and California's Air Resources Board, EPA released a draft "technical assessment report" (TAR) in July 2016 and accepted public comments on it. EPA finalized the TAR in November 2016 and issued a

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<sup>3</sup> NHTSA can only set standards five years in advance and EPA standards do not have a similar time limitation, but because they were adopted together as a package, they agreed to review both of them. 49 U.S.C. § 32902 (b)(3)(B) (Noting that the Department of Transportation "shall...issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.").

<sup>4</sup> EPA codified these requirements (and more) in 42 C.F.R. § 86.1818-12(h) ("12(h)"), binding itself to the process and criteria laid out in these regulations.

<sup>5</sup> 42 U.S.C. § 86.1818-12(h)(4).



proposed determination finding the 2022-2025 standards appropriate. EPA then took public comment on the draft determination, receiving over 100,000 comments.

Based on the comments, the technical assessment report, and the regulatory criteria, EPA issued a final determination in January 2017 that the standards for model years 2022-2025 remained appropriate. EPA concluded, based on the TAR, that the existing standards were feasible at a reasonable cost, would reduce greenhouse gas emissions, result in net benefits of almost \$100 million, and that the automotive industry would be able to meet the standards.

On March 15, 2017, President Trump, then-Administrator of EPA Pruitt, and Department of Transportation Secretary Chao announced an intention to revisit the standards. On March 22, 2017, EPA issued a brief, two-page Federal Register notice announcing its intent to reconsider the January 2017 final determination. EPA noted its proposal was “[i]n response to the President’s direction.”

In August 2017, EPA solicited comments on whether it should withdraw the January 2017 finding that the standards were appropriate, and held a public hearing on the same issue in September 2017. EPA Administrator Pruitt formally withdrew the final determination on April 1, 2018. EPA stated that the January 2017 decision was no longer appropriate due to the “significant record that has been developed since the January 2017 Determination....” It is not clear whether EPA was referring to the comments it received during 2017 or some other information. EPA later clarified that it meant the comments it received. More importantly, EPA did not dispute the underlying findings in the TAR, but simply claimed that it was overridden by new information in the record.

From a legal perspective, it was not necessary to withdraw the final determination in order to begin a new rulemaking process to undo the 2021 to 2025 GHG standards, but EPA did so anyway. EPA’s withdrawal of the final determination set in motion the joint rulemaking process currently underway at EPA and NHTSA.<sup>6</sup>

California and other states, as well as environmental groups, immediately filed suit in the D.C. Circuit challenging the withdrawal on procedural and substantive grounds. EPA has filed a motion to dismiss the case and the court is reviewing the briefing submitted this spring in support of and in opposition to that motion. The court has also scheduled oral argument in the case for September 6, 2019.

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<sup>6</sup> By statute, NHTSA cannot set fuel economy standards more than five years in advance, so it would be undertaking a rulemaking regardless. 49 U.S.C. § 32902 (b)(3)(B).



## Legal Issues

There are four main issues in the case: two are jurisdictional, one is procedural, and one is substantive. The court will first address the two jurisdictional issues to determine whether the case can move forward. If the court finds in favor of EPA, it will dismiss the case. If the court finds in favor of California and the other states, then it can move on to the procedural and substantive issues.

### I. Whether Petitioners Have Standing

The first jurisdictional issue is whether petitioners have standing, which is the right mix of conditions that allow a party to sue. The petitioners assert several theories of standing. California argues that it has a special interest in the package of rules adopted under the Obama administration because it explicitly named California's Air Resources Board (CARB) alongside NHTSA and EPA as responsible for preparing the TAR. California invested thousands of hours over years to collaborate on the report only to have the Trump administration disregard those contributions and rely on other information to re-open the rulemaking process.

Other states argue they have suffered informational and procedural injuries as EPA has ignored the mid-term evaluation process and proceeded according to new information that was not publicly vetted. The environmental groups are also alleging an informational injury - that EPA's failure to disclose detailed information when it revised the determination deprived groups of information needed for their work on these issues and in violation of the rules for this process. EPA contends that these injuries are non-existent or insufficient to establish standing. The court will determine whether it agrees that California, the other states, and/or the environmental groups have sustained an injury that can support their case.

### II. Whether the Revised Determination is a Final Agency Action

The second jurisdictional issue is whether the EPA's action is a final agency action, which is the only type of action that can be challenged under the Administrative Procedure Act, the law that petitioners allege has been violated in their substantive claim.<sup>7</sup> An agency action is final if it: (1) marks the "consummation of the agency's decisionmaking process," and (2) is one "by which rights or obligations have been determined, or from which legal consequences will flow."<sup>8</sup>

EPA argues that its revised determination which finds the standards inappropriate was not a final agency action. Instead, it was a decision to engage in rulemaking to adjust the standards. EPA argues that the rules that will result from the current rulemaking process will be a final agency action. The states argue that the revised determination is a final agency action because it marked the end of the mid-term evaluation decisionmaking process on whether or not the

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<sup>7</sup> Administrative Procedure Act, 5 U.S.C. § 704.

<sup>8</sup> *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks and citations omitted).



standards were appropriate.<sup>9</sup> The states point out the regulatory requirement to initiate a new rulemaking process which is triggered if the standards are determined inappropriate after the mid-term evaluation. The states argue that the triggering of this requirement demonstrates that the revised determination had legal consequences. The court will weigh these arguments, applying the unique facts of this situation to the two-part test for final agency actions.

If the court finds that the states and/or the environmental groups have standing and the revised determination is a final agency action, then the court will consider whether EPA violated procedural requirements in the regulations governing this process.

### **III. Whether EPA Complied with Section 12(h) of the Regulations**

As mentioned earlier, the mid-term evaluation is a new process that was created as part of the package of forward-looking rules in 2012. EPA adopted new regulations to guide the process in Section 12(h) of its regulations on greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles.<sup>10</sup> The states argue that Section 12(h) requires EPA to make its determination based on the TAR and the technical information produced by EPA, NHTSA, and CARB. The states also point to eight factors in Section 12(h) that EPA needed to address “in detail” in its determination.

The states argue that EPA failed to comply with both of these requirements, abandoning the TAR and related information in favor of other data, and only briefly touching on some of the required factors. EPA argues that it complied with Section 12(h) in its revised determination. The court will need to analyze EPA’s revised determination and the requirements in Section 12(h) and decide whether EPA complied with the process.

### **IV. Whether the Revised Determination is Arbitrary and Capricious**

The substantive issue is whether EPA’s revised determination—that the standards are no longer appropriate—is arbitrary and capricious. The states argue that the revised determination “...fails to articulate a rational connection between the facts found and the choices made.”<sup>11</sup> The states also highlight EPA’s move away from the TAR and a reliance on other information. EPA argues that its revised determination is a product of rational, logical decisionmaking and based on valid information.

### **The Remedy and Possible Outcomes**

The final, and perhaps most crucial, element in this case is the remedy. The states have requested that the court vacate EPA’s revised determination and reinstate the 2017

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<sup>9</sup> Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16077, 16,087 (April 13, 2018) (stating “This notice concludes EPA’s MTE [Mid-Term Evaluation]....”).

<sup>10</sup> Greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles, 40 C.F.R. § 86.1818-12.

<sup>11</sup> Petitioners’ Brief at 35, *State of California, et al v. EPA, et al*, (No. 18-01114) D.C. Cir. (Feb. 7, 2019).



determination. The practical consequences of this remedy are unclear. This is a novel situation given that the mid-term evaluation process is new and the consequences will depend on the status of the current rulemaking for new standards at the time the court issues its decision.

If EPA has finalized the new standards by the time the court rules, vacating the revised determination and reinstating the original determination—that the Obama standards are appropriate—would raise the question of whether the original GHG emission standards should also be reinstated. If the standards have not been finalized yet, then the reinstatement of the original determination could derail the rulemaking process.

NHTSA's fuel economy standards add another layer of complexity. NHTSA's rulemaking is not related to the mid-term evaluation process, which is solely for EPA's GHG standards. NHTSA would have had to undertake a rulemaking process regardless of EPA's actions in keeping with its five-year cycle for fuel economy standards. In vacating the revised determination, the court could conclude that it is compelled to reinstate the original GHG standards and this could take the GHG standards out of alignment with the new fuel economy standards, creating uncertainty for the auto industry.

However, EPA has the authority to revise its vehicle emission standards "from time to time" as the Administrator deems appropriate.<sup>12</sup> This authority could be used to defend the new rulemaking process, but the states would still have valid questions about the process since EPA began the rulemaking after issuing the revised determination, purporting to follow Section 12(h) of the regulations.

Being mindful of the remedy problem ahead, the court could find that the petitioners' informational injury could be resolved by requiring EPA to release more data to support its revised determination, including information from the TAR. This could be a challenge for EPA since it has explained that it did not rely on any additional data beyond what it presented in the notice of the withdrawal of the previous final determination, the comments on that notice, and the information in its revised determination.<sup>13</sup>

Also, the information in the TAR will not support EPA's revised position since it supports EPA's 2017 final determination.

Alternatively, the court could remand the determination to the agency for reconsideration in line with any findings it makes regarding EPA compliance with Section 12(h) and/or the support for its decision. This would allow the EPA to issue another determination, perhaps with more detail and more supporting information, but EPA could tailor it to avoid affecting the current rulemaking process or newly finalized rules.

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<sup>12</sup> Clean Air Act, 42 U.S.C. § 7521(a).

<sup>13</sup> Brief for Respondent at 37, *State of California, et al v. EPA, et al*, (No. 18-01114) D.C. Cir. (Jan. 11, 2019) ("EPA has already fully disclosed the record upon which the Determination was based....").



## **Conclusion**

It is difficult to predict how the court might rule on the substantive claim of the revised determination being arbitrary and capricious. Perhaps in part because it is difficult to imagine the court ignoring the looming issue of the remedy and the court is likely to keep that in mind as it proceeds through the four claims outlined above.

As noted, the court has a variety of off-ramps, so to speak, which allow it to dismiss the case before arriving at the substantive claim: lack of standing, lack of a final agency action, or a procedural defect. Finally, there is the possibility that the timing of the case and the timing of the new rules (due late summer or early fall) will coincide so that it makes sense to consolidate this case with the inevitable challenges to the forthcoming rules. This case is one to watch because there is potential for the court to break new ground as it reviews the novel issues presented.