



Transcript of CleanLaw Episode 20: CleanLaw: Caitlin McCoy talks with Michelle Melton about Vehicle Standards, May 9, 2019

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Robin Just: Welcome to this podcast from the Environmental and Energy Law Program at Harvard Law School. In this episode, Caitlin McCoy speaks with Michelle Melton, a third-year student here about the proposed changes to the fuel economy and greenhouse gas emission standards for vehicles. They discuss the lead up to and details of the proposed rules and talk about ongoing and future litigation around these rules. We hope you enjoy this podcast.

Caitlin McCoy: This is Caitlin McCoy, the Climate, Clean Air, and Energy Fellow here at the Environmental and Energy Law Program. We are thrilled today to have one of our brilliant students, Michelle Melton, join us as a guest on our podcast. Welcome, Michelle.

Michelle Melton: Thanks for having me.

Caitlin: Let me give you a little background about Michelle and why we have invited her here today. She's a third-year law student here at Harvard Law School. Before law school, she spent three years working at the Energy and National Security Program at the Center for Strategic and International Studies in Washington, DC. This was following her graduation from Georgetown University with a dual master's degree in foreign service and international history, so she's no stranger to policy analysis. That's for sure. During her time here at Harvard so far, she's worked as a research assistant to professors Richard Lazarus, Jodie Freeman, and Jack Goldsmith. She's also completed an externship with the US Department of Justice in the Environment and Natural Resources Division. In addition to all of that, she's also served as a volunteer law clerk at the California Air Resources Board and the California Attorney General's Office.

Caitlin: She wrote a guest blog for us in November, so you might recognize her name that way. She has pointed out a hugely consequential, but largely overlooked aspect of the proposed vehicle standards that we'll be discussing today. We'll get to some of that in the second half of our podcast, so stayed tuned. It's our great pleasure to have her here today. We'll be discussing some key aspects of the proposed vehicle standards as well as what's at stake in the new proposal for California and the other states that have adopted California's standards.



Caitlin: Thanks again, Michelle. I feel bad. I'm going to just continue talking. This is going to be a style of our podcast where Michelle and I will be going back and forth a bit discussing these things together today. And so, I'm going to continue talking to give you all a little bit of background and overview of these standards that we'll be discussing. It's important to know there's two sets of standards that relate to emissions and fuel economy of new cars and light trucks in the United States. They have been issued together most recently, but they are distinct in terms of the agencies that create them, their purposes, and the statutes that authorize their creation.

Caitlin: First, we have the Corporate Average Fuel Economy standards. Those were first created in 1975 by the National Highway Transportation Safety Administration. We will be referring to that agency as NHTSA in order to save ourselves from repeating that over and over. That's a part of the Department of Transportation. Our Corporate Average Fuel Economy standards were created to provide improved energy efficiency of motor vehicles. They are set in miles per gallon. You might recognize them from the stickers that appear in the windows of cars at dealerships. They establish an average fuel economy standard that is to be achieved over an entire fleet of vehicles produced in a given model year by an auto manufacturer. NHTSA is authorized to create these standards by the Energy Policy and Conservation Act.

Caitlin: Second, we have emission standards that are set by the Environmental Protection Agency. These also apply to new vehicles, and they regulate air pollutants that come out of the tailpipes of these vehicles. We're talking about pollutants like carbon dioxide and other greenhouse gases that are emitted by cars and trucks. The purpose of these standards set by EPA is to protect public health. EPA first set these greenhouse gas emission standards for new vehicles back in 2010. These standards are set in grams per mile, however, increasing the fuel economy of vehicles has proven to be one of the principal ways that auto manufacturers meet these limits because the majority of our greenhouse gas emissions are CO₂. Given today's technology, the best way to decrease grams per mile of CO₂ is to decrease fuel consumption per mile, thus increasing the efficiency. EPA is authorized to create these public health standards by the Clean Air Act.

Caitlin: Okay. Now, that we have all of that out of the way, I will finally turn to Michelle and ask her to talk a little bit about California's history of air pollution regulation. We've been talking about the federal standards, but California has a special role in this process. Can you tell us a little bit about that?

Michelle: Sure. Under Section 209 of the Clean Air Act, California has an ability to set its own vehicle emissions standards so long as it gets what's called a waiver from EPA. This is in recognition of the fact that California has been regulating vehicle emissions since before the federal government, and California was the only state



that has been grandfathered into the Clean Air Act. In 1967, Congress recognized both California's leadership on vehicle air pollution standards, as well as California's unique geography and air pollution when it passed the Air Quality Act of 1967. It later, in 1977, strengthened the waiver provision and also added Section 177, which authorized other states to adopt California's standards.

Caitlin: Wow. So let's fast forward a bit from the 1960s and '70s and talk about what happened in 2010 at the time that the standards for 2017 through 2025 were being negotiated on a federal level. California played an important role in those negotiations. That's because the Obama administration had granted California's waiver to set greenhouse gas standards for vehicles. That waiver had been in a bit of limbo during the Bush administration. Once the Obama administration came into power, they granted the waiver almost immediately. And so automakers were then in the position of considering whether they would have to comply with different standards for greenhouse gases in California versus standards that might be set on a federal level.

Caitlin: So the automakers, EPA, and California all sat down to negotiate a unified set of rules. Obviously, NHTSA was involved and I think other parts of the Obama administration were involved in these historic negotiations that brought together all of the parties. The goal here was to set a unified set of rules that would then apply to the entire country and avoid the problem of a two-car market, right? Where we would have one set of standards that would apply for cars to be sold in California and other states that had adopted California's standards and then one set of standards for everyone else in the rest of the country.

Caitlin: We reached an agreement back at that time. Part of this package of this unified set of rules was that California said, "Any car that meets the federal standard meets our standards and can be sold in California." The way that this was phrased is that a car that met federal standards was deemed to comply with California standards. In reading about this issue, you may hear people talking about the deemed-to-comply provision or deemed-to-comply rule. That's what that means, that California said, "Okay. We will recognize that meeting the federal standard is sufficient for us." Just a quick note, even though I said that back in 2010, they were negotiating standards for 2017 through 2025, it's important to know that NHTSA is only allowed to set standards five years at a time, but as part of these historic negotiations, the agencies, the automakers, and California had agreed to go a little more forward-looking and set augural standards for 2022 through 2025.

Caitlin: This was in the interest of future product planning for the auto industry and trying to harmonize California's greenhouse gas standards in with those forward-looking fuel economy standards because EPA doesn't face a similar restriction of just setting its greenhouse gas standards five years at a time. So actually when the standards were finalized in 2012, EPA's greenhouse gas emissions standards were



final for all nine years going forward. This is just a really unique situation, which is why we think it deserves a little discussion here as part of the background.

Caitlin: Also of note that part of this unique deal too was the midterm review. That was to take place around 2016. That would be a moment where EPA would evaluate and NHTSA would evaluate whether these forward-looking 2022, 2025 standards were actually then to be confirmed right at the time when it was appropriate for them to be confirmed. So there was a whole process that went into that, a draft technical assessment report in July 2016, a proposed determination in November 2016, but, ultimately, the final determination that, yes, those second-phase standards were appropriate was published in January 2017. That was one of the last acts of the Obama administration.

Caitlin: Often, that's framed as sort of a last-minute thing, but we wanted to provide a little more background to let you all know that this was actually a process that had been foreseen and planned for some time, and a lot of work had gone into the technical reporting and proposal of this determination before it was actually finalized in January of 2017, shortly before the Trump administration came into power. Let's talk a little bit about what has happened since then because it has been quite a ride since January 2017. Michelle, what happened with this final determination that I was just talking about?

Michelle: Sure. I just hasten to add that California actually did play a big role, even though they had no formal role in the final determination, the Air Resources Board played a large technical role in helping prepare the final determination in doing the technical assessment of whether the standards were still appropriate. In April, on April 1st, 2018, which was the last day formally from the formal agreement that a determination from the EPA administrator could be made, Scott Pruitt announced that he was withdrawing the January 2017 final determination claiming that the standards were not appropriate because of changed circumstances.

Michelle: This has been challenged by states and environment groups in the DC Circuit. That litigation is ongoing. Briefing is going to happen this spring. It's not entirely clear what will happen to the presumably then final standards if California, and the other states, and environment groups prevail in this suit, but it is on a theoretically, legally separate track.

Caitlin: Yeah. That's really an interesting thing to keep an eye on because the whole process of doing this midterm evaluation is new, as I said. It's not something that is normally part of setting these standards. It's because we had this very unique and historic deal that involved this forward-looking piece. So we built in this midterm review. It's really not a lot of precedent, if any at all that's, on point to try to inform us what might happen, whether this case goes one way or another



in terms of the overall process of setting these standards. It's definitely something really unique that raises a lot of novel legal questions and something that we will be keeping an eye on here.

Michelle: While that litigation is ongoing, EPA and NHTSA have not stopped on their proposed fuel economy and greenhouse gas emission standards, which were released in August of 2018. These standards propose freezing fuel economy standards at model year 2020 levels for model years 2021 to 2026 and propose freezing greenhouse gas emission standards at model year 2021 levels. The standards, instead of tightening at, I think it is 2.5% per annum between 2021 and 2025, instead plateau. So instead of requiring the auto industry to continue to innovate and increase efficiency to reduce fuel consumption and greenhouse gas emissions, the standards stagnate and result in higher greenhouse gas emissions from the transportation sector relative to what would have been the case under continuing Obama administration policies.

Michelle: That said, Andrew Wheeler recently had a confirmation hearing. He's currently the deputy administrator and the acting administrator of EPA since Scott Pruitt stepped down last summer. He said at his confirmation hearing that EPA plans to finalize new fuel economy standards rising half a percentage point per year rather than being frozen through model year 2026. So it's not entirely clear what's going to be in the final, how much of what's in the proposal is going to make it into the final, but we're all waiting to see.

Caitlin: Yeah. That's the first little teaser that we've had, obviously, from the agency because things have gotten quiet since the proposed rule came out and the comment period ended. We've all just been sitting around wondering and so this statement from Wheeler in the confirmation hearing got a lot of buzz because it's our first indication that the agency is considering departing from this plateau that they had proposed in August to actually ratchet up a tiny bit, which is really interesting. Maybe it is an indication that there's a big weight of comments behind tightening over time, and that the agency feels it needs to be responsive to that.

Michelle: In terms of what is actually being proposed in the rule aside from the standard levels, NHTSA has proposed to treat California's waiver as preempted under the Energy Policy and Conservation Act. That would be an action that NHTSA takes. Alternatively, EPA has proposed that it would withdraw California's existing waiver. It has not actually said anything about future years' waivers, but based on its reasoning, it would deny all future waivers for greenhouse gas standards as well. It's not clear whether either agency has the legal authority to do what they're proposing to do. There are two district court rulings on this issue, neither one of which is dispositive on the merits. Obviously, if this gets up to the Supreme



Court, which everyone anticipates that it will if they finally follow through on what's in the proposal.

Michelle: There is this interesting hiccup, where in *Massachusetts v. EPA*, the landmark 2007 case, it said that EPA had the authority to regulate greenhouse gases. The Supreme Court did address the question of whether EPA regulation of motor vehicle carbon dioxide emission under the Clean Air Act interferes with DOT and specifically NHTSA's responsibility to set fuel economy standards. The court found that EPA has been charged with protecting the public health and welfare, a statutory obligation wholly independent of DOT's mandate to promote energy efficiency and that the two agencies could effectively co-regulate and bring these two different standards into harmony. It's not entirely clear whether the agency is on solid ground in claiming that California's waiver is preemptive since the California waiver provision was not at issue in *Massachusetts v. EPA*. It's also not clear whether EPA has the authority to revoke an existing waiver. That issue or anything like that issue has really never been litigated before.

Caitlin: I'll pause here to self-promote and note that on our website, we have a couple of blog posts. One really outlining what Michelle was just speaking about, which is the state of the law on this issue of trying to preempt the waiver. And so we go into some detail about those two US District Court cases that she mentioned. If you want to read up on that, you can find those on our website. We also went through and detailed how EPA and NHTSA discuss their potential plans to either withdraw the waiver or consider the waiver to be preempted as it came out in the proposed rule at the end of this summer. If you're interested in digging a little deeper into those things, you can find those on our website. There's also been a lot of other terrific scholarship out there about how novel these issues really are in terms of trying to preempt or trying to withdraw the waiver.

Caitlin: Let's turn to what the auto industry has been doing because we've been talking about what the agency has proposed and this journey that EPA and NHTSA have been on over the course of the Trump administration to change these standards and to try to change California's ability to regulate. What has the auto industry been doing all this time?

Michelle: The auto industry has certainly not spoken in one voice about this issue. It's important also to separate their response to the California waiver provision and their response to freezing the fuel economy and greenhouse gas emission standards. The auto industry is a diverse group of stakeholders. It includes not only the big auto manufacturers but also parts suppliers among others. They've really been all over the place. Initially, back at the end of the Obama administration, the manufacturers were grumbling but seemed to be generally in agreement that the standard for 2017 to 2025 were achievable. Some automakers though, as soon as the Trump administration took office and even



before, had started lobbying to weaken the standards. It's not entirely clear what they wanted. There was some chatter about technical fixes and not necessarily freezing the standards, but they never necessarily took a public position on that.

Michelle:

In May 2018, however, the manufacturers publicly came out and supported both the One National Program and continued improvements in fuel economy. That was, if you recall from our timeline earlier, after the withdrawal of the Gina McCarthy era final determination, but before the proposal came out in August. They publicly supported both the One National Program and continued improvements in fuel economy. They never put a number on this. It seems like they were trying to perhaps influence and play both sides, but throughout the process generally and the comment period specifically, as I mentioned, different automakers have taken different positions.

Michelle:

It's pretty clear that they want some regulatory relief and they're not on board with the complete rollback that was... Excuse me. A complete freezing of the standards that was proposed in August. At the same time, however, they have consistently communicated their preference for a negotiated settlement, but California has remained steadfast that the current standards are achievable. They've actually been much more silent on the waiver. It's not entirely clear where they stand on that. They clearly have a preference for one standard as opposed to two.

Caitlin:

Yeah. Speaking of California, let's talk about what California did after the proposed rules were released. As you remember, California had this deemed-to-comply provision whereby they would recognize compliance with the federal standards as compliance with California standards. Well, after California took a look at the proposed rules and even... This was following a summer in which it was very much in the news cycle where you saw the California Air Resources Board, the head of which, Mary Nickels, was very vocal in saying that the Trump administration's potential proposals were not going to be something that California was going to be very happy about and that California would be fighting the entire time to try to maintain some semblance of the program that had been negotiated under the Obama administration. We heard some rumors of meetings. I saw some photos on Twitter of, I think, Scott Pruitt or different people at the EPA at the time going to try to meet with Mary Nickels and other officials from the Air Resources Board and try to come to an agreement, but it looked like that never really came to pass.

Caitlin:

Once the proposed rules were released in August, California moved swiftly then in September, to revise its vehicle regulations at a state level. They removed that deemed-to-comply provision. So they removed this ability of manufacturers to say, "I'm in compliance with the federal standard. Thus, I'm in compliance with



California standards." They did say that this was dependent on if the federal standards did end up changing, right? Because we were still and we are still in the time of the proposed rules and not final rules.

Caitlin: What's interesting about all of this is that this could be a little bit of a wrinkle given California's current waiver. When California's current waiver under Section 209 of the Clean Air Act was approved by the EPA in 2013, it explicitly included the deemed-to-comply rule as part of that waiver package. That raises yet another novel legal question, which is that if California changes some of its rules for which it currently has a waiver, how does that affect the waiver. As I said, it remains to be seen. Indeed, I think California would say, "Well, the EPA and NHTSA have dropped their end of the bargain. It's only logical that this sort of key piece that we agreed to is removed from our standards because the rug has been pulled out from under us at a federal level." But it's unclear how a court might view these things.

Caitlin: Now, the other issue with removing this deemed-to-comply language is that this could also be problematic for other states that have adopted California's standards and included this deemed-to-comply language. Now, we're going to talk about why that could be a potential issue. In order to do that, we need to talk about Section 177 of the Clean Air Act. We mentioned it earlier, but let's explain exactly what Section 177 is. Section 177 allows other states to adopt California standards for the vehicles within their jurisdictions. Currently, we have 13 states as well as the District of Columbia that have adopted and follow California standards. They represent about 40% of the auto market in the United States.

Caitlin: Why would other states do this, right? One reason is that they have air pollution issues that they realize enhanced regulation of their vehicles would help achieve. It's not just about greenhouse gases, but it's also about normal criteria pollutants that are subject to the Clean Air Act. In many of these areas, by reducing the pollution that comes out of the tailpipe of vehicles and improving the fuel economy of vehicles, you get better air quality and not just in terms of greenhouse gases. Michelle, I'm going to turn to you to ask what are the specific requirements then for states that want to go ahead and take this step of adopting California standards under Section 177?

Michelle: Sure. There are two explicit criteria and one implicit structural criteria. The implicit structural criteria is that states have to be in nonattainment with their criteria pollutant standards meaning that their air quality is not meeting national standards as set by EPA. Those states, which is every state, turns out, are eligible to adopt California standards. Once you're within the remit of this part of the statute, there are two explicit criteria. The first is that the standards that states adopt have to be identical to the California standards for which a waiver has been granted for a particular model year.



Michelle: This is why the deemed-to-comply provision may pose an issue because if states still retain the deemed-to-comply revision, but California doesn't, then their standards will not be identical to the California standards. It's kind of a catch 22 for the states because if they don't change to California standards, they're not identical, but if they do change, they're at risk of being in violation of the original waiver that was granted to California. So it's unclear what's going to happen there.

Michelle: The other explicit criteria is that California and any other state following California standards has to adopt those standards at least two years before the start of the model year. That is determined by regulations set by the EPA administrator.

Caitlin: What's interesting thinking about a state that wants to adopt California standards under this provision and California's process, when we compare those two processes, I wonder where is the role for EPA in this Section 177 process.

Michelle: Well, it's funny you mention that because there is no explicit role for EPA in the process. The Section 177 states, again, that's named after the section in the Clean Air Act, they don't have to get EPA's approval to adopt California standards. In fact, there's no mechanism for EPA to disapprove states that adopt California standards. It's not clear from any provisions either in Section 177 or other provisions of the Act like Title III, which are the general provisions, which authorize judicial action, for example, that EPA has any authority to go after states for adopting or not adopting Section 177 standards. The exception being if states incorporate the adoption of California standards into their state implementation plans to achieve criteria pollutants, which actually some states have done.

Caitlin: Interesting. Yeah. Even when you go on EPA's website and look at the page that deals with vehicle emission and California's waivers, they note that nothing in Section 177 provides them a role in the process of other states that adopt California standards. So it's really different from their role under Section 209 where they're very much in a position of approving or denying the waiver for California standards.

Caitlin: The topic of your blog post that you wrote for us back in November had to do specifically with Section 177. That's because EPA has made a proposal in its proposed rule package released in August that has kind of flown under the radar and hasn't gotten a lot of attention, but you were bright enough to pick it up and write this fantastic post for us. I want to just ask you to give us an overview on what EPA is proposing to do with Section 177 in this new package of rules?

Michelle: Sure. I should add it's a very, very short provision. It's about two columns on one page of a 515-page, triple-column Federal Register notice, so it's pretty easy to



miss, but what EPA is claiming is that the text, context, and purpose of Section 177 supports their legal conclusion that the provision is limited to providing states the ability to adopt and enforce standards designed to control traditional air pollutants to address National Ambient Air Quality Standards, what we call NAAQS in the business, non-compliance. Specifically, they claim that the title of the section in which Section 177 appears, which is New Motor Vehicle Emission Standards in Nonattainment Areas, and the fact that it's limited to states that have state implementation plans, that is those that are in nonattainment, means that this is only about traditional pollutants. Section 177 was designed to address traditional pollutants, not greenhouse gases. And that therefore, states should not be able to adopt greenhouse gas standards whether or not California have the ability under its waiver to adopt those standards.

Caitlin: I like to think of this really as the one-two punch or the one-two-three punch technically, I suppose because we have NHTSA proposing to say that California's waiver is preempted. They can't even have a waiver for greenhouse gas emissions. You also have EPA saying, "Well, even if it's not preempted, we're going to go ahead and withdraw it." Then you have this sort of third line of attack that Michelle just laid out, which is even if California is somehow able to hang onto this waiver and a court finds in California's favor and doesn't go with NHTSA or EPA's view that the waiver can be preempted or withdrawn in the ways that they are proposing, that ultimately Section 177 doesn't allow other states then to go ahead and adopt California's standards.

Caitlin: So then even if the waiver survives, it will truly just be limited to California and take out a lot of the potential impact of these greenhouse gas emissions standards, which would be to affect about 40% of the market in the United States and really creates major reductions that put us on a path towards climate change mitigation in this country because, unfortunately, transportation has recently just edged over the power generation sector in terms of our largest greenhouse gas footprint in this country. It's sort of part of this step-by-step process by which EPA and NHTSA are working together to ensure that even if the waiver survives, it will be California alone that is able to hang onto it. And the rest of the states that might otherwise or that would otherwise join California in keeping these standards will not be able to.

Caitlin: It's going to be very interesting to see how a court approaches the arguments that have been advanced by EPA like this argument about the title of the section, whether that's going to carry much weight with the courts. As I said, for the very first time in 2010, the waiver was extended for greenhouse gas standards. As I've been saying, I feel like, throughout this whole podcast, again, we have another novel legal issue that will be before the courts as part of the whole huge amount of litigation that is going to unfold once this rule is final



Michelle: Assuming this stays in the final rule. This may be-

Caitlin: Right. That's true. That's true. Let's not get ahead of ourselves. Good point, Michelle. We are still awaiting the final rule. Actually, to that end, I think I should note that acting administrator Wheeler said in his confirmation hearings, another little teaser that he gave us, was that his plan was to finalize this rule at the end of March. He made it seem like there was an important deadline, that there was basically a clock ticking on them. So I went to look through NHTSA and EPA's statutory mandates to understand where this deadline might be coming from. What I found is that NHTSA has a requirement that they need to give the auto industry 18 months of lead time. They basically need to complete a rule-making that has new Corporate Average Fuel Economy standards at least 18 months before the start of the model year to which they will apply.

Caitlin: The proposed standards that we've been talking about and that are in the proposed rule are for model years 2021 to 2026. EPA and NHTSA are shooting to finish this rule by the end of March 2019 here because that will provide 18 months of lead time that will allow for the release of 2021 models in October of 2020. If anyone listening to this podcast has ever purchased a new car or looked at purchasing a new car, you know that the next model year is traditionally released during the fall of the previous year, but actually, under EPA regs, automakers can release the next model year as early as January 2nd of the year before. Right now, we're in 2019, and we could actually have 2020 cars on the market as early as January 2nd, 2019. Now, no automakers do that because it's confusing to people and because they have stock from this year that they need to try to sell before they go ahead and put those new, exciting models out there for people to look at.

Michelle: Then if this ultimately does get to litigation, it might be useful for us to just talk quickly about what we think of the arguments and whether EPA is likely to revise this. I think it's fairly unlikely actually that EPA ditches this. They may, but if they don't, I think that they're probably going to have a hard time in the courts for a couple of reasons. As many states have pointed out in their comments, EPA's reading of the statute ignores the plain text, which does not, on its face, limit states to adopting only those standards that explicitly relate to criteria pollutants. EPA, as one commenter pointed out, is reading nonattainment pollutants into a statute concerned with nonattainment areas. The language that's in Section 177 is actually the same as the language in Section 209, the California waiver provision. So it's not entirely clear that EPA has the better of the argument.

Michelle: Possibly the more important issues for court to consider is that this actually creates a problem that we know that Congress intended to avoid, which is the third car problem. Congress explicitly said in Section 177 that nothing in this subsection shall be taken basically to create or have the effect of creating a motor



vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards, which Congress called a third vehicle. This proposal actually does create a third vehicle. It is one that is the same as California, but only on criteria pollutant standards. It's really important to keep in mind that states would still be able to sign onto California standards for criteria pollutants, but not their standards for greenhouse gases. This, in effect, creates the third vehicle that we know Congress was trying to avoid.

Michelle: The bigger problem, I think, from my perspective is really this issue of the interaction between greenhouse gases and criteria pollutants. Some states have written the greenhouse gas standards into their state implementation plans in order to achieve their ozone requirements, for example. EPA admits in the proposal that the provisions of the state implementation plan that they have already approved would continue to be enforceable until EPA essentially forced a revision process, which suggests that this proposal is sort of half-baked.

Michelle: The other issue is that the agency really is trying to draw a neat line between greenhouse gases and criteria pollution. In the case of tailpipe emissions at least, it's really not that obvious for two reasons. First, states including California that have greenhouse gas standards use them to achieve criteria pollutant attainment. That was the point and that actually, in a way, although EPA has this purposivist argument that the purpose of Section 177 was to achieve NAAQS attainment, they are achieving NAAQS attainment. That was, in fact, the point.

Michelle: The second issue is that climate change does contribute to criteria pollution. It's directly... Well, I should say indirectly worsening surface-level ozone by raising temperatures and increasing particulate matter through, for example, more frequent wildfires and things of that nature. So this neat line that EPA is trying to draw in the statute, both in Section 177 and more broadly between greenhouse gases and criteria pollutants or traditional pollutants and greenhouse gases is not as clear as EPA would like it to be. So it does reflect kind of a... You could call it a mess. I don't mean it in a pejorative sense, but sort of the mess made of the statute by Massachusetts v. EPA and the continuing fallout of that decision when you have an administration that is not very environmentally friendly.

Michelle: In any event, this is all a long-winded way of saying I think that this artificial distinction or this blurry line between criteria pollutants and greenhouse gases is exposed in this proposal in particular. We'll see whether courts really accept that distinction that EPA wants to draw or not.

Caitlin: I'm really glad you pointed that out because it highlights really the difficulty that's at the heart of this entire process, which is the synergistic effects of these pollutants on each other. It's really hard to, as Michelle said, neatly silo everything. Also from the perspective of the technologies that go into



management, as I said earlier, we do still have this bit of a technological barrier where the best way to reduce greenhouse gas pollution and CO2 pollution, in particular, is to improve fuel economy. Well, now that we have finally laid out all of these issues, do we have any indication of what the Section 177 states might do? Are we seeing any action on their part that gives us sort of a sense of where they're going and what they might be doing to prepare before the release of this final rule?

Michelle: Well, certainly, many, if not all of the states, have commented on the proposal. To put it mildly, they're not very happy with what EPA has proposed with regard to 177 states. It's very possible that if and when EPA finalizes the proposal with regards to 177 states, they will sue. Although, of course, many of them were already joining suit with California, to begin with about the waiver. So that litigation is certainly coming whether or not EPA ultimately retains the 177 proposal in its final rule.

Michelle: In terms of what else they're doing, some states we've seen have started to modify the regulations to be identical to California's provision. They are changing their deemed-to-comply provisions. Not clear where all of the states are on this or whether all of them are moving, much less at the same pace, but I think that you will probably see that pick up in some states, especially if and when this provision is finalized.

Caitlin: Yeah. I think it's going to be interesting to see what happens once the rule is final, of course. I think, right now, we're still waiting for it to be finalized. We see California stepping up and changing its deemed-to-comply provision contingent on whether the federal standards do change in the final rule. Like you said, we're seeing some states like Maryland, for example, that's in the process of revising their standards. I think there are a lot of states that are kind of taking a wait and see approach, that are waiting to see what the final federal rule actually contains. Then they're going to decide do they want to take the step of removing their deemed-to-comply provision, fully aligning their standards with California, and moving into that camp very firmly or do they want to retain the deemed-to-comply and sort of have this hybrid structure where maybe they believe the new federal standards to not be so incredibly harmful, that they would be willing to consider the federal standards as sufficient for their jurisdictions.

Caitlin: As we've said, that raises the question of whether they can actually even maintain that hybrid structure because to have their own standards under 177, they need to be identical to California. What's the point of having their own standards if they're willing to go along with the federal standards? They may as well get rid of them altogether and just go along for the ride with the federal standards.



Caitlin: Another interesting aspect of this too is that we've had an election. We've had elections in many states since all of these things have been happening, so we have some states like Colorado where we have a new governor who is really engaged on these issues and has recently issued an executive order trying to get the state to develop a zero-emission vehicle program. That is something that will require their use of Section 177. Even in this time of uncertainty, we do see states that still want to try to exercise that 177 authority. So it's a mixed bag across the board. I don't think that we will be bored in the next few months as we continue to see how things play out with the case in the DC circuit over the final determination, and as we see the final rule, and as we presumably see all of the lawsuits that are filed out of the final rule. There's a lot to keep an eye on here, and it's going to be very, very interesting to see what the courts have to say.

Michelle: Certainly not a boring time to be an environmental lawyer.

Caitlin: No, no. That much we can say for sure. Well, thank you again, Michelle. It's been wonderful having you here.

Michelle: Thanks for having me.

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