



Transcript of CleanLaw Episode 25: The Clean Car Rules Rollbacks with Caitlin McCoy and Joe Goffman, September 23, 2019

To return to our website [click here](#).

Robin Just: Welcome to this episode of Clean Law from the Environmental and Energy Law Program at Harvard Law School. In this episode, Joe Goffman, our executive director, talks with our Climate, Clean Air, & Energy Fellow, Caitlin McCoy about the clean car rules. They discuss EPA and the National Highway Traffic Safety Administration's final rule issued on September 19th that preempts California's greenhouse gas standards and withdraws California's Clean Air Act waiver. We hope you enjoy this podcast.

Joe Goffman: Hello, Caitlin. We're here today to talk about an action that the Environmental Protection Agency together with the National Highway Traffic Safety Administration took on Thursday, September 19th. It was a final action. They proposed these actions I think about a year ago. So could you just do two things? One, explain where we were in this area as of the end of the Obama administration. And explain what the Trump administration did on September 19th.

Caitlin McCoy: Hello Joe. I'm back on the podcast here after a little bit of a hiatus. And yes, California had a waiver that was granted by EPA in 2013 for its greenhouse gas standards for vehicles. And at the end of the Obama administration, there were also Corporate Average Fuel Economy standards, which we call a CAFE standards in shorthand, for light trucks and passenger cars. And NHTSA had adopted those in a way that increased their stringency over time. So that was sort of where we were. We had these standards for greenhouse gas emissions from vehicles that were set by California and approved by EPA. And then we had these standards from NHTSA to slowly increase the fuel economy of cars within fleets of cars produced by manufacturers over time.

Caitlin: And indeed that has been how these standards have operated for a long time. I mean, since the 1970's, we've had the Clean Air Act where EPA, and to some extent California with EPA's waiver, set standards for pollutants that come out of the tailpipe of vehicles that can affect air quality and can affect public health and the environment. And we have NHTSA setting standards that seek to conserve energy. So they seek to set limits for the fuel economy of vehicles. And these standards have now starting in 2009, run together concurrently. So we saw the beginning of a departure from that. Last August, 2018, we saw



proposed rules come out from NHTSA and EPA proposing to change the way that these rules were created under the Obama administration. So instead of having rules for fuel economy that increased the stringency over time, we now had NHTSA proposing a flat lining of the standards at a certain point. And EPA unfortunately doing the same thing with the greenhouse gas emissions standards.

Caitlin: And as part of this new weakening of the previous standards, EPA and NHTSA had each given a separate basis for withdrawing California's waiver or preempting it. So we can talk a little bit more about the difference between withdrawal and preemption, because there was certainly a lot of that in this final action on Thursday. So what actually happened was-

Joe: Because I think they're pretty important. First, as of the end of 2016, the rules on the books required tailpipe emissions of greenhouse gases from automobiles to become progressively lower year by year through model year 2025.

Caitlin: That's correct.

Joe: And the California rules in place require the same thing because although California started its program, started the process of putting its rules in place back before the Obama administration came into office. The Obama administration and California worked together to harmonize their requirements. And one of the instruments that California needed and the Obama administration agreed to was to grant California the authority to enforce the standards that were on its books. Notwithstanding the fact that on their face, they were basically the same standards that the federal government adopted.

Caitlin: Yes. And that authority is the waiver.

Joe: Right.

Caitlin: Yeah. So last Thursday what happened was, as I said, all of this was proposed in one large package in August of 2018. They proposed these two maneuvers related to the waiver as well as weakening of the standards for both greenhouse gases and fuel economy.

Caitlin: So what happened on Thursday was that EPA took action on just one piece of that, which is the waiver. So EPA took action to withdraw the waiver, and NHTSA took action making a determination that the waiver was preempted by the Energy Policy and Conservation Act.

Caitlin: So that essentially means under the law, if a federal law has a preemption clause, that basically means that it doesn't allow states or in some cases other



federal agencies to adopt certain types of laws that might conflict or be too closely related to the law that the agents, the federal agency is adopting under that specific federal statute.

Caitlin: So here we have the National Highway Traffic Safety Administration, which is a subsection of the Department of Transportation. Which is tasked with implementing the Energy Policy and Conservation Act. And that's the act that's used to set these CAFE standards. And in that act, there is a clause that says that when there's an average fuel economy standard in effect, a state or a political subdivision of a state can't adopt or enforce a law or regulation that's related to fuel economy standards. So it's a pretty broad clause. So NHTSA is now for the first time making a determination that that clause blocks laws that have been adopted by California.

Joe: Back in August of 2018, they proposed to take away California's authority they proposed to freeze in place current levels of fuel economy as opposed to those levels getting tighter and tighter. They proposed to freeze in place the greenhouse gas tailpipe emission standards as opposed to what the Obama rules had said. Which was each year those standards had to get more and more stringent. So on September 19th, they did the first of those things. We're still waiting for them to do the second two things, right?

Caitlin: That's correct. And at the press conference where EPA administrator Andrew Wheeler and the secretary of the Department of Transportation, Elaine Chao, I would say announced this action. But actually, I think President Trump announced this action on Wednesday before over Twitter. So he kind of scooped his own officials. So it's hard to say that they announced it. So I guess we can say they made remarks about it. And when they made those remarks, Secretary Chao said that the final standards themselves would be released in 'a few weeks.' So there had been rumors that we might see them sometime in October. So if that's the case, then we'll be seeing them soon. And we do know that those standards went to the Office of Management and Budget for review in early August. So assuming that they are able to do a rather timely review of those standards despite their complexity, we could be seeing them soon. But for now, we do have the first piece of what they had previously proposed. And this piece is a final rule. So that's important in the sense that it can be challenged in court. So I'm happy to go over and just talk about all of the elements in the final rule if we think that would be of interest to people.

Joe: Yeah. Yes. I think so. I don't follow this issue as closely as you do, but I was struck by the fact that the document that they put out was about 250 pages long. And there were lots of moving parts. So maybe it would just help to go through each moving part.



- Caitlin: Exactly. I think that that will keep us busy here on the podcast today. And perhaps we can save some of my in depth analysis for pieces that I'll put out in writing or another podcast in the future. Because I think we can fill all of our time here today just talking about these different moving pieces.
- Caitlin: So yes, 230 pages long. It's quite a piece of work. And that's because it includes, NHTSA's determination that California's greenhouse gas emission standards are preempted by the Energy Policy and Conservation Act. And there's also a NHTSA determination that zero emission vehicle programs are also preempted by the Energy Policy and Conservation Act. And those are programs not just in California, but in other states as well, which is important to note.
- Caitlin: And NHTSA also adopts regulatory language that clarifies its interpretation of that preemption provision in the Energy Policy and Conservation Act. So it kind of sets out notice to all future potential actions taken by states, what it thinks the boundaries of that provision are. And then three more. So hang in there.
- Caitlin: EPA then steps onto the scene and withdraws California's waiver on the basis of NHTSA's preemption determination. And that's we'll there, it's sort of an interesting one because they say, well if NHTSA is preempting it and declaring that California standards are null and void, we don't technically have to do anything. But just in case we have to do something, we withdraw the waiver. So I count that as as one of the elements. And then next, EPA also withdraws California's waiver on a separate basis. Which is it proposes a different interpretation of section 209b1b of the Clean Air Act, which is part of the section that governs how these waivers are issued. And it uses that new interpretation to say California can no longer have a waiver. So we're withdrawing it.
- Caitlin: And then the last thing is EPA finalizes a new interpretation of section 177 of the Clean Air Act. And that's the section that allows other states to follow California's standards. So when California sets its standards, other states are allowed to adopt standards that are identical to California. So they can essentially follow along in having more ambitious standards as well. So this is EPA's I would call that sort of a backstop just in case EPA loses in litigation somewhere along the way and California gets its waiver back, gets its standards reinstated. It will then truly stand alone and other states will not be allowed to follow it anymore. So they finalize that determination. So it's quite the laundry list.
- Joe: So let's in reverse order. So the agencies teed this up as two different legal questions. Legal question number one generally is, is the agency acting appropriately in withdrawing the waiver under that granted under section 209b of the Clean Air Act. And separately, did the agency act appropriately in



withdrawing the authority of the more than dozen states that under section 177, adopted the California standards? So they get to defend on two different fronts.

Caitlin: Yes, that's right.

Joe: Is there anything in these separate actions or the different pieces of the jigsaw puzzle that if put together here, that surprised you or struck you as unusual?

Caitlin: Well, I have to say, to go into it a little bit, to talk about exactly how NHTSA makes its case for preemption. I found that interesting just because we don't have much in the way of NHTSA talking about its preemption authority. There is a little bit, and NHTSA certainly makes reference to that in this final rule here.

Caitlin: I thought it was interesting. NHTSA essentially says Congress has given them the responsibility to balance these different factors when it sets the CAFE standards. Right? So when you look at the Energy Policy and Conservation Act, it says that the Department of Transportation, and that has been delegated then to NHTSA, is responsible for determining maximum feasible fuel economy standards. So when it's doing that, it needs to consider technological feasibility, economic practicality, the need of the nation to conserve energy. And the effect of other federal motor vehicle standards on fuel economy.

Caitlin: And I found it notable that when NHTSA recited these factors and talked about the responsibility that congress had given it in this area, it left off that last one. The effect of other federal motor vehicle standards, which I found really interesting because the two court cases that we have from 2007, which were both in US district courts. Both looked into that phrase specifically and made findings related to EPA standards and California standards that were adopted with the waiver. Using that factor as sort of a leverage point to say that NHTSA needs to think about what California's standards are. And NHTSA needs to think about what EPA's standards are, and NHTSA needs to work with them. And I read those cases as sort of softening the potential blow of the preemption provision. Which when you read it sounds really broad. So I found it interesting that when NHTSA recited its responsibilities, it didn't mention that. It just mentioned the importance of technological feasibility, economic practicality, and conserving energy.

Caitlin: I should mention that the exact phrasing of that factor was changed in 1994 when the Energy Policy and Conservation Act was recodified. So the current version is the effect of other motor vehicle standards of the government on fuel economy. So that's government with a capital G, which is to say federal. So this change in wording could become a point of contention in the litigation. And I



actually discuss it in a blog post on our website that's called CAFE Standards and the California Preemption Plan.

Caitlin: Ironically too, in one point they threw in there consumer choice as one of the elements. Which is clearly not in this statute. But I think might be just a slip that is sort of reflective of what's actually going on inside the agency in how they might be thinking about these standards. Because we know that consumer choice at the moment leans really hard towards SUVs and towards trucks. And those are cars that consume a lot of gasoline and a lot of fuel, and make it difficult for the manufacturers to balance their fleets in terms of achieving really ambitious fuel economy. Because those cars consume a lot. But they are a consumer favorite right now now that gas prices are low. And they're also really big money makers for the car companies.

Caitlin: So I found that kind of interesting. I don't want to read too much into it. Obviously it's early days yet. But of course that was something that caught my eye because I thought well, we're missing a piece of those statutory factors. And indeed, at one point they reference one that's not on the list.

Joe: Well you actually just said something that's kind of interesting and I'm not sure people necessarily appreciate as acutely as you just described it. Which is the way NHTSA came out with their determination. They didn't make an argument that as a matter of law, the Energy Policy and Conservation Act per se if you will, preempts the actions that California took. Because those actions entail compliance through changing fuel economy. They basically represented themselves as having the authority under the statute to make a fine grain reasoned judgment as to whether there was a preemption event or not.

Caitlin: Indeed. That was their sort of first line of argument. And one that was a through line throughout the NHTSA section was, "This is our job. We are in the position of balancing these factors. And we've been tasked with this by Congress." But of course they did come through and make an argument about how intertwined fuel economy and greenhouse gas emissions are. And there is a whole long section in there, in the final rule where they talk about how essentially how they measure fuel economy is how much carbon dioxide is coming out of the tailpipe. So they say from a scientific perspective, these things are so intertwined that that's why any law that California makes related to greenhouse gas emissions is necessarily related to fuel economy. Especially because with the limits of current technology, the best way to manage the carbon dioxide coming out of the tailpipe of a vehicle is to manage how much fuel that car burns.

Joe: They're also, it sounds like an element of their understanding of preemption is that they are the sole authority.



Caitlin: Absolutely. Absolutely. And there is much discussion of that in the EPA section. Because for many years, EPA made statements in its waiver grants saying, "When we get an application for a waiver from California for vehicle standards, we have three statutory elements in section 209 of the Clean Air Act that we can consider in order to potentially deny that waiver. And whether NHTSA preempts California's standards is not on that list. It's not within our authority to consider. So we're not going to take this to NHTSA and ask for their permission whether we can grant this waiver. We're doing something that's wholly separate."

Caitlin: So that was EPA's way of operating for many years. And they announced in this final rule that they believe that was not the right way to operate. That they are doing things differently now, and that they are working now more closely with NHTSA to coordinate. And that's why they are sort of stepping back. I think in a sense you really get that sense in the rule because the NHTSA section comes first. That they are stepping back and letting NHTSA take action now. And then sort of in the alternative, they're there with their re-interpretation of one of those criteria to withdraw the waiver.

Joe: Well that's a bit of a wow right there that the agency is very specifically and explicitly stepping back.

Caitlin: Absolutely.

Joe: And essentially in a way, it's kind of on its own. I mean there's a two step here. NHTSA's taking the position that it's the sole authority. And by that I guess it means not only the sole authority vis-a-vis the states, but this whole authority vis-a-vis the EPA. Notwithstanding the fact that Congress told EPA that it was its job. And if you will, its job alone to implement the Clean Air Act.

Caitlin: Right. And opponents of all of this are quick to point to Massachusetts versus EPA, a Supreme Court case from 2007. Where the Supreme Court has a line talking about how NHTSA has certain responsibilities under the Energy Policy and Conservation Act to set that fuel economy standards. EPA has certain responsibilities under the Clean Air Act. And there's no reason why they can't each do what Congress has asked them to do under their various statutes.

Caitlin: So opponents read that sort of in a way similar to what you just said. That they each have separate grants of power and authority that they each need to uphold and act on. And now in this final rule, you see both NHTSA and EPA sort of reinterpreting those same lines from Massachusetts vs EPA to say the greenhouse gas emissions standards that EPA was tasked with creating under the Clean Air Act. And NHTSA's fuel economy standards are so intertwined that there is a linkage between them. That's the phrase that's used over and over



again, the linkage. To say that that case actually stands for the proposition that EPA and NHTSA need to work more closely together. And that that old way of doing things where EPA would say, "We have our job, you have yours. We're not paying attention to whether you think there's a preemption issue here, we're granting the waiver." Was the wrong way of doing things. And they read the Supreme Court as telling them that they need to work together and the way that they see that happening is stepping back, letting NHTSA preempt, and then making their own preemption case as well.

Joe: I would guess that the vast, vast majority of people who looked at, study the Supreme court 2007 Mass versus EPA case, the takeaway was the borders of NHTSA's jurisdiction and the EPA's jurisdiction may touch, but they don't cross. Now EPA of all agencies has raised its hand to say, "Oh no, no, no. The borders cross. And where they cross, the Clean Air Act in effect doesn't apply."

Caitlin: Right, right. It's certainly a departure.

Joe: One of the things that you had mentioned when we were preparing for this interview was that NHTSA talks about the California Zero Emission Vehicle program which has in various forms been in existence for a pretty long time. And California originally included in its regulations requirements that manufacturer sells zero emitting vehicles. Back at a time when California was focused on not on greenhouse gas emissions, but on the pollutants that caused ozone smog and fine particle smog. And that's been part of the regulatory landscape for a long time. But I gather that there are Zero Emitting Vehicle or ZEV provisions in NHTSA's determination and EPA's revocation of the waiver.

Caitlin: Indeed. Since 1990, California has had Zero Emission Vehicle requirements and EPA first approved those in a 1993 waiver actually. So you're right to say this is an incredibly long standing element. So yes, EPA withdraws the part of the 2013 waiver that relates to Zero Emission Vehicles as well as the greenhouse gas emissions standards.

Caitlin: But more interestingly I think, NHTSA says that Zero Emission Vehicle mandates are preempted also by the Energy Policy and Conservation Act. That affects California and that affects other states that have these ZEV mandates as well. And what I think is interesting about it is I read earlier that preemption clause language from the Energy Policy and Conservation Act that talks about standards that are related to fuel economy.

Caitlin: So NHTSA makes an argument that feels to me personally like a bit of a stretch when it starts to talk about preemption for these ZEV mandates. So I'll read just verbatim. Bear with me. I mean I feel like they say it best. Let's go straight to the source.



- Joe: You're using the word best in an ironic way I think. But go ahead.
- Caitlin: Yes. So NHTSA says, "Such laws which require that a certain number percentage of vehicles sold or delivered in a state by a manufacturer meet ZEV requirements directly and substantially affect fuel economy standards by requiring manufacturers to eliminate fossil fuel use in a portion of their fleet."
- Caitlin: So this really sets up NHTSA's view of how far it thinks that its preemption provision can go. It's one thing to say greenhouse gas emissions requirements affect fuel economy by requiring more stringent limits on fuel economy, and trying to draw those lines and those chains of causation. And it's another to say by requiring zero emissions, requiring zero fossil fuel use, you are also making laws that are related to fuel economy. It's certainly, and part of how they bolster that argument is saying these mandates require, "The application of additional efforts and resources beyond those needed to comply with federal standards, and directly conflict with the goals of the Energy Policy and Conservation Act. As they apply irrespective of the federal statutory factors." The ones that I mentioned earlier. "That NHTSA's required to consider when it sets fuel economy standards, including technological feasibility and economic practicality."
- Caitlin: So I find that really interesting because it's essentially saying that you're taking resources away from compliance with fuel economy standards. And that's part of how the ZEV mandates run into trouble. And they run afoul of the preemption clause. And again, we get that insistence that NHTSA has been tasked with these factors and must consider them and they're the only one, as I was saying earlier. So to me, the chain of causation between Corporate Average Fuel Economy standards and Zero Emission Vehicles is a little more tenuous. And the idea that you could preempt something simply because it takes resources away from compliance with your standards also strikes me as similarly tenuous.
- Caitlin: So I'm really curious to see what happens in the litigation over these standards, which has already been filed in the DC district court I should mention right away on Friday. California and 23 States, the District of Columbia, and the cities of New York and Los Angeles all filed together against the National Highway Traffic Safety Administration and the Department of Transportation for this preemption decision. This bit of the final rule. So notably, EPA was not named in the lawsuit, and EPA has not been sued yet. So we'll wait for that to happen. But that is certainly, this ZEV piece is going to be a piece that I'm watching closely.
- Joe: Well, what's really interesting about what you said is that there're really two very different arguments being made here, right? One argument is the greenhouse gas emissions standard that applies to the tailpipes of cars with



internal combustion engines. You meet those standards by and large by, you can meet them any way you want. But by and large what the car manufacturers do is increase the fuel economy of their fleet. And that pencils out to meaning that the emission standard, that's one argument.

Joe: Now you have an argument that's totally unrelated to that. Which is that when car companies compute their fuel economy average, they include the value of the ZEV, which is zero. Or I guess more to the point. NHTSA is saying well since we interpret EPCA. Not to create a per se preemption. But to give us a lot of interpretive and implementation authority over these questions, we've decided that taking account of various factors including what I think is a new one. The level of resources the car companies have to put in, we can say that the ZEV mandate falls within our authority and falls within our authority to make these kinds of judgements. That's way different from the first argument, but maybe it explains why NHTSA took pains to come up with this idea that it is the preemptive authority, not that the statute preempts other authorities. Because that's a pretty heroic job they're doing to make the anti-ZEV argument.

Caitlin: That's true. And I think you're right that it accounts for how much in the final rule they reiterate over and over their role, their authority, their special task given to them by Congress. And just hearing you describe it, I'm struck by how jarring all of this is given that the Energy Policy and Conservation Act was enacted in 1975 at the height of the oil crisis in this country. And it was intended to save energy, and to reduce the amount of oil that we consume as a country.

Caitlin: So to think now of NHTSA saying that it's a step too far for manufacturers to be asked to produce or sell into the market a certain amount of vehicles that are extremely efficient, and vehicles that may not burn any gasoline at all. Vehicles that might be 100% electric are preempted and indeed should not be subject to these sort of requirements that they make up a certain part of the market share. So really, the whole thing strikes me as so strange. When we reflect back on the purpose and the mission of the statute.

Joe: I think you put your finger on something again. It seems when you look at how the agency, the EPA has interpreted various discreet provisions of the Clean Air Act and done so often in a self restricting way. In the same way you just described NHTSA's dealing with EPCA. The agency also reads the overarching purpose of the Clean Air Act, which Congress expressed in explicit terms both in the legislative history and in the statute itself out of the statute. So both EPCA and the Clean Air Act seem to be getting the same treatment by their respective agencies.

Joe: But based on your description Caitlin, it feels like one of the reasons that NHTSA invested so much effort in the argument to expand its own authority and



perogatives under that authority expansively was so that they could get to this ZEV question. Because this seems like it's not only opening a whole other front, it's opening a whole other war.

Caitlin: Exactly. And that's visible. I've started reading the complaint filed by California and the other parties. And that is one of their key arguments is NHTSA can't do anything to 100% electric vehicles. It's beyond its authority. So that's certainly going to be tested.

Caitlin: But your point to EPA's project under the Clean Air Act is a valid one. And that's certainly what we see happening in the latter portion of this final rule. The way that EPA goes about its interpretation of the criteria for denying the waiver represents what we've seen in other actions that EPA has taken, particularly under the Clean Air Act, but under other statutes as well. Which is to narrow as much as possible its authority to take action.

Joe: So we talked about the fact that suddenly NHTSA with EPA's eager cooperation, read boundary restrictions into Mass versus EPA that nobody knew existed before. And EPA essentially ceded some of its authority to NHTSA. But not having forgotten entirely that they did have some Clean Air Act authority under section 209b, it sounds like EPA made an independent argument based on that provision of the statute for taking away or revoking the waiver on its own motion. Yeah, I know that their preferred position was NHTSA's determination by itself extinguished the foundation or the waiver and the waiver itself. But just in case the agency also made an alternative argument under section 209b.

Caitlin: Yeah, that's correct. So we're seeing EPA essentially using the three criteria that they have in section 209b to deny a waiver, to reconsider a waiver that has been granted. And potentially withdraw the waiver if they find that California no longer satisfies one of those criteria. So EPA is pretty explicit about this. They talk at length about their authority to reconsider actions like the waiver. And they say that they have both pre grant review and post grant review authority. And in appropriate circumstances, that post grant review may result in the withdrawal of a prior waiver.

Caitlin: So how they go about it in this case is they use one of the criteria under 209b1b. And in that, they set up this idea that they call the particularized nexus, which becomes sort of a catchphrase for them. Not to be confused with the significant nexus under the waters of the United States whole saga. But they have this new catchphrase, and they love it. They use it throughout. And they have this idea that the California waiver needs to have these specific features.

Caitlin: So they say that Congress enacted the waiver authority for California against the backdrop of traditional criteria pollutant problems. And that all three links in



their chain of the particularized nexus were connected to specific local California features. So number one is criteria pollutants emitted from the tailpipes of California vehicles. Number two is emissions of those criteria pollutants, which contribute to air pollution by concentrating locally in elevated ambient levels. And then three, results in health and welfare effects. And they give an example from ozone. Which are extraordinarily aggravated in California as compared to other parts of the country, which can be attributed to the confluence of California's peculiar characteristics. And it gives some examples. Population density, transportation patterns, wind and ocean currents, temperature inversions, and topography.

Caitlin: So that I think, although you can tell I was clearly reading from the proposed rule, sets up their theory of how the waiver to California should function. So one of those criteria in 209b is that California needs to have compelling an extraordinary conditions that justify the grant of the waiver. And as you can hear under their particularized nexus theory, those compelling and extraordinary conditions in EPA's new reading need to be confined to these extremely localized and regional conditions. And are really dependent on specific geographical and climactic features in California. So what they end up doing is repeating, I think verbatim.

Caitlin: Because I went ahead and read the 2008 waiver denial decision last week in preparation. And they repeat pretty much verbatim a lot of what is in that 2008 denial saying that climate change isn't one of these localized regional problems that we can compare to things like ozone pollution. When we emit GHGs, they go all the way up in the atmosphere. They mix. There's about an even global concentration that sort of mixes throughout the atmosphere. And that California can't really make claims that it is going to face climate change impacts that are really unique and extraordinary, that are these types of unique and extraordinary conditions that when it makes claims about drought, well there are other Western states that are going to face drought. And when it makes claims about coastal issues, well there are other coastal issues like look at Louisiana, look at Massachusetts, that these states are going to face. And that none of these things distinguished California in the way the EPA now reads extraordinary and compelling to mean. So that's how they narrow it. That's their new reading and this particularized nexus that relies very heavily on historic features and presents itself in opposition to the idea of climate change and GHGs as a 'global problem.' That's the way that they do it, essentially.

Joe: To do a little bit of a backfill, you made a reference to the 2008 waiver denial. This was in the last year of the Bush administration when California applied for a waiver for the first round of its vehicle greenhouse gas emissions program. Or its clean car program, the Bush administration denied the waiver for the reasons that you just enumerated. This particularized conditions or factors issue.



Joe: To be fair, the case that the Bush administration then made in 2008 and the Trump EPA made last week is not absurd on its face by any means. And I think there is a lot of history behind the waiver authority that's tied very much into the features of Southern California and its air shed, and the unique contribution that automobiles make to air quality degradation there.

Joe: But here's the interesting thing. 209b is written in a way that kind of implies a presumption in favor of California's prerogative. The three factors that are in the statute are what the administrators should look at if he or she is going to deny the waiver. So the burden is really on the administrator to justify denying a waiver after California adopts a program. It's not on California to demonstrate that it is justified in having adopted the program in the first place. So the statute seems to tilt the field or tilt the platform in California's favor, notwithstanding the say superficial appeal of first the Bush EPA and now the Trump EPA's arguments. You don't actually have to agree with that. And let's not forget that you are the expert just cheerleading on the sidelines.

Caitlin: You're just the Clean Air Act in general expert. And I'm the one tasked with digging into this nightmare under 209.

Joe: Yeah. The term in general is doing a lot of work there. Well as a colleague, I really should say this. We're recording this on Monday afternoon, September 23rd. And I think you've done an absolutely heroic job in a very short period of time of marshaling a lot of material and starting to get your mind wrapped around it. And I wish you were able to spend all that great talent and resources on something a little more, shall we say progressive than yet another anti-environmental effort on the part now not of one, but of two different agencies. That not only undermines the federal government's authority, but attacks the ability of states to exert their historical leadership. But anyway, thank you for doing this.

Caitlin: I would say it's my pleasure, but it's not. But yet I feel a sense of responsibility to read these things, try to unpack what is being said here, how it's being said. And to try to think about the way the agency is going about these things. In the hope that a future administration might see fit to put things back together again, or perhaps make a brand new way. So we'll see.

Joe: Well thank you very much Caitlin, for doing all this work at lightning speed. And doing this interview. I know that we won't be able to stop you from digging further into this rule-making package. And since we probably won't be able to stop you, we may do another one of these interviews perhaps after you do a little writing about it as well.



Caitlin:

Indeed. Back to lock myself in my office and work on writing something about this. And not to give too much away, but I think the podcast itself might already be a bit of a giveaway that I think I'll be focusing my first piece at least on NHTSA's actions. Especially because this first lawsuit that we have is specifically focused on NHTSA and its actions. So stay tuned.

To return to our website [click here](#).