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Rethinking the “One National Program” for Clean Cars: Where Does the Biden Administration Go from Here?

By Lia Cattaneo, JD/MPP 2022

Reducing greenhouse gas (GHG) emissions in the United States will require decarbonizing the transportation sector, which represents the largest share of U.S. emissions. President Biden kickstarted his domestic climate agenda by issuing an Executive Order that requires agencies to review certain Trump administration regulations, including the two Safer Affordable Fuel-Efficient (SAFE) Vehicles Rules.¹ These rules are the latest in an escalating legal and political battle over motor vehicle standards issued by the Environmental Protection Agency (EPA), the National Highway Traffic Safety Administration (NHTSA),² and the State of California.

In the Clean Air Act (CAA), Congress established nationwide motor vehicle emission standards and preempted state standards, but it carved out a special role for one state: California. In recognition of California’s air quality challenges and innovative solutions, Congress gave California the ability to seek a preemption waiver, allowing it to adopt and enforce more stringent emission standards than the federal ones. Other states can adopt California’s standards, and 12 states and the District of Columbia have now done so.³

But in a September 2019 joint rulemaking, EPA and NHTSA withdrew California’s waiver, granted in 2013, relying on novel legal interpretations of the agencies’ respective statutory authorities, the CAA and the Energy Policy and Conservation Act (EPCA). Part I of the SAFE Vehicles Rules set out “One National Program” for fuel efficiency standards and GHG emission standards. Specifically, the Part I Rule did two things: (1) it preempted and revoked California’s waiver on two separate bases, and (2) it barred other states from adopting California’s GHG standards. The Part II Rule, issued later, set the technological standards for the One National Program.

States and localities, environmental groups, and other interest groups (collectively, the Petitioners) challenged the Part I Rule in federal court.⁴ Although the D.C. Circuit received briefs in the case (*Union*

¹ Exec. Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

² NHTSA is an operating administration within the U.S. Department of Transportation.

³ Brief of State and Local Government and Public Interest Petitioners at 68, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. June 29, 2020).

⁴ *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. filed Oct. 28, 2019). Many of the filings can be found at the following link: <http://climatecasechart.com/case/union-of-concerned-scientists-v-national-highway-traffic-safety-administration/>.

Also note that separate cases were filed against EPA and NHTSA in the D.C. Circuit and D.C. District Court, respectively, forcing questions about which court should hear the challenges. The CAA gives the D.C. Circuit original jurisdiction over nationwide challenges to EPA’s emission standards, 42 U.S.C. § 7607(b)(1), but EPCA



of *Concerned Scientists v. NHTSA*), the court granted the Biden administration's February 1 request to hold the litigation in abeyance until the administration completes its review of the Part I Rule.⁵ This means that the D.C. Circuit won't decide on the legality of the Trump administration's rule. So, where does the Biden administration go from here?

In this paper, I briefly explain the history of California's CAA waiver and EPA's and NHTSA's determinations in the Part I Rule. Then I describe the legal challenges and questions facing the Biden administration in its review of the Part I Rule and potential restoration of California's waiver.

Background

Brief History of California's Waiver

In the 1950s and 60s, California struggled with some of the worst air quality in the country, particularly in Los Angeles.⁶ In the absence of federal action regulating pollution from cars and trucks, California enacted the country's toughest standards for vehicle emissions and pollution control technology through a process that looks quite similar to what California and EPA do today.⁷ Congress took notice. The 1967 CAA Amendments established national standards for these mobile sources for the first time and preempted states from setting their own motor vehicle standards. But, in recognition of California's unique regulatory role and air pollution concerns, Congress created an exemption for California. Congress sought to avoid a patchwork of state standards that would complicate manufacturers' compliance, but it permitted a two-program system in order to balance centralized control with policy innovation.

does not have an equivalent provision, *California v. Chao*, No. 19-cv-02826 (D.D.C. filed Sept. 20, 2019); *EDF v. Chao*, No. 1:19-cv-02907 (D.D.C. filed Sept. 27, 2019); *South Coast Air Quality Management District v. Chao*, No. 1:19-cv-03436 (D.D.C. filed Nov. 14, 2019). The D.C. Circuit ultimately accepted both the NHTSA and EPA portions of the case. *Order, Union of Concerned Scientists v. NHTSA*, No. 19-01230 (D.C. Cir. Feb. 4, 2020). The district court stayed the consolidated NHTSA cases in response. *Minute Order, State of California v. Chao*, No. 1:19-cv-02826 (D.D.C. Feb. 11, 2020). Petitioners opposed this move and continued to argue that the D.C. Circuit lacked jurisdiction over the NHTSA claims. See *Brief of State and Local Government and Public Interest Petitioners*, *supra* note 3, at 74.

⁵ *Order, Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. Feb 8, 2021). See also *Corporate Average Fuel Economy Standards / Greenhouse Gas Standards*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2017/09/corporate-average-fuel-economy-standards-greenhouse-gas-standards/> (last visited Feb. 20, 2021).

⁶ See Sarah Gardner, *LA Smog: The Battle Against Air Pollution*, MARKETPLACE (July 14, 2014), <https://www.marketplace.org/2014/07/14/la-smog-battle-against-air-pollution/>.

⁷ In 1959, the California legislature directed the state's public health agency to determine the "maximum allowable standards of emissions of exhaust contaminants from motor vehicles which are compatible with the preservation of the public health including the prevention of irritation to the senses." Harold W. Kennedy & Martin E. Weekes, *Control of Automobile Emissions—California Experience and the Federal Legislation*, 33 L. & CONTEMP. PROBS. 297, 298–99 (1968). The agency went on to develop standards, establish a test procedure for vehicles, and approve pollution control devices. *Id.* at 299–301.



Under the CAA, California must request a preemption waiver for state regulatory programs that affect vehicle emissions, engine standards, or heavy-duty equipment. The waiver allows California to enforce standards different from the federal government's. The CAA's waiver provision—Section 209(b)(1)—states that EPA must grant a waiver unless the agency finds that:

- (A) California has determined that its standards are, in the aggregate, at least as protective as EPA's standards, and this determination is arbitrary and capricious;
- (B) California “does not need such State standards to meet compelling and extraordinary conditions”; or
- (C) California's standards are not “consistent with” the CAA's provisions regarding technological feasibility (Section 202(a)).⁸

With this language, Congress set a high bar for EPA to deny a waiver. A House report with the 1977 CAA Amendments noted that the EPA Administrator was not supposed to “substitute his judgment for that of [California].”⁹ The same report noted that to find California had misjudged its standards under Section 209(b)(1)(A), the EPA Administrator would need “clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State.”¹⁰

Since the first waiver was issued in 1968, EPA has granted over 100 waivers.¹¹ The majority of the waivers EPA has granted were for California's *criteria pollutant* emission standards, rather than GHG standards.¹² EPA has only fully denied one waiver request from California—a decision the agency quickly reversed. In 2008, against the unanimous advice of the agency's technical and legal staff, EPA Administrator Stephen Johnson denied California's first GHG emission standards waiver request,¹³ citing a lack of “compelling and extraordinary conditions” under Section 209(b)(1)(B) as

⁸ 42 U.S.C. § 7543(b)(1).

⁹ DENISE A. GRAB ET AL., INST. FOR POL'Y INTEGRITY, NO TURNING BACK: AN ANALYSIS OF EPA'S AUTHORITY TO WITHDRAW CALIFORNIA'S PREEMPTION WAIVER UNDER SECTION 209 OF THE CLEAN AIR ACT 3 (2018), https://policyintegrity.org/files/publications/No_Turning_Back.pdf (citing H. Rep. No. 95-294, at 302 (1977)).

¹⁰ *Id.*

¹¹ Emily Wimberger & Hannah Pitt, *Come and Take It: Revoking the California Waiver*, RHODIUM GRP. (Oct. 28, 2019), [https://rhg.com/research/come-and-take-it-revoking-the-california-waiver/#:~:text=Last%20month%20the%20Trump%20administration.set%20during%20the%20Obama%20administration;PollutionStandardsAuthorizedbytheCaliforniaWaiver,CAL.AIRRES.BD.\(Sept.17,2019\),https://ww2.arb.ca.gov/resources/fact-sheets/pollution-standards-authorized-california-waiver-crucial-tool-fighting-air](https://rhg.com/research/come-and-take-it-revoking-the-california-waiver/#:~:text=Last%20month%20the%20Trump%20administration.set%20during%20the%20Obama%20administration;PollutionStandardsAuthorizedbytheCaliforniaWaiver,CAL.AIRRES.BD.(Sept.17,2019),https://ww2.arb.ca.gov/resources/fact-sheets/pollution-standards-authorized-california-waiver-crucial-tool-fighting-air).

¹² Under the CAA, EPA establishes National Ambient Air Quality Standards (NAAQS) for so-called criteria pollutants. Pollutants currently included in this category are ground-level ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, and particulate matter. GHGs are not a criteria pollutant. For an argument about how they could be included as such, see GRACE WEATHERALL, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, IMMEDIATE EXECUTIVE ACTION: UNEXPLORED OPTIONS FOR ADDRESSING CLIMATE CHANGE UNDER THE EXISTING CLEAN AIR ACT (July 27, 2020), <https://eelp.law.harvard.edu/2020/07/immediate-executive-action-unexplored-options-for-addressing-climate-change-under-the-existing-clean-air-act/>.

¹³ JAMES MCCARTHY & ROBERT MELTZ, CONG. RSCH. SERV., CALIFORNIA'S WAIVER REQUEST UNDER THE CLEAN AIR ACT TO CONTROL GREENHOUSE GASES FROM MOTOR VEHICLES 5 (2009); Notice of Decision Denying a Waiver of Clean Air Act



the basis for denial.¹⁴ Following President Obama's election, EPA reconsidered its decision and reversed course, withdrawing and replacing EPA's prior denial of California's waiver request.¹⁵

In 2013, EPA granted California a waiver for its Advanced Clean Cars program for model years 2017 and later, which included the State's low-emission vehicle standards (which I will call the GHG standards)¹⁶ and zero-emission-vehicle (ZEV) standards.¹⁷ Broadly, the ZEV standards required a certain percentage of vehicles sold or delivered in a state to be hybrid or electric.¹⁸

Other States' Adoption of California's Standards Under Section 177

Before the Part I Rule, if EPA granted California's waiver request, other states were then permitted to follow California's GHG standards under Section 177 of the CAA.¹⁹ Section 177 permits states to "adopt and enforce" standards that are "identical to the California standards for which a waiver has been granted for [a given] model year."²⁰ Before the Trump administration revoked California's 2013 waiver, several states had adopted California's GHG and/or ZEV standards. States are not required to seek EPA approval to adopt California's standards under Section 177.

GHG Emissions and Joint Rulemaking

EPA and NHTSA both have authority to set vehicle standards, but their authorities derive from different statutes, and they set standards for different purposes. EPA sets *GHG emission* standards under the CAA in order to protect public health and welfare.²¹ NHTSA sets *fuel economy standards* under EPCA in order to improve the efficiency of motor vehicles and promote energy conservation.²²

Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

¹⁴ JOHN B. STEPHENSON, GOV'T ACCOUNTABILITY OFF., CLEAN AIR ACT: HISTORICAL INFORMATION ON EPA'S PROCESS FOR REVIEWING CALIFORNIA WAIVER REQUESTS AND MAKING WAIVER DETERMINATIONS 2, GAO-09-249R (2009).

¹⁵ GRAB ET AL., *supra* note 9, at 3; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's

2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009).

¹⁶ For additional information, see *Low-Emission Vehicle Program*, CAL. AIR RES. Bd., <https://ww2.arb.ca.gov/our-work/programs/low-emission-vehicle-program> (last visited Sept. 26, 2020).

¹⁷ For additional information, see *Zero-Emission Vehicle Program*, CAL. AIR RES. Bd., <https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program> (last visited Sept. 26, 2020).

¹⁸ For more information, see INT'L COUNCIL ON CLEAN TRANSP., OVERVIEW OF GLOBAL ZERO-EMISSION VEHICLE MANDATE PROGRAMS (2019), <https://theicct.org/sites/default/files/publications/Zero%20Emission%20Vehicle%20Mandate%20Briefing%20v2.pdf>.

¹⁹ 42 U.S.C. § 7507.

²⁰ *Id.*

²¹ *Id.* § 7521(a)(1).

²² *Id.* § 6201. Reducing dependence on foreign oil was a motivation for the initial passage of EPCA, and the fuel economy standards were in part designed to help maintain a stable, reliable supply of oil. See HEATHER L.



In 2009, in the wake of *Massachusetts v. EPA*²³ (the landmark decision that affirmed EPA's authority to regulate GHG emissions from motor vehicles), EPA and NHTSA announced they would harmonize their standards and issue joint rulemakings.²⁴ In 2012, the two agencies promulgated harmonized standards for cars and other passenger vehicles for model years 2017–2025.²⁵

Under former President Trump, EPA and NHTSA issued a notice of proposed rulemaking on August 24, 2018, entitled, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks."²⁶ The agencies finalized these proposals in two parts and without significant changes.

The Part I Rule, finalized in September 2019, set out new legal interpretations of the CAA and EPCA to (1) revoke California's waiver for its GHG emission and ZEV standards based on arguments that those standards are preempted by EPCA and that California does not need such standards, and (2) change EPA's interpretation of Section 177 and bar other states from adopting California's GHG standards.²⁷ It is important to note that this revocation is unlike the Bush administration's 2008 denial of a waiver application; here, the Trump administration took an unprecedented step in *retroactively revoking* a waiver that had been in place for six years.

The Part II Rule, finalized in April 2020, set new fuel economy and GHG emission standards for cars and light duty trucks for model years 2021 through 2026.²⁸ Among other things, the Part II Rule lowered the annual stringency increase for fuel economy and GHG emissions (i.e., the requirements that fleetwide miles-per-gallon and CO₂-per-mile improve each year) to 1.5%, as compared to 5% in the Obama-era standards. Although the agencies did not quantify the impact of the Part I Rule on GHG emissions, they did estimate that the Part II Rule would result in 1.9 to 2.0 *additional* billion barrels of fuel consumed and 867 to 923 *additional* million metric tons of CO₂ as compared to the

GREENLEY, CONG. RSCH. SERV., THE WORLD OIL MARKET AND U.S. POLICY: BACKGROUND AND SELECT ISSUES FOR CONGRESS, Summary (2019).

²³ 549 U.S. 497 (2007).

²⁴ This was the first time EPA set GHG emission standards for motor vehicles. It had issued a so-called Endangerment Finding in 2009 that led the agency to regulate GHG emissions from motor vehicles. See EPA, *Regulations for Greenhouse Gas Emissions from Passenger Cars and Trucks*, <https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-greenhouse-gas-emissions-passenger-cars-and> (last visited Oct. 21, 2020).

²⁵ 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

²⁶ 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018). For additional background on the proposed rule, see *CAFE Standards and the California Preemption Plan*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, (Aug. 24, 2018), <https://eelp.law.harvard.edu/2018/08/cale-standards-and-the-california-preemption-plan/>; Michelle Melton, *Beyond the Waiver: EPA's Plan to End State GHG Vehicle Standards*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Nov. 5, 2018), <https://eelp.law.harvard.edu/2018/11/beyond-the-waiver-epas-plan-to-end-state-ghg-vehicle-standards/>.

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

²⁸ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020).



Obama administration's standards.²⁹ While I do not discuss the Part II Rule in this piece, there has been significant discussion about how the Biden administration might strengthen these standards in addition to revisiting the legal determinations in the Part I Rule.³⁰ The Part II Rule is also being reviewed pursuant to President Biden's recent Executive Order.

Part I Rule

This section reviews the major legal determinations made in the Part I Rule and how the Trump administration defended those arguments in the D.C. Circuit. These arguments will be important to address as the Biden administration shifts course.

NHTSA determined that California's GHG and ZEV standards are preempted under EPCA. EPCA preempts all state and local laws "related to" fuel-economy standards³¹ and does not have a parallel waiver provision to the one in the CAA.³² In the Part I Rule, NHTSA took the position that because California's GHG emission standards *affect* fuel economy, they are sufficiently "related to" fuel economy and are therefore preempted.³³ The agency relied on the "direct, scientifically recognized, mathematical relationship between combustion of gasoline . . . and the amount of carbon dioxide emitted at the vehicle's tailpipe."³⁴ Using the same logic, NHTSA argued that California's ZEV standards were also preempted; the ZEV standards "directly and substantially" affect fuel economy because manufacturers are required to eliminate fossil fuel use in a portion of their fleet.³⁵ Thus, NHTSA said

²⁹ *Id.* at 24,176.

³⁰ See, e.g., Maxine Joselow, *Early Test for Biden: Car Emissions Rules*, E&E News (Nov. 30, 2020), <https://www.eenews.net/climatewire/2020/11/30/stories/1063719417>; Marianne Lavelle, *Trump Rolled Back 100+ Environmental Rules. Biden May Focus on Undoing Five of the Biggest Ones*, INSIDE CLIMATE NEWS (Nov. 17, 2020), <https://insideclimatenews.org/news/16112020/trump-rollbacks-biden-clean-cars-power-methane>; Reid Frazier, *What Biden's Win Means for the Environment and the Fight to Rein in Climate Change*, ALLEGHENY FRONT (Nov. 12, 2020), <https://www.alleghenyfront.org/what-bidens-win-means-for-the-environment-and-the-fight-to-rein-in-climate-change/> (interviewing Jody Freeman).

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

³² SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,313.

³³ *Id.*

³⁴ Brief of Government Respondent at 40, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. Sept. 9, 2020).

³⁵ SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,314. ZEV standards are likely to become increasingly important, and the Biden administration will need to strongly consider how to address this argument. California has announced that by 2035, all cars and other passenger vehicles in the state will be required to be electric. Press Release, Off. Of Governor Gavin Newsom, Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California's Fight Against Climate Change (Sept. 23, 2020), <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.



that California's GHG and ZEV standards were "void *ab initio* under the preemptive force of EPCA."³⁶

EPA withdrew California's waiver due to NHTSA's preemption determination. EPA reasoned that because EPA and NHTSA undertake joint, harmonized rulemaking and NHTSA determined that EPCA preempts California's GHG and ZEV standards, EPA must revoke the State's 2013 waiver for consistency.³⁷ EPA relied in part on language from *Massachusetts v. EPA* that stated, "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."³⁸ EPA asserted it could not maintain California's 2013 waiver without creating inconsistency, stating that it would put the government "in the untenable position of arguing that one federal agency can resurrect a State provision that, as another federal agency has concluded and codified, Congress has expressly preempted and therefore rendered void *ab initio*."³⁹ Although that section of *Massachusetts v. EPA* has often been used to argue for why NHTSA and EPA can work together on joint fuel economy and GHG standards, the Trump administration used it as a reason for EPA to go along with NHTSA's preemption determination.

More broadly, this structure reveals an underlying power dynamic between the two agencies, present at least during the Trump administration. EPA bowed to NHTSA in rescinding the waiver primarily on the basis of NHTSA's preemption determination before EPA proffered an explanation based on its own statutory authority under the CAA. The two agencies previously worked together to craft rulemakings, and those rulemakings relied on complementary interpretations of both EPCA and the CAA. In addition to the Part I Rule putting NHTSA's interpretation and authority first, some reporting has indicated that NHTSA—and not EPA—was largely responsible for driving these changes and even drafted the first versions of the Part I Rule.⁴⁰

In the alternative, EPA withdrew California's waiver based on its interpretation of Section 209(b)(1) of the CAA. First, EPA argued that it had the authority to reconsider its 2013 waiver decision based on a "statutorily implicit" ability to continually assess the validity of waivers.⁴¹ Second, EPA reconsidered California's 2013 waiver based on the agency's new interpretation of one of the three criteria for waiver denial, reading "compelling and extraordinary conditions" in a new way. The agency interpreted the term "conditions" to only apply to regional and local conditions in California. For "extraordinary conditions" to apply, EPA determined that there needed to be a "particularized nexus

³⁶ SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,314.

³⁷ *Id.* at 51,338 ("NHTSA's determination renders EPA's prior grant of a waiver for those aspects of California's regulations that EPCA preempts invalid, null, and void, and, to the extent that administrative action is necessary on EPA's part to reflect that state of affairs, EPA hereby withdraws that prior grant of a waiver on this basis.").

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

³⁹ Brief of Government Respondent, *supra* note 34, at 78.

⁴⁰ See Robinson Meyer, 'We Knew They Had Cooked the Books,' ATLANTIC (Feb. 12, 2020), <https://www.theatlantic.com/science/archive/2020/02/an-inside-account-of-trumps-fuel-economy-debacle/606346/>.

⁴¹ Brief of Government Respondent, *supra* note 34, at 64. The government pointed to no specific statutory provisions but cited a Senate report on the matter. *Id.*



between the emissions from California vehicles, their contribution to local pollution, and the extraordinary impacts that that pollution has on California due to California’s specific characteristics.”⁴² Because GHGs “globally mix in the upper atmosphere” and other states also experience climate impacts, there could be no such “‘particularized nexus’ to conditions unique to California.”⁴³

EPA finalized a new interpretation of Section 177 that prevents states from adopting California’s GHG standards. EPA determined that Section 177 only applies to criteria pollutants and does not apply to GHGs. Section 177 permits states to adopt and enforce certain California “standards relating to control of emissions” from new motor vehicles.⁴⁴ The Trump administration determined that the word “standards” is ambiguous and relied on the title of the provision to resolve that ambiguity. The title of the section is “New motor vehicle emission standards in nonattainment areas,” which refers to areas in noncompliance with at least one National Ambient Air Quality Standard.⁴⁵ Because GHGs are not criteria pollutants and a state can’t be in nonattainment for GHGs, the Trump administration concluded that Section 177 is not designed to address global air pollution.⁴⁶ Therefore, the CAA authorizes states to adopt California’s criteria pollutant standards, but not its GHG standards. EPA’s Section 177 determination does not extend to California’s ZEV standards, and EPA did not respond to comments noting this potential inconsistency.⁴⁷ This section is essentially severable from the waiver preemption and revocation arguments; addressing the arguments above and reinstating California’s waiver alone would not remove this bar on other states adopting California’s GHG standards.

Next Steps for the Biden Administration

The Biden administration is reviewing the Part I and Part II Rules. EPA and NHTSA will need to move quickly to address the Trump administration’s regulatory changes, given the impact of both rules on national GHG emissions, and the need for manufacturers to have certainty for future model years. In revising the Part I Rule, the agencies should take steps not only to reverse the Trump administration’s actions, but also to restore and protect the status quo ante from future changes. In order to reissue California’s waiver, the Biden administration must first rescind NHTSA’s interpretation that EPCA preempts the grant of a waiver for GHG and ZEV standards under the CAA, and EPA’s interpretation of California’s “compelling and extraordinary conditions.” The administration must also address EPA’s

⁴² Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 47.

⁴³ Brief of Government Respondent, *supra* note 34, at 95–96 (citation omitted). Note also that the Chamber of Commerce and the National Automobile Dealers Association made this argument to the D.C. Circuit in 2011 when they petitioned that court for review of EPA’s decision to grant California’s waiver. See Chamber of Com. of the U.S. v. EPA, 642 F.3d 192, 198–99 (D.C. Cir. 2011). The court ultimately didn’t rule on the merits because it found it lacked jurisdiction. *Id.* at 199.

⁴⁴ 42 U.S.C. § 7507.

⁴⁵ *Id.*

⁴⁶ SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,351.

⁴⁷ Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 68 n.22.



Section 177 determination. This section explores the major procedural and substantive questions the Biden administration will need to contend with.

The administration's first priority will likely be connecting with automakers and California to rebuild relationships and trust. Many automakers seem to be preparing to work with the Biden administration; several have begun to signal a voluntary transition to electric vehicles,⁴⁸ and in August 2020, six automakers made bilateral agreements with California to continue working toward more ambitious GHG reduction goals.⁴⁹ The latter may inform the Biden administration's planning for the Part II Rule regarding emission standards. From a political perspective and to manage litigation risk, the relationship between the administration and automakers is critically important to crafting a replacement for the Part II Rule, particularly one that includes ambitious targets in line with the climate action goals the incoming Biden administration previewed during the campaign.

Procedural Question: Rescinding and Replacing the Part I Rule

It is unclear whether EPA and NHTSA could repeal the Part I Rule now and replace it later, or whether the agencies would need to repeal and replace Part I at the same time, in the same rulemaking. EPA has approached recent major policy changes like this either in one step (repeal and replace) or in two separate steps (repeal and then replace). For example, EPA used the one step approach for repealing and replacing the Clean Power Plan with the Affordable Clean Energy Rule. For the Waters of the United States Rule, EPA first repealed the Obama administration's definition of "waters of the United States," thus returning to an earlier version, and later provided a replacement interpretation.

In the case of the Part I Rule, repeal alone may not be sufficient. Repealing the Trump administration's interpretation would return to a status quo ante where questions would persist. In the Obama administration's 2012 rule, EPA and NHTSA punted on making an official preemption determination: "Comments were received on this topic, but NHTSA is deferring consideration of the preemption issue. The agency believes that it is unnecessary to address the issue further at this time because of the consistent and coordinated Federal standards that will apply nationally under the National Program."⁵⁰

On the one hand, without much affirmative language in the Code of Federal Regulations to return to, the Biden administration may need to repeal and replace Part I at the same time. This would avoid legal risk if the 2012 "deferring consideration" language is insufficient to provide a stop-gap now that the Trump administration took a position on preemption. However, repealing and replacing Part I at

⁴⁸ See, e.g., *Our Path to an All-Electric Future*, GEN. MOTORS, <https://www.gm.com/electric-vehicles.html> (last visited Feb. 20, 2021); Joseph Guzman, *Jaguar Going All Electric, Land Rover Going Majority Electric*, HILL (Feb. 17, 2021), <https://thehill.com/changing-america/sustainability/climate-change/539324-jaguar-going-all-electric-land-rover-going>.

⁴⁹ Press Release, Cal. Air Res. Bd., Framework Agreements on Clean Cars (Aug. 17, 2020), <https://ww2.arb.ca.gov/news/framework-agreements-clean-cars#:~:text=The%20framework%20agreements%20are%20voluntary,and%20create%20jobs%2C%20and%20save>.

⁵⁰ 2017 and Later Model Year Light-Duty Vehicle GHG Emissions and CAFE Standards, 77 Fed. Reg. at 63,147.



the same time would potentially take longer than simply repealing Part I and replacing it at a later date. There is also a danger that promulgating a new rule will create an opportunity for litigation challenging these interpretations and this approach. The Trump administration's interpretation might also be revived if the combined repeal-and-replace rule were struck down by a reviewing court.

On the other hand, it's possible that the Biden administration could repeal the Part I Rule and return to the 2012 language temporarily while planning to replace the Part I Rule in the longer term. This could move things along more quickly but also invites some litigation risk.

Procedural Question: Restoring California's Waiver

In the Part I Rule, the Trump administration revoked a valid waiver for the first time. Assuming the Biden administration rescinds, or rescinds and replaces, the Part I Rule, it is also unclear whether the Biden administration can then re-grant California's 2013 waiver or whether California will need to submit a new waiver request.

In 2009, the Obama administration withdrew the Bush administration's 2008 denial of California's waiver request and reconsidered the decision after California's Governor petitioned the agency.⁵¹ The Obama administration argued that the Bush administration had misapplied the statutory direction of Section 209(b): first, it ignored the statute's strong presumption in favor of granting a waiver, and second, it wrongly concluded that, based on the facts available, California did not have "compelling and extraordinary conditions" to warrant a waiver.⁵²

At first glance, it may seem that the Trump administration acted the same way because it reconsidered a prior determination. However, the two approaches could not be more different. First, the Trump administration relied on a new interpretation of its authority under the CAA: "Congress intended 'that EPA [have] inherent authority to reconsider' the continued propriety of California waivers and, if need be, withdraw them."⁵³ EPA argued it had roving authority to revisit any waiver determination at any time. The Obama administration, by contrast, quickly revisited a recent denial in response to California's request. Second, the Trump administration *withdrew* a waiver when the statute clearly weighs in favor of granting them. And third, Trump's withdrawal came after six years of having the waiver in place. This generated significant reliance interests, which affected companies, California, and other states that had adopted California's standards, among others. The Supreme Court has recently noted the importance of considering such reliance interests. In 2020, the Court held that the Department of Homeland Security had failed to consider reliance interests when it rescinded the Deferred Action for Childhood Arrivals program, which made the agency's actions arbitrary and capricious.⁵⁴

⁵¹ Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. at 32,745.

⁵² *Id.* at 32,746.

⁵³ Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 64.

⁵⁴ See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1899 (2020).



The Trump administration launched into a kind of statutory no-man's land that the Biden administration must now contend with. There is no language in the CAA that explicitly discusses EPA's authority to reconsider or withdraw waivers, let alone re-issue a previously withdrawn waiver. The Biden administration may be able to rely on some version of the Obama administration's arguments to review and re-grant the 2013 waiver immediately. However, California has not submitted a similar request for review as in the Obama administration.⁵⁵ As part of a new Part I Rule, the Biden administration could find that Section 209(b)(1) only confers waiver withdrawal authority under some limited circumstances like the ones here, or not at all. A narrower reading of EPA's withdrawal authority could pose a more significant litigation risk because a reviewing court could find the statute is clear in the opposite direction: that EPA has the kind of roving withdrawal authority claimed by the Trump administration.

Alternatively, EPA could continue to rely on the Trump administration's interpretation that the agency has wide latitude to continually review waivers, though this approach could empower a future administration to revoke a waiver based on the same authority.

Again, there is no language in the CAA that addresses whether a withdrawn waiver can be reinstated, and it's possible that the Biden administration cannot do so. The Biden administration could attempt one of the arguments above to reinstate the 2013 waiver. A more conservative alternative would be for EPA to decide on a *new* waiver request from California. As of this writing, California has not submitted any such request.

Regardless of the waiver approval strategy, the Biden administration will likely want to address any potential reliance interests that have developed since the Trump administration's rule was finalized in order to avoid the same arguments surfacing in future litigation.

Substantive Questions: Repealing the Part I Rule

Rule repeals are defined as "rule making" under the APA, and they require the same notice and comment process as promulgating a rule in the first instance.⁵⁶ In rescinding the Part I Rule, the Biden administration will need to describe its reasons for rejecting the Trump administration's position. The legal bar for an agency changing its position is essentially the same as putting forward a new regulation. EPA and NHTSA will need to (a) show they recognize that they are changing position, and (b) engage in reasoned decisionmaking that is not arbitrary or capricious.⁵⁷ They need not show

⁵⁵ California petitioned for reconsideration of the final rule after it was issued and before litigation commenced, but the State has not petitioned the agency in a formal way since then. *In re* Petition for Reconsideration of the Safer, Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/Administrative%20Petition%20for%20Reconsideration.pdf>. The petition for reconsideration noted that there is no provision in the CAA that addresses petitions for reconsideration of waiver decisions, which are not rules under EPA's interpretation or the CAA's statutory provisions. *Id.* at 7.

⁵⁶ 5 U.S.C. § 551(5).

⁵⁷ *FCC v. Fox Television Stations*, 556 U.S. 502, 514–15 (2009).



a different interpretation is somehow *better* than the Trump administration’s Part I Rule.⁵⁸ This section discusses some of the main substantive points the Biden administration will need to consider when defending a change in position.

The Biden administration can easily find that California in fact has compelling and extraordinary conditions that require EPA to grant a waiver under Section 209(b)(1)(B) of the CAA. EPA could reverse the Trump administration’s interpretation of “compelling and extraordinary conditions” and argue instead that the GHG impacts need not be California-specific. But even without doing that, there are a host of California-specific climate impacts the Biden administration can point to, as Petitioners noted in the litigation.⁵⁹ Wildfires and droughts, for example, are uniquely impacting California.⁶⁰ Local GHG emissions are also causing local ocean acidification.⁶¹ California also needs these standards to prevent climate impacts, even if the standards may only play a small role in climate mitigation; the Supreme Court and others have found that “mere” incremental reductions in GHGs are not a reason to decline to act.⁶²

EPA can also easily reverse its prior determination that other states may not adopt California’s GHG standards under Section 177. Section 177 permits “any state” to “adopt and enforce for any model year standards relating to control of emissions from new motor vehicles” identical to California’s.⁶³ The Trump administration found ambiguity in the term emission “standards” and interpreted it to mean standards for criteria pollutants only.⁶⁴ The Biden administration could capitalize on that ambiguity and assert that “standards” applies more broadly to cover GHG standards, too. EPA’s argument about the title of Section 177 is not determinative, and GHG standards are scientifically proven to support reductions in criteria pollutants.⁶⁵

The more difficult issue to overcome when replacing the Part I Rule is arguing against EPCA’s preemption of California’s GHG and ZEV standards under the CAA. The text of EPCA states that federal law preempts any state emissions standards “related to” fuel economy. The Trump administration argued that GHG emission standards are inherently “related” to fuel economy standards, and thus preempted by EPCA, because motor vehicle fuels release GHGs when burned and improving fuel economy is currently the best technological option available for reducing GHGs from motor vehicles. This is a strong argument based on the text of EPCA.

⁵⁸ *Id.*

⁵⁹ Brief of Government Respondent, *supra* note 34, at 56 (“California is ‘one of the most “climate-challenged” regions of North America.’” (citations omitted)).

⁶⁰ *Id.* at 58.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 42 U.S.C. § 7507.

⁶⁴ Brief of Government Respondent, *supra* note 34, at 107.

⁶⁵ See Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 72–73.



A few federal courts have reached these questions and have come out different ways.⁶⁶ Two district courts found that EPCA *does not* preempt CAA waivers for California’s GHG standards.⁶⁷ Another district court found that EPCA *did* preempt a CAA waiver for California’s ZEV standards.⁶⁸ And the Second Circuit, although not discussing EPCA preemption of *California’s* ZEV standards, found that New York City’s rules designed to incentivize the use of hybrid-engine and fuel-efficient vehicles were preempted under EPCA because the rules were “relate[d] to fuel economy standards.”⁶⁹

The Biden administration can still make a case that EPCA does not preempt California’s GHG and ZEV standards. Parties in the D.C. Circuit litigation made a number of compelling arguments that the Biden administration could consider adopting. For example:

- History is informative. According to Petitioners and several members of Congress who filed an amicus brief, Congress has intended—or at least acquiesced to—EPCA’s nonpreemption of California’s GHG and ZEV standards by continually amending the CAA and EPCA while reaffirming California’s standards.⁷⁰ For example, in the 1990 CAA amendments, Congress directed EPA to establish ZEV standards that matched California’s, which could not have been done if EPCA preempted such standards.⁷¹ The 2007 amendments to EPCA (also known as the Energy Independence and Security Act) include a savings clause that prevents the statute from superseding other provisions of law. These amendments were passed in the wake of *Massachusetts v. EPA* and the two district court opinions holding EPCA did not preempt a CAA waiver for California’s GHG standards.⁷² Senate floor debate on the same bill indicated Congress’s strong support for California’s standards.⁷³
- Congress intended for California’s standards to become *federal standards* once a waiver is granted, and therefore not subject to preemption.⁷⁴ NHTSA is required by EPCA to consider

⁶⁶ For additional background, see *California, CAFE Standards, and the Energy Policy and Conservation Act*, HARV. L. SCH. ENV’T & ENERGY L. PROGRAM (June 19, 2018), <https://eelp.law.harvard.edu/2018/06/california-cafe-standards-and-the-energy-policy-and-conservation-act/>.

⁶⁷ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 354, 398 (D. Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1175, 1179 (E.D. Cal. 2007) (as corrected Mar. 26, 2008).

⁶⁸ *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 WL 34499459, at *3 (E.D. Cal. June 11, 2002) (enjoining California’s 2001 ZEV mandate as preempted by EPCA because “ZEV regulations will have the practical effect of regulating fuel economy”).

⁶⁹ *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 157 (2d Cir. 2010) (citation omitted).

⁷⁰ See Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 85–86.

⁷¹ Brief of Members of Congress as Amici Curiae Supporting Petitioners at 15 n.7, *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. July 6, 2020).

⁷² See *id.* at 17, 18, 20.

⁷³ See *id.* at 19.

⁷⁴ See Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 88.



the effect of other federal motor vehicle emission standards when it sets fuel economy.⁷⁵ Legislative and regulatory history indicate that California's standards are considered part of this federal scheme.⁷⁶

- The scientific literature may also be interpreted differently such that there is no inevitable relationship between GHG standards and fuel economy, or ZEV standards and fuel economy.⁷⁷ Petitioners point to, as an example, the fact that there is no direct relationship between fuel economy and an automaker's decision to reduce GHG emissions by substituting or limiting GHGs used in a vehicle's air conditioner refrigerant.⁷⁸
- *Massachusetts v. EPA* can lend support for a coordinated approach that preserves California's waiver. In that case, the Supreme Court noted that there was "no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency," and also that EPCA does not license EPA to shirk its environmental responsibilities under the CAA.

Complying with the National Environmental Policy Act

NHTSA may also want to conduct a National Environmental Policy Act (NEPA) analysis of any major change to avoid similar challenges to those raised by Petitioners. Petitioners alleged that NHTSA violated NEPA by promulgating its preemption determination without preparing an environmental assessment or environmental impact statement.⁷⁹ NEPA requires that such a document be prepared for major federal actions, including interpretations of federal statutes, that significantly affect the quality of the human environment.⁸⁰

In the litigation, NHTSA asserted that it should be exempt from considering the effects of the Part I Rule under NEPA because EPCA *compels* the agency to preempt California's standards—in other words, NHTSA's hands are tied. The Supreme Court held in *Department of Transportation v. Public Citizen*⁸¹ that the Federal Motor Carrier Safety Administration did not need to consider in its environmental assessment the impact of actions that the agency had no discretion to prevent.⁸²

⁷⁵ 49 U.S.C. § 32902; Brief of Members of Congress as Amici Curiae Supporting Petitioners, *supra* note 71, at 12 & n.3.

⁷⁶ See Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 87–94.

⁷⁷ See *id.* at 98–99.

⁷⁸ See *id.* at 100.

⁷⁹ EPA's actions were not challenged under NEPA, likely because "courts have consistently recognized that certain EPA procedures or environmental reviews under enabling legislation are functionally equivalent to the NEPA process and thus exempt from the procedural requirements of NEPA," *EPA Compliance with the National Environmental Policy Act*, EPA, <https://www.epa.gov/nepa/epa-compliance-national-environmental-policy-act> (last visited Oct. 21, 2020).

⁸⁰ 42 U.S.C. § 4332(2)(C); Brief of State and Local Government and Public Interest Petitioners, *supra* note 3, at 108.

⁸¹ 541 U.S. 752 (2004).

⁸² *Id.* at 760–61.



NHTSA claimed it was similarly compelled by EPCA and lacked discretion to grant the waiver, and thus should be exempt from having to consider the impact of the Part I Rule under NEPA. If the Biden administration abandons the statutorily compelled preemption argument, then the administration cannot use the Trump administration's *Public Citizen* argument to avoid NEPA review.

Seeking a Legislative Fix

Though legislative action is perhaps unlikely given the current political balance in Congress,⁸³ the Biden administration could work with Congress to create a legislative fix, clarifying with explicit language that EPCA does not preempt EPA's authority under the CAA to issue waivers for California's GHG and ZEV standards. This is the safest solution given that the plain text of EPCA can easily be construed to suggest preemption of California's GHG and ZEV standards, and an increasingly conservative, textualist-oriented federal judiciary may be less persuaded by the Biden administration's preferred interpretation.⁸⁴

Conclusion

The legal issues at play in the Part I Rule and the Biden administration's choices moving forward are not merely interesting thought puzzles for lawyers. Rescinding California's waiver and implementing the Trump administration's weakened federal standards across the country have had serious environmental and public health consequences. The agencies admitted that the Part II Rule, which built on the legal determinations put forward in the Part I Rule, would increase fuel consumption and GHG emissions,⁸⁵ contributing to climate change and public health concerns resulting from exposure to increased vehicle emissions. The Biden administration should move swiftly to reverse the Part I Rule, and simultaneously ensure manufacturers will be in a position to meet California's standards once the State's 2013 waiver is restored or a new waiver is granted. The administration should also take steps to harden its legal interpretations of EPCA and the CAA against litigation challenges and future alternative interpretations.

⁸³ Senator John Barrasso has recently replaced Senator Lisa Murkowski as the top-ranking Republican on the Senate Energy and Natural Resources Committee—the committee of jurisdiction for EPCA and related energy legislation. Senator Barrasso is more conservative, particularly on environmental issues, than Senator Murkowski, which may make new legislation more challenging. See Geof Koss & Jeremy Dillon, *Coal's Clout Could Rise After Murkowski Committee Exit*, E&E News (Jan. 14, 2020), <https://www.eenews.net/stories/1062038575>.

⁸⁴ Trump appointees make up more than a quarter of currently active federal judges. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>. President Trump's appointments flipped the balance of appointees on several courts of appeals from majority-Democrat to majority-Republican appointed. *Id.* Although the political party of the appointing President is far from determinative of a judge's view in any given case, Trump's judges are likely to lean conservative in many cases. See Cass Sunstein, Opinion, *There's Room for Surprises from Amy Coney Barrett*, BLOOMBERG (Sept. 27, 2020), <https://news.bloomberglaw.com/us-law-week/opinion-theres-room-for-surprises-from-amy-coney-barrett-cass-sunstein>.

⁸⁵ See text accompanying note 29.



There has been recent commentary about the courts serving as a “revolving door” for climate policy, as subsequent administrations swing from one extreme to another with regulations immediately caught up in the courts.⁸⁶ Without assistance from Congress, the Biden administration’s executive actions are likely to face legal challenges—made more difficult by a relatively conservative federal judiciary. The administration can take executive action and risk losing in court, or it can convince Congress to pass new legislation to affirm the administration’s preferred policy position. The stakes will only get higher as climate change accelerates and the country works to decarbonize the transportation sector—which will require finding ways to incentivize and possibly mandate the purchase of electric vehicles. Resolving these legal questions about interpretations of and potential conflicts between EPCA and the CAA is critical to facilitating the necessary transformation of our transportation sector to protect public health and the environment.

⁸⁶ Jennifer Hijazi, *Are Courts A 'Revolving Door' For Climate Policy?*, E&E News (Oct. 23, 2020), <https://www.eenews.net/stories/1063716897>.