



It's no secret that the Trump Administration has it out for California. Attorney General Jeff Sessions just [sued](#) the state for its refusal to aid Immigration and Customs Enforcement in detaining undocumented immigrants. Donald Trump just [claimed](#) that highly popular Governor Jerry Brown is doing a terrible job, despite Brown leading California out of a crippling recession, leaving the state with a \$6 billion surplus, and presiding over a booming economy. And this week, EPA Administrator Scott Pruitt [warned](#) the state that California is "not the arbiter" of greenhouse gas emissions standards for automobiles. He added that "'Federalism is not one state dictating to the rest of the country what should occur in the area of" fuel efficiency standards. The implication, although Pruitt refused to confirm it, is that he is planning to revoke the waiver California received to issue greenhouse gas emissions standards for the 2021-2025 automobile fleet.

Here's the background. As a centerpiece of their respective climate policies, California and the Obama Administration jointly issued [a series of standards](#) designed to reduce carbon emissions from various categories of vehicles. California agreed not to issue its own standards as long as the federal standards were implemented even though it has special authority under the Clean Air Act to do so. Upon taking office, the Trump Administration almost immediately signaled that it would consider loosening the standards for model years 2021-25, which require manufacturers to meet average fuel economy standards of 54.5 miles per gallon for passenger vehicles by 2025 (there is a direct correlation between fuel economy and the amount of carbon emitted from a vehicle).

Included within the standards was a mid-term review that required California and the federal government to determine whether auto companies could comply with them. Although the Obama Administration completed its review and concluded that manufacturers could, in fact, meet the standards, Pruitt pulled the review and is [conducting](#) a new one

(although the review is supposed to be for the 2022-2025 years, the Administration has extended it to include 2021 vehicles as well) . The results of that review are due on April 1. All expectations are that EPA will find that the 2021-25 standards cannot be met. EPA will in turn then move to loosen the standards.

If EPA loosens the standards, California's Air Resources Board has already voted to keep the Obama standards in place. The big question is whether EPA will, while loosening the federal standards, also attempt to yank permission for California to issue its own standards. Given his recent statements and the fact that California standards [apply](#) to about a third of the country (other states can opt into the California standards or choose to follow federal standards), it is hard to believe he will let California move forward without a fight.

Before describing what is at stake legally, it is worth describing what is at stake environmentally. Though the Trump Administration's withdrawal of the Clean Power Plan, which regulates the electricity sector, has received more media attention, the loosening of greenhouse gas emissions standards for the transportation sector is in my view more devastating. Transportation sector emissions are now the [largest category](#) of U.S. greenhouse gases (and have been in California for years). Unlike the electricity sector, which is seeing declines in greenhouse gases even without the Clean Power Plan from a combination of fuel switching from coal to natural gas and the rise of renewable fuels like solar and wind, transportation sector emissions are [increasing](#). These increases are the result of low gasoline prices, increases in driving, and a return to rising sales of SUVs and light trucks. Loosening the greenhouse gas/fuel economy standards will make this problem worse. If Pruitt also attempts to revoke California's permission to issue its own standards, national transportation sector emissions may rise even faster. and California may have real difficulty meeting its own ambitious greenhouse gas targets.

Although California has special authority to regulate vehicle emissions under the Clean Air Act, it may not do so without a waiver from EPA. All other states are [preempted](#) from issuing emissions standards. To receive a waiver California must [show](#) that that its standards will be "at least as protective of public health and welfare as ... federal standards." EPA can deny the waiver if the standards are not necessary to "meet compelling and extraordinary circumstances." EPA has already issued California a waiver for 2021-25 greenhouse standards. Pruitt, then, would have to revoke California's waiver, something no EPA Administrator has ever done.

California's [waiver](#), issued by EPA in 2013, is broad in scope. It covers not only the greenhouse gas emissions standards but also an extension of California's conventional air pollutant regulations for cars and trucks (called the LEV III standards) and an expansion of

its Zero Emissions Vehicle program to require approximately a quarter of the state's passenger vehicle fleet to be zero emission by 2025. The three programs covered by the waiver are intertwined and as EPA found in granting the waiver, designed to reduce both air pollution and greenhouse gas emissions:

This program combines the control of smog-causing pollutants and GHG emissions into a coordinated package of amendments and requirements for MY 2015 through 2025 in order to address near and long term smog issues within California and identified GHG emission reduction goals. The program also includes amended ZEV regulations and a Clean Fuels Outlet regulation. These additional program elements are designed to address these goals as well.

If Pruitt attempts to revoke the California waiver, California has already [made clear](#) it will sue. Such a lawsuit would raise several important legal questions: First, does EPA have the authority to revoke an already issued waiver? The Clean Air Act gives the Administrator the authority to deny a waiver only if the state does not need standards to meet "compelling and extraordinary circumstances". The statute does not include any explicit authority to revoke an already issued waiver, though EPA would argue that the authority is implicit in the language setting forth the reasons for denying a waiver. And agencies fairly regularly revoke and then revise rules they issue under statutory authority. California may look to arguments [being made](#) in litigation over whether the Trump Administration can withdraw land Presidents Obama and Clinton designated as national monuments for a parallel argument even though there are some distinct differences between the two statutory schemes.

The second argument that will be at the heart of a California suit if EPA revokes the waiver is whether the state needs the vehicle emissions standards to meet "compelling and extraordinary circumstances." In 2008, the George W. Bush Administration denied a California waiver request for the nation's first ever greenhouse gas emissions standards (the Obama Administration later [overturned](#) the waiver denial and implemented GHG and fuel economy standards in concert with California for model years 2012-2016.) The Bush EPA [argued](#) that California's authority to issue emissions standards was limited to standards addressing local or regional air pollution. Because climate change is a global problem that affects all states (and countries), not just California, the state failed to meet "compelling and extraordinary circumstances" in the Bush Administration's view.

We are likely to see a return of this argument from the Pruitt EPA. California's defense will be twofold: 1) the three components of its vehicle program are addressing both conventional air pollution and climate change and are part of a long history supporting California's need for separate vehicle standards; and 2) the state does, in fact, face compelling and extraordinary circumstances as average global temperatures increase. With respect to the first argument, EPA has [historically decided](#) that California's compelling and extraordinary circumstances are well understood given its difficulty complying with federal air pollution standards, its geography and terrain, the fact that its pollution problems are caused principally by mobile sources and so forth. The state has, essentially, a programmatic waiver and need not show that any particular waiver is needed to demonstrate that the state should have separate standards. Given how intertwined the three programmatic components (LEV III, ZEV and GHGs) are, they contribute overall to California's programmatic need to have its own standards. But even if the state must show that its greenhouse gas emissions standards are needed to meet compelling and extraordinary circumstances, the state has plenty of evidence for such a finding. These circumstances include the melting of the state's snowpack, extreme drought exacerbated by higher temperatures, more frequent and more intense wildfires, and, perhaps most importantly, increased air pollution as a result of hotter weather. The state's year of disasters — massive wildfires both Northern and Southern California, including the largest wildfire in the state's history and devastating flooding — are unfortunate evidence to support California's point.

EPA may try one more legal argument to support a decision to revoke California's waiver. EPA may deny (and, Pruitt would argue, by extension revoke) California's waiver under one additional provision of the CAA, 209(b)(1)(C). The provision [has been interpreted](#) to say that EPA must deny California's waiver under that provision if the state's standards and procedures provide "inadequate lead time to permit the development of technology necessary to meet those requirements, given appropriate consideration to the cost of compliance within that time." Pruitt is likely to find in the midterm evaluation of the 2021-2025 standards that the standards are too restrictive and are infeasible to comply with even though the Obama Administration found the opposite. It doesn't seem a stretch of the imagination to see Pruitt use a similar argument under 209(b)(1)(C) to revoke California's waiver. There is plenty of evidence that technology does exist to meet the standards (hybrid and battery technology alone demonstrate that) but that doesn't mean we won't see EPA making such an argument.