



According to a [Bloomberg report](#) this morning, the Trump Administration, under new EPA Administrator Andrew Wheeler, will release a proposal later this week to freeze greenhouse gas emission and fuel economy standards at 2020 levels. The effect is that automakers will face standards of about 35 miles per gallon rather than seeing the standards increase to about 50 miles per gallon by 2025. The proposal will also reportedly revoke California's waiver under the Clean Air Act that gives the state separate authority to issue greenhouse gas emissions standards and to mandate that automakers sell a specified percentage of zero emission vehicles (10-12 percent by 2025). The proposal is a direct assault on federal climate policy and on California climate and air pollution policy. It also flies in the face of the Trump Administration's [express commitment](#) to "restor[e] power to the states through cooperative federalism."

I have previously described the background behind the car standards and California's waiver [here](#). With that background in mind, it is worth emphasizing that the proposal to roll back the combined federal-California standards and to revoke the California waiver would, in my view, be the single most consequential and devastating act against Obama-era climate policies the Trump Administration has taken. Though the decision to repeal the Clean Power Plan has garnered more attention, the rollback of greenhouse gas standards for automobiles promises to do much more damage in the long run to any effort to reduce U.S. greenhouse gas emissions dramatically. That's because the electricity sector - the target of the Clean Power Plan - is experiencing reductions in total greenhouse gases because of shifts to natural gas and renewable power even without the Clean Power Plan in place. The transportation sector, by contrast, is experiencing increases in emissions and just surpassed the electricity sector as the largest contributor to U.S. greenhouse gas emissions. Low gasoline [prices, increases in driving](#) as a result of stronger economic growth, and [shifts](#) in consumer purchases toward SUVs and away from smaller, more efficient cars are all contributors. History also teaches us that without government

regulation, the car industry doesn't produce more fuel efficient cars: between 1975 and 2007, U.S. cars actually got [less](#) fuel efficient, not more. Freezing the GHG/fuel efficiency standards at 2020 levels means that we are highly unlikely to see any improvements in fuel economy or in reducing greenhouse gases from the transport sector. The Union of Concerned Scientists [estimates](#) that U.S. greenhouse gases will increase by 2.2 billion tons as a result.

Now for what's at stake legally. It's worth analyzing the two components of the reported proposal to freeze standards and to revoke the California waiver separately. Any proposal to freeze the combined fuel efficiency/GHG standards at 2020 levels (independent of what happens with the California waiver) will undoubtedly face a legal challenge, either from states that want to see action on climate change, from environmental groups, or even from manufacturers of automotive technology that improves fuel efficiency and cuts greenhouse gases. The challenge is likely to look something like the following. In simple terms, freezing the standards at 2020 levels violates the Clean Air Act because the increase in emissions that will result will endanger public health and welfare. That's because [Massachusetts v. EPA](#), the landmark Supreme Court case, required EPA to determine whether greenhouse gases emitted from vehicles (which the Court held are "pollutants" under the Clean Air Act) endanger public health and welfare. In 2009, EPA made such an [endangerment finding](#) based on the overwhelming scientific consensus that emissions of greenhouse gases are warming the atmosphere and creating climate change. Based on this endangerment finding, EPA, in conjunction with the National Highway Transportation and Safety Administration, issued the first set of combined GHG/fuel economy standards — for 2012-2016 - with cooperation from California. EPA and NHTSA then adopted a second set of standards for 2017-2025. Given that EPA has found that greenhouse gases from automobiles endanger public health and welfare, what is the rationale for freezing the standards at 2020 levels, causing an increase of 2.2 billion tons of emissions as a result? The Obama Administration did a thorough ["mid-term" evaluation](#) of the 2022-2025 standards and concluded that the standards could be met with existing technology and cost-effectively. The Pruitt EPA rescinded the review and replaced it with one that is significantly less persuasive. But even with a stronger administrative record, is it consistent with the endangerment finding to simply freeze the standards, resulting in huge increases in emissions, rather than modifying them but continuing to work toward eliminating the danger to public health and welfare the emissions are causing?

The second component of the reported Wheeler EPA proposal, in addition to freezing the current standards at 2020 levels, is to rescind the California waiver that allows the state to issue its own greenhouse gas emissions standards through 2025 and to expand its zero

emission vehicle program. If EPA does not revoke the waiver for the greenhouse gas emissions standards, then California can simply issue the Obama standards and the 12 states that have opted to follow the California standards will follow suit. Then we'd have a "two car" country, with 13 states following the California standards and the rest of the country following standards frozen at 2020 levels. But the reports are that EPA will go even further and revoke not only the greenhouse gas standards but also California's zero emission vehicle program. Nine states follow the ZEV program and would be unable to do so. The ZEV program is complex but essentially requires automakers to meet a requirement that 25 percent of their fleet be zero emission by 2025.

Here is important background about the waiver, slightly revised from a previous post. 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, of course, already issued California a waiver for 2021-25 greenhouse standards. Administrator Wheeler, 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 ZEV program to require approximately 10-12 percent 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 EPA 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.

The waiver that California received explicitly rejects this argument. More affirmatively, it finds that California has compelling and extraordinary circumstances to regulate greenhouse gases and conventional air pollutants, and that the three programs for which the waiver was granted are intertwined to regulate greenhouse gases and conventional air pollution. California has ample evidence that it has already faced extraordinary harm from climate change, including more intense droughts, wildfires, and heat waves. The state in the past several years has been in some ways one of the poster children of climate change (along with Puerto Rico, Houston, and the areas hit by Hurricane Sandy).

At least as important, the GHG regs and especially the ZEV regs also help reduce conventional air pollutants, something the CAA provision that grants California the authority to issue its own standards was explicitly designed for. California undoubtedly has compelling and extraordinary circumstances to regulate conventional air pollutants: the state has the only two [extreme non-attainment areas](#) for ozone pollution in the country and two air basins that are not in attainment for [fine particulate matter](#) (called PM 2.5). It has received dozens of waivers since the state was granted special authority to regulate in 1967. EPA has *always* found that California has compelling and extraordinary circumstances to

issue its own regulations because of its air pollution problems. As a result, revoking the waiver for the ZEV regulations in addition to revoking it for greenhouse gases makes the Administration's case even more legally vulnerable.

EPA may also 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." EPA has already found in its 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 EPA 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.

Finally, EPA is reportedly considering making one more argument about why California should not be able to issue greenhouse gas emissions standards (and potentially ZEV regulations.) The argument is that California is preempted from issuing such standards under a separate federal statute, the Energy Policy Conservation Act. I have [previously blogged](#) about this argument and simply repeat part of that post below.

The Energy Policy and Conservation Act (EPCA) preempts all states, including California, from issuing fuel economy standards. EPA may try to argue that EPCA in some way supersedes or overrides California's special authority to regulate tailpipe emissions under the Clean Air Act. This argument, is frankly, close to legally indefensible.

Let's start with the fact that California's standards do not regulate fuel economy, they regulate greenhouse gases. So on its face, California is not regulating fuel economy. Moreover, nowhere in the EPCA is NHTSA given the authority to override California's waiver, and nowhere does the statute say that NHTSA's authority "supersedes" California's special waiver authority under the Clean Air Act. But there's more. EPA and auto manufacturers have lost this argument three separate times. In two [district court cases](#), auto manufacturers argued that an earlier version of California's greenhouse gas emissions standards for cars was preempted by the EPCA. They lost. EPA tried a similar argument in the landmark U.S. Supreme Court decision [Massachusetts v EPA](#). The Court in *Mass v. EPA* held that greenhouse gases are air pollutants under the Clean Air Act and that EPA had a statutory obligation to consider whether these pollutants endanger public health and welfare. EPA tried to argue that EPA itself could not regulate greenhouse gases from

automobiles because NHTSA and the Department of Transportation had the responsibility to regulate fuel economy. Here is the way the Supreme Court described EPA's argument that it could not regulate greenhouse gases from automobiles under the Clean Air Act:

The agency [explained] that if carbon dioxide were an air pollutant, the only feasible method of reducing tailpipe emissions would be to improve fuel economy. But because Congress has already created detailed mandatory fuel economy standards subject to Department of Transportation (DOT) administration, the agency concluded that EPA regulation would either conflict with those standards or be superfluous."

The Court categorically rejected EPA's argument:

...that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public health and welfare ... a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

The logical conclusion of *Mass v. EPA* is that a) since greenhouse gases are "air pollutants" under the Clean Air Act; b) and because EPA has a statutory obligation to consider whether to regulate greenhouse gases from automobiles; c) California has statutory authority to regulate pollutants (including greenhouse gases) from automobiles; and d) the EPCA preemption provision over fuel economy does not prohibit the state from doing so because the statutory authority California has is "wholly independent from" the fuel economy standards.

The battle over greenhouse gas standards and the California waiver is about to begin.

California, other environmentally-minded states, environmental groups, clean technology companies and others will not give up the standards without a fierce legal fight. In my view the law is on the side of California and its allies, though with an increasingly conservative, anti-regulatory Supreme Court, predictions about the ultimate outcome of litigation are fraught with uncertainty. Stay tuned.

