

This post was originally published on the American Constitution Society's Expert Forum on September 18, 2019. President Trump announced the revocation on Twitter this morning.

It's not news that the Trump administration has been planning, via its so-called SAFE Rule, to freeze Obama-era fuel economy standards, roll back tailpipe greenhouse gas (GHG) emissions standards, and revoke California's Clean Air Act authority to set its own emissions standards. But in recent weeks, as several major automakers have signed on to a **deal** with California to recognize the state's authority to regulate and to continue reducing tailpipe GHG emissions, the Trump administration has ramped up its attacks. The assault is now culminating in an announcement that the administration will revoke California's waiver, even before it finalizes its rollback of the fuel economy and tailpipe emissions standards.

The attack on the standards, and on California's authority, is all the more

confounding because even the auto industry has called for the federal government to come to the table with California. In a June **hearing** before the House of Representatives Energy & Commerce Committee, auto industry representatives testified that the rollback would undercut already-dedicated industry investment in clean technologies and cede American leadership in that space. Even Republican legislators echoed the industry's calls for the administration to rethink its plans, suggesting that the ensuing regulatory uncertainty would be bad for all.

Instead, the administration is barreling forward into unprecedented territory—a waiver has never been revoked in the 50-year history of the Clean Air Act—where it will find itself on shaky footing from both a policy and a legal perspective.

Why a waiver revocation is bad policy

There are a number of reasons why a waiver revocation is an unwise move from a policy perspective: (1) this revocation-only action throws the auto industry into regulatory uncertainty that creates economic risks for businesses; (2) revoking California's waiver has serious consequences for air quality in California and other states, not to mention setting back the fight against climate change; and (3) a waiver revocation achieves none of the stated goals of the administration's rollback plan.

Revocation just begins the litigation battle between California (and, likely, other groups and states) and the administration. That litigation could take months, or even years, to resolve—assuming there's not a change of administration in the middle that moots the entire dispute. Further, the bifurcation of the waiver revocation from the rest of the rollback rule raises the possibility of an even longer timeframe to reach full resolution, as well as potentially inconsistent determinations in two separate litigations.

While litigation is ongoing, automakers will not know which set of standards will ultimately apply to them: California's, the Obama-era federal standards, or the Trump rollback. Ironically, even though the administration insists that it will be creating "one national standard" by revoking California's waiver, it will actually be doing the opposite. Currently, California's standards are harmonized with the federal government's standards, so there actually is only one national standard that automakers can meet. If the waiver is revoked, that harmonization will disappear, and automakers could ultimately be left to comply with different California and federal standards depending on the outcome of the litigation.

In the meantime, the market continues to progress: consumers are interested in more fuel-efficient and greener cars, and other countries are requiring improved fuel economy. In other words, automakers are being pushed by economic forces to make more efficient (and lower-emitting) cars, regardless of what the federal government does. In this environment, many automakers see the wisdom of trying to create some clarity for themselves even as the administration's actions muddy the waters. Hence the framework agreement between California and a handful of major automakers: better to agree to a set of standards regardless of litigation outcomes than to find yourself holding the compliance bag months or years down the road. Even automakers who haven't signed on to the agreement continue to call for talks between California and the administration for the same reason. The ensuing battle over California's waiver authority is simply bad for business.

It is also bad for public health. A waiver revocation, if upheld, would upset not only California's authority to enforce its tailpipe GHG standards, but would also interfere with enforcement of its zero-emission vehicle (ZEV) mandate. The ZEV program was originally adopted not to address climate change, but to combat smog pollution, a purpose it still serves. California suffers from some of the worst smog pollution in the nation; for example, the South Coast Air Basin exceeded federal ozone standards for over one-third of the year in 2017. California isn't the only state that uses these regulations to reduce air pollution, either. Even the administration's own analysis recognizes that other states rely on California's rules to meet federal ambient air quality standards—but if California loses its authority to enforce its standards, so will those states. That's why the attorneys general of those states and the mayors of over fifty cities within them **have stressed** that "these standards are both necessary and feasible" and are "particularly appropriate given the serious public health impacts of air pollution in our cities and states…"

And, of course, a waiver revocation, if upheld, would set California and other states back in their fight against climate change. Transportation sector emissions account for nearly 40 percent of California's GHG emissions. If California loses this regulatory tool, the challenge of meeting its aggressive GHG reduction goals by 2030 and 2045 will become even tougher. California stands to suffer disproportionate effects from climate change as a result of its unique geography and climate, including heat waves, worsening ozone pollution, harm to agricultural production, wildfires, and a rising sea level. And the administration's action comes at a time when respected **climate scientists** have suggested that we need to redouble, not relax, our efforts to address climate change.

Finally, an action to revoke the waiver is antithetical to the administration's own stated purposes for the SAFE Rule: arguments that the Obama-era standards created vehicle safety concerns for consumers and that the compliance timeframes were not technologically feasible. Those arguments themselves have always been weak; consumer purchasing pattern data shows that the safety gains the administration touted are specious, and automakers are well on track to meeting the Obama-era standards—in fact, some cars on the market today are already years ahead of the curve. But even if the administration's arguments held up, finalizing a rule that leaves Obama-era standards in place while revoking California's waiver does nothing to address either of those purported concerns.

Why a waiver revocation stands on shaky legal footing

The administration has argued that: (1) it has "inherent authority" under the Clean Air Act to revoke the waiver because it does not meet the standards of Clean Air Act section 209 and (2) California's standards are preempted by the federal Energy Policy and Conservation Act (EPCA), which authorizes the federal government to set fuel economy standards. Neither argument is convincing.

In reality, the Clean Air Act does not contain any waiver revocation authority. Section 209 spells out the process for granting a waiver and explains that EPA must grant a waiver unless one of three unusual circumstances exists: (1) California's finding that its standards are at least as stringent as the federal government's was arbitrary and capricious, (2) California does not need the standards to meet compelling and extraordinary conditions; or (3) the standards and accompanying enforcement procedures are inconsistent with Clean Air Act section 202. But the act is clear that these are considerations that come into play *before*, not *after*, a waiver has been granted. There is no suggestion that Congress intended to create revocation authority, and no such authority has ever been recognized by a court, or otherwise. Even if the section 209 factors did apply in the context of a waiver revocation, the California standards satisfy all of section 209's requirements: they are at least as stringent as the federal government's standards, they are necessary to meet compelling and extraordinary conditions that California faces both with respect to air pollution like smog and climate change, and they are consistent with section 202 of the Clean Air Act.

Nor does EPCA preempt the standards. The administration's argument, put simply, is that because reductions in tailpipe GHG emissions can be achieved by improving fuel economy, California's emissions standards are preempted by EPCA's regulation

of fuel economy. But multiple federal courts have determined that EPCA's regulation of fuel economy does not preclude regulation of vehicular GHG emissions. In *Massachusetts v. EPA*, the Supreme Court found EPCA did not displace EPA's authority to regulate GHG emissions; based on that finding, federal courts in Vermont and California have concluded that EPCA does not preempt state GHG standards, upholding California's tailpipe standards and Vermont's adoption of them.

In sum, revoking the waiver throws regulated industry into costly uncertainty, could result in serious harm to public health, and does not support the administration's own stated rationale for a standards rollback. It's just not smart policy. It's also unprecedented, unauthorized by the Clean Air Act, and unsupported by prior agency and court decisions.