



Traffic on the 405 Freeway in West Los Angeles. Credit: Chris Yarzab, Flickr

In two complementary actions in the last week, the Biden administration has set the stage for more stringent regulation of greenhouse gas (GHG) emissions from passenger vehicles—one of the country’s single [largest sources](#) of pollution that causes climate change.

Today, the Environmental Protection Agency published a [notice](#) that it would reconsider the Trump administration’s withdrawal of California’s waiver to set tailpipe greenhouse gas emissions standards and a zero-emission vehicle (ZEV) mandate. Public comment on the reconsideration is open through July 6, with a hearing set for June 2.

EPA’s move today follows action last week by the National Highway Transportation Safety Administration (NHTSA), an arm of the Department of Transportation, which released a [draft](#) of its proposed repeal of a portion of Part 1 of the Trump administration’s Safer Affordable Fuel-Efficient Vehicles (SAFE) Rule. NHTSA is calling this proposed rule the “CAFE Preemption Rule.” Publication of the rule in the Federal Register is forthcoming, so the public comment period on the new rule has yet to begin.

The history leading up to these two actions is complex, and I’ll recap it in a moment. NHTSA’s repeal would undo the Trump administration’s codification of a determination that the Energy Policy Conservation Act (EPCA), the statute that delegates NHTSA the authority

to set fuel economy standards, preempts any state government from setting tailpipe GHG standards or any kind of ZEV mandate. The CAFE Preemption Rule also rescinds NHTSA's determination, in SAFE Part 1, that California's Advanced Clean Cars (ACC) tailpipe GHG emissions standards and ZEV mandate were preempted by EPCA. EPA relied on that determination when it withdrew California's waiver for parts of the ACC program. EPA's reconsideration of the Trump administration's waiver withdrawal does not immediately restore California's waiver, but indicates serious questions about whether the withdrawal was a proper exercise of agency authority and opens the door for the waiver to be reinstated.

Now for the complex history.

- In 2018, EPA and NHTSA released a joint proposal to freeze Obama-era fuel economy standards and to revoke California's waiver for portions of its ACC Program that set tailpipe GHG emissions standards and mandated that a percentage of automakers' sales in California had to be electric vehicle sales. The proposed waiver revocation was [unprecedented](#) in EPA's then nearly 50-year history, and the proposed standards freeze was riddled with [inaccuracies and contradictory logic](#). Over the next year, the rule remained in development, and when it became clear that the technical aspects of the standards-setting were delaying release of the entire rule, the federal agencies bifurcated the process.
- In September 2019 the agencies [released](#) SAFE Part 1, a joint rulemaking wherein NHTSA made a determination that state tailpipe GHG emissions standards and ZEV mandates, and particularly California's regulations, are preempted by EPCA and EPA, relying in part on NHTSA's preemption determination, revoked California's waiver for portions of its ACC Program.
- SAFE Part 1 was challenged by a bevy of states—California and a number of states who follow, or have expressed intent to follow, California's standards pursuant to Section 177 of the Clean Air Act—and environmental groups, while some automakers and industry groups joined the fray on the side of the federal government. A total of ten lawsuits ended up as a consolidated action in the D.C. Circuit, which has now been held in [abeyance](#).
- In the midst of all this regulatory uncertainty, a group of automakers representing about one-third of the U.S. market [signed a deal](#) in July 2019 with California to acknowledge its authority to regulate in this space and to adhere to a modified set of tailpipe GHG and ZEV standards.

- In March 2020, EPA and NHTSA [finally released](#) SAFE Part 2, setting new federal fuel economy and tailpipe GHG emissions standards for light-duty cars and trucks model years 2021-2026.

One of the Biden administration's first actions was to, by [executive order](#), direct federal agencies to review a number of Trump administration rulemakings. EPA and NHTSA were directed to review SAFE Part 1 and SAFE Part 2, and to release proposed rules "suspending, revising, or rescinding" those actions by April 2021 and July 2021 respectively. NHTSA's CAFE Preemption Rule and EPA's reconsideration notice represent their adherence to that Presidential direction. Here are a few key things to know:

- ***The CAFE Preemption Rule takes the position that NHTSA likely lacks authority to make binding legislative rules about EPCA preemption.*** As a basis for withdrawing the Trump administration's preemption determination, NHTSA explains that, upon further review of EPCA's statutory language and legislative history, there is serious doubt that NHTSA has legal authority to issue a preemption regulation on this score. The agency is on strong legal footing in this assessment: EPCA contains an express preemption provision that does not delegate any authority to NHTSA to issue rules affecting or delineating the scope of preemption, and courts have typically held that agencies need such delegated authority to be able to promulgate those kinds of rules. See, e.g., *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."). The rule doesn't entirely foreclose the possibility that NHTSA might have authority, but says the parts of EPCA the Trump administration cited don't appear to confer that authority, and it's likely enough NHTSA lacks authority that the responsible thing to do is to rescind the preemption determination and return to NHTSA's past practice of silence on EPCA preemption of categories of state regulations.
- ***The CAFE Preemption Rule rescinds both NHTSA's general preemption determination and the agency's earlier finding that Advanced Clean Car regulations were preempted by EPCA.*** The language of SAFE Part 1 was not particularly clear as to which parts of the rule were intended to be interpretive guidance and which legislative rulemaking. It was clear that NHTSA codified, in agency regulations, its determination that state tailpipe GHG emissions standards and ZEV mandates were preempted by EPCA, but much of the language specific to

California's regulations was included in the rule's Preamble, where the line between interpretive and legislative rulemaking is murkier. To eliminate any ambiguity, NHTSA now says it is rescinding any interpretive statements related to California's program as well as the preemption determination itself.

- ***The CAFE Preemption Rule does not make an affirmative determination that state tailpipe GHG emissions standards and ZEV mandates are not preempted by EPCA.*** The agency acknowledges that some commenters might want NHTSA to make an inverse determination to the one the Trump administration made: that state tailpipe GHG emissions standards and ZEV mandates are affirmatively not preempted by EPCA. While NHTSA doesn't completely close the door on the possibility of such a determination in the future, it does explain that past agency practice has been to offer its assessment of preemption questions in guidance documents and opinions, rather than through legislative rulemaking processes. The tenor of the rule suggests that the agency is likely to return to that practice.
- ***Neither the CAFE Preemption Rule nor the EPA reconsideration notice reinstate California's waiver.*** Both do clear the way for EPA to do so, however. NHTSA is not the agency with authority to grant a waiver; only EPA has that authority (as the EPA notice explains, it's unclear that EPA has the authority to withdraw a waiver as it did in SAFE Part 1). But EPA relied on NHTSA's preemption determination to revoke California's waiver, so with that determination out of the way, the path is clearly open for EPA to reinstate California's waiver, or to issue new waivers in the future for tailpipe GHG emissions standards and ZEV mandates. Ultimately, EPA's reconsideration process will determine what happens to the current ACC Program waiver, but NHTSA's rule removes a hurdle for future California waiver requests for tailpipe GHG emissions standards (for example, for California's Advanced Clean Trucks regulations).

In sum, NHTSA's rule finds that the agency likely never had the authority to issue a preemption regulation in the first place—a determination that, NHTSA acknowledges, is the most expedient way to get the Trump administration's erroneous preemption regulations off the books. While NHTSA does some work in the rule to try to create daylight for future regulations affirming that state tailpipe GHG standards and ZEV mandates are not preempted by EPCA, nixing the earlier regulations in this way does make it more likely that the agency will return to its past practice of rulemaking silence on EPCA preemption. It's a middle-ground approach, but because a litigation challenge to **any** agency determination on preemption is a near certainty, NHTSA's emphasis on getting a bad rule off the books, even if it comes at the expense of an affirmative statement that state emissions and ZEV rules aren't preempted, seems like a smart one.

On the EPA side of the street, the agency has highlighted obvious questions—raised in the many petitions for reconsideration it received—about EPA’s own authority to withdraw a waiver generally and in this particular context, and about EPA’s conclusions regarding the necessity for the types of regulations the waiver covered. While the reconsideration notice signals the potential that the waiver withdrawal will ultimately be rescinded, the agency notably isn’t taking that step yet. States, cities, and environmental groups who weighed in on SAFE Part 1 and ultimately sued the agency are likely to reiterate their strong arguments about EPA’s lack of authority to withdraw a waiver and the Trump administration’s misinterpretation of provisions of the Clean Air Act. But I’ll be very curious to see the industry reaction, particularly in light of the California-automakers framework agreement and the new commitments on the part of big automakers—particularly GM—to ramp up EV production. Even the CEO of industry group Alliance for Automotive Innovation, which entered the SAFE Part 1 litigation on the side of the Trump administration, has [noted](#) the auto industry’s alignment with the Biden administration’s EV goals.

My, how the times have changed.