COLORADO’S ZERO EMISSION VEHICLE REGULATION

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As power generation becomes cleaner, transportation has taken over as the largest source of greenhouse gas emissions in the United States. Emitting over 1.9 billion tons of carbon dioxide per year domestically, transportation is a major contributor to global climate change. Reducing greenhouse gases emitted from the tailpipes of cars and light-duty trucks, while increasing fuel efficiency, is an important step toward combatting climate change. As the federal government fails to acknowledge or address the urgency and severity of climate change, states are taking the lead. Colorado has recently joined nine other states in adopting California’s tailpipe emissions standards. At the same time, federal regulatory agencies are planning to amend and freeze the national standards. This Article discusses Colorado’s new Zero Emission Vehicle Regulation and the potential impacts of the pending federal rollback.

I. BACKGROUND

In August of 2018, the Trump Administration released a proposal to freeze the federal fuel economy and tailpipe standards after model-year 2020. As part of that proposal, EPA indicated that it would revoke California’s waiver of preemption under the Clean Air Act (Act), which allows the state to set its own tailpipe-emission standards. This waiver option was built into the Act to allow California to innovatively address its severe air quality issues. And, to prevent manufacturer burdens from fifty different tailpipe standards, the Act permits only two types of cars: those that meet the California standards and those that meet the federal standards. Under § 177, states can choose to adhere to the federal standards or adopt standards identical to the California’s. To date, nine other states have adopted parts of the California standards.

The Obama Administration, after lengthy negotiations with manufacturers and the California Air Resources Board, reached a deal to harmonize the federal and state standards through model year 2025. The deal provided for an interim

2 Id.
6 42 U.S.C. § 7507. Sometimes referred to as the “third vehicle prohibition.”
review to evaluate feasibility for model years 2022–2025. After the interim review, EPA and the National Highway Traffic Safety Administration (NHTSA) proposed to replace the Corporate Average Fuel Economy (CAFE) standards with the Safer and Fuel-Efficient Vehicles Rule (SAFE rule). The proposed rule effectively freezes the standards at model year 2020, amending the prior standards, which increased in stringency through 2026. In addition to revoking California’s waiver of preemption, the SAFE rule includes a proposal to find that state-level tailpipe emission standards are preempted under the Energy Policy and Conservation Act (EPCA). EPCA directs NHTSA to set average fuel economy standards, with the purpose of reducing dependence on foreign oil.

In the face of a potential rollback at the federal level, Colorado has adopted California’s tailpipe standards. On Friday August 19th, the Colorado Air Quality Control Commission voted 8–1 to adopt the Zero Emission Vehicle Standard, the final component of California’s Advanced Clean Car Program. This decision helps to ensure Colorado continues to progress toward its emission reduction goals. The remainder of this article examines the predicted impacts of the Zero Emission Vehicle Standard in Colorado and the potential effect of the finalized SAFE rule.

II. ZERO EMISSION VEHICLE STANDARD

At the direction of Governor Polis and the Air Quality Control Commission, the Colorado Department of Public Health and Environment proposed the adoption of California’s Zero Emission Vehicle (ZEV) Standard. Regulation 20 now incorporates by reference California’s Low Emission Vehicle Standard and ZEV Standard. The ZEV program requires manufacturers to deliver at least 4.86% of their total sales in Colorado as electric vehicles in model year 2023. Different types of electric cars qualify for varying ZEV credits based on emissions, and the number of credits increases over time.

In the weeks leading up to the rulemaking hearing, the auto manufacturers reached a compromise with the Colorado Energy Office and the Colorado
Department of Transportation. The compromise, which was subsequently adopted, allows manufacturers to bank ZEV credits from sales occurring before the effective date of the regulation. It also allows manufacturers to comply through limited use of credits generated from sales in other states. The dual purpose of the compromise was to alleviate burdens to manufacturers while getting a greater number of electric cars on the road sooner.

The proposed regulation and associated documents predict that the higher percentage of electric cars in Colorado will lead to significant greenhouse gas emission reductions, improvements in urban smog, and reduced costs for consumers. The ZEV regulation is predicted to lead to over 3.2 million tons of greenhouse gas reductions by 2030. This amount of greenhouse gas reductions correlates with $1.07 billion in cost savings to the general public. Similarly, it is predicted to lead to reductions of 307 metric tons of ozone precursors, helping the Front Range region to comply with federal ozone standards. Additionally, for model year 2023 ZEVs, the proposal predicts over $65 million in savings from reduced maintenance and repair costs over conventional vehicles.

III. IMPACT OF THE SAFE RULE

When the final SAFE rule is published, it will presumptively invalidate California’s tailpipe standards and other state standards that rely on California’s waiver. However, environmental groups, states, and potentially the car manufacturers that recently reached an agreement with California, will challenge this rule almost immediately. And with such important interests relying on the outcome of the legal battle, it is likely a court will stay the rule pending judicial

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22 Id. at 14.

23 Id.

24 Id. at 15.

25 Id. at 10.


review. Otherwise, the manufacturers will face massive uncertainty about which types of vehicles they will be required to produce, while citizens and environmental groups stand to forgo major health and environmental benefits if state regulations are invalidated.

Both EPA and NHTSA are reversing long-standing practices in an attempt to justify the SAFE rule. Even a cursory review of the proposed rule exposes some of the agencies’ flawed reasoning, and it seems likely that a reviewing court will invalidate the rule. In addition to the numerous methodological and factual flaws, the agencies’ legal reasoning is questionable for two main reasons.

First, it is not clear that EPA has statutory authority, express or implied, to revoke a waiver. Since the enactment of the waiver provision in 1967, EPA has granted over fifty waivers, denied one, and revoked zero. In fact, the text of § 209 and the legislative history suggest that EPA’s authority is rather confined. The statutory provisions hold that the administrator “shall” approve waivers, rather than “may” approve waivers. The section also provides only three limited circumstances when the administrator can deny a waiver, but makes no mention of revocation. EPA argues that the three conditions that allow the administrator to deny a waiver are the same conditions that allow the revocation of a waiver. From there, EPA argues that California does not need its standards to meet “compelling and extraordinary conditions.” But the plain text of § 209 requires EPA to defer to California’s determination of compelling and extraordinary conditions, not conduct and independent inquiry.

Second, NHTSA’s finding that EPCA preempts state tailpipe standards is in conflict with Massachusetts v. EPA and two other federal cases. NHTSA relies heavily on the fact that the Supreme Court did not consider the issue of EPCA preempts state regulation of tailpipe CO₂ emissions. This overlooks that the state-level regulations are adopted under the CAA and with approval from EPA. NHTSA even cites the Court’s discussion of the overlap between EPCA and EPA’s responsibilities under the CAA, seemingly undercutting its own argument:

28 See, e.g., Texas v. EPA, 829 F.3d 405, 435 (5th Cir. 2016) (granting a stay and relying on three other cases where stays were granted due to compliance costs of at least $200 million).
32 Id.
33 SAFE rule, supra note 3, at 43,232.
34 SAFE rule, supra note 3, at 43,240.
36 SAFE rule, supra note 3, at 43,232.
EPA has been charged with protecting the public's “health” and “welfare,” 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. See Energy Policy and Conservation Act, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.\textsuperscript{37}

Moreover, two federal courts directly addressing whether EPCA preempted state tailpipe emissions found that there was no issue of preemption.\textsuperscript{38} NHTSA simply argues that both courts were incorrect, and then reverses its decades-long practice of harmonizing fuel economy standards with EPA’s tailpipe standards. Moreover, EPCA expressly contemplates the overlap between the standards and requires NHTSA to consider “the effect of other motor vehicle standards” when setting fuel economy standards.\textsuperscript{39} This suggests that Congress intended NHTSA’s fuel economy standards as secondary to EPA’s standards, which serve the more important goals of protecting public health and welfare.

IV. CONCLUSION

Colorado, California, and nine other states are reducing greenhouse gas emissions from the transportation sector despite the possible federal rollback. The emission reductions brought about by electric car technology are a significant step in the battle against climate change. Consensus between these states and the major auto manufacturers marks a progression that is unlikely to be stopped, despite the federal government’s attempts to halt progress.

\textsuperscript{37} Massachusetts, 549 U.S. at 532.
\textsuperscript{38} See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007); Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), as corrected (Mar. 26, 2008). Both courts found that EPA’s approval effectively “federalized” the state-level regulations, and thus a preemption analysis was improper.
\textsuperscript{39} 49 U.S.C. § 32902.