

The auto emissions war against California

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Blatantly illegal. Vindictive. Retaliatory. Spiteful. Or, as California Gov. Gavin Newsom aptly described it, a "weaponization of the USEPA."

All these terms accurately characterize the Trump administration's recent action to eliminate the state of California's longstanding authority under the federal Clean Air Act to adopt auto emission standards for California that are more stringent than the national standards set by the federal government. That action is bad news not only for California, but also for the environment as well as the consumers and automobile industry that the Trump administration's action purports to aid.



California, other affected states and numerous environmental organizations have already filed lawsuits against Trump's Environmental Protection Agency, seeking judicial intervention to nullify the EPA's "waiver withdrawal." And it's likely that they'll prevail in that legal challenge.

To understand the current dispute, a bit of historical background is required. When Congress passed the Clean Air Act in 1970, it included a provision that generally preempts states from adopting their own tailpipe emission standards for cars and trucks. However, beginning in 1966 California was already adopting its own tailpipe emission standards to address severe air pollution problems those emissions were causing in the Golden State -- especially the Los Angeles metropolitan area. Recognizing that history and expertise, Congress expressly granted California -- and only California -- continuing authority to adopt its own, more stringent tailpipe emission standards under the CAA. State officials were required under Section 209(b) of the CAA to seek a "waiver" of the national standards each time California sought to adopt its more stringent tailpipe standards and, conversely, the same CAA provision gave the EPA very limited grounds upon which to deny California's waiver request.

Over the subsequent half-century, this congressional exercise of cooperative federalism generally worked smoothly and well. California sought and received over 100 separate waivers from the EPA to adopt its more stringent tailpipe standards to curb "conventional" air pollutants such as carbon monoxide and sulphur dioxide. The results have been outstanding: despite the steady increase in the number of cars and trucks on its roads in the past 50 years, California's air pollution levels attributable to vehicular sources have declined by approximately 95%.

This arrangement worked so successfully that Congress chose to expand it when it amended the CAA in 1977. Congress added Section 177, allowing other states the ability to "opt into" California's more exacting tailpipe standards, rather than be subject to the EPA-promulgated national limits. Over the past 42 years, a large number of states have done just that: for example, some 13 other states have opted into California's greenhouse gas tailpipe and zero emission vehicle standards. When added to California's 12% of the national automotive market, these "section 177" states account for over 35% of all affected motor vehicles sold in the United States -- some 15 million vehicles annually.

But things became more complicated and fractious after the U.S. Supreme Court ruled in its landmark 2007 *Massachusetts v. EPA* decision that greenhouse gas emissions are "pollutants" subject to regulation under the CAA. California promptly sought a waiver from the George W. Bush administration to implement the first-in-the-nation GHG tailpipe emissions standards that California regulators had adopted in 2004. For the first time in CAA history, the EPA initially denied the waiver request in 2008, finding that California's tailpipe standards were not necessary to meet "compelling and extraordinary conditions" relating to state climate change concerns. Then-California Gov. Arnold Schwarzenegger, represented by then-Attorney General Jerry Brown, promptly sued the Bush administration, challenging the waiver denial.

That litigation was rendered moot with the 2009 inauguration of President Barack Obama. The Obama administration promptly reconsidered and ultimately granted California's waiver request to implement its own GHG tailpipe emission standards, expressly concurring in California's position that it desperately needs those standards to meet the state's compelling and extraordinary challenges from climate change. The Obama administration then went further, striking a three-way agreement with California and the automobile industry to "federalize" California's GHG tailpipe standards on a nationwide basis and join them with the federal government's own, stringent mileage (CAFÉ) standards for passenger vehicles through the 2025 model year. (Under applicable federal law, only the *federal* government can adopt CAFÉ standards -- a fact California officials have never contested.)

That brings us to President Trump's war on the environment, and his vengeance on California. Since taking office, Trump has pledged to repeal the Obama/California GHG tailpipe emission standards, as well as the Obama administration's CAFÉ standards. (That, of course, is only part of Trump's multifaceted efforts to repeal Obama-era environmental rules.) Almost immediately, California officials announced their own plan to retain and enforce their own state GHG tailpipe standards, per the previously granted USEPA waiver.

Trump's efforts to repeal the existing federal standards have at least temporarily stalled; his minions have struggled mightily to construct plausible legal, technical or scientific rationales for its rollback initiatives under the CAA and related federal laws, in the face of promised lawsuits by the state of California and numerous other stakeholders. Meanwhile, in July

California announced an historic agreement with Ford, Honda and two other major automakers in which the companies pledged to follow California's stringent GHG tailpipe emission standards prospectively.

This latter agreement reportedly enraged the president, who quickly retaliated against both California and the automakers. Trump directed his Department of Justice to launch an antitrust investigation of those four companies, claiming their pollution control agreement with California "might" violate federal antitrust laws. (Antitrust experts roundly criticize this argument as patently frivolous.)

Meanwhile -- and also under marching orders from President Trump -- on Sept. 19, EPA Administrator Andrew Wheeler announced he was revoking the federal government's previously granted waiver allowing California to implement its GHG tailpipe emissions standards. The Trump administration bases its revocation decision on four stated rationales:

- Withdrawal of California's waiver will allow automakers to build and market cars and trucks that are cheaper, safer and therefore better for consumers;
- Automakers need this waiver revocation and related federal rollbacks in order to remain in business;
- The nation needs a uniform set of fuel economy standards; and
- California should not be allowed to "dictate" environmental rules to the rest of the nation, because that violates the CAA's intent.

Each of these stated justifications is utterly without merit.

First, economic studies indicate that the California tailpipe standards, if left in effect as part of the Obama administration's GHG and CAFÉ standards that Trump now seeks to nullify, would save American consumers more than \$1.7 trillion in fuel prices through 2025. And Trump is trotting out the same, tired canard that the auto industry invoked for decades: that mileage and pollution control standards will make vehicles less safe. However, rates of automobile deaths and serious injuries have actually declined dramatically over the years as technology improvements have made vehicles safer as well as less polluting and more efficient.

Second, the auto industry is on record as opposing the drastic GHG emission and CAFÉ rollbacks that the Trump administration is proposing. As noted above, four of the world's largest automakers have expressly embraced the California GHG emission limits that Trump & Co. are trying to nullify. And, critically, not one major automaker has expressed public support for the administration's withdrawal of California's waiver. Indeed, several of them are *already* complying with California's projected tailpipe emission limits.

Third, and as noted above, California has never attempted to set fuel economy standards, either for itself or the nation as a whole. All concerned agree that this role is left exclusively to the federal government. (California and other critics of Trump's proposed CAFÉ standard rollback *have* had the temerity to note that such federal action will result in the discharge of 6 billion tons of additional GHG emissions over the expected lifetimes of the affected vehicles.) And the U.S. Supreme Court and lower federal courts have repeatedly held that the existence of CAFÉ standards does not displace the need for -- and government's obligation to consider -- pollution control measures to abate GHG emissions.

The fourth justification of the Trump administration's waiver withdrawal is the most specious of all: Congress expressly authorized California to adopt its own, more stringent tailpipe emission standards in 1970, and explicitly allowed other states to adopt California's standards as their own a few years later. Conversely, California has never attempted to impose its emission limits on any other state or the federal government.

California Attorney General Xavier Becerra is leading a broad coalition of 24 states challenging the Trump administration's attempted waiver revocation in court. That challenge should succeed. As noted above, the Trump administration's justifications for the waiver revocation are fake news. Equally important, the CAA contains *no statutory authority whatsoever* for the federal government to revoke a waiver request by California that it has previously granted.

In sum, the Trump administration's waiver revocation is unwanted by anyone but President Trump (along with, perhaps, Big Oil, which alone stands to benefit financially from higher polluting, less efficient vehicles). That revocation, meanwhile, is the automobile industry's worst nightmare, creating regulatory uncertainty that will extend for years and disrupt its manufacturing and marketing efforts. And it's bad news for consumers in California and other "opt-in" states, who desire cleaner vehicles that are cheaper to own and operate. Finally, the waiver revocation, if upheld, erodes the ability of California and other affected states to meet their ambitious but necessary GHG reductions from the transportation sector -- the single largest generator of GHG emissions -- in the face of federal retrenchment and resistance on the climate change front.

Fight on, California, fight on. ☞