

July 6, 2021

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: *Reconsideration of the Withdrawal of a Waiver for California's Light-duty Vehicle ZEV and GHG Standards*, Docket ID No. EPA-HQ-OAR-2021-0257

Dear Administrator Regan:

The Northeast States for Coordinated Air Use Management (NESCAUM) offers the following comments on the U.S. Environmental Protection Agency (EPA) action titled “California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Public Comment,” 86 Fed. Reg. 22,421 (Apr. 28, 2021), in the above-referenced docket. In this action, EPA requests comment on its reconsideration of the agency’s previous withdrawal of the waiver of preemption it had granted to the State of California for the greenhouse gas (GHG) emissions and zero emissions vehicle (ZEV) components of the state’s Advanced Clean Car (ACC) program in the action titled “Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program,” 84 Fed. Reg. 53,310 (Sept. 27, 2019) (SAFE 1).

NESCAUM is the regional association of state air pollution control agencies in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. NESCAUM serves as a technical and policy advisor to its member states on a wide range of air pollution and climate issues and facilitates multi-state initiatives to improve air quality and mitigate climate change. For more than three decades, NESCAUM and its member states have closely collaborated with California and other states, EPA, and the automobile industry to promote low emission vehicles and ZEVs.

As discussed below, NESCAUM strongly supports EPA’s reconsideration and prompt rescission of the agency’s unlawful withdrawal of the ACC program waiver, and its erroneous pronouncements purporting to limit the authority of states to adopt California’s GHG emissions standards under Section 177 of the Clean Air Act (CAA).

I. Introduction

For half a century, through multiple revisions, and across Republican and Democratic administrations and Congresses, our nation has had in place a basic architecture of “cooperative federalism” for protecting public health from air pollution. This fundamental approach depends upon dual federal and state regulation under the CAA to deliver healthy air. Pursuant to this

structure, the federal government establishes nationwide public health air quality standards, and the states retain the responsibility for devising strategies to meet these standards.¹ Indeed, “so long as the ultimate effect of the State’s choice of emissions limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.”²

The structure and legislative history of the CAA reflects an intent to prevent the federal government from second-guessing state policy choices.³ As part of this fundamental design, Congress has granted to California special and broad latitude to undertake motor vehicle emissions controls and has recognized the authority of other states to align their standards with California.⁴ This approach acknowledges California’s leadership and capabilities in establishing motor vehicle emissions controls, as well as its unique air quality challenges, and has consistently guided EPA’s review and approval of the state’s waiver applications under the highly permissive and narrow tests set forth in Section 209(b) of the CAA. EPA is required to grant California’s requests for waivers of preemption for motor vehicle emissions standards where the agency finds that the state has a compelling and extraordinary need for such standards and that its approach is at least as stringent as the federal one, so long as the state has not been arbitrary and capricious.

The CAA also provides important flexibility and latitude to states other than California who want to reduce motor vehicle emissions. Section 177 allows states to adopt and enforce California’s more stringent new motor vehicle emissions standards for which a waiver has been granted under Section 209(b). This “opt-in” authority is entirely permissive: states require no review or approval from EPA to adopt California’s emissions standards. Indeed, through decades and multiple detailed revisions, Congress has repeatedly declined to impose any limits, other than sufficient “lead time” and “identity” with California’s standards, on this broad state authority.⁵ States that have exercised this authority rely on their standards for their air pollution control and climate change mitigation plans and programs and to meet their statutory emissions reduction requirements.

EPA’s actions in SAFE 1 are inconsistent with the refined federal and state balance embedded in the CAA, the statute’s lengthy congressional and regulatory history, and multiple sources of legal authority that provide enormous discretion to California and other states to adopt motor vehicle emissions standards. In SAFE 1, EPA unlawfully withdrew the waiver of preemption it had previously granted to California in 2013 for the GHG emissions and ZEV requirements of

¹ See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 845-46 (1984); *Train v. Natural Res. Defense Council, Inc.*, 421 U.S. 60, 64-65 (1975).

² *Train*, 421 U.S. at 79.

³ *Id.*

⁴ “Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program,” 78 Fed. Reg. 2,112, 2,115 (Jan. 9, 2013).

⁵ Likewise, Congress expressly preserved states’ and local governments’ rights to enact certain laws regulating motor vehicles, providing in Section 209(d) that “[n]othing in this title shall preclude or deny to any State or political subdivision the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.” Thus, state and local governments retain their authority to regulate how vehicles are used in local areas.

the state's ACC program. EPA based the withdrawal on a flawed interpretation of Section 209(b) and an unlawful determination by the National Highway and Traffic Safety Administration (NHTSA) that the Energy Policy and Conservation Act (EPCA) preempts states from enacting GHG emissions and ZEV standards. EPA also proffered a novel and erroneous interpretation of Section 177 that would allow states to opt-in to California's criteria pollutant standards, but not its GHG emissions standards, rather than evaluating those standards in the aggregate consistent with longstanding EPA precedent. Overall, the treatment of California and Section 177 state authority in SAFE 1 reflects a radical departure from the fundamental principles of cooperative federalism and states' rights embedded in the CAA and consistently confirmed by the legislature, the agency, and the courts.

II. Background

In August 2018, NHTSA and EPA commenced a joint proposed rulemaking titled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks." 83 Fed. Reg. 42,986 (Aug. 24, 2018). In that notice, NHTSA erroneously asserted that California's and other states' GHG emissions and ZEV standards are preempted by Section 509(a) of EPCA; while EPA proposed, among other things, to withdraw the January 9, 2013, waiver of preemption it had granted to California for the GHG emissions and ZEV components of the ACC program. As detailed in NESCAUM's comments submitted on October 25, 2018, this proposal was deeply flawed and unlawful in numerous respects.⁶

Nevertheless, NHTSA and EPA finalized SAFE 1 on September 27, 2019. In that action, NHTSA unlawfully codified regulatory text and appendices, and offered erroneous statutory interpretations, that purported to radically expand the scope of the self-executing provision in Section 509(a) of EPCA to preempt California and other states' authority to set GHG emissions and ZEV standards under Sections 209(b) and 177 of the CAA.⁷ For its part, EPA unlawfully withdrew the waiver of preemption it had granted in 2013 for the GHG emissions and ZEV requirements of the ACC program on two grounds. First, EPA posited that the standards purportedly preempted under EPCA could not receive a waiver of preemption under Section 209(b) of the CAA. EPA stated that, even though it intended not to consider non-statutory criteria in future waiver proceedings, it was somehow appropriate to do so here because EPA and NHTSA had chosen to coordinate their regulatory actions. Second, EPA concluded, through a tortured and meandering reading of Section 209(b), that California did not need its GHG standards "to meet compelling and extraordinary conditions." Further, even if it did, EPA wrongfully asserted that California did not "need" the standards insofar as they would not

⁶ NESCAUM, "Comments on Safer Affordable Fuel-Efficient Vehicles Rule Proposal," Docket ID Nos. NHTSA-2016-0067 and EPA-HQ-OAR-2018-0283 (Oct. 25, 2018), available at <https://www.nescaum.org/documents/nescaum-comments-safe-vehicles-proposal-20181025.pdf/>.

⁷ NHTSA recently proposed to fully repeal the regulatory text and appendices promulgated in SAFE 1 and withdraw the interpretative statements made by NHTSA in the preamble based on concerns that its actions in SAFE 1 exceeded its rulemaking authority under EPCA. 86 Fed. Reg. 25,980 (May 12, 2021). NESCAUM strongly supports this proposal. See NESCAUM, "Comments on Proposed Rule on Corporate Average Fuel Economy (CAFE) Preemption," Docket ID No. NHTSA-2021-0030 (June 11, 2021), available at <https://www.nescaum.org/documents/nescaum-comments-nhtsa-safe-1-repeal-20210611-final.pdf>.

meaningfully address global air pollution problems specifically associated with GHGs. To reach these conclusions, EPA deviated from its decades-old approach of interpreting Section 209(b) as requiring consideration of the need for California’s emissions standards “in the aggregate,” and instead adopted an approach that conditions the granting of a waiver on a pollutant-specific demonstration of compelling and extraordinary conditions.

EPA asserted that it possessed “inherent” authority under Section 209(b) to reconsider and withdraw the GHG and ZEV components of the ACC program waiver that it had granted more than five years before. EPA also provided unauthorized and erroneous interpretations of Section 177, asserting that the provision does not allow states to adopt California’s GHG standards and is only available to states with approved nonattainment plans.

After EPA and NHTSA finalized SAFE 1, the State of California, a coalition of 28 states and cities, and various non-governmental organizations filed petitions for clarification and reconsideration, which EPA granted. EPA now requests comment on whether the agency properly exercised its authority in SAFE 1 in reconsidering and withdrawing the 2013 ACC program waiver, whether it properly interpreted and applied Section 209(b)(1)(B) of the CAA, and whether it properly considered EPCA preemption and its effect on the waiver. EPA also requests comment on whether it possessed authority in SAFE 1 to provide an interpretation of Section 177, whether that interpretation was appropriate, and whether California’s mobile source emission standards adopted by states pursuant to Section 177 may have both criteria emission and GHG emission benefits and purposes. NESCAUM addresses each of these issues below.

III. EPA lacked any legal basis to revoke California’s existing CAA waiver.

a. EPA lacked express or inherent authority to revoke the waiver.

The CAA does not confer any express authority on EPA to reconsider or revoke an already-granted waiver. In SAFE 1, EPA relies on a 1967 Senate Report, which states that the EPA Administrator has “the right . . . to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of that waiver,” to support its assertion of “inherent” authority to reconsider and withdraw California’s waiver.

This argument fails for multiple reasons. First, a mere reference to a solitary statement in a Senate report does not suffice to confer authority on EPA when the agency lacks the express statutory authority to revoke California’s waiver.⁸ Second, the waiver provisions were significantly amended in 1977 to “broaden and strengthen California’s authority to prescribe and enforce separate new motor vehicle emission standards.”⁹ EPA’s reliance on isolated history is particularly misplaced because that history addresses an older, narrower version of the waiver

⁸ See *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011) (noting that the courts do not “allow[] ambiguous legislative history to muddy clear statutory language”); see also, e.g., *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001) (Scalia, J.) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

⁹ H.R. Rep. No. 95-294, at *23, 233 (Conf. Rep.) (1977).

provision. Third, the 1967 statement by its own terms would apply only to situations where California “no longer complies with the conditions” of an existing waiver, not where EPA makes a policy determination that the waiver should not have been granted in the first instance. EPA fails in SAFE 1 to identify any violations of the conditions imposed in the ACC program waiver.

EPA’s assertion of inherent authority is also contrary to the principle that an agency is “a creature of statute” and has no “constitutional or common law existence or authority, but only those authorities conferred on it by Congress.”¹⁰ Because the CAA does not contain any express grant of revocation authority, and such authority would be contrary to the broad discretion conferred on California to adopt its own standards, EPA lacks any such authority.

Moreover, EPA’s reconsideration of the waiver was untimely and unfairly prejudicial. Over five years had elapsed since EPA had granted the 2013 waiver and nearly a decade since it had granted the previous waiver for California’s GHG standards in 2009. Agency reconsideration of a decision may take place only “if done in a timely fashion.”¹¹ For California and the Section 177 states, the GHG and ZEV programs permitted under the waiver are vitally important, enabling long-term planning and yielding critical emission reductions that will contribute significantly to the states’ abilities to meet their climate goals, and in some cases requirements to reduce statewide GHG emissions mandated by state law, as well as their statutory obligations to attain and maintain the health-based National Ambient Air Quality Standards (NAAQS) for criteria pollutants.

b. Even assuming EPA could revoke the waiver, EPA improperly interpreted and applied Section 209(b) of the CAA.

Section 209(b) requires EPA to grant a request for a waiver of preemption if California “determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards,” unless EPA finds that: (1) California’s determination was “arbitrary and capricious,” (2) California “does not need such state standards to meet compelling and extraordinary conditions,” or (3) California’s “standards and accompanying enforcement procedures are not consistent with Section 202(a) of the [CAA].”¹² The D.C. Circuit has explained that EPA “is not to overturn California’s judgment lightly,” that California must

¹⁰ *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

¹¹ *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.); *see also Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) (agency reconsideration “must occur within a reasonable time”); Daniel Bress, *Administrative Reconsideration*, 91 Va. L. Rev. 1737, 1760 (2005) (“While a few opinions contain language suggesting that agencies should have the power to reconsider regardless of the amount of time that has passed, most courts have adopted the general rule that reconsideration must occur within a short and reasonable time period.”).

¹² As EPA correctly observes in the instant action, “it has long been settled” that the burden of proof in waiver proceedings is on the opponent of the waiver to demonstrate that one of the criteria for a denial has been met. 86 Fed Reg. at 22,423 (“Thus, EPA’s practice has been to defer and not to intrude in policy decisions made by California in adopting standards for protecting the health and welfare of its citizens.”) (citations omitted).

have “the broadest possible discretion in selecting the best means to protect the health of its citizens,” and that the state may “blaze its own trail with a minimum of federal oversight.”¹³

In SAFE 1, EPA abandoned its decades-old interpretation of Section 209(b) as requiring consideration of the need for California’s emissions standards “in the aggregate,” and adopted a pollutant-specific approach to determining the existence of “compelling and extraordinary conditions.” This abrupt change in course cannot be justified, particularly given Congress’s broad grant of authority to California. According to the D.C. Circuit:

Congress had an opportunity to restrict the waiver provision in making the 1977 amendments, and it instead elected to expand California’s flexibility to adopt a complete program of motor vehicle emissions control. Under the 1977 amendments, California need only determine that its standards will be “in the aggregate, at least as protective of public health and welfare than applicable Federal standards,” rather than the “more stringent” standard contained in the 1967 Act. This change originated in the House. The House Committee Report explained: “The Committee amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”¹⁴

EPA has consistently and correctly explained in 1984, 2009, and 2013 that this statutory language does not allow EPA to evaluate on a pollutant-by-pollutant basis whether or not specific pollutants amount to compelling and extraordinary conditions.¹⁵ As EPA noted in 1984, “to find that the ‘compelling and extraordinary conditions’ test should apply to each pollutant would conflict with the amendment to section 209 in 1977 allowing California to select standards ‘in the aggregate’ at least as protective as federal standards.”¹⁶ EPA’s reversal of its 30-year-old interpretation and practice of considering California’s need for its clean cars program as a whole when determining eligibility for a pollutant-specific waiver was legal error.

Likewise, EPA’s alternative conclusion in SAFE 1 that California does not “need” its standards because they will not “meaningfully address” global GHG emissions misses the mark. The U.S. Supreme Court has rejected this argument, explaining that “[w]hile it may be true that regulating

¹³ *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.2d 449, 463 (D.C. Cir. 1998) (citations omitted).

¹⁴ *Motor & Equipment Mfrs., Inc. v EPA*, 627 F.2d 1095, 1109-10 (D.C. Cir. 1979) (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977), U.S. Code Cong. & Admin. News 1977, p. 1380).

¹⁵ 78 Fed. Reg. 58,090, 58,100-01 (Sept. 20, 2013).

¹⁶ 49 Fed. Reg. 18,887, 18,890 (May 3, 1984). This approach makes sense given the recognition that there may be tradeoffs among the pollutants so that it may not be possible for every pollutant to be regulated more stringently than under the federal standards:

By 1977, however, Congress recognized that there were trade-offs in regulating emissions of different pollutants and that more stringent standards for one pollutant could necessitate less stringent standards for another pollutant (H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 [1977]). Requiring the protectiveness of the California standards to be evaluated as a package permitted California “to weigh the degree of health hazards from various pollutants and the degree of emission reduction achievable for various pollutants with various emission control technologies and standards” (H.R. Rep. No. 294, 23 [1977]).

National Research Council, “State and Federal Standards for Mobile-Source Emissions” at 69 (2006).

motor-vehicle emissions will not by itself reverse global warming,” the possibility that a regulatory agency may “take steps to slow or reduce it” is sufficient.¹⁷ The effects of climate change are global, but its causes are often local, requiring collective action to mitigate emissions.

The assertion in SAFE 1 that California’s GHG standards and ZEV regulation would have only a *de minimis* effect on climate change understates the impact that collective action by California and the Section 177 states can have on GHG emissions. Fourteen states have adopted the GHG emission standards established in the ACC program; eleven of these jurisdictions have also adopted the ZEV program, and one is in the process of adopting the ZEV program. Four additional states and the District of Columbia are in the process of adopting the ACC program, including the GHG standards and ZEV regulation. With a total population of over 140 million people, these 19 jurisdictions collectively account for more than 42 percent of the U.S. population, nearly half of the nation’s gross domestic product, and more than 40 percent of the U.S. new car market.¹⁸ Light-duty vehicles are the largest contributor to GHG emissions in these states. Moreover, the GHG standards and ZEV regulation provide economies of scale that demonstrate the viability of electric and other advanced vehicle technologies for future application in the international market, resulting in an even greater global impact.

c. EPA lacked authority under the CAA to withdraw the waiver based on EPCA’s preemption provision.

The narrow grounds on which EPA is authorized to deny a request for a waiver under Section 209(b) do not include preemption under other federal laws. As the D.C. Circuit has explained in the context of Section 209(b), “there is no such thing as a general duty” on an administrative agency to make decisions based on factors other than those Congress expressly or impliedly intended the agency to consider.”¹⁹ It is a basic principle of administrative law that an agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.”²⁰ Even if EPA possesses some implicit authority to revoke a waiver, such revocation could only be based on grounds that would justify denying a waiver in the first instance. Accordingly, because the statute does not authorize EPCA preemption as a basis to deny a waiver, EPA may not base its waiver revocation decision on EPCA preemption.

Congress was aware of EPCA when it amended the CAA waiver provisions in 1977, but it declined to include any provision authorizing EPA to deny or revoke a waiver based on EPCA preemption. This is in sharp contrast to other provisions in the 1977 CAA amendments where Congress expressly cross-referenced EPCA to limit EPA’s authority to issue other types of

¹⁷ *Massachusetts v. EPA*, 549 U.S. 497, 425-26 (2007).

¹⁸ See Ron Jarmin, “The 2020 Census: Our Growing Nation,” U.S. Census Bureau (Apr. 26, 2021), <https://www.census.gov/newsroom/blogs/director/2021/04/2020-census-our-growing-nation.html>; Nat’l Auto. Dealers Ass’n, “Auto Retailing: State by State” (visited July 6, 2021), <https://www.nada.org/statedata/>.

¹⁹ *Motor & Equipment Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1116 (D.C. Cir. 1979); *Motor & Equipment Mfrs. Ass’n v. EPA*, 142 F.3d 449, 467 (D.C. Cir. 1998) (same).

²⁰ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

waivers.²¹ Indeed, EPA has previously acknowledged that the issue of the impact of a California waiver on EPCA, or vice versa, is outside the scope of its permissible review under the CAA.²² EPA offered no reasonable explanation in SAFE 1 for its departure from this practice.

The Supreme Court has explained how to evaluate an agency's authority to preempt state law: "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."²³ In SAFE 1, EPA had no statutory authority to decline to issue (or to revoke) a CAA waiver on the basis of claimed preemption under EPCA, and the "nature and scope of the authority granted by Congress" to EPA demonstrates that EPA lacked such authority.

Moreover, NHTSA is now proposing to fully repeal the regulatory text and appendices promulgated in SAFE 1, and withdraw the interpretative statements made by NHTSA in the preamble, due to "significant concerns that the regulations finalized in the SAFE I Rule likely exceeded the Agency's rulemaking authority under EPCA."²⁴ In any event and regardless of whether NHTSA finalizes this proposal, it was inappropriate for EPA to reconsider and withdraw California's waiver based on purported EPCA preemption.

IV. Section 177 does not limit the ability of states to adopt California's GHG standards.

a. EPA lacked authority to provide an interpretation of Section 177 in the SAFE 1 proceeding and cannot enforce that interpretation.

Enacted as part of the 1977 Amendments to the CAA, Section 177 provides states with authority to control motor vehicle emissions, which had previously been reserved to the federal government and California. Section 177 is a critically important tool that provides states with enhanced flexibility and authority to deal with state air pollution challenges. It allows states to

²¹ For example, the 1977 amendments authorized automobile manufacturers to request a waiver of emissions standards if EPA made certain findings, including that the applicant "has established that effective control technology, processes, operating methods, or other alternatives are not available . . . to achieve compliance prior to the effective date of such standards, taking into consideration costs, driveability, and fuel economy." 1977 CAA Amendments § 201. The same section contained a separate waiver provision relating to innovative technology and NOx standards, which could only be granted if EPA made certain findings, including that "the technology or system has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act." *Id.* (currently codified at 42 U.S.C. § 7521(b)(3)(C)); *see also id.* (additional provision requiring that a waiver "will result in significant fuel savings at least equal to the fuel economy standard applicable in each year under the Energy Policy and Conservation Act").

²² 78 Fed. Reg. 2,112, 2,145 (Jan. 9, 2013) ("Evaluation of whether California's GHG standards are preempted, either explicitly or implicitly, under EPCA, is not among the criteria listed under section 209(b)."); 74 Fed. Reg. 32,744, 32,783 (July 8, 2009) ("EPA may only deny waiver requests based on the criteria in section 209(b), and inconsistency with EPCA is not one of those criteria."); 73 Fed. Reg. 12,156, 12,159 & n.19 (Mar. 6, 2008).

²³ *City of New York v. FCC*, 486 U.S. 57, 66 (1988) (citation omitted).

²⁴ 86 Fed. Reg. 25,980 (May 12, 2021).

“promulgate regulations requiring vehicles sold in their state to be in compliance with California’s emission standards or to ‘piggyback’ onto California’s preemption exemption.”²⁵

Unlike much of the CAA that authorizes EPA to oversee state implementation, Section 177 is carefully drawn to empower states to decide for themselves whether to adopt California’s standards. EPA does not need to approve state adoption of California’s standards, EPA cannot veto state adoption of California’s standards, and the CAA does not grant EPA authority to implement or impose additional conditions on state adoption of California’s standards. As the Second Circuit has explained, “Section 177 charges the EPA with a single, narrow responsibility to issue ‘regulations’ in order to define the commencement of a model year under [Section] 177” for purposes of the two-year lead time requirement.²⁶ The states’ authority to adopt California’s standards has existed for more than 40 years and has been a key component of Northeast state air pollution control programs, in some cases for decades, enabling states to address transportation sector emissions more effectively. Moreover, EPA’s interpretation is entitled to little or no deference.²⁷

b. EPA incorrectly interpreted Section 177 as limiting the ability of states to adopt California’s GHG emissions standards.

1. The text of Section 177 does not limit state emissions regulation to criteria pollutants.

The text of Section 177 contains no limitation on the types of pollutants for which motor vehicle emission standards are authorized. Rather, it permits regulation of any automotive emissions that are regulated under Title II of the CAA (“Emission Standards for Moving Sources”). As codified, Section 177 provides:

§ 7507. New motor vehicle emission standards in nonattainment areas

Notwithstanding section 7543(a) of this title, any State with plan provisions approved under this part [Title I, Part D (Plan Requirements for Nonattainment Areas)] may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

(1) such standards are identical to the California standards for which a waiver has been granted for such model year, and

(2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

²⁵ H.R. Rep. No. 294, 309 (1977).

²⁶ *Motor Vehicle Mfrs. Ass’n v. NYSDEC*, 17 F.3d 521, 535 (2d Cir. 1994).

²⁷ *United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001).

While Congress limited state authority under Section 177 to places with plan provisions approved under Part D, Congress did not impose any limitations on the type of pollutants subject to regulation. The plain language of Section 177 clearly allows for such states to adopt motor vehicle regulations promulgated by California, so long as such standards are identical to California's and adopted with sufficient lead-time. Nothing in the text of Section 177 suggests that states are barred from adopting California's GHG standards.

Moreover, Congress employed the same language in Section 177 that it utilized to authorize California's regulation of motor vehicle emissions in Section 209(b)(1) ("standards. . . for the control of emissions from new motor vehicles or new motor vehicle engines"), providing a clear indication that it intended co-extensive grants of authority to California and the Section 177 states.²⁸ These parallel grants of state authority to regulate motor vehicle emissions under Sections 209(b) and 177 are in turn governed by Section 202 of the CAA. In that regard, whether GHGs may be regulated under Section 202 has been settled since the Supreme Court's decision in *Massachusetts v. EPA*.²⁹ Thus, in SAFE 1, in addition to ignoring the plain text of Section 177, EPA ignored Section 177's operation against the backdrop of Section 209, and the interplay of both sections with Section 202, and incorrectly concluded that Section 177 does not authorize state regulation of GHGs.³⁰

2. *The title and location of Section 177 refer to geographic areas combatting pollution, not pollutants.*

Nor does the title of Section 177 ("New motor vehicle emission standards in nonattainment areas") support EPA's narrow interpretation in SAFE 1 of state authority to adopt GHG emission standards. The title's reference to "standards in nonattainment areas" does not operate as a limitation on the types of pollutants that states may regulate, but rather as a limitation on state geographic areas for which the adoption of California motor vehicle emission standards is authorized in the first instance. Under Section 177, states with an approved state implementation plan to achieve or maintain a NAAQS are eligible to adopt California's standards. This includes states that are currently in nonattainment, states that were, but are no longer in nonattainment, and states in the Ozone Transport Region established under Section 184 of the CAA. The abbreviated reference to "nonattainment areas" in the title merely refers to states that are, have

²⁸ Where Congress has intended to limit the types of pollutants subject to particular regulatory requirements, it has done so. *See, e.g.*, 42 U.S.C. § 7412 ("hazardous air pollutants"); 42 U.S.C. § 7476 ("other pollutants"). In contrast to Section 177, in other sections of the CAA that discuss nonattainment, Congress has specifically addressed certain pollutants. *See* 42 U.S.C. § 7407 ("Air quality control regions") (discussing ozone, carbon monoxide, PM-10, lead, and regional haze).

²⁹ 549 U.S. 497 (2007).

³⁰ This textual reading is consistent with the case law interpreting Section 177 on this issue. In 1994, the Second Circuit rejected challenges to New York's adoption of California's standards requiring the sale of certain numbers of zero emission vehicles. *Motor Vehicle Mfrs. Ass'n v. NYSDEC*, 17 F.3d 521, 536-37 (2d Cir. 1994). More recently, another court observed that Vermont and other Section 177 states permissibly adopted California's GHG emission standards pursuant to Section 177. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 302 & n.5, 338 (D. Vt. 2007).

been, or are treated as if they are in nonattainment. In SAFE 1, EPA appears to have read “nonattainment pollutants” into a statutory title that discusses “nonattainment areas.”³¹

Likewise, the location of Section 177 in Title I, Part D, rather than in Title II, is not dispositive of the types of pollutants states may regulate under Section 177. Rather, the placement of the section bears on which states may regulate any pollutant from motor vehicles in their state. While the location of a section within the statutory framework may provide some context as to congressional intent, courts are bound to take a broader view in interpreting statutes.³²

In fact, a similar waiver provision located in Section 209(e) authorizes states with approved Title I, Part D plan provisions to “adopt and enforce standards relating to control of emissions from nonroad vehicles or engines.” EPA does not attempt in SAFE 1 to reconcile its interpretation of Section 177 authority with the Section 209(e) waiver provision. EPA might contend that Section 209 would permit regulation of GHGs because it is located in Title II (“Emissions Standards for Moving Sources”), but this would lead to the absurd result that states could regulate GHG emissions from nonroad vehicles, but not light-duty vehicles, a result that Congress could not have intended.

The placement of Section 177 in Part D of Title I is unrelated to limitations on the types of pollutants that states may regulate. Congress simply intended to confer state authority to regulate motor vehicle emissions on states with plans approved under Part D. Thus, it is reasonable and entirely appropriate that Congress would choose to locate such authority in the Title I provisions relating to state nonattainment plans.

3. *The SAFE 1 rule may lead to the creation of a “third car” in violation of Section 177.*

By prohibiting states from adopting California’s GHG standards, EPA’s interpretation of Section 177 in SAFE 1 could have the effect of creating a “third car,” an outcome expressly prohibited by Section 177. In the 1990 amendments to the CAA, Congress added new language to Section 177 that reinforces the “identity” requirement and ensures that states cannot adopt or enforce California’s standards in a way that would result in more than “two types of cars in this country.”³³ The so-called “third-vehicle” prohibition provides:

Nothing in [Section 177 or in subchapter II (emissions standards for moving sources)] shall be construed as authorizing any such State. . . to take any action of any kind to

³¹ Even if EPA’s reading of the title of Section 177 was somehow correct, it is a well-established principle of statutory construction that the titles and headings of a statute cannot override the plain meaning of statutory text. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 483 (2001) (citing *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947) (“Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.”)).

³² *Food and Drug Admin. v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (a court must interpret a statute as a “symmetrical and coherent regulatory scheme and fit, if possible, all parts into a harmonious whole”).

³³ *Am. Auto. Mfrs. Ass’n v. Comm’r, Mass. Dep’t of Env’tl. Prot.*, 998 F. Supp. 10, 13 (D. Mass. 1997), *aff’d sub nom. Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Env’tl. Prot.*, 208 F.3d 1 (1st Cir. 2000) (“In short, there can only be two types of cars in this country: ‘California’ cars or ‘federal’ cars.”).

create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a “third vehicle”) or otherwise create such a “third vehicle.”

If California is authorized to adopt GHG standards under Section 209(b), but Section 177 prohibits states from adopting California GHG standards, then there exists the potential for three sets of cars: (1) those regulated under the federal standards; (2) those regulated under the California standards; and (3) those regulated under Section 177 state standards for non-GHG pollutants. This would have the absurd result of preventing Section 177 states from adopting any of the California standards, an outcome that would be patently contrary to congressional intent.³⁴

c. California’s mobile source emission standards adopted by Section 177 states have both criteria emission and GHG emission benefits and purposes.

Even if EPA could somehow enforce the novel interpretation proffered in SAFE 1 that Section 177 limits states to adopting California standards designed to control criteria pollutants, EPA still could not preclude state regulation of GHG emissions because of the established link between higher atmospheric temperatures caused by GHG emissions and the formation of ozone. Decades of technical analysis, including EPA studies, show that a reduction in GHGs has a beneficial effect on addressing NAAQS nonattainment.

In SAFE 1, EPA relied on a limited reading of CARB’s ACC program waiver request as suggesting that California only adopted the ZEV program to achieve GHG emissions reductions. In doing so, EPA unreasonably departed from its own prior understanding that GHG standards should be seen as a strategy to control criteria pollutants to address NAAQS nonattainment. EPA has previously asserted that “[c]limate change is expected to increase regional ozone pollution, with associated risks in respiratory illnesses and premature death.”³⁵ EPA has also acknowledged that while ozone, for example, “is a local or regional air pollution problem, the impacts of global climate change can nevertheless exacerbate this local air pollution problem.”³⁶ EPA has further recognized that “[c]limate change is expected to exacerbate tropospheric ozone levels,” and wildfires, which “can also contribute to health problems through increased generation of particulate matter.”³⁷ Indeed, EPA has acknowledged that California’s GHG standards are appropriately designed and intended to reduce levels of criteria pollutants.³⁸

³⁴ See generally, e.g., *Clinton v. City of N.Y.*, 524 U.S. 417, 429 (1998) (rejecting the “Government’s new-found reading” of a statutory provision that “would produce an absurd and unjust result which Congress could not have intended.”) (citation omitted).

³⁵ 74 Fed. Reg. 66,525 (“There is now consistent evidence from models and observations that 21st century climate change will worsen summertime surface ozone in polluted regions of North America compared to a future with no climate change.”).

³⁶ 74 Fed. Reg. at 32,763.

³⁷ 73 Fed. Reg. at 12,168.

³⁸ *Id.* (“There is a logical link between the local air pollution problem of ozone and California’s desire to reduce GHGs as one way to address the adverse impact that climate change may have on local ozone conditions. Given the clear deference that Congress intended to provide California on the mechanisms it chooses to use to address its air pollution problems, it would be appropriate to consider its GHG standards as designed in part to help address a local air pollution problem . . .”).

In any case, California specifically designed its GHG standards, in part, to address nonattainment of ambient air quality standards for criteria pollutants. California has frequently referenced the science to support GHG standards as a necessary method for controlling ozone and particulate matter pollution and has recognized that its ability to reduce nonattainment days for ozone and wildfire-caused particulate matter depends on its ability to reduce GHG emissions.³⁹ Moreover, California's and the Section 177 states' ZEV regulations have a direct impact on air quality by lowering or altogether eliminating tailpipe emissions of smog-forming pollutants and particulate matter. Accordingly, EPA's assertion in SAFE 1 that GHG standards are not designed to address NAAQS nonattainment is incorrect and cannot be a basis to preclude state adoption of GHG standards under Section 177.

V. Conclusion

Climate change is the great challenge of our time. The transportation sector is the largest source of climate-warming GHG emissions in the nation and a major source of harmful air pollution. NESCAUM's member states have long been at the vanguard of national efforts to combat climate change and have made ambitious commitments to substantially reduce GHG emissions in the near term. California's and other states' ability to set GHG and ZEV standards under the CAA is the single most important tool the states have to mitigate GHG emissions from transportation and a critical component of their air quality and climate action strategies.

For all of these reasons, NESCAUM strongly supports EPA's reconsideration and prompt rescission of the agency's unlawful withdrawal of the ACC program waiver, and its erroneous pronouncements purporting to limit the authority of states to adopt California's GHG emissions standards under Section 177 of the CAA.

Sincerely,



Paul J. Miller
Executive Director

cc: NESCAUM Directors
Lynne Hamjian, Cynthia Greene, EPA R1
Richard Ruvo, EPA R2

³⁹ See, e.g., "California Air Resources Board, Reconsideration of Previous Denial of a Waiver of Preemption," Docket ID No. EPA-HQ-OAR-2006-0173-9006 (Apr 6, 2009) ("[C]limate change will likely slow progress toward attainment of health based air quality standards and increase pollution control costs by accentuating the potential for high ozone and high particulate days . . ."); "EPA Public Comment Hearing Regarding Waiver Request for California's Advanced Clean Car Program," Docket ID No. EPA-HQ-AOR-2012-0562 at 17-19 (Sep 19, 2012) (addressing the exacerbating effect of GHGs on ozone and particulate matter pollution); "Public Hearing, In the Matter of California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption," Docket ID No. EPA-HQ-OAR-2006-0173 at 27 (May 30, 2007) ("Even at the low to mid-range projections for global warming temperature increases California faces dozens of extra unhealthy days conducive to ozone formation.").