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Climate Regulation

Practitioner Insights: California, Trump Prepare for Battle Over Fuel Efficiency Standards

By TIMOTHY D. CREMIN

California and the Trump administration are gearing up for a battle to repeal existing regulations that significantly increase vehicle fuel efficiency standards by 2025. This battle involves many of the central disputes in today's political environment: reducing government regulations, climate change, industry versus environmentalists, the extent of executive, legislative and judicial power and states' rights.

The battle could prove a key test of the Trump administration's plans to roll back other environmental protection regulations. This also gives President Donald Trump an opportunity to make good on his vow to eliminate regulations viewed as burdensome by industry, one of his campaign promises. However, California, which has set its own vehicle emissions standards for nearly 60 years, will certainly press its rights as it makes an aggressive push to reduce its greenhouse gas emissions.

The undoing of the regulations will not be an easy process. It will involve a public and potentially lengthy administrative process and inevitably end up in court. In order to understand where this is heading, one needs to understand the origin of the fuel efficiency standards, where we stand today, and the process for and implications of the proposed change.

California's History of Regulation The story starts in the 1950s in smog-ridden California. The pollution levels in the state were extremely high and visible on almost a daily basis as a brown haze. California legislators and regulators stepped in to address the public health issues by first regulating emissions from industrial uses. But

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they quickly learned that vehicle exhaust was the number one cause of pollution. In 1959, California enacted legislation requiring the state Department of Public Health to establish air quality standards and controls for motor vehicle emissions. In 1966, California became the first state in the nation to adopt auto tailpipe emission standards. In 1967, the federal government enacted the Federal Air Quality Act (the predecessor to the Clean Air Act). It allowed California a waiver to set its own vehicle emissions standards based on its existing regulations and its unique and severe air quality problems.

This waiver was included as part of the Clean Air Act, which preempts all states except California from regulating vehicle emissions. Under the Clean Air Act, the Environmental Protection Agency administrator shall grant the waiver if the California standards are "at least as protective of public health and welfare as applicable federal standards." The waiver shall only be denied if: (1) the state's determination of health protection is arbitrary and capricious; (2) the standards are not needed to meet "compelling and extraordinary conditions;" or (3) the standards are inconsistent with Clean Air Act provisions related to technical feasibility and manufacturer lead time for compliance. The Clean Air Act also allows other states to adopt California standards, which 12 other states have done. Because of this and California's status as the largest automobile market in the country, the California standards have a huge effect on the vehicle manufacturing industry.

The EPA has granted California more than 50 waivers since 1967. The first challenge to a waiver request was during the Bush administration, which serves as a precursor to the current battle. In 2005, California requested a waiver to regulate vehicle emissions to reduce greenhouse gas emissions. This was the first time California standards were based on combating climate change. The EPA delayed action on the waiver request pending the outcome of the U.S. Supreme Court case addressing whether the Clean Air Act granted authority to regulate greenhouse gas emissions (*Massachusetts v. EPA*). After the U.S. Supreme Court ruled in 2008 that the EPA could regulate greenhouse gas emissions under the Clean Air Act as an air pollutant that endangers public health and welfare, the EPA denied California's waiver request, finding that the request did not meet the "compelling and extraordinary conditions" criteria of the Clean Air Act. This was the first time the EPA de-

nied a formal waiver request outright. California sued EPA over its waiver denial, but the case was never decided because the Obama administration reversed the federal government's position on the waiver. However, the fight over regulation of vehicle emissions to address climate change had begun.

Obama Increases Vehicle Fuel Efficiency In 2009, as part of the auto industry bailout, the Obama administration adopted new rules requiring a fleet fuel efficiency standard of 35.5 miles per gallon by model year 2016, a big jump from the 2009 model year requirement of 25 mpg. These standards were roughly equivalent to the California standards and came close to establishing one nationwide standard. The California standards were adopted as a major component of the state's ambitious climate change program, AB 32, which set a target for reducing statewide greenhouse gas emissions to 1990 levels by 2020. Automobile emissions are the leading source of greenhouse gas emissions in the state, so vehicle fuel efficiency is a major component of its efforts to reduce the effects of climate change.

Fast forward to the regulations involved in the present dispute. In 2012, the EPA adopted new stricter fuel efficiency standards, which would nearly double the average fuel economy of new cars and trucks to 54.5 mpg by 2025. These standards were developed in coordination with California regulators and were mostly focused on reducing greenhouse gas emissions. The standards were generally consistent with California's standards under its Advanced Clean Cars program, a major component of its climate change plan. Thirteen major automakers, including General Motors, Ford and Chrysler, endorsed the new standards after a lengthy negotiation that included a key concession to the automakers. The rule includes a mid-term review to assess the progress made toward achieving the 54.5 mpg requirement, something the Trump administration could reconsider. The standard could be altered if the manufacturers establish difficulties in meeting the new requirements as part of the review.

Trump Vows to Ease Regulations Trump's election in 2016 changed the existing dynamic regarding fuel efficiency regulations. His policy platform included pledges to reduce overall government regulations to decrease burdens and costs on businesses, dismantle environmental regulations relating to climate change and greenhouse gases and rollback the so-called "war against fossil fuels." The repeal of the current fuel economy standards checks all these boxes. It is one of the most significant government regulations of the auto industry. The industry argues that the regulations unfairly burden its business by increasing its costs and forcing the creation of cars that are inconsistent with market demand. Presently, customer demand is for larger, less fuel efficient vehicles, which also are the most profitable for auto companies. The most recent increases in fuel efficiency are targeted at addressing climate change by reducing the use of fossil fuel and the resulting greenhouse gas emissions. This underlying basis for the regulations is inconsistent with the federal government's current focus on eliminating environmental regulations that combat climate change. The vehicle regulations fall into the same category as the clean power measures that the Trump administration has pledged to reduce (for example, ending the "war on coal"). The new EPA administrator, Scott Pruitt, has

echoed these points in his confirmation hearing and public pronouncements on the repeal of vehicle emission regulations.

On the other hand, California is primed for a fight against the proposed repeal. The California regulatory agency in charge of establishing the state's fuel efficiency standards is the California Air Resources Board (CARB). In late March, CARB unanimously voted to affirm its existing higher standards for 2025 under an EPA waiver in a public rebuke to Trump's plan. Higher vehicle fuel efficiency standards are critical to California's most recent ramping up of its state greenhouse gas reduction target to address climate change. In 2016, the state passed SB 32, which increased its greenhouse gas reduction target to 40 percent below 1990 levels by 2030. This new target will require California to reduce its greenhouse gas emissions by approximately five times as much from 2020 to 2030 as it achieved from 2006 to 2016. The vehicle fuel efficiency standards are a key component to meeting this ambitious reduction target. A critical program to meeting this fuel efficiency standard is increasing the production of zero emission cars. California received a waiver from the EPA in 2013 to create its zero-emissions vehicle (ZEV) program. These zero-emission vehicles will play a large part in increasing fleet average miles per gallon.

California also is using a states' rights argument to support its position. Taking a page out of the red states' playbook used during the Obama administration, California will look to the courts to enforce the rights reserved to it under the Clean Air Act waiver provisions. Other states seem ready to join California in any battle. New York has already made public statements in support of California's standards and the filing of legal action.

All Branches of Government in Play So, how will this process play out? One thing is clear—the existing fuel efficiency standards rules cannot be changed quickly and simply by executive order. So the changes will play out through four related paths: (1) EPA repeal and replacement of existing standards, (2) EPA action on California's existing waivers and likely future waiver requests, (3) court challenges to any EPA action and (4) possible amendment to the Clean Air Act waiver provisions by Congress. All three branches of the federal government, as well as the state governments, will be involved in the outcome.

Trump and Pruitt have stated that they want to repeal the existing regulations and revoke the California waiver. This will take a lengthy public process in compliance with administrative law requirements for rule-making. The repeal of the regulations will require the same notice, public review and hearing process as the adoption of the regulations. The repeal also will have to meet the same standards and requirements for the protection of public health required under the Clean Air Act. So a repeal will have to rebut the existing record and public health findings that supported adoption of the regulations.

Replacement standards will likely have to accompany any repeal. A repeal without the adoption of replacement regulations will likely violate federal law. The absence of any fuel efficiency standards for cars would be inconsistent with the Clean Air Act mandates regarding protection of public health through regulation of vehicle emissions. Repeal without replacement also would con-

flict with the Energy Independence and Security Act of 2007. Under that law, the Department of Transportation is required to set corporate average fuel economy (CAFE) standards for new cars and trucks. The law directs CAFE levels to rise on a fixed schedule through 2020 and then be set at a “maximum feasible level” after that date. An argument that the repeal will result in the automatic re-implementation of the 2009 standards will likely fail. First, those standards only applied to vehicles through 2016. Second, the evidence supporting the 2016 standard of 35.5 mpg would have to be updated to address current environmental conditions and public health and welfare impacts, since the original rules were adopted based on pre-2009 information, which is more than seven years old. The bottom line is that the repeal process will be lengthy and contentious.

Any repeal of the federal standards will likely be accompanied by a process to revoke the California waiver and a potential application by California for a new waiver. There are no existing regulations that address revocation of the waiver. So, how the process will proceed is not exactly known. The process will reconsider the granting of the original waiver. It is anticipated that this process will be governed by the waiver standards described above. The EPA could look at the process it followed in 2008, the only time a waiver request by California was denied. Under the Clean Air Act, any denial needs to be based on one of three factors: (1) California’s determination of protection of public health supporting the waiver was arbitrary and capricious, (2) the California standards do not meet “compelling and extraordinary conditions” or (3) the California standards are inconsistent with technical feasibility and lead time for manufacturers to comply. The EPA will need to establish a factual basis to deny the waiver on one of these grounds that will have to refute the evidence presented by California in support of the waiver.

No matter what action the EPA takes, it will be challenged in court. California has already said it will sue over any attempt to revoke or deny a waiver, and other states will join the lawsuit. The courts have heard a number of state challenges to federal agency administrative actions in recent years, but it is difficult to predict any outcome here. Even if the EPA revokes the existing regulations or California’s waiver, the fate of those measures will be determined by the courts, which will introduce delay and uncertainty as the litigation process plays out.

A little discussed potential outcome is that Congress could amend the Clean Air Act to eliminate the waiver for California. As discussed above, the waiver was originally enacted because California vehicle fuel efficiency standards were already in place when the federal government enacted its regulatory regime. But what Congress gives, it can take away. Certainly, there is a basis to support establishing one nationwide vehicle effi-

ciency standard. The Clean Air Act preempts all other states from enacting regulations. In addition, the basis for allowing California to have its own standards may have changed over the last 50 years. This action presents both political and legal issues. Whether there is the political will to amend the Clean Air Act is unknown. But if the legislative authority to grant the waiver is removed, it is known that California will challenge this action in court.

Environment Versus States’ Rights Versus Market What does this all mean for the various stakeholders involved? For the automobile industry, it means possible increased profits by allowing it to focus on profitable larger cars and trucks, which have lower fuel efficiency. It potentially would also lessen their investment in alternative fuel or electric cars, which have a lower market demand and are more costly to manufacture and less profitable. Some in the auto industry also argue that there are technical obstacles to developing cars to meet the standards, which increase research and development costs. Overall, the reduction in regulatory requirements would provide the industry flexibility in conducting its business.

For the current administration, it means an opportunity to take concrete actions consistent with its campaign promises to reduce government regulations, especially environmental regulations. It would demonstrate that the administration is opposed to regulations to combat climate change. The action fits the narrative of helping important American industries, such as the auto manufacturers. These positions also are strongly supported by other industries, such as fossil fuel producers.

For California, it is one of the higher-profile battles with the Trump administration over differing policy priorities. Greenhouse gas reduction and lower vehicle emissions to combat climate change are cornerstones of California’s current environmental policy. It will be important for California to assert its rights to continue to regulate vehicle emissions to meet its aggressive greenhouse gas reduction goals to reduce the public health threats of climate change. It will also provide an opportunity to reinforce the regulation of greenhouse gases under the Clean Air Act. This battle also will be one of a series of state lawsuits challenging rollbacks of other federal environmental protection regulations. California is prepared to fight repeal of the Clean Power Plan regulations (including energy efficiency measures) and elimination of restrictions on oil drilling along the coast.

There is a lot at stake. The only thing that is certain is that the Trump administration and California are ready to fight over this issue, which involves their conflicting policy perspectives on environmental regulations, climate change and vehicle emission reductions.