
ENVIRONMENTAL LAW & PROPERTY RIGHTS

EPA REGULATION OF FUEL ECONOMY: CONGRESSIONAL INTENT OR CLIMATE COUP?¹

By Marlo Lewis*

Note from the Editor:

This paper assesses EPA's rule setting standards for motor vehicle greenhouse gas emissions. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the EPA's new regulation. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- EPA, National Highway Traffic Safety Administration, Final Tailpipe Rule: <http://www.globalwarming.org/wp-content/uploads/2011/08/Final-Tailpipe-Rule.pdf>
- EPA, National Highway Traffic Safety Administration & California Air Resources Board, Interim Joint Technical Assessment Report: Light Duty Vehicle Greenhouse Gas Emission Standards and Fuel Economy Standards for Model Years 2017-2025: <http://www.epa.gov/oms/climate/regulations/ldv-ghg-tar.pdf>
- Letter from Rep. Darrell E. Issa to EPA Administrator Lisa Jackson (Sept. 30, 2011): <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/09/30/Health-Environment-Science/Graphics/oversight930.pdf>
- Letter from EPA Administrator Lisa Jackson to Sen. Jay Rockefeller (Feb. 22, 2010): http://epa.gov/oar/pdfs/lpj_letter.pdf
- Letter from Dave McCurdy, President and CEO, Alliance of Automobile Manufacturers, to Sens. Nancy Pelosi, Harry Reid, John Boehner, and Mitch McConnell (Mar. 17, 2010): <http://www.openmarket.org/wp-content/uploads/2010/06/auto-alliance-letter-to-house-and-senate-leaders-march-17-2010.pdf>
- Sen. Lisa Murkowski, opening statement, debate on S.J. Res 26: <http://www.gpo.gov/fdsys/pkg/CREC-2010-06-10/pdf/CREC-2010-06-10-pt1-PgS4789.pdf#page=1>

In May 2010, the Environmental Protection Agency (EPA) issued a rule setting standards for motor vehicle greenhouse gas emissions. By creating these standards, EPA is implicitly regulating fuel economy. Because the rule also obligates EPA to regulate greenhouse gases from stationary sources, the agency is now determining national policy on climate change. EPA has asserted that it is simply implementing the Clean Air Act. But the Clean Air Act was neither designed nor intended to regulate greenhouse gases, and it provides no authority to regulate fuel economy.

Last year, Congress declined to give EPA explicit authority to regulate greenhouse gases when Senate leaders abandoned cap-and-trade legislation. A key selling point for the Waxman-Markey cap-and-trade bill was that it would exempt greenhouse gases from regulation under several Clean Air Act programs.² If instead of introducing a cap-and-trade bill, Reps. Waxman and Markey had introduced legislation authorizing EPA to do exactly what it is doing now—regulate greenhouse gases through the Clean Air Act as it sees fit—the bill would have been rejected. The notion that Congress gave EPA such authority in 1970, almost two decades before global warming emerged as a public concern, and five years before Congress enacted the first fuel economy statute, defies common sense.

* Marlo Lewis, Ph.D., is a senior fellow at the Competitive Enterprise Institute's Center for Energy and Environment.

I. EPA Is Regulating Fuel Economy

Motor vehicle greenhouse gas emission standards implicitly regulate fuel economy. EPA and the National Highway Traffic Safety Administration (NHTSA) confirm this—albeit not in so many words—in their joint May 2010 greenhouse gas/fuel economy Tailpipe Rule. As the agencies acknowledge, no commercially-proven technologies exist to filter out or capture carbon dioxide (CO₂) emissions from fossil fuel-powered vehicles. Consequently, the only way to decrease grams of CO₂ per mile is to decrease fuel consumption per mile, i.e., increase fuel economy.

Although the Tailpipe Rule also targets other greenhouse gas emissions from new motor vehicles, such as hydrofluorocarbons (HFCs) from vehicle air conditioning systems, CO₂ constitutes 94.9% of vehicular greenhouse gas emissions, and “there is a single pool of technologies . . . that reduce fuel consumption and thereby reduce CO₂ emissions as well.”³

That EPA is regulating fuel economy is also evident from EPA, NHTSA, and the California Air Resources Board's (CARB's) *Interim Joint Technical Assessment Report*, the framework document for the Administration's current plan to increase average fuel economy to 54.5 miles per gallon by 2025. The document proposed a range of fuel economy targets from 47 mpg to 62 mpg. The mpg targets are simple reciprocals of four CO₂ reduction scenarios: “Four scenarios of future stringency are analyzed for model years 2020 and 2025, starting

with a 250 grams/mile estimated fleet-wide level in MY 2016 and lowering CO₂ scenario targets at the rate of 3% per year, 4% per year, 5% per year, and 6% per year.⁴

The 54.5 mpg target represents a negotiated compromise between the 4% per year (51 mpg) and 5% per year (56 mpg) CO₂ reduction scenarios.⁵

II. Clean Air Act Does Not Provide the Authority to Regulate Fuel Economy

Does section 202 of the Clean Air Act, the provision through which EPA is promulgating motor vehicle greenhouse gas emission standards, say anything about fuel economy? It did not in 1970, but as amended in 1977, it does.

Section 202(b)(4)(C) authorizes EPA to grant an automaker a four-year waiver from nitrogen oxides (NO_x) emission control standards if the waiver is necessary to develop innovative power train or emission control systems that have “a potential for long-term air quality benefit or the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy Conservation Act after the waiver expires.” No waiver may apply to more than 5% of a manufacturer’s production or more than 50,000 vehicles, or engines, whichever is greater.

So when Congress amended the Clean Air Act in 1977, it spoke directly to the issue of fuel economy in section 202, and what it granted EPA was a limited authority to grant temporary waivers from NO_x emission standards. Congress did not, in addition, authorize EPA to develop or adopt fuel economy standards.

Congress, through separate statutes—the 1975 Energy Policy Conservation Act (EPCA) and 2007 Energy Independence and Security Act (EISA)—gave NHTSA sole responsibility to prescribe fuel economy standards.⁶ The Secretary of Transportation is to consult with the EPA Administrator before prescribing fuel economy standards,⁷ and EPA is to calculate the fuel economy of vehicles and test automakers’ compliance with fuel economy standards.⁸ But prescribing fuel economy standards is NHTSA’s responsibility, not EPA’s.

III. The Administration’s Greenhouse Protection Strategy

Because EPA regulation of fuel economy exceeds the statutory scheme Congress created, EPA’s actions are vulnerable to both legal challenge and legislative repeal. But that is the case only if the auto industry has the will to fight. Therefore, obtaining industry buy-in has become a key objective of the Obama Administration. Using CARB as the heavy, EPA endangered the distressed auto industry’s very survival. Then EPA offered to protect auto makers from this threat if—but only if—they pledged not to challenge EPA and CARB’s new greenhouse gas/fuel economy regulations.

Although the details of the negotiations may never be known, the basic terms and outcome are clear enough. In February 2009, EPA Administrator Lisa Jackson commenced a rulemaking⁹ to reconsider Bush EPA Administrator Stephen Johnson’s denial¹⁰ of California’s request for a waiver to establish greenhouse gas motor vehicle emission standards. Because the waiver would also allow other states to adopt the California program, because states would be implicitly regulating fuel economy, and because automakers would have to reshuffle the

mix of vehicles delivered for sale in each “California” state to achieve the same average fuel economy, Jackson’s proceeding could have balkanized the U.S. auto market.

The National Automobile Dealers Association clearly explained this possibility in a January 2009 report titled *Patchwork Proven*.¹¹ Consumer preferences differ from state to state, so the same automaker typically sells a different mix of vehicles in each state. Only by sheer improbable accident would the average fuel economy (or grams CO₂-equivalent/mile) of an automaker’s vehicles delivered for sale in one state be the same as that in another state. But if EPA granted the California waiver, each automaker would have to achieve the same average fuel economy (grams CO₂-equivalent/mile) in every state opting into the California program. If all fifty states were to adopt the program, each automaker would have to manage fifty separate fleets, reshuffling the mix in each state regardless of consumer preference. This would produce a chaotic situation.

This possibility gave EPA and CARB the advantage in closed-door negotiations with the auto industry over EPA’s greenhouse gas/fuel economy regulations. As part of the “Historic Agreement”¹² brokered by Obama Environment Czar Carol Browner, California and other states agreed to consider compliance with EPA’s greenhouse gas emission standards as compliance with their own.¹³ But in return, auto manufacturers and their trade associations had to support both the Tailpipe Rule and the California waiver.¹⁴ In a September 30, 2011 letter to EPA administrator Lisa Jackson, House Oversight and Government Reform Committee Chairman Darrell Issa summarized the terms for auto makers under the “Historic Agreement”:

In addition to the extreme secrecy, participating automobile manufacturers, as well as their representative trade associations, waived their legal rights to:

1. Pursue litigation challenging California’s regulation of GHG emissions, including litigation concerning preemption under the Energy Policy and Conservation Act (EPCA);
2. Contest any final decision by EPA granting California’s waiver request; and
3. Contest any final fuel economy regulations issued by either EPA or NHTSA.¹⁵

IV. The Disappearing, Reappearing Patchwork

In January 2010, Alaska Senator Lisa Murkowski sponsored a Congressional Review Act resolution of disapproval (S. J. Res. 26)¹⁶ to nullify the legal force and effect of EPA’s Endangerment Rule.¹⁷ The Endangerment Rule is the trigger for the Tailpipe Rule and the prerequisite for all other EPA greenhouse gas regulations. Sen. Murkowski is neither a climate skeptic nor an opponent of greenhouse gas regulation per se. But in her view, “politically accountable members of the House and Senate, not unelected bureaucrats, must develop our nation’s energy and climate policies.”¹⁸

In a February 2010 letter to West Virginia Sen. Jay Rockefeller, EPA Administrator Lisa Jackson warned that enactment of S. J. Res. 26, by overturning the Endangerment Rule on which the Tailpipe Rule depends, would “undo” the

“Historic Agreement,” leaving California and other states free to create a regulatory patchwork inimical to the health of the U.S. auto industry.¹⁹ This was also the key talking point of the Alliance of Automobile Manufacturers, the main industry group opposing S. J. Res. 26.²⁰

Neither Jackson nor the Alliance mentioned that the patchwork possibility exists because she granted the waiver²¹ in the first place. Had Jackson reaffirmed Johnson’s denial, there would have been no such possibility; hence no reason for the auto industry to defend EPA’s new regulations.

The peril of a “regulatory patchwork” was one of EPA Administrator Johnson’s reasons, in December 2007, for denying California’s request for a waiver.²² Proponents dismissed this concern out of hand.²³ They argued as follows: EPA has been granting California waivers for the past forty years. Waivers have never created a state-by-state regulatory “patchwork.” In each case, the waiver created two easily-managed standards, federal and California. A waiver for greenhouse gas emission standards would also create just two standards, not a “patchwork.”

Johnson’s detractors overlook the fact that, unlike all previous California emission standards, greenhouse gas emission standards implicitly and unavoidably regulate fuel economy. Only after EPA finalized the Endangerment Rule did environmental advocates recognize the patchwork issue created by the California waiver. None mentioned they had changed their tune; none acknowledged that Administrator Johnson had been correct.

V. Case for Denying the Waiver

Administrator Jackson approved the California waiver in late June 2009.²⁴ Johnson’s decision denying the waiver sets out a number of persuasive reasons why she should not have done so.

Johnson’s argument²⁵ may be summarized as follows. Section 209(b)(1)(B) of the Clean Air Act says that “[n]o such waiver shall be granted if the Administrator finds that . . . such state does not need such standards to meet extraordinary and compelling conditions.” California’s “compelling and extraordinary conditions” are the state’s geography, meteorology, and large number of vehicles, which cause severe “local and regional air pollution.” Those California-specific conditions have no “close causal ties” to the “global air pollution” linked to climate change:

1. Greenhouse gas concentrations are essentially uniform throughout the globe, and are not affected by California’s geography and meteorology.
2. California’s vehicles emit greenhouse gases, but so do mobile and stationary sources throughout the world. The resulting “global pool” of greenhouse gas emissions is not any more concentrated in California than anywhere else.
3. Even if one assumes that “extraordinary and compelling” refers not to the “global air pollution” itself but its potential impacts, such as heat waves, drought, and sea-level rise, California’s vulnerability is not “sufficiently different” from the rest of the nation to justify waiving federal preemption of state motor vehicle emission standards.

As my colleague CEI General Counsel Sam Kazman quipped approvingly, “They call it global warming, not California warming.”

One might restate Johnson’s argument as follows. Given California’s unusual geography, meteorology, and number of vehicles, the state cannot clean up its air, or attain federal air quality standards, unless it obtains waivers to adopt tougher-than-federal motor vehicle emission standards. This rationale for granting waivers does not apply to greenhouse gases, which are not *air quality* contaminants, and for which federal *air quality standards* do not exist.

In addition, EPA could not grant the waiver without authorizing California to do that which Congress has prohibited—regulate fuel economy. EPCA states:

When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.²⁶

This is a very strong statement of preemption. States are prohibited from adopting laws or regulations “related to” fuel economy standards. This broad language bars the adoption of fuel economy standards packaged as something else or commingled with other measures. A balkanized auto market—the threat created by the California waiver—is what the EPCA preemption was designed to prevent.

VI. California Program Is Related to Fuel Economy Standards

That the California greenhouse gas motor vehicle emissions law, AB 1493, is highly “related to” fuel economy is obvious from CARB’s 2004 Staff Report presenting the agency’s “initial statement of reasons” for its regulatory proposal.²⁷ Nearly all of the Staff Report’s recommended options for reducing greenhouse gas emissions were previously recommended as fuel-saving options in the National Research Council (NRC)’s 2002 fuel economy report.²⁸

CARB proposes a few additional options not included in the NRC study, but each is a fuel-saving technology, not an emission-control technology.

The text of AB 1493 also implies that CARB is to regulate fuel economy. AB 1493 requires CARB to achieve “maximum feasible” greenhouse gas reductions that are also “cost-effective,” defined as “[e]conomical to an owner or operator of a vehicle, taking into account the full life-cycle costs of the vehicle.”²⁹ CARB interprets this to mean that the reduction in “operating expenses” over the average life of the vehicle must exceed the “expected increases in vehicle cost [purchase price] resulting from the technology improvements needed to meet the standards in the proposed regulation.”³⁰ Virtually all of the “operating expenses” to be reduced are expenditures for fuel. The CARB program cannot be “cost-effective” unless CARB regulates fuel economy.

In a letter earlier this year to House Energy and Power Subcommittee Chairman Ed Whitfield, CARB Executive Officer James Goldstene explains why he believes EPCA does

not preempt California's greenhouse gas motor vehicle emission standards:

CARB has never claimed that there is no relation between the pollution [CO₂] emitted by burning fossil fuels and the rate at which they are burned [gallons of fuel consumed per distance traveled, i.e. fuel economy]. CARB merely maintains the fact that pollution control and fuel economy are not identical—fuel economy and pollution control regulations have different policy objectives, utilize different incentive and flexibility features, and there are technologies that reduce pollution that are not counted under fuel economy measures, and some fuel economy improvements do not reduce emissions commensurately.³¹

There are several problems with this argument.

1. A greenhouse gas emission standard does not have to be “identical” to a fuel economy standard to be “related to” it. EPCA preempts state laws or regulations “related to” fuel economy.
2. CARB does not maintain that fuel economy and greenhouse gas standards “have different policy objectives.” CARB’s selling point (set out elsewhere in Goldstene’s letter) is that combining EPA’s greenhouse gas standards with NHTSA’s corporate average fuel economy (CAFE) standards yields 33% more fuel savings.
3. The fact that EPA’s greenhouse gas standards utilize “different incentives and flexibility features” is irrelevant. Neither greenhouse gas regulation nor fuel economy regulation is defined by those features and incentives. The CAFE program, for example, would still be a fuel economy program if it did not allow for payments of fines in lieu of compliance or award credits for flex-fuel vehicle sales.
4. Although some technologies—e.g., improved sealants for automobile air conditioning systems—“are not counted under fuel economy measures,” such technologies address only 5.1% of motor vehicle greenhouse gas emissions.³² The remaining 94.9% can only be addressed by fuel-saving technologies. For that share, fuel economy improvements do reduce greenhouse gas emissions “commensurately.”

Being highly “related to” fuel economy, California’s AB 1493 program violates EPCA’s express prohibition.

VII. CARB: Fuel Economy Retro

Although not an issue Johnson considered when denying the California waiver, it is worth noting that the fuel economy program implicitly established by AB 1493 conflicted with fuel economy reforms Congress had enacted in the 2007 Energy Independence and Security Act (EISA). EISA replaced the “flat” standards of the original CAFE program, which applied to an automaker’s entire fleet, with standards based on fuel efficiency-related vehicle “attributes.” The “attribute-based” standards NHTSA developed vary according to a vehicle’s “footprint”—the area formed by the wheel base multiplied by the track width. The flat, fleet-wide approach encouraged automakers to increase production and sale of smaller vehicles to offset the sale of larger, more profitable vehicles rather than improve

fuel economy across all vehicle types. Congress switched to the attribute-based approach in hopes of encouraging compliance via technological innovation.³³

Although California’s greenhouse gas emission standards are calibrated in CO₂-equivalent grams per mile rather than miles per gallon, they are flat, not attribute-based. As in the pre-EISA federal program, there is one average standard for all light vehicles and one for all heavier vehicles. As CARB noted last year:

The AB 1493 regulations set separate greenhouse gas emission standards for both passenger cars and light-duty trucks (PC/LTD1) and heavier light-duty trucks and medium-duty passenger vehicles (LDT2/MDPV). . . . Compliance is determined on a fleet-wide basis, meaning that while each individual model can be above or below the standard, the average of a manufacturer’s fleet must meet the standard or else the manufacturer incurs debits that must be equalized within five years.³⁴

Between the time California applied for a waiver and Johnson’s denial in March 2008, AB 1493 had become a fuel economy anachronism, mandating a regulatory structure Congress had discarded. The Historic Agreement obscures the basic incompatibility between AB 1493 and EISA by aligning CARB’s standards with NHTSA’s.

VIII. The Process Behind the Agreement

The process by which the “Historic Agreement” was negotiated raises additional legal issues. The Presidential Records Act states:

Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.³⁵

Rather than documenting the negotiations producing the “Historic Agreement,” White House Environment Czar Carol Browner required participants to observe a “vow of silence” and forbade them to take notes. “We put nothing in writing, ever,” CARB Chairman Mary Nichols told *The New York Times*.³⁶

In his September 30, 2011 letter to Administrator Jackson,³⁷ Chairman Issa notes three circumstances suggesting that the Obama Administration tied its offer of bailout money to automakers’ participation in the agreement:

1. The Administration reached multi-billion dollar agreements to bail out GM and Chrysler three weeks after the “Historic Agreement” was struck.
2. Former EPA Associate Administrator Lisa Heinzerling served on “the Presidential Task Force charged with bailout negotiations and was also a primary negotiator of the ‘Historic Agreement.’”

3. One domestic manufacturer received over \$200 million in federal support for the development of electric vehicles—“two loans being authorized in the weeks leading up to the agreement, and one authorized on May 20, 2009, the day after the ‘Historic Agreement’ was announced. . . .”

A deal combining bailout money with protection from the patchwork possibility EPA created could be characterized as an offer the auto industry could not refuse.

IX. More on The Process

The more recent negotiations culminating in the EPA/NHTSA/CARB greenhouse gas/fuel economy standards for model years 2017-2025 also appear to be problematic.

Citing Jeremy Anwyl,³⁸ CEO of Edmunds.com, and Jack Nerad³⁹ of Kelley Blue Book, in an August 11, 2011 letter⁴⁰ to White House Counsel Kathryn Ruemmler, Chairman Issa contends that although the Administration conferred with environmentalists, automakers, and union labor, there was no one at the table representing “the very consumers who will be asked to buy a new generation” of higher-priced vehicles. The 54.5 mpg standard was the product of an “off-the-record political negotiation.” From this point on, the rulemaking process will be a “mere formality”—a criticism also voiced by Amy Sinden of the pro-regulatory Center for Progressive Reform.⁴¹

The Administrative Procedure Act “does provide agencies with the option of conducting a negotiated rulemaking,” notes Issa. However, “such a process is subject to additional transparency requirements, such as those required under FACA [Federal Advisory Committee Act].” FACA requires the head of the lead agency to (i) make an official determination that a negotiated rulemaking committee serves the public interest;⁴² (ii) publish in the *Federal Register* a notice that lists the persons proposed to represent the affected interests, describes the agenda of the negotiation, and solicits public comment;⁴³ and (iii) keep minutes and records.⁴⁴ EPA and NHTSA, the lead federal agencies in the negotiation, did not take those steps.

X. Outside the Scope of Law?

Issa also contends that the Obama Administration’s recent fuel economy deal is “outside the scope of law.” EPA and NHTSA plan to establish fuel economy standards for model years 2017-2025—a nine-year period. But EPCA limits the setting of fuel economy standards to “not more than 5 model years.”⁴⁵

EPA and NHTSA address this issue in their November 2011 joint proposed rulemaking. Due to EPCA’s five-year limitation, NHTSA’s CAFE standards for MYs 2022-2025 are “conditional.” In contrast, “EPA’s standards for those model years will be legally binding when adopted in this round.” NHTSA’s MY 2022-2025 standards “will be determined with finality in a subsequent, de novo, notice and comment rulemaking” based on a “mid-term evaluation” to be completed no later than April 1, 2018. To maintain the “benefits” of “harmonization,” NHTSA is proposing standards for all nine model years, “but the last 4 years of standards will not be legally binding as part of this rulemaking.”⁴⁶

Thus, to get around EPCA’s five-year limit, NHTSA proposes only to *propose* but not *finalize* fuel economy standards for MYs 2022-2025. Yet automakers had better plan to comply with those standards anyway, because EPA’s standards for MYs 2022-2025 are legally binding, the two sets of standards are “harmonized,” and NHTSA will finalize its standards (or something similar) after a “mid-term evaluation.” NHTSA’s “conditional,” “non-binding” MY 2022-2025 standards are not voluntary.

The agencies’ joint proposed rule does not explain the legal basis for this plan. Nowhere does EPCA authorize NHTSA to propose “conditional” fuel economy standards, much less “conditional” standards that exceed the five-year limitation.

This nine-year plan also conflicts with another EPCA provision. EPCA obligates the Secretary of Transportation to consider “economic practicability” when setting fuel economy standards.⁴⁷ But, observes Issa, “At this time it is impossible for NHTSA to adequately consider economic practicality for fuel standards in MYs 2022-25, primarily because car manufacturers themselves do not have product plans for that year, and market conditions are unknown 14 years into the future.”⁴⁸

XI. Harmonized and Consistent?

In *Massachusetts v. EPA*, the Court rejected the argument that EPA “cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT [Department of Transportation].” The Court did not explain why it rejected that argument. It simply asserted: “The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”⁴⁹

Recent history suggests the two agencies cannot avoid inconsistency. NHTSA’s approval of a nine-year fuel economy standards program conflicts with EPCA’s five-year limitation. NHTSA and EPA’s off-the-record stakeholder negotiations conflict with FACA and the Presidential Records Act. NHTSA’s support for the California waiver conflicts with EPCA’s prohibition of state laws and regulations “related to” fuel economy.

Echoing the Court, the agencies claim that EPA and CARB’s greenhouse gas standards are “harmonized and consistent” with NHTSA’s fuel economy standards. Yet the same officials contend that if Congress were to overturn EPA’s greenhouse gas component of the Tailpipe Rule, Americans would consume 25% more oil (an additional 19.1 billion gallons) over the lifetime of the same vehicles. How can that be?

CARB Executive Director David Goldstene addresses the issue in his aforementioned letter to Chairman Whitfield:

That the National Program [NHTSA + EPA] achieves greater emissions reductions and fuel savings than the CAFE standards alone is a result of the different underlying statutory authority that results in different program components. The four key differences are: 1) unlike the Energy Policy Conservation Act (EPCA), the CAA [Clean Air Act] allows for the crediting of direct

emission reductions and indirect fuel economy benefits from improved air conditioners, allowing for greater compliance flexibility and lower costs; 2) EPCA allows Flexible Fuel Vehicle (FFV) credits through model year 2019, whereas the EPA standard requires demonstration of actual use of a low carbon fuel after model year 2015; 3) EPCA allows for the payment of fines in lieu of compliance but the CAA does not; and 4) treatment of intra firm trading of compliance credits between cars and light trucks categories.⁵⁰

Difference 1) doesn't get us near 19.1 billion gallons in additional fuel savings. According to the Tailpipe Rule, CO₂ emissions due to air conditioner-related loads on automobile engines account for 3.9% of total passenger car greenhouse gas emissions, and various technologies could reduce air conditioner-related CO₂ emissions by 10% to 30%.⁵¹ A 30% reduction of the 3.9% of motor vehicle emissions associated with air conditioner engine load would decrease fuel consumption by only 1.1%.

Differences 2) and 3) are likely the big factors. Per difference 2), automakers cannot comply with EPA's greenhouse gas standards by manufacturing flexible-fueled vehicles. And per difference 3), automakers cannot pay fines in lieu of compliance with EPA's greenhouse gas standards.

Because of differences 2) and 3), EPA will be able to mandate additional fuel savings beyond those required by the statutory scheme Congress created.

The National Program is "harmonized and consistent" only in the sense that EPA and CARB's standards trump NHTSA's standards when the two conflict. Yet, to repeat, Congress authorized NHTSA, not EPA, to prescribe fuel economy standards, and prohibited state agencies like CARB from doing so.

In a July 11, 2011 letter to Chairman Whitfield responding to questions from Energy and Commerce Committee members,⁵² EPA Associate Administrator David McIntosh also vouched for the harmony and consistency of the National Program.

In his question to EPA, Rep. John Shimkus pointed out that EISA extended the CAFE credit granted to manufacturers of FFVs, phasing it out in 2020, whereas EPA's greenhouse gas regulations allow credits "only during the period from model years 2012 to 2015." After that, "EPA will only allow FFV credits based on a manufacturer's demonstration that the alternative fuel is actually being used in the vehicles." Shimkus asked: "How can this rule be characterized as 'harmonized and consistent' if the way EPA treats FFV [credits] is markedly different than the way Congress mandated FFV credits be treated under CAFE?" McIntosh replied:

EPA treats FFVs for model years 2012-2016 the same as under EPCA [as amended by EISA]. Starting with model year 2016, EPA believes the appropriate approach is to ensure that FFV emissions are based on demonstrated emissions performance, which will correlate to actual usage of alternative fuels. This approach was supported by several public comments.

Thus, according to McIntosh, starting in 2016, EPA will not give an automaker a CAFE credit for building FFV vehicles unless the automaker demonstrates that its customers actually use alternative fuels—a requirement inconsistent with EISA. Several people submitting comments on EPA's greenhouse gas standards supported this approach. And that is the only justification needed to override the policy set forth in law.

In sum:

- In 2016-2019, NHTSA gives credits for building FFVs.
- In 2016-2019, EPA does not give credits for building FFVs.
- The two policies are harmonized and consistent.

McIntosh did not reply to another question from Shimkus: "Could the logical reason for Congress's silence on FFVs in section 202(a) be that Congress never envisioned the Clean Air Act would be used to regulate fuel economy?"

XII. Is California the Tail that Wags the Dog?

The "National Program" transfers power from NHTSA to EPA and CARB in a more fundamental way. EPA and CARB can compel NHTSA to "harmonize" its regulations with theirs just by proposing new, more stringent greenhouse gas emission standards. Since EPA attributes endangerment to the "elevated concentrations" of atmospheric greenhouse gases,⁵³ since even full implementation of the non-ratified Copenhagen climate treaty would only slow the growth of atmospheric concentrations,⁵⁴ and since even a "low probability" risk of a "high impact" event qualifies as endangerment,⁵⁵ EPA and CARB will always have reason to tighten emission standards.

Even so, the process moved faster than most outsiders expected. On May 21, 2010, President Obama issued a memorandum directing EPA and NHTSA to develop greenhouse gas/fuel economy standards for MYs 2017-2025,⁵⁶ fourteen days after publication of the agencies' Tailpipe Rule prescribing greenhouse gas/fuel economy standards for MYs 2012-2016.

Under EISA, NHTSA is not required to prescribe MY 2017 fuel economy standards until April 2015.⁵⁷ Yet the Administration initially planned to finalize fuel economy standards for MY 2017 and later by July 2012, "nearly three years before they are due."⁵⁸ What is the reason for such a speedy turnaround?

In a January 11, 2011 letter to Chairman Issa, the Alliance of Automobile Manufacturers reported that "CARB intends to pursue the development of its own separate rules for MY 2017-2025 light duty GHG emission regulations early this year—*more than a year ahead of the federal rule* [emphasis in original]." The Alliance letter complained that California's "rushed effort toward a state rulemaking is not in the spirit of a collaborative effort to develop a single national program for fuel economy/GHG standards."⁵⁹ By rushing, California recreated the possibility of a fuel-economy patchwork, necessitating a new round of stakeholder negotiations and a new "Historic Agreement."⁶⁰

Two differences between the July 2011 "Historic Agreement" and the May 2009 "Historic Agreement" are worth

noting. First, whereas the May 2009 agreement set fuel economy standards only moderately more aggressive than those proposed in NHTSA's 2008 rulemaking to implement EISA,⁶¹ the July 2011 agreement proposes fuel economy standards that are far more aggressive. It is doubtful that Congress would approve a 54.5 mpg standard if it were proposed in legislation and put to a vote. Second, the July 2011 agreement commits EPA to grant a waiver for California's MY 2017-2025 greenhouse gas emission standards *before* California requests it or finalizes the standards to which it would apply.⁶²

Note that Obama's May 21, 2010 memorandum directs NHTSA and EPA to "produce joint federal standards that are harmonized with applicable State [i.e. California] standards." EPA and NHTSA's standards are to harmonize with CARB's standards, not the other way around.

The term "National Program" is misleading. Our current fuel economy regime is the California Program, not the statutory scheme Congress created through either EPCA or the Clean Air Act.

XIII. The Greenhouse Briar Patch

In addition to regulating fuel economy, EPA is applying Clean Air Act permitting requirements to large stationary sources of greenhouse gases: power plants, refineries, steel mills, pulp and paper factories, and cement production facilities.⁶³ EPA will soon establish greenhouse gas New Source Performance Standards (NSPS) for coal-fired power plants and petroleum refineries.⁶⁴ If these go unchallenged, it is likely that EPA will develop greenhouse gas performance standards for numerous other industrial source categories. We can also expect EPA to set quasi-fuel economy standards for aircraft, marine vessels, and non-road engines and vehicles,⁶⁵ even though no existing statute authorizes any agency to prescribe such standards. In short, EPA is legislating climate change policy.

EPA claims that its climate policy regulations follow inexorably, like a row of falling dominoes, from *Mass. v. EPA*. According to EPA, the Court left the agency no choice but to make an endangerment finding, the Endangerment Rule compelled EPA to establish motor vehicle greenhouse gas emission standards, the Tailpipe Rule automatically made greenhouse gases from "major" stationary sources "subject to regulation" under the Prevention of Significant Deterioration (PSD) pre-construction and Title V operating permits programs, and litigation pursuant to the Endangerment Rule compelled EPA to establish NSPS for coal-fired power plants and petroleum refineries.

EPA's reading of *Mass. v. EPA* will be tested in litigation before the D.C. Circuit Court of Appeals in *Coalition for Responsible Regulation, Inc. v. EPA*. Petitioners seek to overturn EPA's Endangerment, Tailpipe, Triggering, and Tailoring Rules.⁶⁶ Whatever the ruling in that case, Congress would still be free to overturn the agency's greenhouse gas regulations for either statutory or policy reasons.

A question seldom explored, however, is why, in *Mass. v. EPA*, counsel for EPA did not argue then, as EPA argues now, that regulating greenhouse gases via the Clean Air Act leads to "absurd results."

EPA's July 2008 Advance Notice of Proposed Rulemaking,⁶⁷ June 2010 greenhouse gas Tailoring Rule,⁶⁸ and September 2011

brief in *Coalition for Responsible Regulation v. EPA*⁶⁹ develop the argument that applying PSD and Title V permitting requirements to greenhouse gases produces regulations that conflict with and undermine congressional intent.

Whereas only large industrial facilities emit enough smog- and soot-forming air pollutants (100/250 tons per year) to meet the PSD/Title V major source applicability thresholds, millions of non-industrial facilities—big box stores, office buildings, churches, hospitals, schools, Dunkin Donut shops—emit enough carbon dioxide (CO₂) to meet the thresholds. Permitting agencies could not keep up with the volume of permit applications, and the ever-growing backlog would cripple both environmental enforcement and economic development. Annual PSD permit applications would jump from 280 to more than 81,000 per year, a 300-fold increase. Sources requiring operating permits would increase from 14,700 to 6.1 million, a 400-fold increase. A 40-fold increase in permit applications would extend processing time from 6-10 months to 10 years—greatly exceeding the maximum of 18 months allowed by the statute.⁷⁰ To avoid permit gridlock, EPA and its state counterparts would have to hire an estimated 230,000 additional staff at any annual cost to taxpayers of \$21 billion.⁷¹

This assessment raises several questions. Why didn't counsel for EPA explain to the Supreme Court that an endangerment finding would lead, via a tailpipe rule, to absurd results? Why didn't EPA's counsel argue that the chain of causality from endangerment finding to absurd results is evidence Congress did not design or intend for the Clean Air Act to be a framework for greenhouse gas regulation?

To suggest that EPA had no grasp of the regulatory ramifications of an endangerment finding until after the Court decided *Mass. v. EPA* is not credible. It is tantamount to saying that the expert in the Clean Air Act did not understand how the statute works.

In June 1998, technology analyst Mark P. Mills published a report warning that a CO₂ endangerment finding could compel EPA to regulate over 1 million small- to mid-sized businesses.⁷² The study was a response to EPA General Counsel Jonathan Z. Canon's April 1998 memorandum, which argued that several Clean Air Act regulatory provisions are "potentially applicable" to greenhouse gases.⁷³ Petitioners in *Mass. v. EPA* cited the Cannon memorandum in their initial petition for a rulemaking to establish greenhouse gas emission standards for new motor vehicles.⁷⁴ The Mills study was published by the Greening Earth Society, a project of the Western Fuels Association, one of EPA's stakeholders. The agency could not have been unaware of it.

In its brief in *Coalition for Responsible Regulation v. EPA*, EPA states that for more than thirty years, it has consistently taken the position that PSD applies to *any* regulated air pollutant. In the agency's words: "EPA expressly confirmed the applicability of PSD to *any* pollutant regulated under the Act, including specifically all non-NAAQS pollutants, in regulations issued in 1978, 1980, and 2002."⁷⁵ Greenhouse gases would become "regulated air pollutants" the moment any EPA regulation controlling greenhouse gas emissions from motor vehicles took effect.

- Absurd results are additional evidence that Congress did not design or intend the Clean Air Act to be used as a framework for regulating greenhouse gases.

It is unclear whether EPA's counsel did not make these arguments for this reason, but by losing the case, EPA gained the power to regulate CO₂, the most ubiquitous byproduct of industrial civilization.

Endnotes

- 1 The title of this article is inspired by the excellent collection of essays, *Climate Coup: Global Warming's Invasion of Our Government and Our Lives* (Patrick J. Michaels ed., 2011).
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- 4 U.S. ENVTL. PROT. AGENCY, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. & CAL. AIR RES. BD., INTERIM JOINT TECHNICAL ASSESSMENT REPORT: LIGHT DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND FUEL ECONOMY STANDARDS FOR MODEL YEARS 2017-2025, at viii (2010) [hereinafter EPA, NHTSA, CARB, Interim Joint Technical Assessment Report], available at <http://www.epa.gov/oms/climate/regulations/ldv-ghg-tar.pdf>.
- 5 *Id.* at ix.
- 6 49 U.S.C. § 32902(a).
- 7 49 U.S.C. § 32902(b).
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- 12 President Barack Obama, Remarks on National Fuel Economy Standards (May 19, 2009), transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-fuel-efficiency-standards>.
- 13 State of California Air Resources Board, Resolution 10-15, Feb. 25, 2010, available at <http://www.arb.ca.gov/regact/2010/ghgpv10/res1015.pdf>.
- 14 Letter from Edmund G. Brown, Jr., Attorney General, California, to Lisa Jackson, Administrator, EPA, and Raymond H. LaHood, Secretary, Department of Transportation at 2 (May 18, 2009), available at <http://www.epa.gov/oms/climate/regulations/calif-aty-general.pdf>.
- 15 Letter from Rep. Darrell E. Issa, U.S. House of Representatives, to Lisa Jackson, Administrator, EPA (Sept. 30, 2011), available at <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/09/30/Health-Environment-Science/Graphics/oversight930.pdf>.

- 16 The text of S.J. Res. 26 is available at <http://www.gpo.gov/fdsys/pkg/BILLS-111sjres26pcs/pdf/BILLS-111sjres26pcs.pdf>.
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- 24 EPA, California State Motor Vehicle Pollution Standards; Notice of Decision Granting a Waiver of Clean Air Act Prevention for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-15943.pdf>.
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- 26 49 U.S.C. § 32919(a).
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42 5 U.S.C. § 563, *available at* http://www.law.cornell.edu/uscode/5/usc_sec_05_00000563----000-.html.

43 5 U.S.C. § 564, *available at* http://www.law.cornell.edu/uscode/5/usc_sec_05_00000564----000-.html.

44 5 U.S.C. § 566, *available at* http://www.law.cornell.edu/uscode/5/usc_sec_05_00000566----000-.html.

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49 Massachusetts v. EPA, 549 U.S. 432 (2007).

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51 Tailpipe Rule, *supra* note 3, at 25427-25428.

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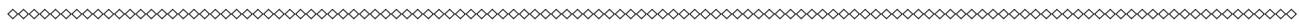
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The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

Section 111(b): "He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."

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80 EPA, Regulating Greenhouse Gas Emissions under the Clean Air Act, *supra* note 65, at 44481.

81 Dialing in Your Own Climate, World Climate Report, <http://www.worldclimaterreport.com/index.php/2006/04/10/dialing-in-your-own-climate/> (Apr. 10, 2006).

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