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U.S. Environmental Protection Agency
EPA Docket Center
Air Docket
Docket ID No. EPA-HQ-OAR-2021-0257
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Connecticut
Delaware
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Re: U.S. Environmental Protection Agency “California State Motor Vehicle Pollution Control Standards: Advanced Clean Car Program: Reconsideration of a Previous Withdrawal of a Waiver of Preemptions; Opportunity for Public Hearing and Public Comment”

To Whom It May Concern:

The Ozone Transport Commission (OTC) Mobile Sources Committee is submitting these comments on the U.S. Environmental Protection Agency’s (EPA’s) 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 (April 28, 2021). In this action, EPA seeks comment to inform its reconsideration of the withdrawal, in the September 27, 2019, “Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program” (“SAFE 1”) (84 Fed. Reg. 53,310), of two components of the waiver of preemption it granted to California on January 9, 2013 (78 Fed. Reg. 2,112) for the state’s Advanced Clean Car (ACC) program. The ACC program includes Low Emission Vehicle III which further reduces criteria pollutant and greenhouse gas (GHG) emissions from gasoline and diesel-fueled cars and amended the state’s Zero Emission Vehicle (ZEV) program. In “SAFE 1,” EPA withdrew the ZEV and GHG portions of the waiver.

In the 1990 Clean Air Act Amendments, Congress established the OTC to address regional ozone pollution affecting the OTC member jurisdictions. The OTC members are Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia. In addressing their collective regional ozone problem, the OTC members are responsible for developing and implementing initiatives to reduce nitrogen oxides (NOx) and volatile organic compounds (VOCs), the precursor air pollutants that contribute to the formation of ground level ozone pollution.

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In June of 2018, the OTC issued a resolution concerning vehicle emissions and states' rights.¹ The resolution stated that technical analysis completed by OTC and EPA shows that mobile sources are the most significant contributor to ozone in the Ozone Transport Region (OTR). In addition, the resolution stated that to address the mobile source contribution to ozone problems in the OTR, a majority of OTC states have adopted the California Low Emission Vehicle Program in state regulations and incorporated the standards into their State Implementation Plans, as provided for under the Clean Air Act. Further, the OTC urged EPA to ensure that California's right to a waiver and other states' right to adopt and enforce the California standards under the Clean Air Act be preserved.

EPA states in its reconsideration notice, "In considering whether to rescind the action that withdrew portions of the ACC program waiver, EPA is seeking to determine whether it properly evaluated and exercised its authority to reconsider a previous waiver granted to CARB and whether the withdrawal was a valid and appropriate exercise of authority and consistent with judicial precedent." As discussed below, in "SAFE 1," EPA acted outside its authority and must take swift action to fully rescind its withdrawal of California's waiver, thereby restoring the full effectiveness of the ACC program, including as it pertains to the ZEV mandate and GHG emission standards, for all affected model years.

EPA's SAFE 1 unlawfully attempted to restrict states' rights under Section 177 of the CAA

First and foremost, the interpretation of Section 177 in the SAFE 1 proceeding was inappropriate and unauthorized. Section 177 is carefully drawn to empower states to decide for themselves whether to adopt California's standards, without giving EPA any oversight role whatsoever. This authority provides states with a critical tool to tackle motor vehicle emissions. States have been utilizing this tool for over 30 years and first began adopting California's GHG standards over 15 years ago.

States rely on these standards for both air quality and climate action planning to protect public health and welfare. Ten states in the OTR have adopted the California light-duty vehicle standards and eight of those states have adopted the ZEV mandate. Notably, no approval or review from EPA is needed for states to opt-in to the California program. Moreover, states, not EPA, are responsible for implementing and enforcing the standards. In short, Section 177 gives states the discretion to adopt California standards, and EPA has no authority to take this choice away from the states in the context of the SAFE 1 proceeding or otherwise.

EPA lacked any legal basis to revoke California's existing CAA 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

¹ Ozone Transport Commission, "Resolution of the Ozone Transport Commission Concerning States' Rights and Vehicle Emissions," June 7, 2018 (https://otcair.org/upload/Documents/Formal%20Actions/Resolution_Concerning%20States%20Rights_Vehicle%20Emissions.pdf).

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. 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.” EPA’s reliance on isolated history is particularly misplaced because that history addresses an older, narrower version of the waiver 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.” 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.” This is particularly true where reconsideration would harm significant reliance interest. For California and the Section 177 states, the ZEV and GHG 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, and their statutory obligations to attain and maintain the health-based National Ambient Air Quality Standards (NAAQS) for criteria pollutants.

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].” The D.C. Circuit has explained that EPA “is not to overturn California’s judgment lightly,” that California must 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.”

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” that justify a waiver. 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.”

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. 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.” 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.

EPA lacked authority under the CAA to withdraw the waiver based on the Energy Policy Conservation Act’s (EPCA) 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.” 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.” 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 waivers. 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. EPA offered no reasonable explanation in SAFE 1 for its departure from this practice.

The Supreme Court has explained that at least two requirements must be met for an agency 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.” 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.

The transportation sector is the largest source of ozone forming pollution in the nation. California’s and other states’ ability to set ZEV standards under the Clean Air Act is the single most important tool states have to mitigate emissions from transportation and is a critical component of their air quality strategies. For these reasons, EPA must act quickly to fully rescind its withdrawal of California’s waiver, thereby restoring the full effectiveness of the ACC program, including as it pertains to the ZEV mandate and GHG emission standards, for all affected model years. Thank you for the opportunity to comment on this very important action.

Sincerely,

A handwritten signature in black ink that reads "Kelly Crawford". The signature is written in a cursive, flowing style.

Kelly Crawford
Associate Director
Air Quality Division
Department of Energy & Environment
Government of the District of Columbia
Chair, OTC Mobile Sources Committee

cc: OTC Air Directors
Alejandra Nunez (EPA OAR)
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