



June 10, 2021

Dr. Steven Cliff, Acting Administrator  
National Highway Traffic Safety Administration  
United States Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, D.C. 20590

Re: *Proposed Rule on Corporate Average Fuel Economy (CAFE) Preemption, Docket No. NHTSA-2021-0030*

Dear Acting Administrator Cliff:

The Ozone Transport Commission (OTC) Mobile Sources Committee is submitting these comments in support of the proposed rule on Corporate Average Fuel Economy (CAFE) Preemption (“Proposed Rule”) issued by the National Highway Traffic Safety Administration (NHTSA) [86 Fed. Reg. 25980 (May 12, 2021)]. NHTSA’s proposed rule would fully repeal the regulatory text and appendices promulgated in “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,” published on September 27, 2019, at 84 Fed. Reg. 51310 (SAFE I Rule), and withdraw interpretative statements made by NHTSA in the preamble.

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.

In June of 2018, the OTC issued a resolution concerning states’ rights and vehicle emissions.<sup>1</sup> 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

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<sup>1</sup> 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](https://otcair.org/upload/Documents/Formal%20Actions/Resolution_Concerning%20States%20Rights_Vehicle%20Emissions.pdf)).

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Connecticut

Delaware

District of Columbia

Maine

Maryland

Massachusetts

New Hampshire

New Jersey

New York

Pennsylvania

Rhode Island

Vermont

Virginia

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Paul J. Miller  
Executive Director

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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.

For states that implement California's motor vehicle emissions program under Section 177 of the federal Clean Air Act, their zero emission vehicle (ZEV) and greenhouse gas (GHG) programs are vitally important. Such programs enable long-term planning and yield critical emission reductions that will contribute significantly to states' abilities to meet their statutory obligations to attain and maintain the health-based National Ambient Air Quality Standards (NAAQS) for criteria pollutants. These programs, and the overall Advanced Clean Car program that embodies them, are also important to many non-Section 177 states, which benefit from the emission reductions and resulting critical public health benefits that accrue when California and Section 177 states lead the way.

In the SAFE I Rule, NHTSA improperly codified legislative rules and made various interpretive pronouncements that purported, among other things, to radically expand the scope of the self-executing provision in Section 509(a) of the Energy Policy and Conservation Act of 1975 (EPCA) to preempt the states' inherent Clean Air Act authority to set ZEV, as well as GHG emission standards. Specifically, NHTSA erroneously asserted that California's and other states' ZEV and GHG standards are preempted by Section 509(a) of EPCA, which prohibits a state or political subdivision from adopting or enforcing a law or regulation "related to fuel economy standards" for automobiles covered by an average fuel economy standard, on the basis that carbon dioxide (CO<sub>2</sub>) emissions standards have an impact on fuel consumption.

As detailed in comments submitted to NHTSA, this interpretation is unreasonably expansive and deeply flawed.<sup>2</sup> California's GHG emissions standards are not "related to" and do not otherwise conflict with federal fuel economy standards simply because CO<sub>2</sub> emissions often correlate with fuel consumption. If NHTSA were correct, then any number of tailpipe standards implemented by California and other states to protect public health and welfare could be subject to the same preemption argument. The text, legislative history, and nearly 50 years of administrative and judicial interpretation and application of EPCA and the Clean Air Act foreclose the novel reading of Section 509(a) proffered in the SAFE I Rule.

We agree with NHTSA's analysis in the Proposed Rule that the agency lacks statutory authority to define the scope of EPCA preemption through interpretive rules and to prohibit certain state ZEV standards as well as GHG standards by proclaiming them preempted.

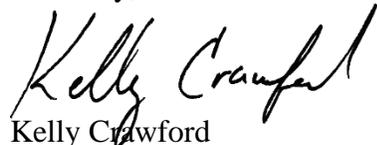
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<sup>2</sup> States of California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Minnesota, North Carolina, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the District of Columbia, and the Cities of Oakland, Los Angeles, San Francisco, San Jose, and New York, "Comments on the Proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," Docket Nos. NHTSA-2018-0067 and EPA-HQ-OAR-2018-0283, October 26, 2018.

Nothing in Section 509(a) of EPCA provides NHTSA with the express or implied authority to define and implement EPCA's preemption provision, or otherwise to interfere with the long-standing authority of California and other states to adopt vehicle emission standards that are more stringent than federal standards under Sections 209(b) and 177 of the Clean Air Act. Because NHTSA exceeded its authority in promulgating the SAFE I Rule, we also agree that the agency should repeal the SAFE I Rule in its entirety, including all codified text and all interpretations and applications of EPCA preemption, as promptly as possible.

As you know, 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, we strongly support and urge NHTSA to adopt the Proposed Rule to repeal the regulations and associated interpretations on EPCA preemption contained in the SAFE I Rule.

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