

EPA and NHTSA Seek Public Comment on Reconsideration of Prior Actions Concerning California's Authority to Enforce Greenhouse Gas Standards and Mandate Zero Emission Vehicles

Client Alert | April 27, 2021

On his first day in office, President Biden signed an Executive Order that directed his administration to focus on addressing climate change, and issued a mandate that certain agencies immediately review a number of agency actions from the previous administration regarding greenhouse gas (GHG) emissions.^[1] In keeping with that directive, the National Highway Traffic Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA) have formally announced their intent to reconsider the 2019 Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program (SAFE 1).^[2] which curtailed California's ability to establish and enforce more stringent GHG emission standards and a Zero Emission Vehicle (ZEV) sales mandate.^[3] These steps are consistent with the Biden administration's efforts to move swiftly to reexamine—and possibly to revoke—environmental regulations promulgated under the Trump administration, and could serve as a prime example of the shifting regulatory landscape for industries subject to GHG regulations.

Through SAFE 1, EPA withdrew the portions of California's waiver under Section 209(b)(1) of the Clean Air Act (CAA) that allowed California to establish its own GHG emission standards and establish a mandate for the sale of ZEVs.^[4] EPA went on to interpret the CAA as preventing other states from adopting California's GHG standards, as well.^[5] In the same action, NHTSA similarly cut back on California's independent regulatory powers by concluding that NHTSA's authority to regulate fuel economy under the Energy Policy and Conservation Act (EPCA) preempted all state and local regulations "related to" fuel economy.^[6]

On April 22 and April 23, 2021, respectively, NHTSA and EPA formally announced that they are reconsidering this action, and will be soliciting public comment on the agencies' separate proposed paths forward.

NHTSA

On April 22, 2021, NHTSA issued a notice of proposed rulemaking that would repeal those portions of SAFE 1 (including the regulatory text and interpretive statements in the preamble) that found California's GHG and ZEV mandates preempted by EPCA.^[7] In particular, NHTSA proposes to conclude that it lacks legislative rulemaking authority to issue a preemption regulation. The notice does not take a position on the substance of EPCA preemption. Rather, NHTSA says merely that it seeks to restore a "clean slate"—*i.e.*, to take no formal agency position on express preemption by EPCA.^[8]

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The notice goes on to state, however, that even if NHTSA had legislative rulemaking authority, it would nonetheless repeal SAFE 1 because “NHTSA now has significant doubts about the validity of its preemption analysis as applied to the specific state programs discussed in SAFE 1,”^[9] including federalism concerns and concerns with the “categorical” manner of the analysis taken in SAFE 1.^[10]

NHTSA’s notice of proposed rulemaking includes a comment period of 30 days after publication in the Federal Register, which is expected in the coming days.

EPA

One day after NHTSA issued its notice, EPA announced its parallel action on SAFE 1. In its notice, EPA takes no new positions on the Agency’s authority to withdraw a previously granted waiver or the statutory interpretation of CAA Section 209.^[11] Rather, EPA’s notice merely summarizes its past positions and tees up these issues, along with issues raised in administrative petitions, for public comment as part of a reconsideration. The notice states that the Agency now believes that there are “significant issues” with the positions taken in SAFE 1 and that “there is merit in reviewing issues that petitioners have raised” in the reconsideration petitions submitted to EPA.^[12] However, the notice does not propose to take any specific alternative interpretation.

Notably, EPA has not initiated a rulemaking proceeding, but rather describes this as an informal adjudication.^[13] The Agency also states that for waiver decisions, “EPA traditionally publishes a notice of opportunity for public hearing and comment and then, after the comment period has closed, publishes a notice of its decision in the Federal Register. EPA believes it is appropriate to use the same procedures for reconsidering SAFE 1.”^[14]

A virtual public hearing will take place on June 2, 2021, and EPA will accept comments until July 6, 2021.^[15]

Conclusion

In announcing the reconsideration of SAFE 1, EPA Administrator Michael Regan stated, “Today, we are delivering on President Biden’s clear direction to tackle the climate crisis by taking a major step forward to restore state leadership and advance EPA’s greenhouse gas pollution reduction goals.”^[16] Final agency actions resulting from these reconsiderations are still months away, but EPA’s and NHTSA’s announcements signal the agencies’ continuing focus on GHG emissions and revisiting regulations issued by the previous administration. As executive branch agencies continue to carry out the directives in President Biden’s Executive Orders related to climate change, the landscape for regulated industries will remain in flux.

^[1] Exec. Order No. 13990, 86 Fed. Reg. 7037, 7041 (Jan. 25, 2021) (issued Jan. 20, 2021).

^[2] 84 Fed. Reg. 51310 (Sept. 27, 2019). The SAFE 1 Rule was challenged in a series of consolidated cases before the U.S. Court of Appeals for the D.C. Circuit, where Gibson Dunn represented a coalition of automotive industry members as Intervenor in support of the rule. *See Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir.). That matter has been held in abeyance at the request of the United States pending further review of the SAFE 1 rulemaking by EPA and NHTSA.

^[3] Press Release, U.S. Dep’t of Transp., NHTSA, NHTSA Advances Biden-Harris Administration’s Climate & Jobs Goals (Apr. 22, 2021), [here](#); U.S. EPA, Notice of Reconsideration of a Previous Withdrawal of a Waiver for California’s Advanced Clean Car Program (Light-Duty Vehicle Greenhouse Gas Emission Standards and Zero

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Emission Vehicle Requirements), [here](#).

[4] 84 Fed. Reg. at 51328.

[5] *Id.* at 51350.

[6] *Id.* at 51313.

[7] U.S. Dep't of Transp., NHTSA, Notice of Proposed Rulemaking (prepublication version), Corporate Average Fuel Economy (CAFE) Preemption (Apr. 22, 2021), [here](#).

[8] *Id.* at 12.

[9] *Id.* at 13.

[10] *Id.* at 37.

[11] U.S. EPA, Notice of Reconsideration (prepublication version), 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 (Apr. 23, 2021), [here](#).

[12] *Id.* at 7.

[13] *Id.* at 27.

[14] *Id.*

[15] *Id.* at 2.

[16] Press Release, U.S. EPA, EPA Reconsiders Previous Administration's Withdrawal of California's Waiver to Enforce Greenhouse Gas Standards for Cars and Light Trucks (Apr. 26, 2021), [here](#).

The following Gibson Dunn lawyers assisted in preparing this client update: Ray Ludwiszewski, Stacie Fletcher, David Fotouhi, Rachel Corley, and Veronica Till Goodson.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Environmental Litigation and Mass Tort practice group, or the following practice leaders and authors in Washington, D.C.:

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