

# Institute for Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

October 26, 2018

**VIA ELECTRONIC SUBMISSION**

**Attn:** Christopher Lieske, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency

**Subject:** The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018)

**Docket No.** EPA-HQ-OAR-2018-0283

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> (“Policy Integrity”) respectfully submits the following comments on the Environmental Protection Agency (“EPA”) and National Highway Traffic Safety Administration’s (“NHTSA”) proposed Corporate Average Fuel Economy and tailpipe carbon dioxide emissions standards for passenger cars and light trucks in model years 2021 through 2026 (“Proposed Rule”).

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. In this letter, we address only one component of the Proposed Rule: EPA’s plan to withdraw the Clean Air Act preemption waiver granted to California in 2013 for the greenhouse gas and Zero Emission Vehicle (“ZEV”) requirements of its Advanced Clean Cars program.<sup>2</sup>

As explained in our attached report, *No Turning Back: An Analysis of EPA’s Authority to Withdraw California’s Preemption Waiver Under Section 209 of the Clean Air Act*, nothing in the text of the Clean Air Act can reasonably be construed as authorizing revocation of a preemption waiver. Nor can a single reference to revocation authority in the congressional reports, relating to a superseded version of the provision’s text, support a finding of revocation authority. Furthermore, finding an implicit grant of revocation authority in Section 209 would be inconsistent with basic federalism principles and with D.C. Circuit case law suggesting that courts should not read revocation authority into statutory silence when doing so would severely

---

<sup>1</sup> No part of this document purports to present New York University School of Law’s views, if any.

<sup>2</sup> In addition, Policy Integrity has submitted the following three sets of comments separately: (1) comments, submitted together with several other organizations, explaining how EPA and NHTSA’s analysis of the social cost of carbon in the Proposed Rule is inconsistent with the best available science, best practices for economic analysis, and legal standards for rational decisionmaking; (2) comments, submitted together with several other organizations, explaining how NHTSA’s analysis of the social cost of carbon in the Draft Environmental Impact Statement for the Proposed Rule is inconsistent with the best available science, best practices for economic analysis, and legal standards for rational decisionmaking; and (3) comments explaining that the economic justifications the agencies have provided for the Proposed Rule are fundamentally flawed. All are available at <https://policyintegrity.org/what-we-do/update/3190>.

disrupt the legitimate expectations of a waiver recipient. Here, California has reasonably relied on its 2013 waiver in developing plans to comply with federal air quality mandates and meet its own environmental goals.

Reliance and federalism concerns similarly weigh against EPA's invocation of *inherent* authority to reconsider the 2013 waiver, as does the fact that any such reconsideration, coming more than five years after the waiver's issuance, would be untimely.

If Section 209 *were* interpreted to confer implicit revocation authority, the exercise of that authority would properly be limited to circumstances in which an increase in the stringency of one or more federal emission standards renders California's standards as a whole comparatively less protective of public health and welfare than federal standards. Allowing revocation only when necessary to ensure adequate protection of public health and welfare would be consistent with the core purpose of the waiver provision, regulatory precedent, and the design of other Clean Air Act provisions and provisions of other federal environmental laws under which federal agencies delegate regulatory authority to states. Revocation on valid protectiveness grounds would also be less disruptive of California's reliance interests, because requiring the state to match federal standards *more* stringent than its own would be unlikely to compromise the state's ability to comply with federal air quality standards.

In the Proposed Rule, however, EPA seeks to withdraw a waiver in conjunction with a *decrease* in the stringency of federal standards relative to California's standards. In other words, EPA cannot—and does not—claim that revocation is necessary to ensure that California's standards remain at least as protective of public health as federal standards. Instead, the agency argues that revocation is justified because (1) NHTSA has proposed to find that California's greenhouse gas and ZEV standards are preempted by the Energy Policy and Conservation Act; (2) EPA no longer believes that California needs its greenhouse gas and ZEV standards to meet compelling and extraordinary conditions; and (3) EPA no longer believes that California's standards are technologically feasible. For all of the reasons discussed above, even if one assumes that EPA has *some* authority to revoke a waiver, none of these are permissible grounds for revocation. Furthermore, NHTSA's proposed finding on EPCA preemption is unreasonable, as are EPA's proposed findings on the need for and feasibility of California's standards. Accordingly, EPA cannot legally withdraw the 2013 waiver.

For further detail on these points, please see the attached report.

Respectfully,

Denise A. Grab

Jayni Hein

Jack Lienke

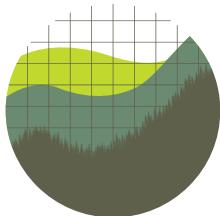
Richard L. Revesz

**Attachment:** DENISE A. GRAB, JAYNI HEIN, JACK LIENKE & RICHARD L. REVESZ, NO TURNING BACK: AN ANALYSIS OF EPA'S AUTHORITY TO WITHDRAW CALIFORNIA'S PREEMPTION WAIVER UNDER SECTION 209 OF THE CLEAN AIR ACT (2018)



# No Turning Back

*An Analysis of EPA's Authority to Withdraw California's Preemption Waiver Under Section 209 of the Clean Air Act*



Institute for  
**Policy Integrity**

NEW YORK UNIVERSITY SCHOOL OF LAW

**October 2018**

Denise A. Grab

Jayni Hein

Jack Lienke

Richard L. Revesz

Copyright © 2018 by the Institute for Policy Integrity.  
All rights reserved.

Institute for Policy Integrity  
New York University School of Law  
Wilf Hall, 139 MacDougal Street  
New York, New York 10012

Denise A. Grab is the Western Regional Director at the Institute for Policy Integrity at NYU School of Law. Jayni Hein is the Policy Director at the Institute for Policy Integrity and an adjunct professor of law at NYU School of Law. Jack Lienke is the Regulatory Policy Director at the Institute for Policy Integrity. Richard L. Revesz is the Lawrence King Professor of Law and Dean Emeritus at NYU School of Law and Director of the Institute for Policy Integrity.

The authors thank the following students at NYU School of Law for assistance in preparing this report: Iman Charania, Alec Dawson, Kelly Lester, Ayala Magder, Zoe Palenik, and Megan Wilkie.

This report does not necessarily reflect the views of NYU School of Law, if any.

# Executive Summary

For fifty years, California has enjoyed unique authority to regulate air pollution from newly manufactured motor vehicles. While the Clean Air Act preempts all other states from setting their own vehicle emission standards, California can request a waiver to do so if it determines that its standards are at least as protective of public health and welfare as federal standards issued by the U.S. Environmental Protection Agency (“EPA”). EPA is required to grant a waiver request unless it finds (1) that California’s determination that its standards are at least as protective as federal standards is arbitrary and capricious, (2) that California does not need its own standards to meet “compelling and extraordinary conditions,” or (3) that California’s standards and accompanying enforcement procedures are “not consistent with” the requirements for federal vehicle emission standards under Clean Air Act Section 202(a).<sup>1</sup> Once a waiver is granted, other states can adopt California’s vehicle emission standards instead of federal standards.<sup>2</sup>

Since the waiver provision was enacted in 1967, EPA has granted more than fifty waivers for California, fully denied only one (a decision it subsequently reversed), and revoked zero.<sup>3</sup> Recently, however, EPA proposed to withdraw portions of a waiver California received in 2013 to set its own emission standards for passenger cars and light trucks in model years 2021 through 2025.<sup>4</sup> Specifically, EPA proposed to revoke the waiver as it pertains to California’s greenhouse gas standards and Zero Emission Vehicle (“ZEV”) standards.<sup>5</sup> This revocation was proposed in conjunction with a proposed weakening of federal greenhouse gas standards for those model years.<sup>6</sup>

Because EPA’s proposal is entirely unprecedented, neither courts nor legal scholars have previously had cause to discuss the circumstances, if any, under which a waiver might permissibly be withdrawn. This report analyzes whether EPA possesses revocation authority and, assuming it exists at all, when and how such authority may be exercised. We explore these questions by looking to the text of the waiver provision (contained within what is now Section 209 of the Clean Air Act); case law on statutory interpretation; legislative and regulatory history; and, finally, other provisions of the Clean Air Act and other federal environmental statutes under which federal agencies are authorized to revoke a delegation of regulatory authority to a state.

We conclude that nothing in the plain text of Section 209 authorizes EPA to revoke a waiver. Nor does the legislative history of Section 209, read as a whole, support a finding of revocation authority. A 1967 Senate Report does include one sentence on the withdrawal of waivers. But even if that stray reference accurately reflected Congressional intent as of 1967, subsequent revisions to the text of the waiver provision cast significant doubt on the 1967 statement’s continued validity.

---

<sup>1</sup> 42 U.S.C. § 7543(b)(1).

<sup>2</sup> See 42 U.S.C. § 7507 (“any state which has [nonattainment] plan provisions approved under this part may adopt and enforce for any model year standards . . . identical to the California standards for which a waiver has been granted for such model year”).

<sup>3</sup> The agency once partially vacated a waiver when required to do so by a court order. 45 Fed. Reg. 45,359, 45,360 (July 3, 1980).

<sup>4</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 43,240 (proposed Aug. 24, 2018) [hereinafter “Revocation Proposal”].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 42,987.

In the absence of textual support, interpreting Section 209 to authorize a waiver withdrawal would be inconsistent with case law from the United States Court of Appeals for the D.C. Circuit suggesting that revocation authority should not be read into statutory silence if doing so would interfere with legitimate reliance interests. California and other states have reasonably relied on the 2013 waiver in developing plans to comply with federal air quality standards and meet state air quality goals. EPA's revocation of the waiver, based on a never-before-articulated theory of its Section 209 authority, would severely and unfairly disrupt those plans.

Federalism concerns also weigh against interpreting Section 209 to confer revocation authority. The regulation of air pollution is an area of traditional state responsibility, and the Supreme Court has cautioned federal courts to "be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers."<sup>7</sup> Section 209 expressly constrains California's traditional authority to regulate air quality in one respect—by requiring the state to seek a waiver before setting its own limits on air pollution from new motor vehicles. But the provision says nothing about the revocation of a waiver that has already been granted. Given the complete lack of textual support for revocation authority and the absence of any regulatory precedent for revocation, a court should not permit EPA to work a further disruption in the usual balance of federal and state regulatory powers by withdrawing California's 2013 waiver.

In addition to lacking express or implied *statutory* authority to revoke a waiver, EPA lacks *inherent* authority to do so. Although agencies can sometimes invoke inherent authority to reconsider their adjudicative decisions, recognizing such authority would be inappropriate here due to the reliance and federalism concerns discussed above, as well as the fact that a revocation of California's 2013 waiver—coming more than five years after the waiver's issuance—would not be timely.

We further conclude that, if Section 209 *were* interpreted to confer implicit revocation authority, the exercise of that authority must be limited to circumstances in which an increase in the stringency of federal emission standards led EPA to conclude that California's standards were no longer as protective of public health and welfare as federal standards. In reaching this conclusion, EPA would need to afford California's own protectiveness determination the same level of deference that Section 209 requires the agency to show when reviewing an initial waiver request.

Allowing revocation only when necessary to ensure adequate protection of public health and welfare would be consistent with regulatory precedent: in the fifty years since the waiver provision was first enacted, insufficient protectiveness is the only potential grounds for revocation that EPA has ever acknowledged. Constraining revocation authority in this manner would also be consistent with the design of other Clean Air Act provisions and provisions of other federal environmental laws under which federal agencies delegate regulatory authority to states. Under the Clean Air Act's Title V permitting program, as well programs under the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act, EPA can withdraw authority it has delegated to a state only upon a finding that the state is failing to fulfill its statutory duties. Finally, revocation on protectiveness grounds would be relatively unlikely to prevent California from meeting federal air quality standards or state air quality goals and would thus be less disruptive of California's reliance interests.

---

<sup>7</sup> *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotation marks omitted).

In its revocation proposal, EPA offers three justifications for withdrawing California's 2013 waiver:

- (1) The National Highway Transportation Safety Administration ("NHTSA") has proposed to find that California's greenhouse gas and ZEV standards are preempted by the Energy Policy Conservation Act ("EPCA"). If NHTSA finalizes this finding, EPA believes that California's standards "cannot be afforded a valid waiver of preemption" under the Clean Air Act.<sup>8</sup>
- (2) EPA no longer believes that California needs its greenhouse gas and ZEV standards to meet compelling and extraordinary conditions.<sup>9</sup>
- (3) EPA no longer believes that California's greenhouse gas and ZEV standards are consistent with Section 202(a) of the Clean Air Act, because they are technologically infeasible.<sup>10</sup>

For all of the reasons discussed above, even if one assumes that EPA has *some* authority to revoke a waiver, none of these are permissible grounds for revocation. Furthermore, NHTSA's proposed finding on EPCA preemption is unreasonable, as are EPA's proposed findings on the need for and feasibility of California's standards. In short, EPA's rationales for revoking California's 2013 waiver are legally and factually insufficient.

---

<sup>8</sup> Revocation Proposal, 83 Fed. Reg. at 43,240.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

# Table of Contents

Executive Summary	i
Introduction	1
The Strong Presumption in Favor of Granting California's Waiver Requests	2
The 2008 Waiver Denial and Its Subsequent Reversal	2
The 2013 Waiver and Its Proposed Revocation	3
I. EPA Likely Has No Authority to Revoke a Waiver	5
A. The Plain Text of Section 209 Does Not Support a Finding of Revocation Authority	5
B. A Stray Reference in the Legislative History of Section 209 Cannot Support a Finding of Revocation Authority	7
C. Reliance Interests Weigh Against a Finding of Revocation Authority	9
D. Federalism Principles Weigh Against a Finding of Revocation Authority	11
E. EPA Cannot Invoke Inherent Authority to Revoke a Waiver	12
II. Even if EPA Did Possess Revocation Authority, Revocation Would Be Permissible Only If an Increase in the Stringency of Federal Standards Rendered California's Standards Comparatively Less Protective of Public Health and Welfare	13
III. EPA's Justifications for Revoking California's 2013 Waiver Are Legally and Factually Insufficient	16
A. NHTSA's Contention that California's Standards Are Preempted by EPCA Cannot Justify a Waiver Revocation	17
B. EPA's Assertion That California Does Not Need a Waiver to Meet Compelling and Extraordinary Conditions Cannot Justify a Waiver Revocation	18
C. EPA's Assertion That California's Standards Are Not Feasible Cannot Justify a Waiver Revocation	20
Conclusion	21

# Introduction

**C**alifornia has long played a key role in advancing the science and policy of motor vehicle pollution control. In the 1950s, California scientists were the first to identify tailpipe emissions of airborne gasoline particles and nitrogen oxides as the primary precursors to smog.<sup>11</sup> And in the 1960s, California became the first jurisdiction to require that new motor vehicles be equipped with technology to control such emissions.<sup>12</sup>

When the U.S. Congress subsequently enacted nationwide limits on motor vehicle pollution, it recognized California's pioneering efforts by exempting the state from federal preemption. Under the Air Quality Act of 1967, all other jurisdictions were barred from setting their own vehicle emission limits. But California could receive a preemption waiver to set more stringent limits than the federal government.<sup>13</sup>

In creating the waiver provision, Congress sought to benefit not just the citizens of California but the nation as a whole. California was touted as a “testing area” for innovative and ambitious pollution control strategies that, if successful, could be rolled out on a national scale.<sup>14</sup>

Congress retained the waiver provision when it passed the landmark Clean Air Act of 1970.<sup>15</sup> And in 1977, it substantially revised the provision in an effort “to expand the deference accorded to California.”<sup>16</sup> For example, lawmakers removed the requirement that each California standard be more stringent than a comparable federal standard and, instead, allowed California to request a waiver upon a determination that its standards would be “*in the aggregate*, at least as protective of public health and welfare as applicable Federal standards.”<sup>17</sup> A House Report explained that this change was intended to “broaden and strengthen the State of California’s authority to prescribe and enforce separate new motor vehicle emission standards from the Federal Standards.”<sup>18</sup> The 1977 Congress also added a “piggyback provision,” Section 177, which allowed other states to adopt California’s standards instead of national standards.<sup>19</sup>

---

<sup>11</sup> Douglas Smith, *Fifty Years of Clearing the Skies: A Milestone in Environmental Science*, CALTECH (Apr. 25, 2013), <http://www.caltech.edu/news/fifty-years-clearing-skies-39248>.

<sup>12</sup> *Id.*

<sup>13</sup> Air Quality Act of 1967, Pub. L. 90-148, § 2, 81 Stat. 501 (1967); *see also* 42 U.S.C. § 7543(b) (the waiver provision as currently codified).

<sup>14</sup> S. REP. No. 90-403, at 33 (1967) (“The Nation will have the benefit of California’s experience with lower standards which will require new control systems and design. In fact, California will continue to be the testing area for such lower standards and should those efforts to achieve lower emission levels be successful it is expected that the Secretary will, if required to assure protection of the national health and welfare, give serious consideration to strengthening the Federal standards.”).

<sup>15</sup> Clean Air Act Amendments of 1970 Pub. L. No. 91-604, § 8(a), 84 Stat. 1694 (1970) (making no substantive changes to Section 208 of the Air Quality Act—i.e., the waiver provision—but renumbering it as Section 209).

<sup>16</sup> *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979) (“[T]he broad thrust of the 1977 amendments . . . was to expand the deference accorded to California.”); *see also* H. REP. No. 95-294, at 301-02 (1977) (“In general, the Environmental Protection Agency has liberally construed the waiver provision so as to permit California to proceed with its own regulatory program. . . . 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.”).

<sup>17</sup> Clean Air Act Amendments of 1977, Pub. L. 95-95, § 207, 91 Stat. 755 (1977) (codified at 42 U.S.C. § 7542(b)(1)) (emphasis added).

<sup>18</sup> H. REP. No. 95-294 at 23.

<sup>19</sup> Clean Air Act Amendments of 1977 § 129(b) (current version codified at 42 U.S.C. § 7507).

## The Strong Presumption in Favor of Granting California's Waiver Requests

The design of the waiver provision—now contained within Clean Air Act Section 209—creates a strong presumption in favor of granting California's waiver requests. As EPA explained in 2009 when it approved California's first request to set greenhouse gas standards for light-duty vehicles, "Congress intentionally structured [the] waiver provision to restrict and limit EPA's ability to deny a waiver, and did this to ensure that California had broad discretion in selecting the means it determined best to protect the health and welfare of its citizens."<sup>20</sup> Accordingly, Section 209 allows the Administrator to deny a waiver request only upon making one of the following three findings: (1) California's determination that its standards will be, in the aggregate, at least as protective of public health and welfare as federal standards is arbitrary and capricious; (2) California does not need the standards to meet compelling and extraordinary conditions; or (3) California's standards and enforcement procedures conflict with the requirements of Clean Air Act Section 202(a), which governs the promulgation and enforcement of federal vehicle emission standards.<sup>21</sup>

By strictly limiting the grounds on which the EPA Administrator could deny a waiver, Congress sought to prevent the Administrator from "overturn[ing] California's judgment lightly" or "substitut[ing] his judgment for that of the State."<sup>22</sup> A House Report accompanying the 1977 Clean Air Act Amendments explained that, in order to find that California acted arbitrarily or capriciously in determining that its standards were at least as protective as federal standards, an EPA Administrator needed "clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State."<sup>23</sup>

Given Congress's unequivocal desire for EPA to defer to California's judgment, it is unsurprising that the agency has, over the past five decades, approved virtually all of California's waiver requests. Specifically, EPA has granted over 50 waivers and fully denied only one—and even that denial was subsequently reversed.<sup>24</sup>

## The 2008 Waiver Denial and Its Subsequent Reversal

In December 2005, California requested a waiver from EPA approving, for the first time, standards that directly limited motor vehicles' carbon dioxide emissions.<sup>25</sup> EPA initially delayed acting on the waiver request pending the Supreme Court's decision in *Massachusetts v. EPA*, which would determine whether greenhouse gases were subject to regulation

---

<sup>20</sup> Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,745 (July 8, 2009).

<sup>21</sup> 42 U.S.C. § 7543(b)(1). EPA has historically interpreted the third criterion narrowly: "[T]he determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the Federal test procedure." 74 Fed. Reg. at 32,767. Courts have agreed with this narrow interpretation. See, e.g., *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998).

<sup>22</sup> H. REP. NO. 95-294, at 302 (1977).

<sup>23</sup> *Id.*

<sup>24</sup> 74 Fed. Reg. at 32,745 ("[S]ince 1970, EPA has recognized its limited discretion in reviewing California waiver requests. EPA has granted over 50 waivers of preemption and has only fully denied one waiver request."). EPA has partially denied several waivers over the years, where portions of the waiver request did not meet statutory criteria. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-249R, CLEAN AIR ACT: HISTORICAL INFORMATION ON EPA'S PROCESS FOR REVIEWING CALIFORNIA WAIVER REQUESTS AND MAKING WAIVER DETERMINATIONS 4 (2009), <https://www.gao.gov/new.items/d09249r.pdf> ("Waivers were granted in part when EPA found that aspects of the waiver request did not meet the criteria under Section 209(b). EPA has granted waivers in part approximately nine times since 1967."); see also *id.* at 7-8 (listing and summarizing nine instances in which EPA granted a waiver in part).

<sup>25</sup> Letter from Catherine Witherspoon, Exec. Officer, Cal. Air Res. Bd., to Stephen L. Johnson, Adm'r, EPA (Dec. 21, 2005), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2006-0173-0017>.

under the Clean Air Act.<sup>26</sup> After the Supreme Court ruled in 2007 that greenhouse gases do fit within the Clean Air Act's definition of "air pollutant,"<sup>27</sup> EPA commenced a hearing and public comment period on California's waiver request.<sup>28</sup>

EPA eventually denied California's request on March 6, 2008.<sup>29</sup> California challenged that decision in the U.S. Court of Appeals for the D.C. Circuit,<sup>30</sup> but the case was never decided. Instead, following the election of President Barack Obama in November 2008, the litigation was put in abeyance while EPA voluntarily reconsidered its decision.<sup>31</sup> On July 8, 2009, the agency officially reversed course and granted California a waiver to set its own greenhouse gas emission standards for model years 2009 through 2016.<sup>32</sup>

## The 2013 Waiver and Its Proposed Revocation

In January 2013, EPA granted California a second waiver for greenhouse gas emission standards, this time as part of California's Advanced Clean Cars program for model years 2015 through 2025.<sup>33</sup> The Advanced Clean Cars program is a "coordinated package"<sup>34</sup> of regulations that includes (1) emission standards for smog-causing pollutants, (2) emission standards for greenhouse gases, and (3) a Zero Emission Vehicle ("ZEV") program "designed to commercialize battery-electric, plug-in hybrid, and fuel cell technologies, reaching about 15% of new vehicle sales in California in the 2025 time frame."<sup>35</sup> In granting the 2013 waiver, EPA observed that the different regulations making up the Advanced Clean Cars program were "compl[e]mentary in the way they address interrelated ambient air quality needs and climate change"<sup>36</sup> and "necessary to achieve the coordinated goals."<sup>37</sup>

The greenhouse gas standards included in California's Advanced Clean Cars package were "almost identical in stringency and structure" to federal light-duty vehicle emission standards for model years 2017 through 2025, which EPA had finalized in October 2012.<sup>38</sup> As part of the rulemaking process for those federal standards, EPA had committed to conducting a midterm evaluation by April 1, 2018, to ensure that the 2022 to 2025 standards remained appropriate under the Clean Air Act, taking into account factors such as changes in fuel prices, changes in the projected vehicle fleet

---

<sup>26</sup> Letter from William L. Wehrum, Acting Assistant Adm'r, EPA, to Catherine Witherspoon, Exec. Officer, Cal. Air Res. Bd. (Feb. 21, 2007), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2006-0173-0002>.

<sup>27</sup> *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007).

<sup>28</sup> California State Motor Vehicle Pollution Standards; Request for Waiver of Federal Preemption Standards; Opportunity for Public Hearing, 72 Fed. Reg. 21,260 (Apr. 30, 2007).

<sup>29</sup> Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

<sup>30</sup> Brief for Petitioner, *State of California v. EPA*, Nos. 08-1178, 08-1179, and 08-1180 (D.C. Cir. 2008), [http://ag.ca.gov/globalwarming/pdf/challenge\\_to\\_waiver\\_denial.pdf](http://ag.ca.gov/globalwarming/pdf/challenge_to_waiver_denial.pdf).

<sup>31</sup> See California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7040 (Feb. 12, 2009).

<sup>32</sup> See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,744 (July 8, 2009).

<sup>33</sup> See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2112 (Jan. 9, 2013).

<sup>34</sup> *Id.*

<sup>35</sup> EPA, REGULATORY ANNOUNCEMENT: EPA DECISION TO GRANT CALIFORNIA'S REQUEST FOR WAIVER OF PREEMPTION FOR ITS ADVANCED CLEAN CAR PROGRAM 1 (2012), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100FGS0.PDF?Dockey=P100FGS0.PDF>.

<sup>36</sup> 78 Fed. Reg. at 2113.

<sup>37</sup> *Id.* at 2131.

<sup>38</sup> EPA, *supra* note 35, at 2.

mix, and changes in relevant technology costs.<sup>39</sup> In adopting its Advanced Clean Cars regulations, California committed to completing a similar midterm review of its own standards.<sup>40</sup>

In January 2017, following an extensive technical assessment process conducted jointly with NHTSA and the California Air Resources Board, EPA issued a midterm evaluation determining that the existing federal greenhouse gas standards for model years 2022 to 2025 remained appropriate under the Clean Air Act.<sup>41</sup> Later that same month, California released its own midterm review, confirming that the greenhouse gas standards and other requirements of the state's Advanced Clean Cars program remained feasible and appropriate for model years 2022 to 2025.<sup>42</sup>

But shortly after arriving at the agency, President Trump's EPA Administrator, Scott Pruitt, announced that he would reconsider EPA's January determination.<sup>43</sup> And on April 2, 2018, Pruitt signed a new midterm evaluation, which summarily deemed the standards for model years 2022 to 2025 "not appropriate in light of the record before EPA" and announced that the agency would initiate a notice-and-comment rulemaking to consider new standards for light-duty vehicles in those model years.<sup>44</sup>

Four months later, EPA, now under the leadership of Acting Administrator Andrew Wheeler, followed through on Pruitt's pledge. On August 1, 2018, Wheeler signed a proposed rule that would roll back federal greenhouse gas standards for model years 2021 through 2025 and, most importantly for purposes of this report, revoke California's 2013 waiver to maintain its own greenhouse gas and ZEV standards for those model years.<sup>45</sup> Revoking the waiver would affect not just California but also twelve other states and the District of Columbia, which have adopted California's standards under Section 177.<sup>46</sup> Together, California and these other jurisdictions account for over a third of U.S. auto sales.<sup>47</sup>

Because EPA has never before attempted to withdraw a waiver under Section 209, neither courts nor legal scholars have had reason to explain when such a revocation is permissible, if ever. This report clarifies the scope of EPA's Section 209 authority by looking to the plain text of the waiver provision, to relevant case law on statutory interpretation, to legislative and regulatory history, and to the conditions under which delegations of regulatory authority can be revoked under other

---

<sup>39</sup> 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 62,784 (Oct. 15, 2012). EPA's greenhouse gas standards were issued jointly with NHTSA's Corporate Average Fuel Economy Standards for model years 2017 to 2021. *Id.* at 62,627. NHTSA planned to finalize CAFE standards for model years 2022 to 2025 concurrently with EPA's completion of its midterm evaluation. *Id.* at 62,628.

<sup>40</sup> See CAL. AIR RES. BD., MIDTERM REVIEW, <https://www.arb.ca.gov/msprog/acc/acc-mtr.htm> (last visited May 30, 2018).

<sup>41</sup> EPA, FINAL DETERMINATION ON THE APPROPRIATENESS OF THE MODEL YEAR 2022-2025 LIGHT-DUTY VEHICLE GREENHOUSE GAS EMISSIONS STANDARDS UNDER THE MIDTERM EVALUATION 1 (2017), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf>.

<sup>42</sup> Press Release, Cal. Air Res. Bd., CARB Releases Major Report on the Future of Ultra-Clean and Zero-Emission Vehicles (Jan. 18, 2017), <https://ww2.arb.ca.gov/news/carb-releases-major-report-future-ultra-clean-and-zero-emission-vehicles>.

<sup>43</sup> Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles, 82 Fed. Reg. 14,671, 14,671 (Mar. 22, 2017).

<sup>44</sup> Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077, 16,077 (Apr. 13, 2018).

<sup>45</sup> Revocation Proposal, 83 Fed. Reg. 42,986, 43,240 (proposed Aug. 24, 2018).

<sup>46</sup> See Press Release, Cal. Air Res. Bd., California Moves to Ensure Vehicles Meet Existing State Greenhouse Gas Emission Standards (Aug. 7, 2018), <https://ww2.arb.ca.gov/news/california-moves-ensure-vehicles-meet-existing-state-greenhouse-gas-emissions-standards-0> ("Currently, 12 other states and the District of Columbia have adopted California's greenhouse gas emissions standards for vehicles."). Colorado also recently announced plans to adopt California's standards. David Migoya, *Colorado Will Adopt California-style Low-Emission Vehicle Standards Under Hickenlooper Order*, DENVER POST (June 19, 2018), <https://www.denverpost.com/2018/06/19/colorado-california-emission-vehicle-standards>.

<sup>47</sup> Evan Halper et al., *California Vows to Fight Trump EPA's Move to Freeze Fuel Economy Rules*, L.A. TIMES (Aug. 2, 2018), <http://www.latimes.com/politics/la-na-pol-trump-fuel-economy-20180802-story.html>.

provisions of the Clean Air Act and other federal environmental statutes. Ultimately, we conclude that EPA likely lacks *any* authority to revoke a waiver. And even if the agency *were* found to have revocation authority, such authority could permissibly be exercised only when an increase in the stringency of one or more federal standards rendered California's standards collectively less protective of public health and welfare than federal standards.

Here, EPA has proposed revocation in conjunction with a *decrease* in the stringency of federal standards relative to California's standards, not a strengthening of federal standards. In other words, revocation is not necessary to ensure that California's standards remain at least as protective of public health as federal standards. Accordingly, even if one assumes that EPA has authority to revoke a California waiver under some circumstances, it cannot permissibly do so for the reasons provided in its recent proposal.

## I. EPA Likely Has No Authority to Revoke a Waiver

**S**ection 209 contains no text that could reasonably be read as authorizing EPA to withdraw a waiver. Nor is the single reference to revocation authority in the provision's legislative history sufficiently probative of Congressional intent to support a finding of revocation authority. Furthermore, interpreting Section 209 to implicitly grant revocation authority would be inconsistent with D.C. Circuit case law suggesting that implicit revocation authority should not be read into statutes when doing so would interfere with legitimate reliance interests.

### A. The Plain Text of Section 209 Does Not Support a Finding of Revocation Authority

Section 209 is an express preemption provision. Section 209(a) bars states from setting their own emission standards for new motor vehicles,<sup>48</sup> and Section 209(b) details the circumstances under which the EPA Administrator must waive application of that bar to California.<sup>49</sup> When interpreting an express preemption provision like Section 209, courts "in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."<sup>50</sup> Nothing in the plain text of Section 209 suggests that Congress intended to grant EPA authority to revoke, withdraw, or cancel a waiver issued under the provision.

---

<sup>48</sup> 42 U.S.C. § 7543(a) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.").

<sup>49</sup> *Id.* § 7543(b)(1) ("The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.") Though the provision does not name California, California was the only state that had adopted motor vehicle emission standards prior to passage of the Air Quality Act of 1967. See S. REP. NO. 90-403, at 33 (1967) ("To date only California has actively engaged in this form of pollution control and, in fact, the initial Federal standard is based on California's experience.").

<sup>50</sup> *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment))).

Section 209 sets out no express substantive or procedural criteria for revoking a waiver. Its silence on these points stands in contrast to other Clean Air Act provisions and provisions of other federal environmental statutes that permit or require federal agencies to delegate regulatory authority to states. For example, Title V of the Clean Air Act empowers EPA to approve state permitting programs for stationary sources that ensure compliance with the Act’s emission limitations and other requirements.<sup>51</sup> The statute provides specific guidance on when and how EPA can withdraw that delegated authority. Specifically, once a state permitting program is approved, EPA may take control of permitting in that state only if the Administrator finds that the state “is not adequately administering and enforcing” the requirements of the Clean Air Act and only after allowing the state 18 months to correct the deficiency in its program.<sup>52</sup> Similarly, Section 402 of the Clean Water Act allows EPA to delegate authority to the states to enforce the requirements of the National Pollutant Discharge Elimination System (“NPDES”).<sup>53</sup> Like Title V of the Clean Air Act, Section 402 of the Clean Water Act includes a provision expressly dictating how and when a delegation under the NPDES program may be withdrawn: only upon a finding that the state “is not administering a program . . . in accordance with requirements of this section,” and only after giving the state notice and 90 days to take corrective action.<sup>54</sup> Section 209, again, contains no such guidance on revocation of a waiver.

In addition to lacking express criteria for revocation, Section 209 lacks any text that could reasonably be construed to grant the agency revocation authority. On this point, the D.C. Circuit’s decision in *Mingo Logan Coal Co. v. EPA* provides an instructive contrast. In *Mingo*, a mining company challenged EPA’s decision to, effectively, revoke a dredge and fill permit issued by the Army Corps of Engineers almost four years after the permit’s approval.<sup>55</sup> While not disputing that Section 404(c) of the Clean Water Act authorized EPA to veto a permit *prior* to its issuance, the mining company argued that EPA lacked statutory authorization to do so retroactively.<sup>56</sup> The D.C. Circuit disagreed, finding that Section 404(c) “imposes no temporal limit on the Administrator’s authority.”<sup>57</sup> However, the court based this conclusion on specific words in the statutory text. It noted, for example, that Section 404(c) authorizes the Administrator to prohibit a specification made in an Army Corps permit “‘whenever’ he makes a determination” that an unacceptable adverse effect will result.<sup>58</sup> By “[u]sing the expansive conjunction ‘whenever,’” the court reasoned, Congress “made plain its intent to grant the Administrator authority to [act] at *any* time.”<sup>59</sup> Additionally, the court noted that Section 404(c) specifically referred to the “withdrawal” of permit specifications when describing the agency’s authority and agreed with EPA that “withdrawal” was “a term of retrospective application.”<sup>60</sup>

Unlike the statutory provision at issue in *Mingo*, Section 209 contains no words that suggest the Administrator has an ongoing ability to evaluate California’s entitlement to a waiver. Section 209(b)(1) provides that no waiver “shall be granted” if the Administrator makes one of three listed findings.<sup>61</sup> This wording indicates that the Administrator is authorized to consider the three factors only *prior* to the granting of the waiver. Had Congress wished to confer a temporally unlimited power to evaluate a waiver under the Section 209(b)(1) factors, lawmakers could easily have used

---

<sup>51</sup> 42 U.S.C. § 7661a(d)(1).

<sup>52</sup> *Id.* § 7661a(i)(1), (4).

<sup>53</sup> 33 U.S.C. § 1342(b).

<sup>54</sup> *Id.* § 1342(c)(3).

<sup>55</sup> *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 609 (D.C. Cir. 2013) (quoting 33 U.S.C. § 1344(c)).

<sup>56</sup> See *id.* at 611.

<sup>57</sup> *Id.* at 613.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (internal quotation marks and citations omitted).

<sup>61</sup> 42 U.S.C. § 7543(b)(1).

language similar to that in Section 404(c), authorizing the Administrator to deny or “withdraw” a waiver “whenever” he or she made one of the Section 209(b)(1) findings.

In summary, Section 209 includes neither an express revocation provision nor any text that could fairly be read as granting the Administrator an ongoing ability to evaluate California’s entitlement to a waiver. Thus, there is no textual support for a finding that EPA may revoke a preemption waiver.

## B. A Stray Reference in the Legislative History of Section 209 Cannot Support a Finding of Revocation Authority

Although EPA can point to no statutory text authorizing revocation, it argues that the “authority to reconsider and withdraw the grant of a waiver . . . is implicit” in Section 209.<sup>62</sup> In support, the agency cites “the legislative history for section 209(b)—specifically, a single sentence on waiver withdrawal from a 1967 Senate committee report.<sup>63</sup> But this stray reference cannot reasonably support a finding of revocation authority for two reasons. First, even assuming that it accurately represented Congressional intent as of 1967, subsequent revisions to the text of Section 209 cast significant doubt on the 1967 statement’s continued validity. Second, because there is no “reference point” for revocation authority in the text of Section 209, a court could not appropriately recognize revocation authority based on “a single passage of legislative history.”<sup>64</sup>

As explained in the Introduction to this report, Congress first established the waiver provision as part of the Air Quality Act of 1967, a precursor to the Clean Air Act of 1970. The Senate Report on the bill that would become the Air Quality Act contains the following sentence on revocation:

Implicit in this provision is the right of the Secretary to withdraw the waiver at any time after notice and an opportunity for public hearing [if] he finds that the State of California no longer complies with the conditions of that waiver.<sup>65</sup>

The Senate Report does not elaborate on what might constitute “the conditions” of a waiver.

Even assuming that the statement in the Senate Report accurately reflected Congressional intent *as of 1967*, subsequent revisions to the waiver provision cast serious doubt on the statement’s continued relevance. In 1977, Congress substantially amended the text of the waiver provision in an effort to “broaden and strengthen the State of California’s authority to prescribe and enforce separate new motor vehicle emission standards from the Federal Standards.”<sup>66</sup>

The 1967 version of the waiver provision vested all authority to determine whether a waiver was appropriate with a federal official, the Secretary of Health, Education, and Welfare (who was, at that time, in charge of federal pollution

---

<sup>62</sup> Revocation Proposal, 83 Fed. Reg. 42,986, 43,242 (proposed Aug. 24, 2018).

<sup>63</sup> *Id.*

<sup>64</sup> *Shannon v. United States*, 512 U.S. 573, 583–84 (1994) (internal quotation marks and citations omitted).

<sup>65</sup> S. REP. No. 90-403, at 34 (1967). The Air Quality Act predicated the creation of the EPA, so the Senate Report referred to the Secretary of Health, Education, and Welfare’s authority to revoke a waiver.

<sup>66</sup> H. REP. No. 95-294, at 23 (1977).

control efforts<sup>67</sup>). The text placed no express limits on the timing of the Secretary's determination:

The Secretary shall . . . waive application of this section to any State which has adopted standards . . . for the control of emissions from new motor vehicles . . . prior to March 30, 1966, unless he finds that such State does not require standards more stringent than applicable Federal standards to meet compelling and extraordinary conditions or that such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this title.<sup>68</sup>

In contrast, the 1977 version of the text vested *California state officials* with the authority to determine, in the first instance, whether California's standards were sufficiently protective of public health and welfare. Even more importantly, it caged the EPA Administrator's ability to evaluate whether California was entitled to a waiver to a single point in time—*after* California had made a protectiveness determination but *before* a waiver had been granted:

The Administrator shall . . . waive application of this section to any State which has adopted standards . . . for the control of emissions from new motor vehicles . . . prior to March 30, 1966, **if the State determines** that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. **No such waiver shall be granted** if the Administrator finds that (A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.<sup>69</sup>

Whereas the wording of the 1967 provision could plausibly have been read to confer an ongoing evaluative power, the 1977 text's use of the phrase “[n]o such waiver shall be granted” makes clear that the Administrator is authorized to consider the Section 209(b)(1) factors only *prior* to the granting of the waiver. In other words, the current text of Section 209 confers no authority to reconsider the appropriateness of a waiver that has already been granted.

The idea that changes to the waiver provision in 1977 eliminated any revocation authority implicitly conferred by the 1967 text draws further support from Congressional reports accompanying the 1977 amendments, which, unlike the 1967 Senate Report, make absolutely no mention of revocation authority.<sup>70</sup> Thus, whether or not the 1967 version of the waiver provision can fairly be interpreted to confer implicit revocation authority, it is highly doubtful that Congress intended to *preserve* such authority when it substantially revised the text of the provision in 1977.

Furthermore, even if the statement on revocation authority in the 1967 Senate Report was not rendered irrelevant by the 1977 amendments, a court could not appropriately recognize revocation authority based purely on this legislative

---

<sup>67</sup> The Secretary's duties with respect to air pollution control were subsequently transferred to the EPA Administrator. See Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), reprinted in 5 U.S.C. app. at 202 (2006), and in 84 Stat. 2086 (1970).

<sup>68</sup> Air Quality Act of 1967, Pub. L. 90-148 § 208(b), 81 Stat. 501 (1967).

<sup>69</sup> Clean Air Act Amendments of 1977, Pub. L. 95-294, § 207, 91 Stat. 685 (1977) (codified at 42 U.S.C. § 7543(b)).

<sup>70</sup> House Report No. 95-294 is the only committee report discussing the 1977 changes to the waiver provision. See H. REP. NO. 95-294, at 23 (1977). The debate on the House floor lacked any substantive discussion of section 209(b). 123 Cong. Rec. 16,194-221; *id.* at 16,627-88; *id.* at 16,913-79 (1977). The Senate version of the bill did not contain revisions to section 209(b), and neither the Senate committee report nor the debate on the Senate floor discussed revisions to section 209(b). See generally S. REP. NO. 95-127 (1977); 123 Cong. Rec. 18,013-76; 18,139-96; 18,458-531 (1977). The Conference Report and the subsequent debate on the House floor did discuss the waiver provision, but they did not mention any EPA authority to withdraw the waiver. H. REP. NO. 95-564, at 170 (1977); 123 Cong. Rec. 27,066-79 (1977). Senate debate of the Conference Report also did not address the waiver provision. See 123 Cong. Rec. 18,013-76 (1977); *id.* at 18,139-96; *id.* at 18,458-531.

history. In *Shannon v. United States*, the Supreme Court explained that “courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point.”<sup>71</sup> In so holding, the Court noted that it could identify *no* case in which it had “given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.”<sup>72</sup> More recently, the D.C. Circuit, in *National Association of Broadcasters v. FCC*, held that statements in a House committee report supporting a broad reading of a statutory provision were “at best, of minimal persuasive force” because they lacked a “reference point” in the “narrower” statutory text.<sup>73</sup> As discussed in Section I.A, Section 209 contains no text that could plausibly be read as authorizing EPA to revoke a waiver. In the absence of such a “statutory reference point,” legislative history cannot support a finding of revocation authority.

## C. Reliance Interests Weigh Against a Finding of Revocation Authority

California’s reasonable reliance on its 2013 waiver weighs against any interpretation of Section 209 that would allow EPA to withdraw a waiver.<sup>74</sup> In the context of a different Clean Air Act provision, the D.C. Circuit expressly cautioned against reading implicit revocation authority into statutory silence when doing so would disrupt a waiver recipient’s “legitimate expectations.”<sup>75</sup>

*American Methyl Corp. v. EPA* involved a waiver granted to a private company to market a fuel blend pursuant to Section 211(f), which is silent on the question of revocation.<sup>76</sup> In setting aside EPA’s attempt to revoke the waiver two years after its issuance, the D.C. Circuit professed an “unwillingness to wrest a standardless and open-ended revocation authority from a silent statute.”<sup>77</sup> That refusal was motivated, in part, by a desire to protect the reliance interests of waiver recipients:

By upholding Congress’s disinclination to grant EPA an unguided and open-ended power to revoke waivers, we ensure that entities subject to regulation under section 211 know what is expected of them. Protecting the legitimate expectations of fuel manufacturers comports with basic fairness; it also encourages investment in technology to create more efficient, less costly, and less polluting substitutes for conventional fuels. Like the sword suspended over the courtier Damocles, the Administrator’s claimed revocation authority would pose an ever-present threat to the marketing of new fuels, fostering great uncertainty in the business community.<sup>78</sup>

Just as the fuel manufacturer in *American Methyl* had a legitimate expectation that EPA would not seek to revoke its fuel blend waivers under Section 211(f), California has a legitimate expectation that EPA will not seek to revoke its Section 209 preemption waiver. That expectation has informed the state’s development of plans to comply with federal and state environmental mandates.

---

<sup>71</sup> *Shannon*, 512 U.S. at 584 (internal citations, quotation marks, and modifications omitted).

<sup>72</sup> *Id.* at 583.

<sup>73</sup> *National Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 422 (D.C. Cir. 2009).

<sup>74</sup> The analysis would, of course, be different if California were to request that EPA reconsider or modify a waiver.

<sup>75</sup> *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 839 (D.C. Cir. 1984).

<sup>76</sup> *Id.* at 828-30, 834.

<sup>77</sup> *Id.* at 836-37.

<sup>78</sup> *Id.* at 839-40.

When it granted the 2013 waiver, EPA acknowledged that components of California's Advanced Clean Cars regulations were "essential" to the state's long-term plans.<sup>79</sup> EPA further recognized "the magnitude of the technology and energy transformation needed from the transportation sector and associated energy production to meet federal [air quality] standards and the goals set forth by California's climate change requirements."<sup>80</sup>

California subsequently relied on the standards covered by its 2013 waiver in state planning efforts. For example, in May 2016, the California Air Resources Board released an updated Mobile Source Strategy report, which explained that the Advanced Clean Cars standards approved in the 2013 waiver "are projected to decrease" light-duty vehicles' nitrogen oxides emissions "by nearly 80 percent from 2015 to 2031 in the South Coast Air Basin," which is not in attainment with national ambient air quality standards.<sup>81</sup> And in its January 2017 midterm review of the Advanced Clean Cars standards, the Air Resources Board explained that the standards are both "a critical measure . . . for achieving national ambient air quality standards in the South Coast and San Joaquin Valley" and "an integral part in [the Board's] Scoping Plan to achieve the [greenhouse gas] reduction goals that were established through California legislation and Executive Orders."<sup>82</sup> Finally, in August 2018, California reaffirmed its need for the greenhouse gas standards covered by its 2013 waiver, explaining that the standards' "emission benefits" were "critical" to satisfying federal air quality standards and state greenhouse gas emission requirements.<sup>83</sup> In short, California continues to rely extensively on EPA's 2013 grant of California's waiver to meet its obligations under the federal Clean Air Act and state laws and policies.

Had EPA denied California's waiver request at the outset, California might have been able to design different approaches to achieve federal and state air quality goals. For example, it could have imposed more stringent emission standards on stationary sources, which, unlike vehicle standards, are not subject to preemption under the Clean Air Act.<sup>84</sup> If EPA is permitted to withdraw the 2013 waiver *now*, however, California likely will not have sufficient time to develop alternative approaches to replace the coordinated framework of strategies it has already begun implementing.

California is not the only state whose legitimate expectations will be upended if the 2013 waiver is revoked. Twelve other states and the District of Columbia have adopted California's emission standards, together making up over a third of the national auto market.<sup>85</sup> These other states, too, have relied on the standards enabled by the 2013 waiver in planning to meet their public health goals. For example, the Commissioner of the Massachusetts Department of Environmental Protection explained in a 2017 press release that implementation of the California vehicle emission standards for automobiles has been a "critical means for Massachusetts to meet greenhouse gas and emissions reduction goals under the Global Warming Solutions Act, and the standards have provided tremendous public health benefits in the Northeast region over the years."<sup>86</sup> Similarly, the New York Department of Environmental Conservation warned in a September 2018 comment letter that shifting from California's standards to the proposed, weaker federal standards would "make

---

<sup>79</sup> See 78 Fed. Reg. at 2131 (noting that, in California's 2012 coordinated air quality plan, "[a]dopted or pending rules, such as the LEV III regulation, were considered essential as baseline reductions assumed for the future").

<sup>80</sup> *Id.*

<sup>81</sup> CAL. AIR RES. BD., MOBILE SOURCE STRATEGY 63 (2016), available at <https://www.arb.ca.gov/planning/sip/2016sip/2016mobsr.pdf>.

<sup>82</sup> CAL. ENVTL. PROT. AGENCY, CAL. AIR RES. BD., CALIFORNIA'S ADVANCED CLEAN CARS MIDTERM REVIEW, at ES-10 (2017).

<sup>83</sup> CAL. AIR RES. BD., STAFF REPORT: INITIAL STATEMENT OF REASONS 23 (2018), <https://www.arb.ca.gov/regact/2018/leviii2018/leviiisor.pdf>.

<sup>84</sup> 42 U.S.C. § 7416.

<sup>85</sup> See Press Release, Cal. Air Res. Bd., California Moves to Ensure Vehicles Meet Existing State Greenhouse Gas Emission Standards (Aug. 7, 2018), <https://ww2.arb.ca.gov/news/california-moves-ensure-vehicles-meet-existing-state-greenhouse-gas-emissions-standards-0>.

<sup>86</sup> Press Release, Cal. Air Res. Bd., CARB Finds Vehicle Standards Are Achievable and Cost-Effective (Mar. 24, 2017), <https://ww2.arb.ca.gov/news/carb-finds-vehicle-standards-are-achievable-and-cost-effective>.

it difficult, if not impossible for New York to achieve and maintain its air quality goals as required by [federal air quality standards].”<sup>87</sup>

Case law suggests that the legitimate expectations of California and other states that have adopted its standards are even more deserving of a court’s solicitude than the industry reliance interests at stake in *American Methyl*. For example, in *American Trucking Association v. Smith*, the Supreme Court emphasized the importance of avoiding interference with a state’s reliance interests in maintaining its expected tax revenue, despite the objections of an industry trade association.<sup>88</sup> In that case, truck drivers challenged the State of Arkansas’s flat tax as impermissibly burdening interstate commerce. While the Arkansas challenge was pending, the Supreme Court invalidated a similar flat tax in Pennsylvania. Arkansas repealed the flat tax and replaced it with a per-mile tax, but the Arkansas Supreme Court refused to order the state to refund the taxes that the truckers had already paid. The Supreme Court granted certiorari to address the question of whether the state needed to refund the taxes that the truck drivers had paid before they were deemed unconstitutional, ultimately holding that, because of the state’s reliance interests, it need not issue the truckers a refund. The Court reasoned that “because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent.”<sup>89</sup> The Court continued:

[I]t is clear that the invalidation of the State’s [highway] tax would have potentially disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State’s current operations and future plans.<sup>90</sup>

Just as an unexpected depletion of Arkansas’ treasury would have had disruptive consequences for the state and its citizens, an unprecedented revocation of California’s waiver would disrupt the state’s carefully crafted plans for satisfying federal air quality standards and meeting its own air quality goals. Accordingly, Section 209 should not be interpreted to silently authorize such disruption.

## D. Federalism Principles Weigh Against a Finding of Revocation Authority

As the Supreme Court observed in *Bond v. United States*, “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.”<sup>91</sup> Furthermore, “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers.”<sup>92</sup> The Court applies “this background principle when construing federal statutes that touch[] on . . . areas of traditional state responsibility.”<sup>93</sup> The regulation of air quality is one such area.

---

<sup>87</sup> Letter from Steven E. Flint, Director, Division of Air Resources, New York State Department of Environmental Conservation, re Comments on CARB Deem to Comply Provision (Sept. 24, 2018), <https://www.arb.ca.gov/lists/com-attach/27-leviii18-U2NdYgYqVjcLOVRS.pdf>; see also Letter from Deborah A. Mans, Deputy Commissioner, New Jersey Department of Environmental Protection, re Proposed Amendments to the Low-Emission Vehicle III Greenhouse Gas Emission Regulation (Sept. 24, 2018), <https://www.arb.ca.gov/lists/com-attach/25-leviii18-BWtRPVcyAjQAdlIN.pdf> (“New Jersey is relying on the significant improvements in vehicle fuel efficiency required by the current national standards, and backstopped by California’s LEV III GHG standards, to meet its near-term emission reduction goals.”).

<sup>88</sup> *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167 (1990).

<sup>89</sup> *Id.* at 182.

<sup>90</sup> *Id.*

<sup>91</sup> *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

<sup>92</sup> *Id.* at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)) (internal quotation marks omitted).

<sup>93</sup> *Id.*

The Supreme Court has long recognized the “historic primacy of state regulation of matters of health and safety.”<sup>94</sup> The Court has further observed that “[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”<sup>95</sup> Thus, a court should be “certain of Congress’ intent”<sup>96</sup> before interpreting an ambiguous statute in a manner that interferes with this traditional authority.

Section 209 expressly constrains California’s traditional authority to regulate air quality in one respect—by requiring the state to seek a waiver before setting its own limits on air pollution from new motor vehicles. But the provision says nothing about the revocation of a waiver that has already been granted. Nor has EPA attempted to revoke a waiver in the five decades since Congress first passed the waiver provision. Given the complete lack of textual support for revocation authority and the absence of any regulatory precedent for revocation, a court should not permit EPA to work a further disruption in the usual balance of federal and state regulatory powers by revoking California’s 2013 waiver.

## E. EPA Cannot Invoke Inherent Authority to Revoke a Waiver

In addition to arguing that it has implicit *statutory* authority, under Section 209, to withdraw a waiver, EPA contends that it has *inherent* authority to do so, based on the “judicial principle that agencies possess inherent authority to reconsider their decisions.”<sup>97</sup> The granting of a waiver under Section 209 is an informal adjudication,<sup>98</sup> and agencies may sometimes rely on inherent authority to reconsider an adjudicative decision.<sup>99</sup> But EPA cannot appropriately invoke such authority with respect to California’s 2013 waiver, for at least three reasons.

First, courts generally require that reconsideration grounded in inherent authority take place in a “short and reasonable time period.”<sup>100</sup> Several have elaborated that, “absent unusual circumstances” a “reasonable time period” is “measured in weeks, not years.”<sup>101</sup> Here, more than five years have elapsed since EPA granted California’s 2013 waiver.

Second, courts frequently cite reliance interests as a factor weighing against a finding of inherent reconsideration authority.<sup>102</sup> As discussed above, California has reasonably relied on its 2013 waiver in developing plans to comply with federal air quality standards and to achieve state environmental goals—as have twelve other states that adopted

---

<sup>94</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

<sup>95</sup> *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *see also Medtronic, Inc. v. Lohr*, 518 U.S. at 475 (“States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)); *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (“Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation traditionally has been a matter of state authority.”).

<sup>96</sup> *Bond*, 134 S. Ct. at 2089.

<sup>97</sup> Revocation Proposal, 83 Fed. Reg. 42,986, 43,242 (proposed Aug. 24, 2018).

<sup>98</sup> See 74 Fed. Reg. at 32,781 (“EPA’s waiver proceedings and actions under section 209(b)(1) are informal adjudications.”).

<sup>99</sup> Daniel Bress, *Administrative Reconsideration*, 91 VA. L. REV. 1737, 1743-44 (2005) (surveying reconsideration case law and finding that agencies “generally have the power to reconsider [adjudicative decisions] unless it is foreclosed by statute, by the agency’s own regulations, or otherwise”).

<sup>100</sup> *Id.* at 1765 & n.81

<sup>101</sup> See, e.g., *Belville Mining Co. v. United States*, 999 F.2d 989, 1000 (6th Cir. 1993) (“[A]bsent unusual circumstances, the time period would be measured in weeks, not years.”) (quoting *Gratethouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975)); *see also* Bress, *supra* note 99, at 1761 n.82 (collecting cases stating same proposition).

<sup>102</sup> Bress, *supra* note 99, at 1765-66, n.120 (collecting cases); *see also Solonex LLC v. Jewell*, No. 13-0993(RJL), 2018 WL 4567132, at \*5 (D.D.C. Sept. 24, 2018) (“The reasonableness of an agency’s decision to rescind a lease must be judged in light of the time that has elapsed and the resulting reliance interests at stake.”).

California's standards under Section 177 of the Clean Air Act.<sup>103</sup> Allowing EPA to revoke the waiver by invoking inherent authority to reconsider its decisions would severely disrupt those reliance interests.

Third, federalism concerns weigh against a finding of inherent reconsideration authority. As discussed above, allowing revocation would interfere with California's traditional responsibility to regulate air pollution.<sup>104</sup> For the same reasons that a court should not, absent clear evidence of Congressional intent, interpret an ambiguous statute to allow interference with traditional state responsibilities, the court should also not recognize an *inherent* authority to work such a disruption in the usual balance of federal and state authority.

As support for its claim of inherent authority, EPA cites the Supreme Court's decision in *Chevron v. NRDC*:

This authority exists in part because EPA's interpretations of the statutes it administers "are not carved in stone." ... An agency "must consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>105</sup>

But the *Chevron* Court was referring to an agency's ability to change its interpretation of ambiguous statutory terms in successive regulatory proceedings. If California were to request a waiver for a new set of vehicle standards starting in model year 2026, EPA could potentially interpret the text of Section 209 differently than it did in the 2013 waiver proceeding—so long as it was interpreting an ambiguous term in a reasonable manner. What EPA cannot do, however, is use a new interpretation of Section 209 as an excuse to claw back the waiver it issued California five years ago for standards in model years 2015 to 2025.

For all of these reasons, it would be inappropriate for a court to find that EPA has inherent authority to revoke California's 2013 waiver.

## II. Even if EPA Did Possess Revocation Authority, Revocation Would Be Permissible Only If an Increase in the Stringency of Federal Standards Rendered California's Standards Comparatively Less Protective of Public Health and Welfare

**E**ven assuming, for the sake of argument, that EPA has *some* authority to revoke a waiver—whether implicitly conferred by Section 209 or inherent—the use of that authority would properly be limited to circumstances in which withdrawal is necessary to ensure adequate environmental protection. More specifically, EPA would need to find that an increase in the stringency of one or more federal emission standards rendered California's standards

---

<sup>103</sup> See *supra* Section I.C.

<sup>104</sup> See *supra* Section I.D.

<sup>105</sup> Revocation Proposal, 83 Fed. Reg. at 43,242 (quoting *Chevron v. NRDC*, 467 U.S. 837, 863-64 (1984)).

collectively less protective of public health and welfare than federal standards.<sup>106</sup> Furthermore, in reaching this conclusion, EPA would need to afford California's own protectiveness determination the same level of deference that Section 209(b) (2) requires the agency to show when reviewing an initial waiver request.

Constraining revocation authority in this manner would be consistent with the core purpose of the waiver provision, regulatory precedent, and the design of other Clean Air Act provisions and provisions of other federal environmental laws under which federal agencies delegate regulatory authority to states. Additionally, this narrow construction of revocation authority would be relatively unlikely to disrupt California's reliance interests.

Since the current text of the waiver provision was enacted in 1977, EPA has publicly contemplated only one circumstance under which it might attempt to voluntarily<sup>107</sup> withdraw a waiver: if a change in federal standards rendered California's standards comparatively less protective of public health and welfare than national standards. EPA referenced the possibility of a withdrawal on these grounds when it granted California's first waiver for greenhouse gas standards in 2009. At the time, there were no federal greenhouse gas standards, so California's proposed standards were necessarily at least as protective of public health and welfare as applicable federal standards. But the agency noted that it could "revisit" its protectiveness determination "[i]f federal greenhouse gas standards are promulgated in the future, and if such standards bring this determination into question."<sup>108</sup> In other words, EPA suggested that it might be able to withdraw the 2009 waiver if necessary to ensure adequate environmental protection in light of new, more stringent federal standards.<sup>109</sup>

Assuming that EPA possesses some revocation authority, interpreting it in the manner suggested by the 2009 waiver grant—as permissible only when necessary to ensure adequate protection of public health and welfare—would be consistent with the core purpose of the waiver provision, which was to allow California, as a pioneering regulator of air pollution, to experiment with more stringent standards than the federal government.<sup>110</sup> Revocation authority so constrained would also be consistent with the design of other Clean Air Act provisions, as well as provisions of analogous

---

<sup>106</sup> Importantly, the mere fact that one of California's standards is less stringent than a corresponding federal standard does not necessarily mean that California's standards are collectively less protective than federal standards. 42 U.S.C. § 7543(b)(1) (California can request waiver "if the State determines that the State standards will be, *in the aggregate*, at least as protective of public health and welfare as applicable Federal standards" (emphasis added)); *see also* H. REP. NO. 95-294, at 302 (1977) (explaining that California's "1978 and later model year standards might be more stringent than the Federal standard for [nitrogen oxides], but less stringent than the Federal standard for [carbon monoxide]").

<sup>107</sup> As noted earlier, the agency once partially vacated a waiver when required to do so by a court order. 45 Fed. Reg. 45,359, 45,360 (July 3, 1980). In that case, the D.C. Circuit had found that a particular set of California nitrogen oxides standards were inconsistent with Section 202(a) of the Clean Air Act because they did not provide sufficient lead time for one manufacturer's compliance. *Id.* The court vacated the Administrator's waiver grant for the standards only to the extent that it permitted California to deny the manufacturer this lead time. *Id.*

<sup>108</sup> Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,752 (July 8, 2009).

<sup>109</sup> EPA made similar statements in pre-1977 waiver proceedings. *See* 42 Fed. Reg. 31,637, 31,638 (June 22, 1977) (granting a waiver for California's "1980-1982 and 1983 and subsequent model year exhaust emission standards . . . applicable to heavy-duty motor vehicles and engines" model year but noting that "if amendments to the current Federal heavy-duty exhaust emission standards and certification procedures are subsequently adopted for 1980 or any later model year, I may then have to reconsider whether this California waiver will remain in effect"); 40 Fed. Reg. 30,311, 30,314 (July 18, 1975) (granting a waiver for 1978 model year but noting that "[u]pon the promulgation of the Federal standard and accompanying test procedure [for that same model year], the waiver will be reviewed with regard to the issues of the relative stringency and the consistency of the Federal and the California requirements").

<sup>110</sup> See S. REP. NO. 90-403, at 33 (1967) ("The Nation will have the benefit of California's experience with lower standards which will require new control systems and design. In fact California will continue to be the testing area for such lower standards and should those efforts to achieve lower emission levels be successful it is expected that the Secretary will, if required to assure protection of the national health and welfare, give serious consideration to strengthening the Federal standards."); H. REP. NO. 95-294, at 301 (1977) (explaining that "underlying intent" of waiver provision is "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare").

federal environmental statutes. As discussed earlier in this report, environmental statutes commonly provide for the delegation of regulatory authority to states; they also commonly instruct EPA to revoke that delegated authority *only* when states fail to uphold their duties to ensure adequate environmental protection. For example, Title V of the Clean Air Act empowers EPA to withdraw a state's delegated authority over stationary-source permitting only if the state "is not adequately administering and enforcing" the Title's requirements.<sup>111</sup> Similarly, Section 402 of the Clean Water Act allows the agency to revoke state administration of an NPDES permit program only if the Administrator determines that the state is not administering and enforcing its program in accordance with statutory mandates.<sup>112</sup> Nearly identical constraints on revocation authority are expressly imposed by Section 3006 of the Resource Conservation and Recovery Act ("RCRA"),<sup>113</sup> which governs the delegation of hazardous waste management authority, and the Safe Drinking Water Act, which governs the delegation of enforcement authority for public water systems to states.<sup>114</sup>

Under each of these statutes—the Clean Air Act, the Clean Water Act, RCRA, and the Safe Drinking Water Act—EPA may revoke state authority only when a state fails to uphold its statutory duties to ensure adequate environmental protection. It is thus reasonable to assume that, even if any implicit revocation authority were conferred by Section 209, it would be similarly limited to circumstances in which California's standards become insufficiently protective of public health and welfare. The alternative—assuming that Congress intended to silently grant EPA much broader revocation authority in Section 209 than it did when expressly authorizing revocation in other environmental programs—is implausible and inconsistent with the D.C. Circuit's previously expressed "unwillingness to wrest a standardless and openended revocation authority from a silent statute."<sup>115</sup>

Additionally, allowing revocation only when an increase in the stringency of federal standards renders California's own standards comparatively less protective of public health and welfare would be relatively unlikely to disrupt the state's reliance interests. Unlike forcing California to accept federal standards that are *less* stringent than its own, as EPA has proposed, forcing California to match federal standards *more* stringent than its own, if needed to ensure equivalent protectiveness of the state's standards taken as a whole, is unlikely to compromise the state's ability to comply with federal air quality standards or meet its own environmental goals.

That said, even if Section 209 does confer implicit authority to revoke a waiver on protectiveness grounds, logic demands that EPA afford California at least the same level of deference during the revocation process as the state receives when making a waiver request. The Administrator may deny a waiver on protectiveness grounds only if he or she finds that California's own determination that its standards "will be, in the aggregate, at least as protective of public health as applicable Federal standards" is "arbitrary and capricious."<sup>116</sup> The Administrator is flatly barred from making this finding if each of California's standards is as stringent as its corresponding federal standard (i.e., if California's nitrogen oxides emission limit is as low as the federal nitrogen oxides limits, its carbon monoxide limit is as low as the federal carbon monoxide limit, and so on).<sup>117</sup> Even if one of California's standards is *less* stringent than a corresponding federal standard, the Administrator is not to "overturn California's judgment lightly" or to "substitute his judgment for that of the State."<sup>118</sup> Instead, there must be "clear and compelling evidence that California acted unreasonably" in assessing the collective

---

<sup>111</sup> 42 U.S.C. § 7661a(i)(1), (4).

<sup>112</sup> 33 U.S.C. § 1342(c)(3).

<sup>113</sup> 42 U.S.C. § 6926(e).

<sup>114</sup> 42 U.S.C. § 300g-3(a).

<sup>115</sup> *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836 (1984).

<sup>116</sup> 42 U.S.C. § 7543(b)(1)(A).

<sup>117</sup> 42 U.S.C. § 7542(b)(2)

<sup>118</sup> H. REP. No. 95-294, at 302 (1977).

protectiveness of California’s entire set of standards relative to the collective protectiveness of relevant federal standards before EPA may deny a waiver.”<sup>119</sup>

The same evidentiary standard must apply to any decision to *revoke* a waiver on protectiveness grounds, assuming that revocation is permissible at all. Otherwise, the requirement of deference at the initial application stage would be meaningless. EPA could find itself compelled to grant a waiver out of deference to California’s judgment and the next month (or year) propose to revoke that same waiver by “substitut[ing its own] judgment for that of the State.”<sup>120</sup> This cannot be the structure Congress had in mind when “ratify[ing] and strengthen[ing]” California’s authority and affording California the “broadest possible discretion” under the waiver provision.<sup>121</sup> Thus, before revoking due to an increase in the stringency of one or more federal standards, EPA would first need to give California an opportunity to make a new determination as to the collective protectiveness of its own standards relative to federal standards. EPA could then review that determination under an arbitrary and capricious standard.

### III. EPA’s Justifications for Revoking California’s 2013 Waiver Are Legally and Factually Insufficient

In its revocation proposal, EPA offers three justifications for withdrawing California’s 2013 waiver:

- (1) NHTSA has proposed to find that California’s greenhouse gas and ZEV standards are preempted by the Energy Policy Conservation Act (“EPCA”), and if that finding is finalized, the standards “cannot be afforded a valid waiver of preemption” under the Clean Air Act;<sup>122</sup>
- (2) EPA no longer believes that California needs its greenhouse gas and ZEV standards to meet compelling and extraordinary conditions;<sup>123</sup>
- (3) EPA no longer believes that California’s greenhouse gas and ZEV standards are consistent with Section 202(a) of the Clean Air Act, because they are technologically infeasible.<sup>124</sup>

For all the reasons discussed above, Section 209 is best interpreted as conferring no authority to revoke a waiver. And if the section *were* found to authorize revocation, that authority would properly be limited to circumstances in which an increase in the stringency of federal standards rendered California’s own standards insufficiently protective of public health and welfare. Thus, none of the three findings offered by EPA is a legally cognizable justification for withdrawing a waiver under Section 209. Furthermore, NHTSA’s proposed finding on EPCA preemption is unreasonable, as are EPA’s proposed findings on the need for and feasibility of California’s standards. In short, EPA has no legal basis for withdrawing California’s 2013 waiver.

---

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See H. REP. NO. 95-294, at 301 (1977) (“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.”); *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1303 (D.C. Cir. 1979) (“[T]he broad thrust of the 1977 amendments . . . was to expand the deference accorded to California.”).

<sup>122</sup> Revocation Proposal, 83 Fed. Reg. 42,986, 43,240 (proposed Aug. 24, 2018).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

## A. NHTSA's Contention that California's Standards Are Preempted by EPCA Cannot Justify a Waiver Revocation

In its revocation proposal, EPA notes that NHTSA has proposed to find that California's greenhouse gas and ZEV standards are preempted by EPCA,<sup>125</sup> which authorizes the Department of Transportation to issue corporate average fuel economy standards and precludes states from issuing "related" standards of their own.<sup>126</sup> If NHTSA finalizes this finding, EPA proposes to withdraw California's Section 209 waiver for its greenhouse gas and ZEV standards on the theory that "state standards preempted under EPCA cannot be afforded a valid waiver of preemption under CAA 209(b)."<sup>127</sup> In other words, EPA maintains that a finding of EPCA preemption by NHTSA is grounds for revoking a waiver.

First, even if the Clean Air Act afforded EPA some authority to revoke a Section 209 waiver, another agency's finding as to the preemptive effect of an entirely separate statute would not be permissible grounds for revocation. Indeed, it is doubtful that EPA could even use such a finding as grounds for denying a waiver in the first instance. The D.C. Circuit has stated that EPA may consider only the factors enumerated in Section 209(b) when deciding whether to grant or deny a waiver request.<sup>128</sup> Because Section 209(b) does not mention EPCA fuel economy standards, EPA is likely precluded from citing the existence of such standards as grounds for denying a waiver request, a fact which the agency has repeatedly acknowledged in waiver proceedings.<sup>129</sup> It would, of course, be absurd to interpret Section 209 as authorizing EPA to revoke a waiver for reasons that could not justify denying a waiver. As discussed in Section II, such an interpretation would effectively nullify Congress's carefully crafted constraints on EPA's authority by enabling the agency to grant a waiver and then immediately revoke it based on factors EPA was forbidden to consider during the initial review. Accordingly, the existence of EPCA fuel economy standards—and any NHTSA finding as to the preclusive effect of those standards—cannot support a revocation of the 2013 waiver.

Furthermore, NHTSA's proposed determination that EPCA preempts California's standards is unreasonable. While a full discussion of EPCA preemption is outside the scope of this report, we note that two federal district courts have rejected claims that EPCA expressly or impliedly preempts California from setting greenhouse gas standards pursuant to a Section 209 waiver.<sup>130</sup> A finding that EPCA preempts California's standards would also be at odds with the logic of the Supreme Court's decision in *Massachusetts v. EPA*. In that case, EPA, then under the George W. Bush administration, argued that EPA itself could not "regulate carbon dioxide emissions from motor vehicles because doing so would require

---

<sup>125</sup> *Id.*

<sup>126</sup> See *California, CAFE Standards, and the Energy Policy and Conservation Act*, Harv. Envtl. L. Program (June 18, 2018), <http://environment.law.harvard.edu/2018/06/california-cafe-standards-energy-policy-conservation-act/>.

<sup>127</sup> Revocation Proposal, 83 Fed. Reg. at 43,240. Notably, EPA does not *itself* find—or propose to find—that California's greenhouse gas and ZEV standards are preempted by EPCA.

<sup>128</sup> See *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462–63 (D.C. Cir. 1998) ("[S]ection 209(b) sets forth the only waiver standards with which California must comply.... If EPA concludes that California's standards pass this test, it is obligated to approve California's waiver application.").

<sup>129</sup> See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2145 (Jan. 9, 2013); Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,750 (July 8, 2009).

<sup>130</sup> See *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1174–79 (E.D. Cal. 2007); *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 398 (D. Vt. 2007). In addition, a number of scholars have examined the interplay between EPCA and California's tailpipe greenhouse gas standards and concluded that EPCA does not preclude California's standards. See, e.g., Kristien G. Knapp, *The Legality of EPA's Greenhouse Gas Waiver Denial*, 39 ENV. L. RPTR. 10,127 (2009); Krista Yee, *A Period of Consequences: Global Warming Legislation, Cooperative Federalism, and the Fight Between the EPA and the State of California*, 32 ENVIRONS ENVT'L. L. & POL'Y J. 183 (2008); and Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699 (2003).

it to tighten mileage standards, a job . . . that Congress has assigned to [the Department of Transportation].”<sup>131</sup> The Court disagreed, explaining that the Department of Transportation’s setting of fuel economy standards under EPCA “in no way licenses EPA to shirk its environmental responsibilities” under the Clean Air Act.<sup>132</sup> In the Court’s view, EPA’s “statutory obligation” under the Clean Air Act to “protect[] the public’s ‘health’ and ‘welfare’”<sup>133</sup> is “wholly independent of DOT’s mandate to promote energy efficiency.”<sup>134</sup>

Like EPA’s Clean Air Act obligation to set health-protecting vehicle emission standards, California’s Clean Air Act authority to set health-protecting standards is “wholly independent” of EPCA’s energy efficiency mandate. Thus, just as EPCA did not preclude EPA from setting greenhouse gas standards, it should not be interpreted to preclude California from doing so pursuant to a validly issued Section 209 waiver.

## B. EPA’s Assertion That California Does Not Need a Waiver to Meet Compelling and Extraordinary Conditions Cannot Justify a Waiver Revocation

EPA next claims that revocation is justified because “California does not need its GHG and ZEV standards to meet compelling and extraordinary conditions.”<sup>135</sup> In addition to being a legally impermissible grounds for revocation, this contention is flatly unreasonable, given the record before EPA.

Unlike NHTSA’s proposed finding on EPCA preemption, a finding by EPA that California did not need its own standards to meet compelling and extraordinary conditions could, if valid, support *denial* of a waiver request.<sup>136</sup> But, contrary to EPA’s assumption, the agency cannot revoke a waiver simply by making any of the findings that might have justified denying that waiver in the first instance.<sup>137</sup> As discussed in Section I of this report, Section 209 cannot reasonably be interpreted to confer an ongoing ability to evaluate California’s entitlement to a waiver under the Section 209(b)(1) factors. Instead, the statute provides that “[n]o . . . waiver shall be granted” if the Administrator makes one of the findings listed in Section 209(b)(1), indicating that the Administrator is authorized to consider those factors only *prior* to the granting of the waiver.<sup>138</sup> Nor can the Administrator properly invoke inherent authority to revoke California’s 2013 waiver, given the reliance interests at stake, federalism concerns, and the untimeliness of the proposed revocation, as also discussed in Section I of this report.

Even if a finding that California does not need a waiver to meet compelling and extraordinary conditions *could* serve as legal grounds for revoking a waiver, EPA cannot reasonably make such a finding given the record before it. As with EPCA preemption, a full discussion of this issue is outside the scope of this report. We note, however, that, in concluding that California’s standards do not satisfy the “compelling and extraordinary conditions” prong of Section 209(b)(1),

---

<sup>131</sup> *Massachusetts v. EPA*, 549 U.S. 497, 531-32 (2007).

<sup>132</sup> *Id.* at 532.

<sup>133</sup> *Id.* (quoting Section 202(a) of the Clean Air Act, 42 U.S.C. § 7521(a)(1)).

<sup>134</sup> *Id.* (citing EPCA Section 2(S), 42 U.S.C. § 6201(S)).

<sup>135</sup> Revocation Proposal, 83 Fed. Reg. 42,986, 43,240 (proposed Aug. 24, 2018).

<sup>136</sup> 42 U.S.C. § 7543(b)(1) (“No such waiver shall be granted if the Administrator finds that . . . (B) such State does not need such State standards to meet compelling and extraordinary conditions . . .”).

<sup>137</sup> Revocation Proposal, 83 Fed. Reg. at 43,242. (“Under section 209(b) of the Clean Air Act, EPA may reconsider a grant of a waiver of pre-emption and withdraw same if the Administrator makes any one of the three findings in section 209(b)(1)(A), (B) and (C).”).

<sup>138</sup> 42 U.S.C. § 7543(b)(1) (emphasis added).

EPA abandons its historical approach to that requirement. Traditionally, EPA has “interpreted section 209(b)(1)(B) to require EPA to consider whether, to meet compelling and extraordinary conditions in California, the state needs to have its own separate new motor vehicle program *in the aggregate*.<sup>139</sup> In other words, EPA has “considered California’s need for a separate program as a whole, rather than California’s need for the particular aspect of the program for which California sought a waiver in any particular instance.”<sup>140</sup>

EPA briefly broke with that traditional approach when it denied California’s first waiver request for greenhouse gas standards in 2008. The agency, then under the George W. Bush Administration, contended that its longstanding interpretation was not appropriate as applied to standards for global air pollutants like greenhouse gases.<sup>141</sup> Thus, instead of evaluating California’s need for its own standards in the aggregate, the agency purported to assess California’s need for its own greenhouse gas standards specifically.<sup>142</sup> Concluding that the state did not need such standards, EPA denied the waiver request.<sup>143</sup>

As explained in the Introduction, California challenged that decision in the D.C. Circuit,<sup>144</sup> but the case was never decided. Instead, after the Obama Administration took office in 2009, the agency voluntarily reconsidered its decision and granted California a waiver to set greenhouse gas emission standards for model years 2009 through 2016.<sup>145</sup>

EPA now seeks to revive the Bush Administration’s approach to Section 209(b)(1)(B) and evaluate California’s need for greenhouse gas and ZEV standards specifically, as opposed to the state’s need for its own motor vehicle pollution program in general.<sup>146</sup> But as the agency persuasively explained when reconsidering the 2008 waiver denial—and reiterated when granting California’s 2013 waiver—this standard-specific approach is at odds with the text and legislative history of Section 209.<sup>147</sup>

Furthermore, even if EPA could properly limit a Section 209(b)(1)(B) inquiry to the question of whether California specifically needs greenhouse gas standards to meet compelling and extraordinary conditions, the answer would still be yes. When it granted California’s 2013 waiver, EPA expressly concluded that California has “compelling and extraordinary conditions directly related to regulations of [greenhouse gases],” and cited evidence supplied by California regarding the impacts of climate change on the state, including the potential for increasingly frequent and intense “extreme events such as floods, heat waves, droughts and severe storms” to “dramatically affect human health and well-being, critical infrastructure and natural systems.”<sup>148</sup> Since 2013, the evidence of California’s unique vulnerability to the effects of

---

<sup>139</sup> Revocation Proposal, 83 Fed. Reg. at 43,241.

<sup>140</sup> *Id.*

<sup>141</sup> Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,159 (Mar. 6, 2008).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Brief for Petitioner 1, *California v. EPA*, Nos. 08-1178, 08-1179, and 08-1180 (D.C. Cir. 2008), [http://ag.ca.gov/globalwarming/pdf/challenge\\_to\\_waiver\\_denial.pdf](http://ag.ca.gov/globalwarming/pdf/challenge_to_waiver_denial.pdf).

<sup>145</sup> See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,744 (July 8, 2009).

<sup>146</sup> Revocation Proposal, 83 Fed. Reg. at 43,246-48.

<sup>147</sup> Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program and a Within the Scope Confirmation for California’s Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2127-28 (Jan. 9, 2013) (explaining EPA’s 2009 conclusion that “the text of section 209(b) and the legislative history, when viewed as a whole, led to the conclusion that the interpretation adopted in the [2008] GHG waiver denial should be rejected”).

<sup>148</sup> *Id.* at 2129.

climate change has only grown.<sup>149</sup> Recent research shows, for instance, that climate change will worsen the state's already extraordinary levels of ozone pollution by increasing "the number of days with conditions conducive to higher ground-level ozone."<sup>150</sup> For these and other reasons, EPA cannot defensibly conclude that California does not need greenhouse gas standards to meet compelling and extraordinary conditions.

## C. EPA's Assertion That California's Standards Are Not Feasible Cannot Justify a Waiver Revocation

EPA's final justification for revocation is that California's greenhouse gas and ZEV standards "are not consistent with Section 202(a) of the Clean Air Act" because "there is inadequate lead time to permit the development of technology necessary to meet those requirements."<sup>151</sup> This, too, is a legally impermissible grounds for revocation. While a finding that California's standards are technologically infeasible could, if valid, support *denial* of a waiver under Section 209(b), EPA lacks authority to *withdraw* a waiver on this basis. Instead, as already discussed in both Section I of this report and the preceding section on "compelling and extraordinary conditions," EPA's statutory authority to evaluate a waiver's compliance with the Section 209(b) factors can be exercised only before a waiver is granted. And once again, EPA cannot properly invoke inherent authority to revoke California's 2013 waiver, because such a withdrawal would be untimely, disrupt California's reliance interests, and create serious federalism concerns.

Furthermore, EPA's contention that California's standards are infeasible is unreasonable as a factual matter. As with the questions of EPCA preemption and the proper interpretation of Section 209's "compelling and extraordinary conditions" prong, a full discussion of feasibility is outside the scope of this report. We note, however, that EPA's current conclusions stand in stark contrast to the agency's prior findings and to California's findings on this issue.

When EPA granted California's 2013 waiver request, it found that "the technical information presented in this record [by California] clearly indicates that [California's] requirements are feasible."<sup>152</sup> Four years later, following an extensive technical assessment process conducted jointly with NHTSA and the California Air Resources Board, EPA released its midterm evaluation of federal greenhouse gas standards, concluding that those standards (which are, in their current form, nearly identical to California's) remained feasible.<sup>153</sup>

California's own midterm evaluation, also released in January 2017, similarly concluded that "the current national 2022 through 2025 model year [greenhouse gas] emission standards can be readily met at the same or lower cost than originally projected when the standards were adopted in 2012."<sup>154</sup> And on August 7, 2018, California's Air Resources

---

<sup>149</sup> See, e.g., OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CAL. ENVTL. PROT. BD., INDICATORS OF CLIMATE CHANGE IN CALIFORNIA (2018), <https://oehha.ca.gov/climate-change/report/2018-report-indicators-climate-change-california>;

<sup>150</sup> CAL. AIR RES. BD., STAFF REPORT: INITIAL STATEMENT OF REASONS 23 (2018), <https://www.arb.ca.gov/regact/2018/levii/2018/leviii-sor.pdf> (describing the "the growing science and data showing direct impacts already occurring in California from climate change").

<sup>151</sup> Revocation Proposal, 83 Fed. Reg. at 43,250.

<sup>152</sup> 78 Fed. Reg. at 2138.

<sup>153</sup> EPA, FINAL DETERMINATION ON THE APPROPRIATENESS OF THE MODEL YEAR 2022-2025 LIGHT DUTY VEHICLE GREENHOUSE GAS EMISSIONS STANDARDS UNDER THE MIDTERM EVALUATION 3 (2017), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf>. For a fuller discussion of EPA's January 2017 findings, see Bethany Davis Noll et al., *Analyzing EPA's Vehicle-Emissions Decisions: Why Withdrawing the 2022-2025 Standards Is Economically Flawed* (2018), [http://policyintegrity.org/files/publications/Analyzing\\_EPAs\\_Fuel-Efficiency\\_Decisions\\_Policy\\_Brief.pdf](http://policyintegrity.org/files/publications/Analyzing_EPAs_Fuel-Efficiency_Decisions_Policy_Brief.pdf).

<sup>154</sup> CAL. ENVTL. PROT. AGENCY, CAL. AIR RES. BD., CALIFORNIA'S ADVANCED CLEAN CARS MIDTERM REVIEW, at ES-3 (2017).

Board released a document noting that, notwithstanding EPA’s proposal to weaken federal standards, the Board remained “confident, based on the extensive record of publically available information” that California’s greenhouse gas standards “are technologically and economically feasible.”<sup>155</sup>

EPA has historically interpreted Section 209 to require substantial deference to California on questions of feasibility. As the agency’s then-Administrator explained in a 1975 waiver grant, “on this issue of technological feasibility,” he “would feel constrained to approve a California approach to the problem which [he] might also feel unable to adopt at the Federal level in [his] own capacity as a regulator.”<sup>156</sup> EPA reiterated this view when it granted California’s 2013 waiver, stating that “California must be given substantial deference when adopting motor vehicle emission standards which may require new and/or improved technology to meet changing levels of compliance.”<sup>157</sup> In the agency’s view, such deference was “consistent with the motivation behind section 209(b) to foster California’s role as a laboratory for motor vehicle emission control.”<sup>158</sup>

As discussed in Section II of this report, assuming that revocation is permissible at all, logic demands that EPA afford California the same level of deference when deciding whether to revoke a waiver as it shows when deciding whether to grant a waiver in the first place. In its revocation proposal, however, EPA seems to suggest that its own findings on feasibility are more deserving of deference than California’s. Specifically, EPA cites the D.C. Circuit’s 1981 decision in *NRDC v. EPA* for the proposition that “there is substantial room for deference to the EPA’s expertise in projecting the likely course of development” for motor vehicle technologies.<sup>159</sup> That case, however, involved a challenge to *federal* vehicle emission standards, not a challenge to an EPA grant or denial of a California waiver under Section 209.<sup>160</sup> It thus has no bearing on the level of deference that EPA must show California’s findings as to the feasibility of the state’s vehicle emission standards.

In summary, EPA’s contention that California’s standards are infeasible is neither a legally cognizable justification for revocation nor a factually defensible conclusion, especially—but not only—in light of the substantial deference that EPA owes California on this issue.

## Conclusion

This report analyzes whether and when EPA may revoke a federal preemption waiver granted to California under Section 209 of the Clean Air Act. Nothing in the text of Section 209 can reasonably be construed as authorizing waiver revocation. Nor can a single reference to revocation authority in the congressional reports, relating to a superseded version of the provision’s text, support a finding of revocation authority. Furthermore, finding an implicit grant of revocation authority in Section 209 would be inconsistent with basic federalism principles and with D.C. Circuit

---

<sup>155</sup> CAL. AIR RES. BD., STAFF REPORT: INITIAL STATEMENT OF REASONS 22 (2018), <https://www.arb.ca.gov/regact/2018/leviii2018/leviii-sor.pdf>.

<sup>156</sup> California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, 40 Fed. Reg. 23,102, 23,103 (May 28, 1975).

<sup>157</sup> 78 Fed. Reg. at 2133.

<sup>158</sup> *Id.*

<sup>159</sup> Revocation Proposal, 83 Fed. Reg. at 43,251 (emphasis omitted) (quoting *NRDC v. EPA*, 655 F.2d 318, 331 (D.C. Cir. 1981)).

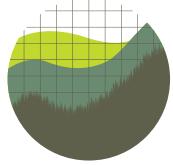
<sup>160</sup> *NRDC v. EPA*, 655 F.2d at 321.

case law suggesting that courts should not read revocation authority into statutory silence when doing so would severely disrupt the legitimate expectations of a waiver recipient. Here, California has reasonably relied on its 2013 waiver in developing plans to comply with federal air quality mandates and to meet its own environmental goals.

Reliance and federalism concerns similarly weigh against EPA's invocation of *inherent* authority to reconsider its 2013 waiver, as does the fact that any such reconsideration, coming more than five years after the waiver's issuance, would be untimely.

If Section 209 *were* interpreted to confer implicit revocation authority, the exercise of that authority would properly be limited to circumstances in which an increase in the stringency of one or more federal emission standards renders California's standards as a whole comparatively less protective of public health and welfare than federal standards. Allowing revocation only when necessary to ensure adequate protection of public health and welfare would be consistent with the core purpose of the waiver provision, regulatory precedent, and the design of other Clean Air Act provisions and provisions of other federal environmental laws under which federal agencies delegate regulatory authority to states. Revocation on valid protectiveness grounds would also be less disruptive of California's reliance interests, because requiring the state to match federal standards *more* stringent than its own would be unlikely to compromise the state's ability to comply with federal air quality standards.

In its revocation proposal, EPA seeks to withdraw a waiver in conjunction with a *decrease* in the stringency of federal standards relative to California's standards, not a strengthening of federal standards. In other words, EPA cannot—and does not—claim that revocation is necessary to ensure that California's standards remain at least as protective of public health as federal standards. Instead, the agency argues that revocation is justified because (1) NHTSA has proposed to find that California's greenhouse gas and ZEV standards are preempted by EPCA; (2) EPA no longer believes that California needs its greenhouse gas and ZEV standards to meet compelling and extraordinary conditions; and (3) EPA no longer believes that California's standards are technologically feasible. For all of the reasons discussed above, even if one assumes that EPA has *some* authority to revoke a waiver, none of these are permissible grounds for revocation. Furthermore, NHTSA's proposed finding on EPCA preemption is unreasonable, as are EPA's proposed findings on the need for and feasibility of California's standards. Accordingly, EPA cannot legally withdraw the 2013 waiver.



Institute for  
**Policy Integrity**

NEW YORK UNIVERSITY SCHOOL OF LAW

Institute for Policy Integrity  
New York University School of Law  
Wilf Hall, 139 MacDougal Street, New York, New York 10012  
[policyintegrity.org](http://policyintegrity.org)