

U.S. EPA Grants California's Clean Air Act Preemption Waiver to Ban Internal Combustion Engines, but for How Long?

December 23, 2024

On December 17, 2024, the U.S. Environmental Protection Agency (EPA) granted California's request for a waiver from Clean Air Act (CAA) federal preemption requirements based on California's adoption of its Advanced Clean Car (ACC) II program, which would require increasing sales of zero emission vehicles such as electric vehicles, culminating in a requirement to no longer sell internal combustion engines (ICEs) by 2035.

Typically, regulation of emissions from mobile sources is a matter of exclusive federal control under the CAA. But in some circumstances where a state's motor-vehicle emissions controls are at least as strict as their federal counterpart's, EPA may grant the state a waiver from federal preemption. These waivers have generated litigation over the past several presidential terms, as different EPA administrations have maintained varying perspectives on whether the state of California should be awarded preemption waivers. Thus, although the ACC II has earned California a waiver under the CAA for regulations related to electric vehicles, we can expect forthcoming challenges regardless of how the incoming Trump administration treats the ACC II program.

Statutory and Regulatory Background

Title II of the CAA assigns the federal government the responsibility for regulating emissions from new motor vehicles.¹ Section 209(a) broadly prohibits states from adopting or enforcing any standard related to the control of emissions from new motor vehicles, establishing federal control as the "cornerstone of Title II."² This federal preemption prevents a fragmented regulatory landscape across states. However, Congress provided a single exception to this preemption in § 209(b), which allows EPA to grant California a waiver to set its own emission standards under specific conditions.³

To obtain a waiver, California must determine that its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards," and EPA must deny the waiver if it finds that California's determination is arbitrary and capricious, California does not need its standards to meet "compelling and extraordinary" conditions, or the standards are inconsistent with CAA § 202(a).⁴ In 1977, Congress added CAA § 177, which permits other states to "adopt and enforce" California's standards.⁵

Since 1967, California has sought over 100 preemption waivers. Until recently, little litigation has been initiated on CAA § 209 waivers. This recent history of reversals, withdrawals, and litigation is discussed below.

ACC I

Historically, California sought waivers for standards that regulated criteria pollutants such as carbon monoxide, nitrogen oxides, and particulate matter — that is, the pollutants that Congress was contemplating in the 1970s.⁶ However, in 2005, California sought a waiver for the first time to regulate greenhouse gas emissions from new passenger vehicles. Initially, in 2008, EPA denied this waiver, interpreting § 209(b) as being aimed at local or regional pollution rather than such global issues as climate change.⁷ But a year later, EPA reversed its decision and granted the waiver.⁸

In 2012, California introduced the ACC I program, which included greenhouse gas standards and a zero-emission vehicle (ZEV) mandate. The following year, EPA granted a preemption waiver for these standards.⁹ However, in 2019, under the Trump administration, EPA withdrew the waiver, stating (as it had in 2008) that § 209(b) does not cover global climate change.¹⁰ Then, in 2022, under the Biden administration, EPA reinstated the waiver. The agency concluded that § 209(b) does, in fact, authorize waivers for standards aimed at global climate change.¹¹ Litigation is pending as to whether EPA exceeded its authority in reversing its revocation of the ACC I waiver.

ACC II

In May 2023, California notified EPA that it had finalized its ACC II regulations, which contain a series of requirements for low-emission vehicles (LEVs) and ZEVs. ACC II requirements include, for example, a mandate for vehicle manufacturers to sell increasing percentages of ZEVs, culminating in a ban on internal-combustion-engine-powered vehicles in 2035. In late 2023, EPA posted a notice of California's request for a waiver based on ACC II and solicited comments on the request.¹² Following a public hearing and comment period, on December 17, 2024, EPA issued its final notice of decision granting California a preemption waiver pursuant to CAA § 209(b) for ACC II.¹³ At the same time, EPA granted a waiver for California's Heavy-Duty Vehicle and Engine "Omnibus" Low NOx Regulations (Omnibus Low NOx program).¹⁴ Although public comment yielded significant industry concerns about the feasibility, legality, and efficacy of these programs, EPA determined that the programs' respective records did not support EPA's denying the waiver requests under any of the three CAA waiver prongs.

What's Next

Few legal predictions can be provided with certainty, but in this case, there is no doubt that the second Trump administration will rescind the ACC II waiver. That will then precipitate litigation over the rescission of the waiver. Certain states may attempt to opt into ACC II, but it is unlikely that they can do so in advance of the waiver's rescission.

Notably, there are other pending preemption waivers before EPA that the agency may decide on before January 20, 2025, including waivers for California's Advanced Clean Fleets regulations¹⁵ and Transport Refrigeration Unit Engine Standards.¹⁶ We fully expect the Trump administration to rescind these waivers as well.

¹42 U.S.C. § 7410.

²*Id.* § 7543(a); *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Env'tl. Conservation*, 17 F.3d 521, 526 (2d Cir. 1994).

³See 42 U.S.C. § 7543(b).

⁴*Id.*

⁵42 U.S.C. § 7507.

⁶See, e.g., 38 Fed. Reg. at 10,235 (Apr. 26, 1973); 59 Fed. Reg. at 48,557 (Sept. 22, 1994).

⁷73 Fed. Reg. at 12,156 (Mar. 6, 2008).

⁸74 Fed. Reg. at 32,744 (Jul. 8, 2009).

⁹78 Fed. Reg. at 2,112 (Jan. 9, 2013).

¹⁰84 Fed. Reg. at 51,310 (Sept. 27, 2019).

¹¹87 Fed. Reg. at 14,332 (Mar. 14, 2022).

¹²88 Fed. Reg. at 88,908 (Dec. 26, 2023).

¹³The prepublication version is available [here](#).

¹⁴The prepublication version is available [here](#).

¹⁵89 Fed. Reg. at 57,151 (Jul. 12, 2024).

¹⁶89 Fed. Reg. at 32,422 (Apr. 26, 2024).

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