

# Five Questions on the Litigation Backlash from the Trump Administration's Fuel Emissions Rollback

Article By:

Sarah A. W. Fitts

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The Trump Administration rolled out its anticipated rules on fuel efficiency and emissions standards for model years 2021-2026 last week. The proposal, at over 900 pages of text, is still being analyzed and reviewed, but early indications are that there will be significant resistance from many affected parties. Here are five key questions rising to the surface in the wake of the proposal.

## 1. Why freeze fuel efficiency standards?

Among other things, the proposed rulemaking includes three major changes. The proposal (1) effectively freezes emissions standards at 2020 levels, (2) challenges California's independent waiver under the Clean Air Act (CAA) that permits it to implement emissions standards that are more stringent than those of the federal government, and (3) directly challenges the programs of other states that voluntarily adopted the California standards. Thirteen states have adopted California's emissions standards for gas-powered vehicles, while nine others have adopted the Zero Emission Vehicle (ZEV) program designed to increase sales of zero-emission vehicles.

In the proposed rule, the EPA and the Department of Transportation (DOT) write that the state and local zero-emissions standards are "expressly and impliedly preempted" by federal laws governing fuel economy regulations.

The Administration seems to be taking the view that California overstepped its waiver authority under the Section 209(b) of the Clean Air Act. This is because California's programs to move the transportation sector to cleaner and more efficient fuels addressed both emissions and fuel efficiency, rather than tailpipe emissions only. Historically, the state has established strong emissions standards to combat air pollution issues related to the unique geography of its major cities. Additionally, given that California and the other states that voluntarily adopted California's standards are home to more than 130 million Americans, California's rules have a significant effect on the composition of the national transportation fleet.

The Administration's position is that, among other things, relaxing the standards will lead to lower automobile sticker costs and hence faster replacement of older personal vehicles with newer, safer, and cleaner cars. To that end, the proposal reads that "[B]y forcing manufactures to design, produce,

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and deliver for sale vehicles that produce no tailpipe CO2 emissions, the ZEV mandate forces further expensive investments in fuel-saving technology than [The National Highway Traffic Safety Administration] has determined appropriate to require in setting fuel economy standards.”

The proposed rule has significant implications across the transportation system, and could have ripple effects on several other segments of the economy, including electric utilities that have planned for increased electrification of the transportation fleet.

## **2. Was the proposal expected?**

The proposal was not a surprise, as the possibility of a rollback had been under discussion since the early days of the Trump Administration. In fact, California and 17 other [states sued](#) the EPA earlier this year when the EPA [announced](#) that it would review the fuel efficiency rules. Another [lawsuit](#) by a group of electric utilities and the automaker Tesla followed shortly thereafter. Additionally, major utility trade groups also [wrote](#) to the EPA in May asking it to finalize rules that incorporate policies from California.

## **3. What might that litigation look like?**

For a law nerd, the case sets up a fascinating battle between state's rights advocates and the federal government, but with the usual roles reversed, and with traditionally blue states advocating for more state-level autonomy.

The Administration's justifications for the proposal are disputed and are likely to be fought aggressively, both in and out of court. California's State Attorney General Xavier Becerra called it a “brazen attack” on California which he would fight in the courts, and California Governor Jerry Brown says, “California will fight this stupidity in every conceivable way possible.” To this end, California initiated its own notice of [rulemaking](#) to amend California's greenhouse gas emission regulation for light-duty vehicles. In the notice, Executive Officer of the California Air Resources Board, Richard Corey, stated that “[t]hese clarifying amendments will ensure that the effects of any federal weakening [of standards] for model years 2021 through 2025 are not felt in California during those model years . . . [s]uch an unfounded weakening removes a material predicate of California's decision to accept compliance with U.S. EPA standards.”

One potential issue is that the proposal may contravene the 2007 holding from [Massachusetts v. EPA](#), where the Supreme Court held that (1) GHG emissions are pollutants under the CAA and subject to regulation by the EPA, and (2) GHG emissions endanger public health and welfare.

If and when the proposal results in a promulgated rule, the rule could be subject to challenge in court. Challenges generally proceed in federal courts of appeals and play out over a period of months to years. Bottom line? It won't be surprising to see challenges to the proposal outlast the Trump Administration.

## **4. Is litigation inevitable?**

Leaving the future of critical automotive regulation for 130 million Americans to the uncertainty and

timeline of a court resolution is an unattractive outcome for most everyone. The automotive industry will have difficulty planning past 2020, electric utilities will have difficulty preparing for increased electrification of transportation, and city planners addressing air quality issues and government entities planning for future infrastructure expenditures will need to deal with uncertainty on standards and funding sources.

There are compelling reasons for the Administration to find common ground with California and the other states that have joined the ZEV mandate initiative. Andrew Wheeler, the new head of the EPA, has said he is open to [compromise](#). Likewise, the automotive industry doesn't like having two sets of rules, one for California and ZEV states and another for the rest of the country. Following the announcement of the proposed rulemaking, the Auto Alliance and the Global Automakers issued a [joint statement](#) urging "California and the federal government to find a common sense solution that sets continued increases in vehicle efficiency standards while also meeting the needs of America's drivers."

## 5. How might this affect the move toward electric cars?

Automakers have made substantial investments in electrification, fuel efficiency, and infrastructure in recent years. The push for next generation vehicles is global, as countries address pollution, climate and economic goals. Many analysts have predicted that the recent improvements in electric automation and infrastructure, such as availability of charging stations, is on the cusp of really bending the demand curve for electric vehicles upward. For example, earlier this year, Ford Motor Company [announced](#) that it would invest \$11 billion in electric vehicles by 2022. So it may well be that the Trump Administration's rollback will not impact the pace of technological change, which is driven by factors beyond federal regulation.

On the other hand, the uncertainty regarding regulations and the impact of rising costs due to tariffs and expected increases in oil prices may affect car-buying habits. Delays in infrastructure investing will also present challenges. Moreover, the real risk that the United States will lose its leadership role in future technology development is something many of us have worried about for a [long time](#).

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