EARTHJUSTICE
BECAUSE THE EARTH NEEDS A GOOD LAWYER

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Submitted via email (Don.Brown@Illinois.gov)

April 28, 2025

Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601

Re: Proposed Illinois Car and Truck Standards (R2024-17)

Earthjustice submits the following comments in support of the Proposed Illinois Clean Car and Truck Standards ("Proposed Rules"). Earthjustice is a nonprofit public interest environmental law firm with more than fifty years of experience litigating before administrative agencies, state courts, and federal courts to enforce and strengthen environmental laws and regulations. Through hundreds of attorneys and staff across 15 offices nationwide, Earthjustice fights to protect public health, preserve natural resources, advance clean energy, and combat climate change. Alongside a broad coalition of environmental, environmental justice, and community advocates, Earthjustice's Chicago-based staff have helped achieve important wins in Illinois, such as advocacy to help secure passage of the Climate and Equitable Jobs Act and Coal Ash Pollution Prevention Act, and continue to push for health and environmental protections for communities throughout the state. The organization has a long history of success challenging unlawful attempts to roll back important environmental protections and policies. It has gone to court to defend California's vehicle emissions standards against a range of threats, from industry challenges to the first Trump administration's attacks.

In this moment, when the federal government is abandoning its responsibilities to address air pollution and protect public health, states must forge ahead to advance policies that meet these important public aims. Here in Illinois, adoption of the Proposed Rules—California's Advanced Clean Cars II (ACC II), Advanced Clean Trucks (ACT), and Low-Nitrogen Oxides Omnibus (Low NOx) rules—promises significant public health and air quality improvements. Earthjustice urges the Board to adopt these standards this year, without additional delay.

Federal threats to California's preemption waivers, which authorize enforcement of ACC II, ACT, and the Low NOx rules, should not distract from the important goal of adopting them in Illinois. The Rule Proponents have already thoroughly detailed the Board's authority to take this action under both state and federal law, including the Illinois Environmental Protection Act and

the Clean Air Act.[1] And the Board has properly rejected arguments challenging its authority.[2] This comment explains why federal attempts to rescind California's waivers neither affect the Board's authority to adopt the Proposed Rules nor justify any delay in doing so.

I. Federal efforts to rescind the preemption waivers do not implicate the Board's authority to adopt the Proposed Rules.

The status of California's waivers has no bearing on the Board's clear legal authority to adopt the Proposed Rules. It is well-established and noncontroversial that a preemption waiver is not a prerequisite to a state's adoption of California standards—it is only required prior to enforcement. *See Motor Vehicle Mfrs. Ass'n of U.S. v. N.Y. Dep't of Env't Conservation*, 17 F.3d 521, 534 (2d Cir. 1994); *cf. Minn. Auto Dealers Ass'n v. Minn. Pollution Control Agency,* 520 F. Supp. 3d 1126, 1137 (D. Minn. 2021) (observing that federal law does not and cannot preempt a rulemaking proceeding to adopt California's vehicle standards). Acting on this settled legal principle, many states adopted ACC II, ACT, and the Low NOx rules prior to EPA granting preemption waivers.[3]

In fact, the Board itself has recognized this authority. In 1991, on its own motion, the Board considered adopting California's Low-Emission Vehicle (LEV I) standards in the absence of a waiver. *See* Second First Notice, *Application of California Motor Vehicle Control Program in Illinois*, R 89-17(C) (Nov. 21, 1991). EPA did not issue a waiver for the LEV I standards until 1993. *See* EPA, *California Motor Vehicle Standards; Waiver of Federal Preemption*, 58 Fed. Reg. 4166 (Jan. 13, 1993). Although a majority of the Board declined at that time to adopt those standards, citing estimates that benefits may be marginal, it stated that it shared the Illinois Environmental Protection Agency's view that the state may adopt the California standards "at any time" if it "decides that further emission reductions are necessary." Dismissal Order, *Application of California Motor Vehicle Control Program in Illinois*, R 89-17(C), slip op. at 7 (Jan. 7, 1993).

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[1] *See* Proponents' Response in Opposition to Motions to Dismiss, *Proposed Clean Car and Truck Standards*, R2024-17 (Oct. 1, 2024); Proponents' Statement of Reasons (SR), *Proposed Clean Car and Truck Standards*, R2024-17, at 16–18 (June 27, 2024).

[2] *See* Order, *Proposed Clean Car and Truck Standards*, R2024-17 (Nov. 7, 2024).

[3] Thirteen states and the District of Columbia (collectively ~34% of national new light-duty vehicle sales) adopted ACC II prior to EPA granting the waiver in 2025. *See* Sierra Club, Clean Vehicle Programs: State Tracker, https://www.sierraclub.org/transportation/clean-vehicle-programs-state-tracker. Ten states (~21% of national new medium- and heavy-duty vehicle (MHDV) sales) adopted the Low NOx rule prior to EPA issuing a preemption waiver. *See id.* Seven states (~18% of national new MHDV sales) adopted ACT prior to EPA issuing a preemption waiver. *See id.*

As thoroughly detailed in the Statement of Reasons and testimony before the Board, transportation emission reductions are necessary in Illinois now, and the Board should finalize the Proposed Rules without regard to the fate of EPA's waiver decisions or—for that matter—any other EPA action. Section 177 of the Clean Air Act, which allows states to adopt California's standards, does not provide a role for EPA in state decisions to do so. *See* 42 U.S.C. § 7507 (allowing states to adopt California standards without approval or other authorization from EPA); *Ford Motor Co. v. EPA*, 606 F.2d at 1293, 1298 (D.C. Cir. 1979) (no requirement that EPA "conduct a separate waiver proceeding for each state" adopting California standards).[4] States have "independent authority," meaning power that is "free from the dictates of a federal agency," to adopt California's standards, and EPA cannot "take[] this choice from the states." *See Virginia v. EPA*, 108 F.3d 1397, 1412 (D.C. Cir. 1997).

II. Federal waiver revocation efforts are unprecedented, unlawful, and likely to be the subject of prolonged litigation.

States across the country, prioritizing the health and welfare of their residents, have adopted California's vehicle standards. These states and California now collectively account for approximately 40% of the nation's new light-duty vehicle market and 25% of the new medium- and heavy-duty vehicle market.[5]

Meanwhile, this year, there has been a major push at the federal level to dismantle federal environmental regulations and policies, which—if successful—would have devastating impacts on public health and the environment. State protections, including California's vehicle emissions standards, are also in the crosshairs. Federal strategies seeking to roll back California's waivers for ACC II, ACT, and the Low NOx rules are illegal, unprecedented, and likely to be tied up in litigation for years to come.

Congress has introduced resolutions attempting to revoke California's waivers under the Congressional Review Act (CRA). But, as explained in detail in the attached Memorandum,

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[4] *See also* EPA, *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*, 87 Fed. Reg. 14332, 14374 (Mar. 14, 2022) (explaining "EPA plays no statutory approval role in connection with states' adoption of [California] standards"); EPA, *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62624, 62637 n.54 (Oct. 15, 2012) (EPA approval not required).

[5] *See* California Air Resources Board, Section 177 States Regulation Dashboard, https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations (last updated April 2025).

EPA's waiver decisions are not "rules" subject to the CRA. *See* Earthjustice, *Memorandum re: The Congressional Review Act and California's Waivers* (Feb. 20, 2025) (Att. 1). In fact, it has long been the view of EPA, including under the first Trump administration, that waiver decisions are not reviewable under the CRA, and Earthjustice has not found a single instance—among dozens and dozens of EPA waiver decisions—in which the agency has concluded otherwise. *See id.* Nonpartisan expert agencies that have considered the issue, including the Congressional Research Service and the Government Accountability Office, all concluded that California's waivers are not rules subject to the CRA.[6] Just this month, the Senate Parliamentarian, an independent nonpartisan official who advises the Senate on procedure, ruled that California's waivers are not reviewable under the CRA.[7] Disapproval resolutions overturning California's waivers would be unprecedented and unlawful.

Just as Congress is not authorized to rescind California's waivers under the CRA, the Clean Air Act does not authorize EPA to do so.[8] Should EPA attempt to withdraw California's waivers administratively, as it did during the first Trump administration, these unlawful actions will spark legal battles that could play out beyond a change in federal policy on the waivers. This is exactly what occurred in 2019, when EPA under Trump attempted—for the first time in history—to administratively rescind California's waiver.[9] Numerous suits brought by businesses and public interest organizations challenged EPA's attempt to revoke the waiver.[10] The cases

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[6] Government Accountability Office, *Observations Regarding the Environmental Protection Agency's Submission of Notices of Decision on Clean Air Act Preemption Waivers as Rules Under the Congressional Review Act* (Mar. 6, 2025) (noting that were Congress to proceed unlawfully and enact disapproval resolutions of California's waivers, "there is a question as to the precise effect those resolutions would have") (Att. 2); Congressional Research Service, California and the Clean Air Act Waiver: Frequently Asked Questions (Aug. 30, 2024); Government Accountability Office, *Environmental Protection Agency—Applicability of the Congressional Review Act to Notice of Decision on Clean Air Act Waiver of Preemption* (Nov. 30, 2023) (Att. 3).

[7] Rachel Frazin, *Senate Parliamentarian Says Lawmakers Can't Overturn California Car Rules—But Republicans May Try Anyway*, The Hill (Apr. 4, 2025), https://thehill.com/policy/energy-environment/5233436-senate-parliamentarian-says-lawmakers-cant-overturn-california-car-rules-but-republicans-may-try-anyway.

[8] *See* Emmett Institute on Climate Change and the Environment, *Comment Letter on EPA and NHTSA Proposed SAFE Rule*, at 2–4 (Oct. 25, 2018) (explaining that the Clean Air Act does not provide EPA with authority to revoke a waiver) (Att. 4). https://law.ucla.edu/news/comment-letter-urging-withdrawal-epa-and-nhtsa-proposed-rule-vehicle-fuel-economy-and.

[9] EPA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51310 (Sept. 27, 2019).

[10] *See, e.g., Sierra Club v. EPA* , 19-1243 (D.C. Cir. Nov. 22, 2019) https://www.epa.gov/sites/default/files/2019-11/documents/sc_19-1243_pfr_11222019.pdf; *Nat'l*

were consolidated and still pending in 2021, when EPA under the Biden administration announced its plan to reinstate the waiver.[11]

Whatever illegal tactics are used to attack California's waivers and exercise control over states' environmental policies, litigation is almost certain, and the fights over these actions will be long. Given this context, the Board should not wait for these cases to play out—particularly given that they do not implicate the Board's authority—and it should work expeditiously to adopt the Proposed Rules before the end of this year.

III. Postponing adoption of the Proposed Rules will create unnecessary delay and compromise important state public health and environmental goals.

Waiting for resolution of the likely litigation over federal attacks on the California waivers is unnecessary and will frustrate Illinois's ability to meet its environmental commitments and responsibilities to its residents.

If the Board instead finalizes the Proposed Rules this year, Illinois would be poised to realize their benefits from the moment there is clarity on the waivers' status. Section 177 already provides a two-year waiting period between state adoption and ability to enforce California standards. *See* 42 U.S.C. § 7507(2). Accordingly, as explained in the Proponents' Statement of Reasons, adopting the Proposed Rules this year means that the first model year to which they will be applicable is the one commencing in January 2028.[12] By that time, litigation, administrative actions, or both may have yielded some preliminary answers regarding the future of the waivers. Securing the California standards in Illinois this year would ensure that they are enforceable the instant the waivers—currently valid and in effect—are affirmed, through litigation or otherwise, or reinstated.

Postponing adoption of the Proposed Rules past this year would be inconsistent with Illinois's statutory commitment to "restor[ing], maintain[ing], and enhanc[ing]" air quality, 415 ILCS 5/8, and the Board's charge to adopt regulations to promote those purposes, 415 ILC 5/10(A). The Proposed Rules' emissions standards and electrification requirements promise

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Coal. for Advanced Transp. v. EPA, No. 19-1242 (D.C. Cir. Nov. 15, 2019) https://climatecasechart.com/wp-content/uploads/case-documents/2019/20191115_docket-19-1242_petition-for-review.pdf)

[11] EPA, *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Public Comment*, 86 Fed. Reg. 22421 (Apr. 28, 2021).

[12] SR at 21–22 (citing 42 U.S.C. § 7507 and implementing regulations 40 C.F.R. §§ 85.2302, 85.2303)

substantial improvements to air quality, and the Board should not delay adopting them. Vehicle emissions are a serious public health problem in Illinois, with consequences ranging from respiratory disease to premature death. The health burdens of vehicle emissions in the state are borne disproportionately by low-income communities and communities of color, and the Proposed Rules would help alleviate some of this burden. [13] A 2025 analysis estimates that adopting ACT alone in Illinois would avoid 500 premature deaths and 600 new cases of childhood asthma annually in the Chicagoland area.[14]

The public health risks related to delaying adoption of the Proposed Rules are particularly high now, because EPA has announced plans to roll back federal vehicle emissions standards,[15] which establish the regulatory floor in Illinois. Relaxation of these standards would harm air quality and communities statewide. Finalizing the Proposed Rules this year would protect against this regulatory backsliding and keep Illinois on course to continue its work restoring and enhancing air quality, consistent with its statutory obligations.

Given the significant benefits of the Proposed Rules and the risks and harms related to delay, the time to adopt them is now.

IV. Conclusion

The Board should not stand idly by in the face of federal efforts to gut critical environmental protections and threaten California's waivers. Illinois communities grappling with the devastating health impacts of vehicle pollution and public interest organizations working for a sustainable future have called on the Board to adopt the Proposed Rules without delay. This is a state policy decision that the Board is empowered to make under state and federal law, and it should take this commonsense action now to protect the state's residents and resources.

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[13] *See* Lang, VA, et al. *Assessing the Air Quality, Public Health, and Equity Implications of an Advanced Clean Trucks Policy for Illinois*, FRONT. EARTH SCI. (2025).

[14] *See id.*

[15] EPA, *EPA Announces Action to Implement POTUS's Termination of Biden-Harris Electric Vehicle Mandate* (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-announces-action-implement-potuss-termination-biden-harris-electric-vehicle.

Thank you for considering these comments.

Sincerely,

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Attachment 1

EARTHJUSTICE
BECAUSE THE EARTH NEEDS A GOOD LAWYER

MEMORANDUM

To: Interested Parties

From: Earthjustice

Date: February 20, 2025

RE: The Congressional Review Act and California's Waivers

On February 14, 2025, the EPA published a news release stating that the agency is planning to transmit the California Clean Air Act ("CAA") Waiver Authorizations on cars and trucks granted during the Biden Administration to Congress for review. The EPA lists California's Advanced Clean Cars II, Advanced Clean Trucks, and Omnibus NOx waivers as the ones that are being transmitted. The intent of this agency action is that Congress, using the Congressional Review Act ("CRA"), will vote to overturn the issuance of the waivers. This memo will detail why this action is **unprecedented, illegal, and radically departs** from decades of administrative standard procedure.

Outline

Background

I. California's Vehicle Emission Standards, the Clean Air Act and the Waivers

For over sixty years, California has been setting its own statewide vehicle emissions standards. In 1959, prior to the Air Quality Act of 1967 and the Clean Air Act, California mandated that the Department of Public Health develop air quality standards for motor vehicles. When the Air Quality Act of 1967 and the Clean Air Act of 1970 passed, establishing federal preemption for motor vehicle emissions, Congress granted an exemption to the state of California, upholding its right to establish its own statewide standards with EPA approval of waiver requests.

Congress specifically granted this exemption to California because of its poor air quality and high levels of air pollution, an issue that continues to persist. The Los Angeles Basin and Central Valley continue to violate national ambient air quality standards and are labeled as non-attainment zones. With over 100 waiver approvals from EPA in the fifty years since federal preemption was established, the federal government has reaffirmed that California has a right to establish its own statewide vehicle emissions standards. In Section 177 of the Clean Air Act, authority was given to other states to adopt California standards under certain circumstances. So far, 17 states and the District of Columbia have adopted one of California's vehicle emission standards.

II. The Congressional Review Act

Congress can overturn certain federal agency actions using the CRA. When agencies issue a 'rule,' the agencies must report it to both houses of Congress and the GAO. Under the CRA, the definition of a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." This includes final rules, major rules, nonmajor rules, and interim final rules. Three types of actions are not subject to the CRA: (1) rules of particular applicability, (2) rules relating to agency management or personnel and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights and obligations of non-agency parties. If members of Congress think that agencies have taken an action that could be considered a rule, but have not submitted it for Congressional review, they can request a formal opinion from the GAO.

Once the rule is reported to Congress, Congress has 60-days-of-continuous-session to introduce a joint resolution of disapproval to overturn the rule. This countdown begins when a rule has been submitted to Congress for review and published in the Federal Register (if applicable). If a rule has not been submitted for Congressional review, the 60-day counter begins on the day that the GAO opinion declares that it is a rule.

The CRA joint resolution of disapproval can pass with simple majority from both houses of Congress and a Presidential signature, or if it overrides a presidential veto. If the joint resolution of disapproval passes, the agency cannot submit a rule that is "substantially the same" in the future. What is considered "substantially the same" is open to interpretation and litigation. The CRA has been a tool mostly used by Republicans in recent years. A total of twenty rules have been overturned since its adoption, sixteen of which were overturned in the 115th Congress (2017-2018) during President Trump's first term.

III. The California CAA Waivers are not Agency Rules

The California CAA Waivers are not agency rules and as such are not subject to the Congressional Review Act. In 2023, the Government Accountability Office ("GAO"), an independent and nonpartisan legislative agency responsible for determining which agencies actions are subject to the CRA, found in a formal opinion that the California CAA Waivers are considered 'adjudicatory orders' and not rules, and therefore not subject to the CRA. Furthermore, the GAO formal opinion asserts that even if the waivers met the definitional requirements of a rule, they would be considered 'a rule of particular applicability' and therefore also not subject to the CRA. The Congressional Research Service reiterated this formal opinion in a report, California and the Clean Air Act Waiver: Frequently Asked Questions on August 30, 2024.

In fact, the EPA itself – even under the first Trump term – has determined a myriad of times that issuance of a waiver is not subject to the CRA. Here are the examples in the three waivers EPA seeks to transmit to Congress.

- Heavy Duty NOx Omnibus Regulation - 90 Fed.Reg. 643, 645 (Jan. 6, 2025): "The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3)."

- Advanced Clean Cars II - 90 Fed.Reg. 642, 643 (Jan. 6, 2025): "The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3)."
- Advanced Clean Trucks - 88 Fed.Reg. 20688, 20726 (April 6, 2023): "Further, the Congressional Review Act, 5 U.S.C. 801, et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3)."

In 2019 when EPA revoked California's Advanced Clean Cars Waiver, it determined the following, "Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this action as not a ''major rule'', as defined by 5 U.S.C. 804(2)." 84 Fed.Reg. 51,310, 51353 (Sept. 27, 2019).

Earthjustice has found no instance where the EPA in dozens and dozens of actions on the California CAA waivers has determined the action was subject to the CRA.

This legal interpretation is also well understood and recognized by members of Congress. Senator Mike Lee, a Republican representing Utah, has recognized that, "California's power to influence national emissions standards for the auto, locomotive, and boating industries is not subject to Congressional review." As such, Republicans have previously introduced pieces of legislation to Congress seeking to limit California's regulatory authority. Therefore, asserting that the California CAA Waivers are subject to the CRA is a way to get around these legislative failures and circumvent standard administrative practice at the EPA to rescind a waiver authorization. Previous attempts from President Trump to rescind EPA waiver authorization for the Advanced Clean Car Waiver using the standard agency process took over a year and was reversed during the Biden administration.

President Trump and EPA Administrator Lee Zeldin are trying to convince the American public and decisionmakers that this is standard practice, when in fact it is a radical departure from federal legal decisions and administrative practice. In the EPA press release, Administrator Zeldin states the following:

> "The Biden Administration failed to send rules on California's waivers to Congress, preventing Members of Congress from deciding on extremely consequential actions that have massive impacts and costs across the entire United States. The Trump EPA is transparently correcting this wrong and rightly following the rule of law."

This quote is misleading and false. President Trump is not trying to follow the rule of law, he is trying to change it to suit his policy priorities, overreaching his executive power.

IV. Setting Dangerous New Precedents

If Congress uses the CRA to overturn the California CAA Waivers, it greatly widens the definition of what could be considered a rule and therefore the opportunities of what Congress could review and repeal. It also blatantly disregards the GAO 2023 formal opinion that the California CAA Waivers are orders and not subject to the CRA. This means that any action that

is considered an order by Administrative Procedure Act definition could be transmitted to Congress for review as well. In addition to the scope of actions that could be reviewed, the timeline of 60 days is also expanded. The timeline starts the day the rule is transmitted to Congress or the GAO designates it as an eligible rule. However, since California waivers were never transmitted to Congress, they could be submitted for review even if the waiver authorization was granted years ago.

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Attachment 2

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-337179

March 6, 2025

Congressional Requesters

Subject: *Observations Regarding the Environmental Protection Agency's Submission of Notices of Decision on Clean Air Act Preemption Waivers as Rules Under the Congressional Review Act*

This letter responds to your request for a legal decision as to whether the Environmental Protection Agency's (EPA) Clean Air Act preemption waivers and Notices of Decision that EPA submitted as rules to Congress and GAO in late February 2025[1] are rules subject to the Congressional Review Act (CRA).[2] Our regular practice is to issue decisions on actions that agencies have not submitted to Congress as rules under CRA in order to further the purposes of CRA by protecting Congress's CRA review and oversight authorities.[3] In this case, we are presented with a different situation because the actions were submitted as rules under the CRA, and it is not one in which we normally issue a legal decision. However, we do have prior caselaw that addressed the applicability of CRA to Clean Air Act preemption waivers, B-334309, Nov. 30, 2023, and EPA's recent submission is inconsistent with this caselaw. Therefore, we are providing you with our views and analysis of preemption waivers under the Clean Air Act that may be helpful as Congress considers how to treat these Notices of Decision and the application of CRA procedures.

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[1] Email from Director, Regulatory Management Division, EPA, to GAO CRA Rules Mailbox, *Subject: Electronic Delivery of USEPA Final Actions to GAO under the Congressional Review Act (CRA) – [0 major and 3 non-major actions (02-19-2025)]* (Feb. 19, 2025) (EPA Initial Submission).

[2] Letter from Senators Sheldon Whitehouse, Alex Padilla, and Adam B. Schiff to the Comptroller General (Feb. 21, 2025) (Request Letter).

[3] GAO does not issue formal decisions on actions that agencies have submitted to Congress as rules under CRA because that submission generally obviates the need for a GAO decision on the matter. *See* B-330376, Nov. 30, 2018 (explaining that when a rule is submitted to Congress, Congress has an opportunity to review the rule and pass a joint resolution of disapproval to void the rule (*see* 5 U.S.C. § 802) and there is no impediment that a GAO decision might cure).

As background to these issues, we issued a legal decision concluding that a Clean Air Act preemption waiver was not a rule subject to CRA but was instead an adjudicatory order. *See* B-334309, Nov. 30, 2023. Furthermore, we explained that even if the waiver were to satisfy the APA definition of a rule, it would be considered a rule of particular applicability and, therefore, would still not be subject to CRA's submission requirement because of CRA's exclusions. *Id.*

For the three Notices of Decision announcing the waivers at issue here, EPA stated that the Notices of Decision were not rules under CRA, and, in the underlying decision documents for two of those notices, cited to our 2023 decision in support of that statement. However, EPA submitted them as rules to GAO and Congress without any explanation of this discrepancy.

We reached out to EPA on February 20, 2025, for clarification on the submission of the Notices of Decision at issue here because the notices themselves stated that CRA did not apply.[4] After receiving your request, we followed our regular procedure[5] and sent a formal letter to EPA on February 25, 2025, seeking factual information and the agency's legal views on this matter.[6] Although EPA resubmitted the Notices of Decision to GAO on February 27, 2025, with additional information in the corresponding CRA reports, the agency still did not address the statements in the notices regarding the inapplicability of the CRA,[7] and, to date, EPA has not further responded to our letter.

As explained more fully below, our view is that the analysis and conclusions in our 2023 Clean Air Act preemption waiver decision would also apply to the Notices of Decision recently submitted as rules to Congress by EPA.

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[4] Email from Senior Attorney, GAO, to Director, Regulatory Management Division, EPA, *Subject: RE: Electronic Delivery of USEPA Final Actions to GAO under the Congressional Review Act (CRA) – [0 major and 3 non-major actions (02-19-2025)]* (Feb. 20, 2025).

[5] GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), *available at* https://www.gao.gov/products/gao-24-107329.

[6] Letter from Assistant General Counsel for Appropriations Law, GAO, to Principal Deputy General Counsel, EPA (Feb. 25, 2025).

[7] Email from Director, Regulatory Management Division, EPA, to GAO CRA Rules Mailbox, *Subject: Electronic Delivery of USEPA Final Rules to GAO under the Congressional Review Act (CRA) – [0 major and 3 non-major rules (02-27-2025)]* (Feb. 27, 2025) (EPA Resubmission).

BACKGROUND

Clean Air Act

The Clean Air Act generally preempts states from adopting or enforcing emission control standards for new motor vehicles or new motor vehicle engines. *See* 42 U.S.C. § 7543(a); B-334309, Nov. 30, 2023. However, the Clean Air Act requires the EPA Administrator to grant a waiver of preemption for a state that adopted a standard prior to March 30, 1966, if the state determined its standard will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. 42 U.S.C. § 7543(b); B-334309, Nov. 30, 2023. Only California can qualify for preemption waivers under this section because it is the only state that adopted a standard prior to March 30, 1966. B-334309, Nov. 30, 2023.

The EPA Administrator must approve the waiver unless the Administrator makes any one of three findings set forth in the statute: (1) the determination of the state is arbitrary and capricious; (2) the state does not need state standards to meet compelling and extraordinary conditions; or (3) the state standards and accompanying enforcement procedures are not consistent with 42 U.S.C. § 7521(a) (EPA standards for emissions from new motor vehicles or new motor vehicle engines). 42 U.S.C. § 7543(b)(1)(A)–(C); B-334309, Nov. 30, 2023.

When the EPA Administrator receives a waiver request, they must provide notice of a public hearing and comment period. 42 U.S.C. § 7543(b); B-334309, Nov. 30, 2023; EPA, *Vehicle Emissions California Waivers and Authorizations*, *available at* https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations (last visited Mar. 5, 2025) (California Waivers and Authorizations Website). The Administrator makes a decision on the waiver and publishes a notice of their decision and reasons in the *Federal Register*. B-334309, Nov. 30, 2023.

The Clean Air Act provides similar procedures for the EPA Administrator to authorize California to adopt and enforce emission control standards for certain nonroad engines or vehicles. 42 U.S.C. § 7543(e)(2)(A). The Administrator must authorize California to adopt and enforce such standards if California determined that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards, unless the Administrator makes any one of three findings set forth in the statute: (1) California's determination is arbitrary and capricious; (2) California does not need its own standards to meet compelling and extraordinary conditions; or (3) the California standards and accompanying enforcement procedures are not consistent with section 7543. *Id.* Like the waiver process under section 7543(b), the authorization process under section 7543(e)(2)(A) involves providing notice of a public hearing and comment period and publishing notice of the decision. *See id.*; California Waivers and Authorizations Website.

EPA Notices of Decision

At issue here are the following EPA Clean Air Act preemption waiver Notices of Decision:

- *California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption; Notice of Decision*, 88 Fed. Reg. 20688 (Apr. 6, 2023) (Advanced Clean Trucks Waiver Notice);

- *California State Motor Vehicle and Engine and Nonroad Engine Pollution Control Standards; The "Omnibus" Low NO_X Regulation; Waiver of Preemption; Notice of Decision*, 90 Fed. Reg. 643 (Jan. 6, 2025) (Low NO_X Waiver Notice); and

- *California State Motor Vehicle and Engine Pollution Control Standards; Advanced Clean Cars II; Waiver of Preemption; Notice of Decision*, 90 Fed. Reg. 642 (Jan. 6, 2025) (Advanced Clean Cars II Waiver Notice).

In the Advanced Clean Trucks Waiver Notice, the EPA Administrator granted two separate requests for preemption waivers regarding four California regulations for heavy-duty on-road vehicles and engines. 88 Fed. Reg. at 20688. The Low NO_X Waiver Notice announced the EPA Administrator's December 17, 2024, decision granting California a preemption waiver for regulations applicable to new 2024 and subsequent model year California on-road heavy-duty vehicles and engines and authorizing regulations regarding off-road diesel engines. 90 Fed. Reg. at 643–44. The Advanced Clean Cars II Waiver Notice announced the EPA Administrator's December 17, 2024, decision granting California a preemption waiver for regulations applicable to new 2026 and subsequent model year California on-road light- and medium-duty vehicles. 90 Fed. Reg. at 642.

Congressional Review Act (CRA)

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and the Comptroller General for review before the rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id.* CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. *See* 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of "rule" under the Administrative Procedure Act (APA), which states that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. §§ 551(4); 804(3). However, CRA excludes three categories of APA rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of nonagency parties. 5 U.S.C. § 804(3).

EPA did not submit CRA reports to Congress or GAO for any of the Notices of Decision when they were initially issued on April 6, 2023, and January 6, 2025, and each notice states that CRA does not apply because the relevant action is not a rule for purposes of the Act. Advanced Clean Trucks Waiver Notice, 88 Fed. Reg. at 20726; Low NO_X Waiver Notice, 90 Fed. Reg. at 645; Advanced Clean Cars II Waiver Notice, 90 Fed. Reg. at 643. In addition, the underlying decision documents referenced in the Low NO_X Waiver Notice and Advanced Clean Cars II Waiver Notice include similar statements about the inapplicability of CRA and cite our 2023 decision determining that a Clean Air Act preemption waiver notice of decision was not a rule under CRA. *See* EPA, *California State Motor Vehicle and Engine and Nonroad Engine Pollution Control Standards; The "Omnibus" Low NO_X Regulation; Waiver of Preemption; Decision Document* (Dec. 17, 2024) (Low NO_X Waiver Decision), at 95 & n.281[8]; EPA, *California State Motor Vehicle and Engine Pollution Control Standards; Advanced Clean Cars II; Waiver of Preemption; Decision Document* (Dec. 17, 2024) (Advanced Clean Cars II Waiver Decision), at 189 & n.504[9] (both citing B-334309, Nov. 30, 2023).

EPA subsequently submitted a CRA report for the three Notices of Decision to Congress and GAO on February 19, 2025.[10] The House of Representatives and GAO received the report on February 19, 2025,[11] and the Senate received the report on February 20, 2025.[12] EPA resubmitted the CRA report to GAO on February 27, 2025.[13] The resubmitted report included additional information for each notice,

[8] This decision document is available at https://www.regulations.gov/document/EPA-HQ-OAR-2022-0332-0109 (last visited Mar. 5, 2025).

[9] This decision document is available at https://www.regulations.gov/document/EPA-HQ-OAR-2023-0292-0562 (last visited Mar. 5, 2025).

[10] *See* EPA Initial Submission.

[11] 171 Cong. Rec. H875 (daily ed. Feb. 26, 2025); EPA Initial Submission.

[12] 171 Cong. Rec. S1311 (daily ed. Feb. 24, 2025).

[13] EPA Resubmission.

including the date of the document, the nature of the action submitted, and proposed effective date.[14] EPA did not explain in either submission why the agency was submitting the notices under CRA given its statement in each notice that CRA did not apply.[15]

DISCUSSION

GAO's 2023 Decision on a Clean Air Act Preemption Waiver Notice of Decision

In B-334309, we examined an EPA Notice of Decision titled *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision* (Advanced Clean Car Program Waiver Notice). 87 Fed. Reg. 14332 (Mar. 14, 2022). This Notice of Decision rescinded EPA's 2019 withdrawal of a 2013 preemption waiver for California's greenhouse gas emissions standards and zero emission vehicle sale mandate, thereby reinstating the waiver. *Id.* at 14332; B-334309, Nov. 30, 2023.

We determined that the Advanced Clean Car Program Waiver Notice was not a rule under CRA because it did not meet the APA definition of a rule. We concluded that the notice was, instead, an "order" under APA. APA defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). APA further defines "licensing" to include an agency

[14] *See id.*, Attachments.

[15] EPA also states in each notice that the action is not a rule under the Regulatory Flexibility Act and therefore EPA did not prepare a regulatory flexibility analysis addressing the impact of the action on small businesses. Advanced Clean Trucks Waiver Notice, 88 Fed. Reg. at 20725–26; Low NO_X Waiver Notice, 90 Fed. Reg. at 645; Advanced Clean Cars II Waiver Notice, 90 Fed. Reg. at 643. Similarly, EPA further states in each notice that the relevant action is not a rule under Executive Order 12866 and is therefore exempt from review by the White House Office of Management and Budget (OMB). Advanced Clean Trucks Waiver Notice, 88 Fed. Reg. at 20725; Low NO_X Waiver Notice, 90 Fed. Reg. at 645; Advanced Clean Cars II Waiver Notice, 90 Fed. Reg. at 643. Lastly, although EPA indicated in their submission to GAO that the notices were "non-major" under CRA, the statements in the notices make it unclear whether the Office of Information and Regulatory Affairs within OMB had an opportunity to review the actions to determine if they were major rules under CRA, *see* 5 U.S.C. § 804(2), given that those determinations are usually made as part of the Executive Order 12866 review process. *See* OMB Memorandum M-24-09, *Guidance on Compliance with the Congressional Review Act* (2024), at 3.

granting or revoking a license, and "license" to include an agency approval, statutory exemption, or other form of permission. 5 U.S.C. § 551(8), (9). An agency action that constitutes an order under APA is not a rule under the statute and, therefore, is not a rule under CRA. B-334309, Nov. 30, 2023 (citing B-334995, July 6, 2023; B-334400, Feb. 9, 2023; B-332233, Aug. 13, 2020 (rules and orders are "mutually exclusive")).

We explained that an adjudicatory order is a case-specific, individual determination of a particular set of facts that has immediate effect on the individual(s) involved. B-334309, Nov. 30, 2023 (citing *United States v. Florida East Coast Railway Co*., 410 U.S. 224, 245–46 (1973); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994)). In contrast, a rule is a broad application of general principles that is prospective in nature. B-334309, Nov. 30, 2023 (citing *Florida East Coast Railway Co.,* 410 U.S. at 246; *Neustar,* 857 F.3d at 895; *Yesler Terrace Community Council,* 37 F.3d at 448).

We concluded that the Advanced Clean Car Program Waiver Notice met the APA definition of an order because the notice determined that California was not preempted from enforcing its Advanced Clean Car Program and therefore made a "final disposition" granting California a "form of permission" as described in the APA definition. B-334309, Nov. 30, 2023 (citing 5 U.S.C. § 551(6), (8), (9)). We noted that the notice was particular to California's Advanced Clean Car Program, involved consideration of particular facts, as opposed to general policy, and had immediate effect on California. *Id.*

We also concluded that even if the Advanced Clean Car Program Waiver Notice met the APA definition of a rule, it would still not be subject to CRA because of CRA's exclusion of rules of particular applicability. B-334309, Nov. 30, 2023. A rule of particular applicability is addressed to an identified entity and also addresses actions that entity may or may not take, taking into account facts and circumstances specific to that entity. B-334309, Nov. 30, 2023 (citing B-334995, July 6, 2023). We noted that the notice concerned a specific entity—California—and addressed a statutory waiver specific to California's Advanced Clean Car Program; therefore, the notice would be a rule of particular applicability. B-334309, Nov. 30, 2023.

EPA's Recently Submitted Notices of Decision

(1) Applicability of GAO's 2023 Decision

The analysis and conclusion in B-334309 that the Advanced Clean Car Program Waiver Notice was not a rule for purposes of CRA because it was an order under APA would apply to the three notices of decision at issue here. For example, all three notices of decision involve waivers granted to California under the same authority and process (42 U.S.C. § 7543(b)) at issue in the Advanced Clean Car Program Waiver Notice. In each case, California requested preemption waivers

from EPA with respect to specific California regulations, and EPA, after holding a public hearing, receiving comments, and considering information presented by California and opponents of the waivers, determined to grant the requested waivers. *See* Advanced Clean Trucks Waiver Notice, 88 Fed. Reg. at 20688–90; Low NO_X Waiver Notice, 90 Fed. Reg. at 643–45; Advanced Clean Cars II Waiver Notice, 90 Fed. Reg. at 642–43.

The Low NO_X Waiver Notice also involves an authorization under a separate authority (42 U.S.C. § 7543(e)(2)(A)). As described above, the nature of the determination and process used is very similar to section 7543(b), and our analysis and conclusions in B-334309 would apply to this portion of the notice as well. *See* Low NO_X Waiver Notice, 90 Fed. Reg. at 644–45 (describing the relevant procedures and grouping the corresponding findings in sections 7543(b)(2) and 7543(e)(2)(A) together in summarizing the decision). Specifically, California requested EPA's authorization to adopt and enforce specific California regulations, and EPA, after holding a public hearing, receiving comments, and considering information presented by California and opponents of the authorization, determined to grant the requested authorization. *See* Low NO_X Waiver Notice, 90 Fed. Reg. at 643–45.

(2) Effect of Resolutions of Disapproval

If Congress were to treat the EPA Notices of Decisions as rules under CRA and subsequently enact resolutions of disapproval, there is a question as to the precise effect those resolutions would have. As described above, if a resolution of disapproval is enacted, then the rule has no force or effect. 5 U.S.C. § 801(b)(1). However, two of the three Notices of Decision submitted by EPA to Congress, the Low NO_X Waiver Notice and the Advanced Clean Cars II Waiver Notice, appear to merely notify the public of previously issued decision documents granting California the requested preemption waivers and, in the Low NO_X Waiver Notice, the requested authorization for its regulations. *See* Low NO_X Waiver Notice, 90 Fed. Reg. at 643–44 (stating that EPA "is providing notice of its decision" and referencing the Low NO_X Waiver Decision); Advanced Clean Cars II Waiver Notice, 90 Fed. Reg. at 642–43 (stating that EPA "is providing notice of its decision" and referencing the Advanced Clean Cars II Waiver Decision). EPA did not include the underlying decision documents in its submission to Congress and GAO.[16] In contrast, the Advanced Clean Trucks Waiver Notice, like the Advanced Clean Car Program Waiver Notice we examined in B-334309, appears to be the decision document. *See* 88 Fed. Reg. at 20688 (stating that EPA "is granting . . . California['s] . . . requests for waivers"). Accordingly, if Congress were to enact resolutions disapproving the Low NO_X Waiver Notice or the Advanced Clean Cars II Waiver Notice under CRA, it is unclear whether or how those resolutions would affect the underlying waivers and authorizations.

[16] *See* EPA Initial Submission; EPA Resubmission.

CONCLUSION

In these circumstances, our view is that our prior analysis and conclusion in B-334309 that the Advanced Clean Car Program Waiver Notice was not a rule for purposes of CRA because it was an order under APA would apply to the three notices at issue here. We provide this information to assist Congress as it considers how to treat these Notices of Decision and the application of CRA procedures.

If you have any questions, please contact Shirley A. Jones, Managing Associate General Counsel, at JonesSA@gao.gov, or Charlie McKiver, Assistant General Counsel for Appropriations Law, at McKiverC@gao.gov.

Sincerely,

Edda Emmanuelli Perez
General Counsel

Congressional Requesters

The Honorable Sheldon Whitehouse
Ranking Member
Committee on Environment and Public Works
United States Senate

The Honorable Alex Padilla
United States Senate

The Honorable Adam B. Schiff
United States Senate

Attachment 3

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: Environmental Protection Agency—Applicability of the Congressional Review Act to Notice of Decision on Clean Air Act Waiver of Preemption

File: B-334309

Date: November 30, 2023

DIGEST

The Environmental Protection Agency (EPA) issued a notice of decision entitled *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision* (*Notice*). The *Notice* rescinds a withdrawal of a waiver of preemption for California's Advanced Clean Car Program.

The Congressional Review Act (CRA) requires that agencies submit rules to Congress for review before they may take effect. CRA incorporates the Administrative Procedure Act's (APA) definition of a rule, which does not include adjudicatory orders. CRA also excludes certain categories of rules from coverage, including rules of particular applicability. EPA did not submit the *Notice* to Congress pursuant to CRA. We conclude that the *Notice* is an adjudicatory order not subject to CRA. Even if the *Notice* were to satisfy the APA definition of a rule, it would be considered a rule of particular applicability, and, therefore, would still not be subject to the CRA's submission requirement.

DECISION

On March 14, 2022, the Environmental Protection Agency (EPA) issued a notice of decision entitled *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*. 87 Fed. Reg. 14332 (*Notice*). We received a request for a decision as to whether the *Notice* is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Capito to the Comptroller General (May 11, 2022). For the reasons discussed below, we conclude that the *Notice* is not a rule under CRA.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/gao-06-1064sp. Accordingly, we reached out to EPA to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, EPA (June 7, 2022). We received EPA's response on July 1, 2022. Letter from General Counsel, EPA, to Assistant General Counsel, GAO (June 30, 2022) (Response Letter).

BACKGROUND

Clean Air Act

The Clean Air Act generally preempts states from adopting or enforcing emission control standards for new motor vehicles or new motor vehicle engines. *See* 42 U.S.C. § 7543(a); Response Letter, at 2; *Notice*. However, the Clean Air Act requires the Administrator of EPA to grant a waiver of preemption for a state that adopted a standard prior to March 30, 1966, if the state determined its standard will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.[1] 42 U.S.C. § 7543(b); Response Letter, at 2–3. The Administrator must approve the waiver unless the Administrator makes any one of three findings set forth in the statute: (1) the determination of the state is arbitrary and capricious; (2) the state does not need state standards to meet compelling and extraordinary conditions; or (3) the state standards and accompanying enforcement procedures are not consistent with 42 U.S.C. § 7521(a) (EPA standards for emissions from new vehicles or new vehicle engines). 42 U.S.C. § 7543(b)(1)(A)-(C); Response Letter, at 3.

When the Administrator receives a waiver request, they must give notice of a public hearing and comment period. 42 U.S.C. § 7543(b); Response Letter, at 3; EPA, *Vehicle Emissions California Waivers and Authorizations*, *available at* https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations (last visited Oct. 5, 2023) (California Waivers).[2] The Administrator makes a decision on the waiver and publishes a notice of their decision and reasons in the *Federal Register*. Response Letter, at 4.

While only California can qualify for a waiver of preemption, section 177 of the Clean Air Act authorizes other states to adopt and enforce emission control standards for new motor vehicles or new motor vehicle engines if the standards are identical to the

[1] Only California can qualify for a waiver of preemption because it is the only state that adopted a standard prior to March 30, 1966. *Notice* at 14332 n. 1.

[2] During the hearing, the state presents its regulations and findings, and parties opposing the waiver have a chance to provide oral testimony. *See* Response Letter, at 3.

California standards for which a waiver has been granted. 42 U.S.C. § 7507 (Section 177).[3]

The Clean Air Act does not explicitly provide for EPA to reconsider and withdraw a previously granted waiver.[4] When EPA reconsiders a previous waiver, it considers whether there was a clerical or factual error in the waiver, or a significant change in a factual circumstance or condition related to the three findings set forth in the statute that would call the waiver into doubt.[5]

EPA's Notice

On June 27, 2012, California requested a waiver of preemption under the Clean Air Act for its Advanced Clean Car Program.[6] The Advanced Clean Car Program regulates smog forming pollutants and greenhouse gas emissions, and includes a zero emission vehicle sales mandate.[7] EPA provided notice of a public hearing and comment period.[8] On January 9, 2013, the Administrator granted the waiver.[9]

Subsequently, in 2018, EPA provided notice of a public hearing and comment period proposing to withdraw the 2013 waiver of preemption for California's Advanced Clean Car Program, and proposing the view that Section 177 does not authorize states to adopt California's greenhouse gas emissions standards.[10] In 2019, the Administrator withdrew the 2013 waiver, and finalized the view that Section 177 does not apply to greenhouse gas standards.[11]

Consistent with Executive Order 13990, issued January 25, 2021, and a number of petitions for reconsideration,[12] EPA issued a notice of a public hearing and comment period to reconsider the withdrawal of the 2013 waiver and interpretive view of Section 177.[13] On March 14, 2022, the Administrator issued the *Notice*, which is the subject of this decision. The *Notice* rescinds the withdrawal of the waiver, bringing

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[3] States are not required to seek EPA approval to adopt California's standards under Section 177. California Waivers.

[4] *Notice* at 14344.

[5] *Id*.

[6] 77 Fed. Reg. 53199–53200.

[7] 77 Fed. Reg. 53199; *see also Notice* at 14332.

[8] 77 Fed. Reg. 53199.

[9] 78 Fed. Reg. 2112.

[10] 83 Fed. Reg. 42986, 42999, 43253 (Aug. 24, 2018).

[11] 84 Fed. Reg. 51310, 51350 (Sept. 27, 2019).

[12] 86 Fed. Reg. 7037; *Notice* at 14333, 14340.

[13] 86 Fed. Reg. 22421 (Apr. 28, 2021).

back into force the 2013 waiver of preemption for California's Advanced Clean Car Program, and rescinds the interpretive view of Section 177, meaning that Section 177 applies to greenhouse gas standards.[14]

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id*. CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. *See* 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

EPA did not submit a CRA report to Congress or the Comptroller General on the *Notice*. In its response to us, EPA stated the *Notice* is an adjudicatory order, not a rule, and therefore is not subject to CRA. Response Letter, at 1.

DISCUSSION

At issue here is whether EPA's *Notice* is a rule under CRA. For the reasons discussed below, we conclude the *Notice* is not a rule because it is, instead, an order.

CRA adopts the APA's definition of rule and, therefore, CRA does not apply to "those types of agency action that the APA defines separately." B-334400, Feb. 9, 2023, at 4. Separate from a rule, which is the result of the rulemaking process, APA provides for agencies to issue an order, which is the result of the adjudication process. 5 U.S.C. § 551(5), (7); B-334995, July 6, 2023. APA defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). APA further defines "licensing" to include an agency

[14] *Notice* at 14332–14333.

granting or revoking a license, and "license" to include an agency approval, statutory exemption, or other form of permission. 5 U.S.C. § 551(8), (9). An agency action that constitutes an order under APA does not meet the definition of rule under APA and, therefore, is not a rule under CRA. B-334995, July 6, 2023; B-334400, Feb. 9, 2023; B-332233, Aug. 13, 2020 (rules and orders are "mutually exclusive").

Courts have identified that an adjudicatory order is a case-specific, individual determination of a particular set of facts that has immediate effect on the individual(s) involved. *See United States v. Florida East Coast Railway Co*., 410 U.S. 224, 245–246 (1973); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir., May 26, 2017); *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir., Sept. 12, 1994). Statutory interpretation can be made through an adjudicatory order. *Neustar*, 857 F.3d at 894. By contrast, courts have provided that a rule is a broad application of general principles that is prospective in nature. *See Florida East Coast Railway Co.,* 410 U.S. at 246; *Neustar,* 857 F.3d at 895; *Yesler Terrace Community Council,* 37 F.3d at 448.

For example, in B-334400, EPA denied petitions from refineries for an exemption under a federal statute. There, the agency considered facts presented by the refineries and comments it received concerning the petitions and applied the relevant standard for exemption. B-334400, Feb. 9, 2023, at 6. Because the agency action was a final disposition of particular petitions under a statutory exemption, we concluded it was an order, not a rule, under APA. *Id*. at 6, 7, 8; *see also* B-332233, Aug. 13, 2020, at 4–5 (after conducting a fact-intensive review, an agency modified the terms of a license to permit the licensee to conduct a new activity, and we concluded the action was an order).

In another case, B-334995, the Food and Drug Administration (FDA) issued a modification to a risk mitigation strategy for a particular drug. Following a process set forth in statute, the agency considered pertinent information and issued the modification after determining it was necessary under the statutory criteria. B-334995, July 6, 2023, at 2, 4. We concluded that FDA's action had immediate effect on the companies sponsoring the drug and was an order under APA. *Id*. at 5–6.

Here, the *Notice* meets the statutory definition of an order, reflects the hallmarks of an order that courts identified, and is similar to the actions in our prior decisions that were orders. With regard to the statutory definition of an order, the *Notice* determines that California is not preempted from enforcing its Advanced Clean Car Program. In doing so, the *Notice* is making a "final disposition" granting California a "form of permission" which meets the definition of order under APA. 5 U.S.C. § 551(6), (8), (9).

Further, the *Notice* is particular to California's Advanced Clean Car Program, as opposed to a broad unspecified group. The Administrator's process involved consideration of particular facts, as opposed to general policy, such as whether there were any factual or clerical errors in the 2013 waiver that could justify the 2019

waiver withdrawal, and whether any "factual circumstances or conditions" related to the statutory waiver criteria had changed so significantly as to call the 2013 waiver into doubt. *Notice* at 14344, 14352; *see* Response Letter at 3–4. The *Notice* has immediate effect in that California is not preempted from enforcing its Advanced Clean Car Program.

The characteristics of the Notice and EPA's processes are similar to our prior decisions involving particular petitions from refineries and a modification to a risk mitigation strategy for a particular drug sponsored by particular companies. In those decisions, the applicable agency considered specific facts under the relevant statute and issued an action having immediate effect on the refineries and drug sponsors.

The fact that the *Notice* also rescinds EPA's previous interpretive view of Section 177 does not make the *Notice* a rule, even though rescinding the interpretive view could have broad, prospective application. An agency action having some characteristics more typical of a rulemaking "does not automatically convert an adjudication into a rulemaking." B-334400, Feb. 9, 2023, at 5; *see also Neustar*, 857 F.3d at 894 ("Statutory interpretation can be rendered in the form of an adjudication, not only in a rulemaking. The fact that an order rendered in an adjudication may affect agency policy and have general prospective application [] does not make it rulemaking subject to APA") (citation omitted). For example, in B-334400, the agency's action affected multiple petitioners and the agency used public notice-and-comment procedures. We concluded, however, that the action was an order, not a rule, because it met the statutory definition of an order and agencies may seek public comment in adjudicatory proceedings. B-334400, Feb. 9, 2023, at 6–7. Here, the *Notice* meets the statutory definition of an order, reflects key hallmarks of an order, and is similar in character and process to the actions in our prior decisions that were orders. We conclude, therefore, that the *Notice* is an order under APA.

Finally, even if the *Notice* fell within the definition of rule, it would still not be subject to CRA because of CRA's exclusion of rules of particular applicability. A rule of particular applicability is "addressed to an identified entity and also address[es] actions that entity may or may not take, taking into account facts and circumstances specific to that [] entity." B-334995, July 6, 2023, at 5. For example, in B-334400, an agency's denial of petitions for a statutory exemption addressed 69 petitions "based on the facts those petitions presented" and, therefore, would be a rule of particular applicability, had the action been considered a rule. B-334400, Feb. 9, 2023, at 7. Here, the *Notice* concerns a specific entity—California—and addresses a statutory waiver specific to California's Advanced Clean Car Program. *See* Response Letter, at 5 (waivers of preemption under the Clean Air Act "are a specific grant of approval to California's request for a waiver of generally applicable [statutory] requirements, which have the effect of recognizing the State's exemption if its request meets the statutory findings"). Therefore, the *Notice* would be a rule of particular applicability and excluded from coverage by CRA on that basis.

CONCLUSION

The *Notice* does not meet the APA definition of a rule. Rather, the *Notice* is an adjudicatory order because it is a final disposition rescinding a waiver withdrawal for California's Advanced Clean Car Program, bringing back into force a waiver of preemption to enforce the program. Even if the action were considered to be a rule, it would be a rule of particular applicability. For these reasons, the *Notice* is not a rule for purposes of CRA and, thus, not subject to the requirement that it be submitted to Congress and the Comptroller General before it may take effect.

Edda Emmanuelli Perez
General Counsel

Attachment 4

UNIVERSITY OF CALIFORNIA, LOS ANGELES **UCLA**

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Emmett Institute on Climate Change and the Environment

SCHOOL OF LAW
405 Hilgard Ave.
LOS ANGELES, CALIFORNIA 90095-1476

October 25, 2018

Submitted via regulations.gov

Acting Administrator Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Attn: Docket No. EPA-HQ-OA-2018-0283

Re: *Comment on Proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, Docket Nos. EPA-HQ-OAR-2018-0283 & FRL-9981-74-OAR; RIN 2127-AL76 & 2060-AU09; NHTSA-2018-0067/NHTSA-2017-0069 ("Proposed Rule")

Dear Acting Administrator Wheeler:

The Emmett Institute on Climate Change and the Environment at UCLA School of Law submits the following comments on the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2012-2026 Passenger Cars and Light Trucks ("Proposed Rule"). The Emmett Institute is a leading law school center focused on climate change and other critical environmental issues, and serves as a source of environmental legal scholarship, nonpartisan expertise, and policy analysis. We appreciate the opportunity to comment on this proposed rule.

As legal scholars and policy advocates with expertise in the Clean Air Act, we are deeply troubled by EPA and NHTSA's joint proposal to freeze federal fuel economy standards for passenger cars and light trucks at model year 2020 levels and to revoke the waiver for the California Advanced Clean Cars ("ACC") program and Zero-Emission Vehicle ("ZEV") requirements appropriately granted to California in 2013 pursuant to the Clean Air Act. While we object to many aspects of the Proposed Rule, we focus our attention in this letter on our conclusion that EPA's proposed revocation of California's ACC/ZEV waiver is inconsistent with its statutory authority and with Congress's intent in enacting the Clean Air Act.

Revocation of the ACC/ZEV waiver would be both unlawful and inappropriate. First, the Clean Air Act does not provide EPA with the authority to revoke a waiver; EPA erroneously

applies the Clean Air Act section 209 standards for waiver grants or denials, but those standards do not apply in this context. Second, even if the agency possessed, as EPA argues, "inherent authority" to revoke California's waiver, the agency is barred from doing so now. EPA granted the waiver *over five years ago*, and states and the automobile and parts manufacturing industries have acted in reliance on the waiver grant. We believe that EPA is estopped from backtracking on its decision so long after its issuance. Finally, California's waiver continues to satisfy the requirements of Clean Air Act section 209. Revocation of California's waiver would ignore the "compelling and extraordinary" conditions that supported EPA's correct 2013 decision to grant the waiver, conditions which, if they have changed at all, have only worsened. Air districts in California, including the South Coast and San Joaquin Valley Air Basins, continue to have the worst air quality in the nation; California's need for its own motor vehicle emission program is just as compelling as it ever has been. And California is uniquely situated to suffer extraordinarily ill effects from climate change, effects that will reverberate nationally and even globally given California's importance for food security and economic stability.

We urge EPA to withdraw the Proposed Rule and leave California's waiver intact.

I. EPA Lacks Authority To Revoke The Waiver

During the long history of the California waiver to regulate motor vehicle emissions, EPA has never revoked a previously-granted waiver. Beyond the continuing necessity of California's waiver, the statute itself provides guidance: the Clean Air Act does not grant EPA the authority to withdraw a waiver that has already been approved.

California has, of course, had the authority to chart its own course on motor vehicle emission regulation for over fifty years, since the 1967 adoption of the precursor to the federal Clean Air Act, the Air Quality Act. Even before the federal government took action to limit motor vehicle emissions, California had already made strides, and "Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards." 74 Fed. Reg. 32744, 32745 (July 8, 2009).

The consequence of this recognition was the adoption of a waiver provision allowing California to set its own standards pursuant to its state law, a provision that became part of the Clean Air Act and was modified in 1977 to provide California with even broader flexibility in setting a motor vehicle emission program. H.R. Rep. No. 294, 95 Cong., 1st Sess. 301-02 (1977). In addition, Congress authorized other states to adopt California's program pursuant to Clean Air Act section 177, expanding the market for manufacturers complying with California's standards. See 42 U.S.C. § 7507. Today, California and the twelve other "Section 177 states" comprise 40 percent of the United States' automobile market.

The standards for grant or denial of California's waiver are codified in section 209 of the Clean Air Act. Section 209 provides that, as long as California finds its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards," EPA must grant the requested waiver unless it makes one of three determinations: (1) California's finding was arbitrary and capricious, (2) California does not need the standards to

meet compelling and extraordinary conditions; or (3) the standards and accompanying enforcement procedures are not consistent with Clean Air Act section 202. 42 U.S.C. § 7543(b). Standards are only inconsistent with section 202 if they are technologically infeasible or if California's test procedures impose requirements that are at odds with federal test procedures. *Motor and Equipment Mfrs. Ass'n, Inc. v. E.P.A.* ("*MEMA I*"), 627 F.2d 1095, 1126 (D.C. Cir. 1979).

But section 209 contains no suggestion that a waiver, once granted, can be revoked. The standards clearly apply when a waiver has been requested and is under consideration by EPA, not retroactively once the waiver has already been determined to satisfy section 209's criteria. In interpreting section 209, which expressly preempts states other than California from setting their own motor vehicle emission standards, "the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent," should be the primary consideration. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); see also *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (where a statute's plain language is not absurd, it should be enforced according to its terms).

Here, the plain language is clear: EPA may consider the factors enumerated in section 209 when determining whether or not to grant a waiver *in the first instance*, not after the waiver is granted. Indeed, Congress has not been reticent to expressly grant revocation authority in other sections of the Clean Air Act or in other federal environmental statutes. See 42 U.S.C. §7661a (granting EPA authority, under specific circumstances, to withdraw a state's delegated authority under Title V of the Clean Air Act to administer its own permitting program); 42 U.S.C. § 300h-1(b)(3) (explaining the circumstances under which EPA can withdraw a state's delegated primary enforcement authority for underground water sources under the Safe Drinking Water Act); 33 U.S.C. § 1342(b) (specifying the conditions under which EPA may withdraw a state's delegated authority to enforce NPDES requirements under the Clean Water Act). Given that Congress has been explicit in other Clean Air Act provisions in granting EPA the authority to revoke, EPA and courts cannot read such authority into a statutory provision from which Congress omitted it.

EPA has asserted that the legislative history of the Air Quality Act creates revocation authority, despite the fact that such authority is absent from section 209 itself. 83 Fed. Reg. 42986, 43242 (Aug. 24, 2018) ("The Administrator has 'the right…to withdraw the waiver at any time [if] after notice and an opportunity for public hearing he finds that the State of California no longer complies with the conditions of the waiver.'") (quoting S. Rep. No. 50-403, 34 (1967)). This assertion is inapposite for two reasons.

First, the legislative history upon which EPA relies dates from the waiver's original adoption as part of the Air Quality Act in 1967. But the waiver provision was amended—and strengthened—as part of the 1977 Clean Air Act amendments. H.R. Rep. No. 294 at 23. The original 1967 waiver provision had authorized the federal Secretary of Health, Education, and Welfare to make the initial determination regarding the necessity of California's waiver. Pub. L. 90-148 § 208(b), 81 Stat. 501 (1967) (providing that the Secretary shall waive the application of the Air Quality Act's standards to California "unless he finds that [California] 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."). In 1977, Congress changed the decision-making structure, placing the necessity determination in the hands of California officials at the outset, and curtailing EPA's authority to deny a waiver to the three limited circumstances enumerated in section 209. The change in structure came with a temporal limitation on EPA's consideration of the section 209 factors: the amended statutory text now specified that the factors were to be considered after California officials determined a state program was necessary but before EPA had granted a waiver to California for that program. 42 U.S.C. § 7543(b) ("No such waiver shall be granted" if EPA makes any of the findings outlined in section 209.). Any discussion of revocation authority is absent from the legislative history for the 1977 amendments. Given the constraints imposed by the amended statutory text, if any revocation authority existed under the original language of the Air Quality Act (and the lack of explicit authority makes this argument doubtful, as explained below), it has since been eliminated by the broader California authority granted in 1977.

Second, the presence of one line in the legislative history for a provision that is no longer intact cannot be the basis for reading revocation authority into Section 209. See *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) ("[R]esort to legislative history is not appropriate in construing plain statutory language."); *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) (courts should "not resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-809 fn. 3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). EPA cannot read "a standardless and open-ended revocation authority" into "a silent statute." *American Methyl Corp. v. E.P.A.*, 749 F.2d 826, 836-837 (D.C. Cir. 1984). The Supreme Court has been clear: "[w]e should prefer the plain meaning [of a statute] since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Where, as here, the plain language of the statute and a comparison with similar federal laws shows that Congress did not intend to include revocation authority as part of section 209, EPA cannot read that authority into the statute based on "a sentence in a legislative committee report untethered to any statutory language." *Abrego v. Dow Chemical Co*., 443 F.3d 676, 686 (9th Cir. 2006); see also *International Broth. of Elec. Workers, Local Union No. 474, AFL-CIO v. N.L.R.B.*, 814 F.2d 697, 699-700 (D.C. Cir. 1987) ("…courts have no authority to enforce alleged principles gleaned solely from legislative history that has no statutory reference point.").

In sum, EPA lacks the authority under CAA section 209 to revoke an already-granted waiver. While EPA is entitled to consider the necessity of California's separate motor vehicle emission program, its ability to do so is temporally limited by the terms of section 209: it does not get to second-guess the waiver determination after it has already been made. Neither the plain language of the statute nor the legislative history offers any support for EPA's assertion of revocation authority here; EPA accordingly lacks the power to withdraw California's 2013 ACC/ZEV waiver.

II. EPA Is Time-Barred From Revoking The Waiver

Even if, as EPA argues, the agency possesses "inherent authority" to revoke California's waiver, the time for EPA to act would be long past. The ACC/ZEV waiver was granted five years ago, in 2013, and since that time, the automobile and parts manufacturing industries and a number of states have acted in reliance on EPA's waiver grant. Indeed, an about-face when the agency's action has been settled for years, not days, weeks, or even months, would set a dangerous precedent and subject regulated entities to significant and unnecessary uncertainty in the future.

As permitted by Clean Air Act section 177, about a dozen states, representing about one-third of the United States auto market, have already adopted California's standards—standards they are reliant upon to meet federal criteria pollutant standards, as EPA acknowledges in the Proposed Rule. 83 Fed. Reg. at 43244 ("EPA may subsequently consider whether to employ the appropriate provisions of the CAA to identify provisions in Section 177 states' SIPs that may require amendment and to require submission of such amendments."). The attorneys general of those states and the mayors of over fifty cities within them have stressed that "these standards are both necessary and feasible" and are "particularly appropriate given the serious public health impacts of air pollution in our cities and states…" Local Leaders' Clean Car Declaration (Apr. 3, 2018). And even automakers have spoken out in "support [of] increasing clean car standards through 2025"; practically speaking, the industry has already invested in compliance with California's program for years. See Ford Motor Company, Statement of Bill Ford, Executive Chairman, and Jim Hackett, President and CEO, "A Measure of Progress" (Mar. 27, 2018). In fact, the California Air Resources Board's ("CARB") 2017 midterm review of the ACC program found that "manufacturers are over complying with the [greenhouse gas ("GHG")] requirements and are offering various vehicles on the road today that are already able to comply with the GHG standards for later model years." CARB, California's Advanced Clean Cars Midterm Review: Summary Report for the Technical Analysis of the Light Duty Vehicle Standards ("ACC Midterm Report") (Jan. 18, 2017), ES-2.

California, of course, has relied on the waiver as well. As the ACC Midterm Report explains, the ZEV requirements have led to "significant advances in PM control" and to improvements in criteria pollutant emission control technology as well. ACC Midterm Report at ES-2. California continues to exceed federal ambient air quality standards; for example, in order to come into attainment with the 8-hour ozone standard by its compliance date of 2023, the Los Angeles region must reduce its NOx emissions "by an additional two thirds beyond reductions from all of the control measures in place today." ACC Midterm Report at ES-11. Attainment of ozone standards "are expected to have to rely heavily on significant and on-going progress towards zero and near-zero mobile source emissions in California," making the ACC program key. *Id*. In fact, the primary purpose of the ZEV mandate was to meet state and federal ambient air quality standards for conventional pollutants, not to achieve GHG reductions. See Proposed Regulations for Low-Emission Vehicles and Clean Fuels: Staff Report (EPA Legacy Docket A-91-71-II-A-3) at 3-4, CARB (Aug. 13, 1990); see also Proposed Regulations for Low-Emission Vehicles and Clean Fuels: Final Statement of Reason (EPA Legacy Docket A-91-71-II-A-7),

CARB (July 1991) at 47-48 ("The primary objective of the adopted regulations is to achieve substantial emission reductions in an attempt to attain the state and federal ambient air quality standards. . . . [W]e believe that the significant penetration of ZEVs is crucial to long-term attainment of the ambient standards in the South Coast, and there is no assurance that ZEVs will be developed without the limited, measured ZEV sales requirements in the regulations.").

Both the South Coast Air Quality Management District ("SCAQMD") and the San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD") rely on the ACC program, and in particular, the ZEV mandate, as a means to implement an approvable state implementation plan ("SIP") to achieve federal ambient air quality standards. SCAQMD's 2016 air quality management plan ("AQMP") points out that the AQMP's "control strategy strongly relies on a transition to zero and near-zero technologies in the mobile source sector…" SCAQMD, 2016 Air Quality Management Plan (Mar. 2017) at ES-5. And SJVUAPCD has explained that "[a]ttainment of the latest [federal] standards will require transformative changes and development of innovative control strategies to reduce emissions from mobile sources, which now make up over 85% of the Valley's NOx emissions…mobile sources, particularly in the goods movement sector, must transition to near zero emission levels…" SJVUAPCD, 2016 Plan for the 2008 8-Hour Ozone Standard (Jun. 16, 2016) at ES-5. Indeed, "…substantial reductions from both mobile and stationary sources are necessary to reach attainment…Such actions to control mobile sources are possible because of California's unique authority to regulate emissions from certain source categories more stringently than the federal government under the Act's §209(b) waiver provision." SJVUAPCD, Draft San Joaquin Valley Supplement to the Revised 2016 State Strategy for the State Implementation Plan (Aug. 27, 2018) at 2. Without the ACC program, neither air district—both of which suffer from degraded air quality unparalleled elsewhere in the nation—will be able to meet *federal* air quality standards for *conventional* pollutants pursuant to its SIP. As discussed above, EPA has recognized this problem in the context of the Section 177 states; it is just as real for California itself. In fact, as discussed further below, the waiver denial will only exacerbate the conventional pollutant problem in California, as climate change worsens the health impacts from ozone and PM pollution.

And the ACC program is also necessary to meet California's 2030 climate change targets, codified in 2016 with the adoption of SB 32. CARB explained that "[m]odeling to meet the 2030 GHG targets established by SB 32…indicates approximately three million additional ZEVs and PHEVs will be needed in 2026 through 2030." ACC Midterm Report at ES-6. In other words, California depends on the waiver—and has relied upon it in planning for the future—to meet both federal and state statutory mandates. While it might have been possible for California to have adopted a different approach to compliance had EPA reassessed the waiver shortly after its grant, if the waiver is revoked now, five years after its issuance, California will lack the requisite time necessary to recover by implementing alternative compliance strategies to meet state mandates.

This sort of reliance—on the part of California, other states, and the automobile and parts industries—is precisely the kind that courts respect when evaluating an agency's reconsideration of a past decision. See *American Methyl Corp.*, 749 F.2d 826. In *American Methyl Corp*., EPA

had granted a waiver to allow marketing of a fuel blend under Clean Air Act section 211(f), which provides no revocation authority, and sought to reconsider that determination two and a half years after the fact. *Id*. at 833. The D.C. Circuit declined to infer "a standardless and open-ended revocation authority from a silent statute." *Id*. at 836-837. In so doing, said the court, "we ensure that entities subject to regulation under section 211 know what is expected of them." *Id*. at 839. "Protecting the legitimate expectations" of those reliant on the EPA's waiver grant avoids an "ever-present threat" to the adoption of new technology and prevents the "extraordinary risk" involved in starting down a compliance pathway, only to have the rug pulled out from underneath. *Id*. at 839-840. Here, reliance is not limited to California and the Section 177 states; like in *American Methyl Corp.*, manufacturers have also relied on the waiver for the past several years as they make investments to design their fleets. The states and regulated entities need to be able to trust that a five-year-old waiver is settled: as *American Methyl Corp.* explains, allowing reconsideration so far after the decision point is economically disruptive and deprives everyone of regulatory certainty. And courts have never permitted agencies to wait a span of years before reevaluating a decision pursuant to "inherent authority"; instead, they have confirmed that reconsideration must take place within a "reasonable period of time"—often defined as "within the period for taking an appeal," and typically, a matter of weeks. See *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (any reconsideration must occur "in a timely fashion"); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977); *Albertson v. F.C.C.*, 182 F.2d 397, 399 (D.C. Cir. 1950). "That period has long expired here." *American Methyl Corp*., 749 F.2d at 835.

EPA possesses no authority, "inherent" or otherwise, to reassess its 2013 waiver determination. But even if it did, the time for that reassessment is long gone. Revocation of the waiver at this juncture, when both state governments and regulated entities have acted in reliance upon it, is both impermissible and unwise.

III. The Waiver Remains Necessary And Appropriate

Beyond EPA's lack of authority to revoke the ACC/ZEV waiver, the waiver should remain in place for another key reason: it continues to comply with all federal standards for a waiver grant. "EPA has consistently interpreted the waiver provision as placing the burden on the opponents of a waiver to demonstrate that one of the criteria for a denial has been met." 74 Fed. Reg. at 32745. It is well-settled that California's findings with respect to its motor vehicle emission program are entitled to significant deference; California has consistently determined, based upon substantial evidence, that the ACC/ZEV program is at least as protective as any federal program, is necessary to meet "compelling and extraordinary conditions," and is consistent with Clean Air Act section 202. Even if the section 209 factors were to apply to a revocation determination—which they do not—EPA has not met its burden to show that the waiver should be withdrawn.

A. California's Findings Are Entitled To Significant Deference

Both EPA and federal courts have long acknowledged that when California makes findings to support a waiver request, EPA must afford those determinations substantial deference. California has consistently presented strong evidence—at the time of the initial waiver request, at the time of EPA's waiver grant, and again during California's 2017 midterm review of the ACC program—to support the necessity and protectiveness of the waiver. As EPA has historically agreed, even if EPA's own analysis differs from California's, that is not a sufficient basis to second-guess the state's determination. 74 Fed. Reg. at 32749. California's findings must stand.

Since 1970, "EPA has recognized its limited discretion in reviewing California waiver requests." 74 Fed. Reg. at 32745. As discussed above, the 1977 amendments further strengthened and clarified California's role in the waiver process, leaving in the state's hands the preliminary determination that California's program is, in the aggregate, at least as protective as applicable federal standards. "The language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them." *MEMA I*, 627 F.2d at 1121.

Indeed, EPA has acknowledged that its job is not to rethink California's considered analysis:

> The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe ***I am required to give very substantial deference to California's judgments on this score***. 40 Fed. Reg. 23102, 23103-23104 (1975) (emphasis added).

California has persuasively demonstrated that its ACC program is at least as—indeed, more—protective than applicable federal standards; that it is necessary to meet "compelling and extraordinary conditions" the state continues to face, both in the aggregate and with respect to climate change and GHG emissions specifically; and that it is technologically feasible in compliance with the requirements of Clean Air Act section 202. While the Proposed Rule offers different interpretations and analysis of available data, EPA has presented no "clear and compelling evidence" to show that California's assessment was "arbitrary and capricious." *MEMA I*, 627 F.2d at 1122. Under these circumstances, EPA is required to defer to California's findings, all of which support the continued endurance of the waiver.

B. The Waiver Satisfies The Requirements Of Clean Air Act Section 209

As discussed above, EPA retains only very limited discretion to review California's waiver requests: unless EPA makes one of the three findings set forth in Clean Air Act section 209, it must grant the requested waiver. EPA assessed California's ACC/ZEV waiver request five years ago and determined that it could not make any of those findings. Although EPA now claims that its new analysis has led it to revise its assessment, EPA has presented no "clear and compelling evidence" sufficient to override California's findings or its own prior determination.

1. The Waiver Is At Least As Protective As Federal Standards

It is indisputable that the ACC program is at least as protective as any applicable federal standards—EPA determined over a decade ago that California's pre-existing standards for light-duty vehicles and trucks are at least as protective as the federal Tier II standards, and there are no applicable federal GHG emission standards. Accordingly, "[c]omparing an absence of EPA greenhouse gas emission standards to the enacted set of California greenhouse gas emission standards provides a clearly rational basis for California's determination that the California greenhouse gas emission program will be more protective of human health and welfare than non-existent applicable federal standards." 74 Fed. Reg. at 32754.

Indeed, EPA does not argue that California acted arbitrarily and capriciously in making its determination. 83 Fed. Reg. at 43240. California's finding stands, and the absence of federal standards with which to compare the ACC program's GHG standards underscores the importance of the waiver and its consistency with section 209's longstanding recognition of California as "a pioneer and a laboratory for the nation in setting new motor vehicle standards." 74 Fed. Reg. at 32745.

2. The Waiver Is Necessary To Meet "Compelling And Extraordinary Conditions"

EPA asserts that California no longer needs the ACC/ZEV waiver to meet "compelling and extraordinary conditions." This assessment is based upon two arguments: (1) that the effects of global climate change are not unique to California, and that standards which address, among other things, climate change are therefore not needed to meet "compelling and extraordinary conditions"; and (2) that even if California does have "compelling and extraordinary conditions" in the climate change context, the waiver is not necessary because it will not solve the problem of global climate change.

These arguments are both specious. First, they ignore the well-established practice of EPA in assessing "compelling and extraordinary conditions," which is to review California's motor vehicle emission program as a whole, not as separate component parts. EPA's attempt to pick off the GHG standards and ZEV requirements as though they do not fit within a larger regulatory program is inconsistent with the law and with the agency's prior practice. Second, they disregard California's substantial evidence—entitled to significant deference—that it will uniquely suffer from the effects of climate change and that implementation of the ACC program

will mitigate those ill effects. EPA has not presented "clear and compelling evidence" to suggest the waiver is no longer needed. *MEMA I*, 627 F.2d at 1122.

a. An evaluation of "compelling and extraordinary conditions" properly considers California's motor vehicle emission program as a whole, not individual component parts.

When assessing whether a waiver request should be granted, EPA has traditionally "consider[ed] whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions." 74 Fed. Reg. at 32759. EPA—even during the Bush Administration—has agreed that it should "look at the program as a whole in determining compliance with section 209(b)(1)(B)" because "in the legislative history of section 209, the phrase 'compelling and extraordinary circumstances' refers to 'certain general circumstances, unique to California, primarily responsible for causing its air pollution problem'" rather than "'the levels of pollution directly.'" 73 Fed. Reg. 12156, 12159-60 (Mar. 6, 2008). In other words, the question should be whether the "fundamental conditions" that cause air pollution in California continue to exist, not whether specific pollution levels are "compelling and extraordinary" or whether specific standards will address the air pollution problem. 74 Fed. Reg. at 32759.

Section 209's legislative history supports this interpretation as well. The 1977 amendments to section 209 clarified that the protectiveness of California's program should be considered "in the aggregate"; the protectiveness of individual component parts of a motor vehicle emission program do not each need to be as stringent as federal standards if the program, as a whole, is at least as protective. 42 U.S.C. § 7453(b)(1). In so amending section 209, "Congress quite intentionally restricted and limited EPA's review of California's standards, and its express legislative intent was to 'provide the broadest possible discretion [to California] in selecting the best means to protect the health of its citizens and the public welfare.'" 74 Fed. Reg. at 32761 (quoting H.R. Rep. No. 294, at 301-302).

In the Proposed Rule, EPA asserts that although the traditional approach of the agency has been to assess California's motor vehicle emission program as a whole, that approach applies only when the program in question "is designed to address local or regional air pollution problems." 83 Fed. Reg. at 43247. But there is no support in the Clean Air Act, its legislative history, or prior agency practice for drawing such a distinction. Indeed, such a distinction would not make much sense; even local or regional air pollution problems are not isolated unto themselves, and there is significant evidence, including that presented by CARB in support of the waiver, demonstrating that supposedly "global" GHG pollution problems can impact local ozone levels.

Simply put, the text and the legislative history of section 209—and the practical realities of air pollution—demonstrate that EPA's traditional approach to "compelling and extraordinary conditions" is the correct one. The only question should be whether general conditions persist in California that necessitate a separate motor vehicle emission program. The answer to that

question is an unequivocal "yes": all of the distinguishing characteristics that led Congress to recognize California's need for a waiver in the first place remain in spades. For example, the South Coast Air Basin exceeded federal ozone standards on 139 days in 2017—over one-third of the year—and ozone conditions are worsening due to climate change's unique effects on California's weather patterns. SCAQMD, Mobile Source Committee, 2017 Ozone Season Summary and Trend Analysis (Oct. 20, 2017). The San Joaquin Valley Air Basin "has the most burdensome $PM_{2.5}$ challenge in the country…[t]he Valley is also one of only two areas in the country classified as an Extreme ozone nonattainment area." SJVUAPCD, Draft San Joaquin Valley Supplement to the Revised 2016 State Strategy for the State Implementation Plan at 1. The other extreme nonattainment area is the South Coast Air Basin. California's need for its own motor vehicle emission program is as strong as ever.

b. Even considered separately, California's GHG standards and ZEV mandates are necessary to meet "compelling and extraordinary conditions."

Even if the GHG standards and ZEV requirements of the ACC program are broken out and considered separately from the components of the program that are specifically targeted to address what EPA has termed "local or regional air pollution problems," they are still necessary to meet "compelling and extraordinary conditions" unique to California. First, California has demonstrated that "its greenhouse gas standards are linked to amelioration of California's smog problems," and EPA has presented no "clear and compelling evidence" to show that this is not the case. 74 Fed. Reg. at 32763. Second, California's unique geography and weather patterns—qualities EPA has acknowledged, in this rulemaking, are among those constituting "compelling and extraordinary conditions"—mean that California will suffer more extreme impacts as a result of climate change. Finally, California has shown that the ACC program will mitigate the negative effects of climate change on the state, and EPA has once again failed to contradict that finding with clear and compelling evidence.

Multiple regions in California fail to meet federal ozone and $PM_{2.5}$ standards; nearly a third of California counties are out of attainment for ozone, and both the San Joaquin Valley and the South Coast Air Basins suffer from "extreme" ozone pollution (South Coast experiences "serious" $PM_{2.5}$ pollution, while San Joaquin's "extreme" $PM_{2.5}$ pollution is the worst in the country). Environmental Protection Agency, *8-Hour Ozone (2015) Designated Area/State Information with Design Values*; Environmental Protection Agency, *PM-2.5 (2012) Designated Area/State Information*. As discussed above, the ACC program, and in particular, the ZEV mandate, is critical to California's ability to meet federal ambient air quality standards for these conventional pollutants. Further, studies have shown that climate change, and the warmer temperatures California will experience because of it, will increase the air stagnation that leads to elevated $PM_{2.5}$ and ground-level ozone concentrations, further worsening this already "compelling and extraordinary" problem. Daniel E. Horton et al., *Occurrence and Persistence of Future Atmospheric Stagnation Events*, 4 NATURE CLIMATE CHANGE 698, 700 (2014); D.J. Jacob and D.A. Winner, *Effect of climate change on air quality*, 43 ATMOSPHERIC ENVIRONMENT 51, 52-53 (2009). Scientists have also found that reductions in GHG emissions can bring with them

co-benefits of improved air quality with respect to conventional pollutants like ozone and $PM_{2.5}$. Y. Zhang, S.J. Smith, J.H. Bowden, Z. Adelman, and J.J. West, *Co-benefits of global, domestic, and sectoral greenhouse gas mitigation for U.S. air quality and human health in 2050*, ENVIRON. RES. LETT. 12, 114033 (Nov. 14, 2017). California is projected to experience the worst health impacts of any state as a result of increased ozone pollution, with costs of over $700 million projected in 2020 alone. Union of Concerned Scientists, *Rising Temperatures, Worsening Ozone Pollution*, at 19 (2011). Science shows that increased GHG emissions, which EPA admits will occur if the waiver is denied, will worsen these impacts, and reductions in GHG emissions, which the ACC program is designed to promote, could mitigate them. EPA offers no evidence to the contrary, even though it recognizes that "clear and compelling evidence" is the burden of proof to demonstrate that "compelling and extraordinary conditions" do not exist. 83 Fed. Reg. at 43244, fn. 567.

The exacerbation of $PM_{2.5}$ and ozone pollution alone is sufficient to demonstrate the continued existence of "compelling and extraordinary conditions," but climate change will have still more severe—and unique—impacts on California. CARB has already "identified a wide variety of impacts and potential impacts within California, which include exacerbation of tropospheric ozone, heat waves, sea level rise and salt water intrusion, an intensification of wildfires, disruption of water resources by, among other things, decreased snowpack levels, harm to high value agricultural production, and additional stresses to sensitive and endangered species and ecosystems." 74 Fed. Reg. at 32765. EPA's only response to this litany of enumerated California-specific harms is to argue that because other states will also suffer climate change-related impacts, California's conditions are not "compelling and extraordinary." 83 Fed. Reg. at 43249.

First, the harms suffered by California will, in many cases, be worse than those experienced in other states due to its individual geography, topography, weather patterns, and other distinguishing characteristics. But more importantly, California does not need to suffer the worst effects to have need for a waiver—that is simply not how "compelling and extraordinary conditions" are assessed. Other states suffer severe "local and regional air pollution problems," including ozone and $PM_{2.5}$ non-attainment, but that has never impacted California's ability to receive a waiver for those standards. Indeed, EPA has recognized that "there is no indication in the language of section 209 or the legislative history that California's pollution problem must be the worst in the country for a waiver to be granted." 49 Fed. Reg. 18887 (May 3, 1984). California has demonstrated that it will suffer numerous serious impacts as a result of climate change. EPA, far from contradicting that evidence, has admitted that those impacts are likely to occur and should be cause for "concern." They certainly constitute "compelling and extraordinary conditions" necessitating the ACC/ZEV waiver.

Finally, EPA's argument that the waiver is not necessary because the ACC program will not solve the issue of global climate change is inapposite. EPA is suggesting that if one program cannot provide the ultimate resolution for a pollution problem, then there is no reason to enact it in the first place. This logic undercuts the technology-forcing purpose of section 209 and is irrelevant to a waiver determination by the agency. As EPA recognized over four decades ago,

"[t]he issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to [EPA's] decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California." 36 Fed. Reg. 17458 (Aug. 31, 1971). But beyond that, California did support its initial waiver request with evidence demonstrating that its program would lead to improvements in climate change and ozone problems in the state. California Air Resources Board, EPA-HQ-OAR-2006-0173-0004. Its policy judgment is entitled to significant deference, and EPA has not presented "clear and compelling" evidence that such improvements will not occur. Absent that proof, a difference of opinion about the efficacy of the regulatory program California has selected is not enough to reassess the waiver.

In sum, even when assessed independently of the ACC program as a whole, the GHG standards and ZEV requirements are necessitated by "compelling and extraordinary conditions" in California. EPA has offered no evidence sufficient to override the substantial deference owed to California's determination that these components of the program are needed, and they must remain in place.

C. The Waiver Is Consistent With Clean Air Act Section 202

Under section 209, EPA's review of a waiver's consistency with Clean Air Act section 202(a) is constrained: those opposed to the waiver must meet their burden of showing either that California's standards are technologically infeasible or that California's test procedures impose requirements that are at odds with the federal test procedure. *MEMA I*, 627 F.2d at 1126. Here, the Proposed Rule suggests that the ACC/ZEV waiver is inconsistent with section 202(a) because California has not provided "adequate lead time for the development and application of necessary technology prior to the effective date of applicable standards." 83 Fed. Reg. at 43251. But California has provided ample support for the feasibility of its standards, which have already been in place for five years, and EPA has not presented clear, compelling evidence that the standards are technologically infeasible.

EPA acknowledges that under applicable D.C. Circuit precedent, the test of infeasibility is whether technology control costs are "excessive"—whether they would cause a doubling or tripling of vehicle cost—but the agency suggests that the agency should instead "holistically consider whether technology control costs are infeasible by considering the availability of the technology, the reasonableness of costs associated with adopting it within the required lead time, and consumer acceptance." 83 Fed. Reg. at 43251; see *MEMA I*, 627 F.2d at 1118. That is simply not the case; Congress' intent was to allow California broad discretion to impose technology-forcing standards. 40 Fed. Reg. 23102, 23103 ("The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed…"). But regardless, California has already demonstrated that the ACC program standards are technologically feasible.

At the time it adopted the ACC program, CARB assessed vehicle technology and the feasibility of the program's standards. CARB relied on a comprehensive vehicle simulation modeling effort and cost analysis, as well as a separate analysis of the GHG benefits of alternative fuel technologies, and "concluded that it had identified the necessary technology in existence at that time that could enable vehicles to meet the GHG standards…" 74 Fed. Reg. at 32769. Those findings are supported by more recent data. As part of its midterm review, CARB assessed manufacturer compliance with the ACC program, which had already been in place for four years. At the time of the review in early 2017, automobile manufacturers had "successfully employed a variety of technologies that reduce GHG emissions and increase fuel efficiency, many at a faster rate of deployment than was originally projected" and manufacturers were "over complying with the GHG requirements and [were] offering various vehicles on the road today that are already able to comply with the GHG standards for later model years." ACC Midterm Report at ES-2. Manufacturers had already "been marketing passenger cars and SUVs meeting the 2025 LEV III criteria pollutant fleet average of super ultra-low emissions vehicles (SULEV30) for over a decade" in response to California's ZEV regulation. *Id*. In other words, not only was the technology in existence and feasible, it was being—and continues to be—successfully employed. This only makes sense: manufacturers have now had over ten years to adjust to the standards, including five years of implementation.

EPA says that its own predictions "for future and timely availability of emerging technologies," including BEV and PHEV technologies, cast doubt on CARB's assessment of technological feasibility. 83 Fed. Reg. at 43251-52. Even if EPA's predictions were to be correct, which market data suggests they are not, there must be more than mere "doubt" to overturn California's finding of technological feasibility: there must be clear and compelling evidence. EPA has not offered any. In the absence of such evidence, California's finding, and the waiver, must stand.

IV. Conclusion

California—Southern California and the San Joaquin Valley in particular—has long had some of the worst air pollution in the country. Congress recognized California's special circumstances, and the wisdom of allowing California regulatory flexibility to address them, over a half-century ago. Since then, EPA has consistently acknowledged California's continued need for its own motor vehicle emission program, granting waiver after waiver to programs combatting persistent air pollution problems. There is no reason to depart from that historical trend now; nor is there any authority for EPA to do so.

Even if EPA could revoke California's waiver, California's findings are entitled to significant deference, and EPA has not met the high burden required to revisit and upend California's analysis. California faces pervasive and persistent air pollution problems and unique climate change impacts. The technologically-feasible ACC program works to address these "compelling and extraordinary conditions." There is no basis for EPA to revoke the ACC/ZEV waiver, and we urge EPA to withdraw its proposal to do so.

Respectfully submitted,

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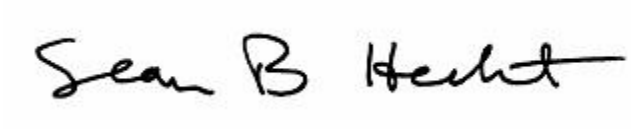

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