



Competitive Enterprise Institute

Free Markets and Limited Government

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National Highway Traffic Safety Administration (NHTSA)
Environmental Protection Agency (EPA)

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Re: 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards, Docket ID No. EPA-HQ-OAR-2010-0799 and/or NHTSA-2010-0131

Contact Information:

Name: Marlo Lewis, Ph.D.

Organization: Competitive Enterprise Institute

Address: 1899 L Street NW, 12th Floor, Washington, DC 20036

Tel: 202-331-1010

Email: mlewis@cei.org

On behalf of the Competitive Enterprise Institute (CEI), a free-market public policy group specializing in regulatory issues, I respectfully submit this comment on EPA and NHTSA's proposed Model Year (MY) 2017 and later light-duty vehicle greenhouse gas (GHG) emissions and fuel economy standards.¹

The agencies project net benefits ranging from \$262 billion (assuming a 7% discount rate) to \$358 billion (assuming a 3% discount rate).² These projections are based on assumptions regarding vehicle cost, fuel prices, and consumer acceptance that may or may not be borne out by events. Skepticism is justified. If the proposed standards are as beneficial to consumers and automakers as the agencies contend, why wouldn't consumers demand and profit-seeking manufacturers produce vehicles built to the same or similar standards without regulatory compulsion? Fuel economy regulation assumes that auto buyers do not want to avoid pain at the pump and automakers do not want to get rich.

Experts will likely debate for years the net benefits of the rule as data become available regarding vehicle costs and sales and auto industry profits and employment. This comment letter examines a cost most experts have not addressed: the damage the Obama Administration's fuel economy agenda does to our constitutional system of separated powers and democratic accountability.

I. End Run Around Congress

In the press release announcing their proposed MY 2017-2025 GHG/fuel economy standards, EPA Administrator Lisa Jackson and Transportation Secretary Ray LaHood boast that they are

bypassing Congress: “Today’s announcement is the latest in a series of executive actions the Obama Administration is taking to strengthen the economy and move the country forward *because we can’t wait for Congressional Republicans to act*” [emphasis added].³

A legislative proposal boosting average fuel economy to 54.5 mpg would not pass in the 112th Congress. Note also that NHTSA need not propose fuel economy standards for MY 2017 until 2014. “We can’t wait” really means: *We won’t let the people’s representatives decide, either now or after the 2012 elections.*

Circumventing Congress has, alas, become the Administration’s preferred M.O. Under the statutory scheme Congress created, one agency –NHTSA – regulates fuel efficiency through one set of standards – Corporate Average Fuel Economy (CAFE) – under one statute – the Energy Policy Conservation Act (EPCA). Yet today, three agencies – EPA, NHTSA, and the California Air Resources Board (CARB) – regulate fuel efficiency via three sets of standards under three statutes – the Clean Air Act (CAA), EPCA, and California Assembly Bill 1493. The CAA provides no authority to prescribe fuel economy standards, and EPCA specifically prohibits states from adopting laws or regulations “related to” fuel economy standards.

II. GHG, Fuel Economy Standards: Highly Related

EPA and CARB claim they are regulating GHG emissions, not fuel economy. But greenhouse gas emission standards *implicitly regulate fuel economy*. As EPA and NHTSA’s May 2010 *Tailpipe Rule* explains, no commercially available technologies exist to capture or filter out carbon dioxide (CO₂) emissions from motor vehicles. Consequently, the only feasible way to decrease CO₂ emissions per mile is to reduce fuel consumption per mile — that is, increase fuel economy. Carbon dioxide constitutes 94.9% of vehicular greenhouse gas emissions, and “there is a single pool of technologies... that reduce fuel consumption and thereby CO₂ emissions as well.”⁴

That EPA and CARB are regulating fuel economy is also apparent from EPA, NHTSA, and CARB’s *Interim Joint Technical Assessment Report*, the framework document for the agencies’ proposed rule.⁵ The document considers four fuel economy standards, ranging from 47 mpg to 62 mpg; each is the simple reciprocal of an associated CO₂ emission reduction scenario. The 54.5 mpg standard is a negotiated compromise between the 4% (51 mpg) and 5% (56 mpg) CO₂ reduction scenarios.

CARB’s 2004 *Staff Report* presenting the agency’s plan to implement AB 1493 is another smoking gun.⁶ Nearly all of CARB’s recommended technologies for reducing GHG emissions (Table 5.2-3) were previously recommended in a 2002 National Research Council study on fuel economy (Tables 3-1, 3-2).⁷ CARB proposes a few additional options, but each is a fuel-saving technology, not an emissions-control technology.

Even the text of AB 1493 implies that CARB is to regulate fuel economy. CARB’s GHG standards are to be “cost-effective,” defined as “Economical to an owner or operator of a vehicle, taking into account the full life-cycle costs of the vehicle.”⁸ CARB reasonably interprets this to mean that the reduction in “operating expenses” over the average life of the vehicle must exceed

the expected increase in vehicle cost.⁹ Virtually all such “operating expenses” are expenditures for fuel. The CARB program cannot be “cost-effective” unless CARB regulates fuel economy.

III. EPA/NHTSA: Denying Plain Facts They Must Know to be True

At a recent hearing before a House oversight panel, three Obama Administration witnesses — NHTSA Administrator David Strickland, EPA Assistant Air Administrator Gina McCarthy, and EPA Transportation and Air Quality Director Margo Oge – denied under oath that motor vehicle GHG emission standards are “related to” fuel economy standards.¹⁰ In so doing, they denied plain facts they must know to be true. *They lied to Congress.*

House Government Oversight and Reform Chairman Darrell Issa put it more diplomatically: “Your statements under oath misrepresented the relationship between regulating greenhouse gases and regulating fuel economy.” By “obstinately insisting” that regulating greenhouse gases and fuel economy are “separate and unrelated endeavors,” he said, the Administration officials “impede the Committee’s important oversight work.”

Why did they “misrepresent” and “impede”? Had they answered truthfully, they would have to admit that California’s greenhouse gas motor vehicle emissions law, AB 1493, which EPA approved in June 2009,¹¹ violates EPCA’s express preemption of state laws or regulations “related to” fuel economy.¹² The officials would also have to admit that EPA is effectively regulating fuel economy, a function outside the scope of its statutory authority.

IV. Power Grab

The falsehood that GHG emission standards are not related to fuel economy standards does more than mask EPA and CARB’s poaching of NHTSA’s statutory authority. It also protects EPA’s efforts to legislate climate policy under the guise of implementing the CAA.

To begin with, the falsehood facilitated a regulatory extortion strategy enabling the Obama Administration to convert the auto industry from opponent to ally in any congressional debate on EPA’s greenhouse gas regulations.

In February 2009, EPA Administrator Jackson decided to reconsider¹³ Bush EPA Administrator Stephen Johnson’s denial of California’s request for a waiver to implement AB 1493.¹⁴ Because GHG emissions standards implicitly regulate fuel economy, because the waiver would allow other states to follow suit, and because auto makers would have to reshuffle the mix of vehicles sold in each “California” state to achieve the same average fuel economy, Jackson confronted the financially-distressed auto industry with the prospect of a market-balkanizing fuel-economy “patchwork.”¹⁵

Then, in May 2009, in backdoor negotiations conducted under a vow of silence (“We put nothing in writing, ever,” CARB Chairman Mary Nichols told the *New York Times*),¹⁶ the White House offered to protect auto makers from the patchwork threat if – but only if – they agreed to support EPA and CARB’s newfound careers as GHG/fuel economy regulators.

Specifically, under what President Obama dubbed the “Historic Agreement,”¹⁷ California and other states agreed¹⁸ to deem compliance with EPA’s GHG standards as compliance with their own in return for auto makers’ pledge¹⁹ not to challenge either the *Tailpipe Rule* or the California waiver. The Administration may also have tied its offer of bailout money to automakers’ acceptance of the ‘triplification’ of fuel economy regulation.²⁰ Outsiders may never know the details, because participants, in apparent defiance of the Presidential Records Act,²¹ kept no minutes or notes of the meetings.

The political payoff for EPA and CARB was not long in coming. In 2010, Alaska Sen. Lisa Murkowski introduced a resolution²² to overturn EPA’s greenhouse gas *Endangerment Rule*,²³ the prerequisite for the *Tailpipe Rule* and all other EPA greenhouse gas regulations. The auto industry lobbied against the resolution,²⁴ warning that it would undo the Historic Agreement and, thus, expose auto makers to a “multitude” of conflicting state and federal standards.²⁵

Of course, the threat of a patchwork exists only because Jackson, disregarding the EPCA preemption, granted the waiver in the first place.

EPA then parlayed its new role as de-facto fuel economy regulator into a mandate to regulate GHG emissions throughout the economy. The *Tailpipe Rule* – at least as EPA reads the CAA²⁶ – compels the agency to regulate GHGs from “major emitting facilities.” EPA is now applying CAA preconstruction and operating permit requirements to large CO₂ emitters such as coal-fired power plants, petroleum refineries, cement production facilities, steel mills, and pulp and paper factories.²⁷

Given these precedents, it was inevitable that EPA would settle environmental lawsuits by consenting to develop GHG “performance standards” for power plants²⁸ and refineries,²⁹ with GHG performance standards for other industrial categories sure to follow. In time, litigants will likely induce EPA to establish quasi-fuel economy standards for marine vessels, aircraft, and non-road engines,³⁰ even though no agency sets such standards under any existing statute.

Because the *Endangerment Rule* identifies the “elevated concentration” of GHGs as the source of endangerment,³¹ EPA has logically committed itself to develop national ambient air quality standards (NAAQS) for GHGs set below current atmospheric concentrations.³² In an August 2010 brief to the Supreme Court in *American Electric Power v. State of Connecticut*, the Department of Justice favorably cited the NAAQS program as a potential regulatory tool displacing federal common law tort action against GHG emitters.³³

V. Constitutional Common Sense

EPA contends that its current and future GHG rules derive from the CAA as interpreted by Supreme Court in *Massachusetts v. EPA* (April 2007). The D.C. Circuit Court of Appeals is now reviewing arguments regarding that claim in *Coalition for Responsible Regulation v. EPA*.

However that case is decided, EPA is clearly wielding powers Congress never intentionally delegated.

Congress declined to give EPA explicit authority to regulate GHGs only last year, when Senate leaders pulled the plug on companion legislation to the American Clean Energy and Security Act (ACESA) – the House-passed cap-and-trade bill sponsored by Reps. Henry Waxman (D-Calif.) and Ed Markey (D-Mass.).

One of ACESA’s selling points was precisely that it would preempt regulation of GHGs under several CAA programs. If instead of proposing cap-and-trade, Waxman and Markey had introduced legislation authorizing EPA to do exactly what it is doing now – regulating GHGs via the CAA as it sees fit – their bill would have been dead on arrival.

The notion that Congress gave EPA such expansive authority when it enacted the CAA in 1970, years before global warming emerged as a public policy concern, defies both history and logic.

¹ EPA, NHTSA, *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Fuel Economy Standards, Proposed Rule*, 76 FR 74854, December 1, 2011, http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cale/2017-25_CAFE_NPRM.pdf (hereafter 2017 GHG/Fuel Economy Rule).

² 2017 GHG/Fuel Economy Rule, 74882.

³ EPA, NHTSA, “We Can’t Wait,” press release, November 16, 2011, <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/c153bac1a0f4febc8525794a0061da1f!OpenDocument>.

⁴ EPA, NHTSA, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, May 7, 2010, <http://www.globalwarming.org/wp-content/uploads/2011/08/Final-Tailpipe-Rule.pdf>

⁵ EPA, NHTSA, CARB, *Interim Joint Technical Assessment Report, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2017-2025*, September 2010, pp. viii-ix <http://www.epa.gov/oms/climate/regulations/ldv-ghg-tar.pdf>.

⁶ CARB, Staff Report, *Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles*, August 6, 2004, <http://www.arb.ca.gov/regact/grnhsgas/isor.pdf> (hereafter CARB, Staff Report).

⁷ National Research Council, *Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards*, 2002, http://www.nap.edu/openbook.php?record_id=10172&page=42.

⁸ http://en.wikisource.org/wiki/California_AB_1493.

⁹ CARB, Staff Report, p. 148.

¹⁰ House Oversight and Government Reform Committee Chairman Darrell Issa quotes the denials in letters sent to the agency officials on October 18, 2011. The letters are available at: <http://www.globalwarming.org/wp-content/uploads/2011/10/2011-10-18-DEI-to-David-Strickland-re-reg-affairs-hearing.pdf>; <http://www.globalwarming.org/wp-content/uploads/2011/10/2011-10-18-DEI-to-Gina-McCarthy-re-EPCA.pdf>; and <http://www.globalwarming.org/wp-content/uploads/2011/10/2011-10-18-DEI-to-Margo-Oge-re-reg-affairs-hearing.pdf>.

¹¹ EPA, *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 FR 32744, July 8, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-15943.pdf>.

¹² 49 U.S.C. §32919, <http://codes.lp.findlaw.com/uscode/49/VI/C/329/32919>.

¹³ EPA, *California Motor Vehicle Pollution Control Standards; Reconsideration of Previous Denial of a Waiver of Preemption*, 74 FR 7040, February 12, 2009, <http://www.epa.gov/fedrgstr/EPA-AIR/2009/February/Day-12/a2913.pdf>.

¹⁴ EPA, *California Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 73 FR 12156, <http://www.epa.gov/fedrgstr/EPA-AIR/2008/March/Day-06/a4350.pdf>.

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- ¹⁵ National Automobile Dealers Association, *Patchwork Proven: Why a Single National Fuel Economy Standards Is Better for America than a Patchwork of State Regulations*, January 2009, <http://www.nada.org/NR/rdonlyres/DBCC625E-2E8E-4291-8B23-B94C92AFF7C4/0/patchworkproven.pdf>.
- ¹⁶ Colin Sullivan, "Vow of silence key to White House-Calif. fuel economy talks," *New York Times*, May 20, 2009, <http://www.nytimes.com/gwire/2009/05/20/20greenwire-vow-of-silence-key-to-white-house-calif-fuel-e-12208.html>.
- ¹⁷ Remarks of the President on National Fuel Economy Standards, May 19, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-national-fuel-efficiency-standards.
- ¹⁸ CARB, Resolution 10-15, February 25, 2010, <http://www.arb.ca.gov/regact/2010/ghgvp10/res1015.pdf>.
- ¹⁹ Attorney General Edmund G. Brown, Letter to Honorable Lisa Jackson and Honorable Ray LaHood, May 18, 2009, <http://www.epa.gov/oms/climate/regulations/calif-atty-general.pdf>.
- ²⁰ Darrell Issa, Letter to Honorable Lisa Jackson, September 30, 2011, <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/09/30/Health-Environment-Science/Graphics/oversight930.pdf>.
- ²¹ 44 U.S.C. § 2203, <http://www.law.cornell.edu/uscode/text/44/2203>.
- ²² S. J. Res. 26, <http://www.gpo.gov/fdsys/pkg/BILLS-111sjres26pcs/pdf/BILLS-111sjres26pcs.pdf>.
- ²³ EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*; Final Rule, 74 FR 66496, December 15, 2009, http://www.epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf (hereafter Endangerment Rule).
- ²⁴ Democratic Policy Committee, *The Consequences and Significance of the Murkowski Disapproval Resolution*, May 13, 2010, http://dpc.senate.gov/dpcdoc-murkowski_dis_res_doc.cfm?doc_name=fs-111-2-65.
- ²⁵ Ben Geman, "UAW to Congress: Don't block EPA climate rules," *The Hill*, 3/15/10, <http://thehill.com/blogs/e2-wire/e2-wire/86809-uaw-to-congress-dont-block-epa-climate-rules>.
- ²⁶ EPA, *Reconsideration of Interpretations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 FR 17004, April 2, 2010, <http://www.gpo.gov/fdsys/pkg/FR-2010-04-02/pdf/2010-7536.pdf>.
- ²⁷ EPA, *PSD and Title V Permitting Guidance for Greenhouse Gases*, March 2011, <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>.
- ²⁸ EPA, *Proposed Settlement Agreement, Clean Air Act Citizen Suit*, 75 FR 82392, December 30, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-32935.pdf>.
- ²⁹ EPA, *Proposed Settlement Agreement*, 75 FR 82390, December 30, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-32929.pdf>.
- ³⁰ EPA, *Regulating Greenhouse Gases Under the Clean Air Act; Proposed Rule*, 73 FR 44458-44463, July 30, 2008, <http://edocket.access.gpo.gov/2008/pdf/E8-16432.pdf>.
- ³¹ EPA, Endangerment Rule, 74 FR 66516.
- ³² Center for Biological Diversity, 350.Org, *Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act*, December 2009, http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.
- ³³ DOJ's brief is available at <http://www.openmarket.org/wp-content/uploads/2010/08/obama-brief-aep-v-connecticut-aug-2010.pdf>.