

Ambitious New EPA Auto Emissions Standards Proposal Aims to Accelerate Electrification of U.S. Transportation

*By Paul Hemmersbaugh, Paul Wierenga and Doug Lavey**

The authors discuss, and place in context, the latest chapters in the Biden Administration's whole-of-government program to combat climate change.

The U.S. Environmental Protection Agency (EPA) has proposed a new suite of tailpipe emissions standards¹ for greenhouse gases (GHG) and criteria pollutants for light- and medium-duty motor vehicles (primarily passenger vehicles and light trucks). The new standards proposed on May 5, 2023 – the most stringent EPA has ever proposed – would apply to new vehicles beginning in model year (MY) 2027 and increase in stringency through MY 2032.

A week earlier, EPA published new proposed Phase 3 GHG emission standards² for heavy-duty vehicles, including delivery trucks, transit and school buses, and tractor-trailers. And on May 8, 2023, EPA announced new proposed GHG emissions standards for fossil fuel-fired power plants.³

The Agency seeks public comment on the proposed light- and medium-duty standards for 60 days following publication in the Federal Register (through July 5, 2023), and on the proposed heavy-duty standards for 50 days following publication (through June 16, 2023). The final regulations for both rulemakings are expected by the summer of 2024.

EPA's new proposals are part of an ambitious multipronged federal plan intended to drive Biden Administration policy priorities: electrification of the U.S. motor vehicle fleet and dramatic reduction of GHG emissions from the

* Paul Hemmersbaugh (paul.hemmersbaugh@us.dlapiper.com) is a partner in DLA Piper, LLP. Paul Wierenga (paul.wierenga@us.dlapiper.com) and Doug Lavey (doug.lavey@us.dlapiper.com) are associates. All are in DLA Piper's Washington, DC office.

¹ <https://www.federalregister.gov/documents/2023/05/05/2023-07974/multi-pollutant-emissions-standards-for-model-years-2027-and-later-light-duty-and-medium-duty>.

² <https://www.federalregister.gov/documents/2023/04/27/2023-07955/greenhouse-gas-emissions-standards-for-heavy-duty-vehicles-phase-3>.

³ See New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule available at: <https://www.epa.gov/stationary-sources-air-pollution/greenhouse-gas-standards-and-guidelines-fossil-fuel-fired-power>.

transportation sector. President Biden's 2021 Executive Order 14037,⁴ titled "Strengthening American Leadership in Clean Cars and Trucks," summarized key elements of the initiative. The Order set an ambitious goal that 50 percent of all new passenger cars and light trucks sold in the United States in 2030 would be zero-emission vehicles (ZEVs), including battery electric vehicles (BEV), plug-in hybrid electric vehicles (PHEV) and hydrogen fuel cell electric vehicles (HEV).

To put that in perspective, BEVs accounted for approximately 5 percent of light vehicles sold in the United States in 2021.

EPA's latest emissions proposals have even more aggressive goals. For example, the Agency estimates that compliance with the new standards may require BEVs alone (not counting PHEVs) to account for 60 percent of total light-duty vehicle sales by 2030 and 67 percent of total sales by 2032.

This article summarizes major federal government actions over the last two years designed to impel rapid reductions in vehicle GHG emissions and provides an initial overview of EPA's new proposed vehicle emissions standards. It also highlights related recent and pending regulatory actions by the California Air Resources Board (CARB), DOT's National Highway Traffic Safety Administration (NHTSA) and the U.S. Department of Energy (DoE), and legal challenges to those actions. Together, these government actions and the resolution of related legal challenges will play a major role in shaping the future of U.S. climate law, energy policy, the U.S. auto and transportation industries, and a large portion of the nation's economy.

COORDINATED FEDERAL GOVERNMENT ACTIONS TO PROMOTE VEHICLE ELECTRIFICATION AND REDUCE GHG EMISSIONS

Rapid electrification of the U.S. auto fleet and transportation sector, intended to mitigate climate change, is a high priority of the Biden Administration, which the federal government has fostered through a number of major regulatory and legislative actions beginning in 2021. EPA's stringent new emission standards proposals are the centerpiece of the next phase of this concerted government effort. A series of prior government actions, some still subject to pending court challenges, established the foundation and building blocks for the transportation transformation envisioned by EPA's ambitious new proposal.

In December 2021 and March 2022, EPA and NHTSA replaced the greenhouse gas emissions and corporate average fuel economy (CAFE) stan-

⁴ <https://www.federalregister.gov/documents/2021/08/10/2021-17121/strengthening-american-leadership-in-clean-cars-and-trucks>.

dards adopted by the previous Administration with more stringent new standards that apply to light-duty cars and trucks through MY 2026. EPA's GHG emission standards accelerated stringency increases to 5-10 percent per year from 2023 to 2026. EPA projected that compliance with those standards would increase the share of battery electric or plug-in hybrid vehicles to approximately 17 percent of cars and light trucks manufactured for sale in the United States in MY 2026.

Also in March 2022, EPA reinstated a Clean Air Act Section 209(b) waiver authorizing the CARB to enforce its Advanced Clean Car Program – which includes both a Low Emission Vehicle program (vehicle criteria pollutant and GHG emissions exhaust regulations) and a ZEV sales mandate. Shortly after reinstatement of that waiver, CARB adopted the Advanced Clean Car II Program, which requires 35 percent of light-duty vehicles sold in California to qualify as zero emission vehicles by 2026, increasing to 100 percent by 2035. Seventeen states and the District of Columbia have adopted all or a portion of CARB's vehicle standards (sometimes referred to as "177 States" after the Clean Air Act provision that allows other states to follow California's vehicle standards), including 15 states that have fully incorporated the ZEV sales mandate. Collectively, California and the 177 States comprise nearly 40 percent of U.S. new light-duty vehicle sales. If enforced, the ZEV mandate would effectively prohibit the sale of new internal combustion engine-powered vehicles in those States by 2035.

FEDERAL LEGISLATION PROVIDING UNPRECEDENTED FUNDING AND INCENTIVES FOR ELECTRIC VEHICLES, INFRASTRUCTURE, AND CLEAN ENERGY PROJECTS AND FACILITIES

Bipartisan Infrastructure Law

In November 2021, Congress adopted the Infrastructure Investment and Jobs Act, which included approximately \$18.5 billion in funding for electric vehicle-related programs. This includes \$5 billion in new funding to develop a nationwide network of 500,000 electric vehicle (EV) charging stations and approximately \$11 billion to transition buses and transit systems and equipment to zero GHG emission technologies.

Inflation Reduction Act

In August 2022, Congress adopted the Inflation Reduction Act (IRA), authorizing billions in additional funding and tax incentives to promote sales and domestic manufacturing of electric vehicles and high-voltage batteries, and for a variety of clean energy and renewables projects, investments, and activities. The IRA replaced the existing \$7,500 consumer tax credit for the purchase of

qualifying new electric, plug-in hybrid or hydrogen fuel cell vehicles, eliminating the per-manufacturer cap and imposing new domestic content and manufacturing eligibility requirements, as well as vehicle MSRP and purchaser income limits.⁵ At least in the first few years, the new, narrower eligibility criteria may significantly limit the use of the credits and their effectiveness in propelling a transition to electric vehicles. In addition, the IRA established electric vehicle tax credits for both used vehicles and commercial vehicles.

In January 2023, the Biden Administration released a sweeping U.S. National Blueprint for Transportation Decarbonization which sets forth broad policy goals for eliminating GHG from the transportation sector to the maximum extent possible by 2050. The Decarbonization Blueprint posited that accelerated transition from internal combustion engine- to electric-powered vehicles is the most effective strategy to decarbonize U.S. motor vehicle transportation. Accordingly, it called for EPA, NHTSA, the Department of Energy, and other federal agencies to adopt aggressive regulatory standards and incentives to catalyze rapid growth in the U.S. electric vehicle market.

The Biden Administration recently took major steps to implement the Decarbonization Blueprint, including EPA's proposed emissions standards for vehicles and power plants, and a DoE proposal that sets the stage for more stringent CAFE (fuel economy) standards, discussed below. Guidance published by Treasury and DoE on April 17, 2023 indicates that only 14 vehicles (including BEVs and PHEVs) will qualify for the full Clean Vehicle Credit starting on April 18, 2023. This compares with an estimated 91 models of electric cars and trucks currently offered for sale in the United States. Combined with purchaser income limits, this appears to confirm that under the new eligibility criteria the initial use of the new Clean Vehicle credits may be fairly limited and do little to increase demand for EVs until more and less costly EVs are eligible for the credit.

EPA'S PROPOSED LIGHT- AND MEDIUM-DUTY MULTI-POLLUTANT VEHICLE EMISSION STANDARDS

Section 202(a) of the Clean Air Act requires EPA to establish standards for emissions of air pollutants from new motor vehicles that, in the Agency's judgment, cause or contribute to air pollution that is anticipated to endanger public health or welfare. When establishing or revising Section 202(a) emissions standards, EPA must consider technological feasibility, compliance cost, and lead time. EPA also may consider other factors, including effects of the standards on the auto industry, consumer costs, energy conservation, and safety.

⁵ See Internal Revenue Code § 30D.

EPA's notice of proposed rulemaking, published in the Federal Register on May 5, 2023, proposes new standards that would apply to vehicle model years 2027-2032. The NPRM alone (without appendices and supporting documents) devotes hundreds of pages to describing the proposed standards, EPA's analyses and rationale, and EPA's conclusion that the proposed standards meet the feasibility, compliance cost, and other statutory criteria. Although EPA's proposals encompass both GHG and other criteria pollutant standards, this high-level summary focuses primarily on GHG emissions-related standards.

GHG Emission Standards

EPA proposes to require year-over-year reductions in GHG (primarily carbon dioxide or CO₂) emissions for MY 2027-2032, with a projected combined fleet (passenger cars and trucks) average target of 82 grams per mile (g/mi) CO₂ by MY 2032. That standard would correspond to a 56 percent reduction in projected fleet average CO₂ emissions compared to the existing MY 2026 standards. The proposal would also require annual increases in stringency for medium-duty vehicles, with an average target of 275 g/mi CO₂ in MY 2032 (an approximately 44 percent reduction compared to MY 2026 standards).

The GHG emission standards would continue to be vehicle footprint-based, with separate standards curves for passenger cars and light trucks. However, EPA has proposed to narrow the stringency difference between the car and truck curves. EPA has also proposed revisions to compliance "flexibility" provisions for air conditioning (AC) and off-cycle credits. The proposed standards would limit AC system efficiency credits to internal combustion engine vehicles and would terminate the off-cycle credits program and refrigerant-based AC credits in MY 2027, except that menu-based credits would be phased out gradually through MY 2030.

Significantly, the proposal would extend manufacturers' authority to include 0 g/mi CO₂ in upstream emissions associated with BEVs – a compliance flexibility that is presently scheduled to terminate in MY 2027.

EPA estimates that the proposed GHG emission standards will reduce CO₂ emissions from the light-duty vehicle fleet by 230 million metric tons from 2027-2032 and put light-duty vehicle transportation on a path to reduce such emissions by 7.31 billion metric tons by 2055. EPA estimates that the standards would increase average vehicle purchase costs, with the largest cost increase of \$1,200/vehicle in MY 2032. However, the Agency believes this cost will be more than offset by reduced fuel, maintenance and repair costs of battery electric vehicles compared to internal combustion engine vehicles – estimating \$9,000 in savings for passenger cars and \$13,000 for light-trucks during the first 8 years of ownership.

Using EPA values for the social cost of carbon, the Agency estimates the value of climate benefits attributable to the proposed standards through 2055 would be at least \$83 billion and as much as \$1.0 trillion. EPA declined to estimate the extent to which the projected GHG emissions reductions would assist in reaching the Paris Agreement goal of limiting global temperature increases below 2 degrees Celsius above pre-industrial levels.

Battery Standards and Stringency Alternatives

The Agency also proposes to establish new battery durability and warranty requirements for battery electric and plug-in hybrid electric vehicles. EPA believes these standards are needed to ensure battery electric and plug-in hybrid vehicles remain compliant and reliable over their full useful life – EPA assumes a useful life of 195,264 miles for passenger cars and 225,865 miles for light trucks for purposes of manufacturer emission credit calculations.

EPA also requests comment on three alternatives to the proposed light-duty GHG emission standards. The alternatives consider differing stringency or pace of stringency increases over the MY 2027-2032 time period. The alternatives would also result in different estimated average vehicle purchase costs.

Criteria Pollutant Emission Standards

The proposal would mandate year-over-year increases in the stringency of emissions limits for non-methane organic gases plus nitrogen oxides (NMOG+NO_x), requiring a combined fleetwide average level of 12 mg/mi by MY 2032. That standard would represent a 60 percent emissions reduction from that required in the last year of existing standards. For medium-duty vehicles, the proposal would impose a fleet average emissions level of 60 mg/mi NMOG+NO_x by 2032, meaning at least a 66 percent reduction below that required by the existing standards.

In addition, both light- and medium-duty vehicles would be required to meet a particulate matter (PM) standard of 0.5 mg/mi across three test cycles, including a cold temperature test. EPA estimates the proposed change would reduce PM emissions from internal combustion engine vehicles by over 95 percent.

EPA estimates that the monetized value of the health benefits of the proposal, particularly reductions in premature mortality or morbidity, would range from \$63 to \$280 billion.

DOE REVISION OF PETROLEUM EQUIVALENCY FACTOR WOULD REDUCE RELATIVE VALUE OF ELECTRIC VEHICLES IN MEETING FUEL ECONOMY STANDARDS

The day before EPA announced the new vehicle emissions standards, the Department of Energy published a proposal designed to induce vehicle

manufacturers increase the fuel efficiency of their internal combustion engine (ICE) vehicles. Because of the direct relationship between the amount of gasoline an ICE burns and its CO₂ emissions, all else being equal an increase in fuel efficiency (miles per gallon) of ICE vehicles reduces their CO₂ emissions. While not as widely noticed as the EPA proposal, the DoE proposal could have a significant and complicating effect on automakers' efforts to meet two closely related sets of federal standards, separately administered by EPA and NHTSA.

DoE proposes to revise⁶ the method it uses to calculate "petroleum equivalent fuel economy" (PEF) of electric vehicles, for purposes of determining vehicle manufacturers' compliance with CAFE standards under the Energy Policy and Conservation Act. Simplified, the PEF calculation is intended to convert an EV's electrical energy consumption into a gasoline-equivalent fuel economy value that vehicle manufacturers may use in their calculation of the corporate average fuel economy of their vehicle fleets. DoE last adjusted the PEF, measured in watt-hours per gallon (Wh/gal), in the year 2000.

On April 11, 2023, DoE announced that it had determined that the factors and variables it uses to calculate the PEF are outdated, and proposed regulations to revise and update those inputs. The result of those revisions, proposed to take effect in 2027, would be a 72 percent reduction in the PEF value to 23,160 Wh/gal from its present 82,049 Wh/gal.

Because the PEF is used to convert the electricity consumption of EVs into a gasoline consumption proxy for purposes of NHTSA's calculation of corporate average fuel economy (fleet average calculations include both ICE and electric-powered vehicles), the PEF reduction would reduce the relative fuel efficiency value of electric vehicles in that calculation. BEVs would uniformly still have a substantially higher fuel economy rating than conventional ICE vehicles for purposes of CAFE calculation. However, DoE's proposed change would effectively mean that the same EV would contribute much less to the manufacturer's fleet average fuel economy in comparison to its fuel efficiency rating using the PEF that has applied for a quarter century.

Thus, at the same time several federal government actions seek to promote displacement of ICE vehicles by BEVs, the DoE proposal could dilute those incentives by reducing the advantage of BEVs for purposes of determining an original equipment manufacturer's (OEM) compliance with fuel efficiency standards. DoE acknowledges that the change would reduce the contribution of BEVs to a manufacturer's CAFE. But the Agency opines that its proposed change to the PEF is appropriate to prevent manufacturers' reliance on

⁶ <https://www.federalregister.gov/documents/2023/04/11/2023-06869/petroleum-equivalent-fuel-economy-calculation>.

overstated EV fuel efficiency ratings to offset inefficient ICE vehicles and avoid improvement in ICE fuel efficiency, stating “the current PEF value leads to overvaluation of EVs in determining fleetwide CAFE compliance, which allows manufacturers to maintain less efficient ICE vehicles in their fleet by utilizing a few EV models to comply with the CAFE standards.” In other words, DoE intends a reduction in the fuel economy rating of EVs to spur increased ICE vehicle fuel efficiency.

Despite DoE's framing of its proposed change in terms of promoting fossil fuel efficiency, the proposed reduction of the PEF may be aimed more at reducing carbon dioxide emissions than conserving petroleum. As explained, increases in ICE vehicle fuel efficiency translate directly into reductions in vehicle carbon dioxide emission reductions. Thus, while petroleum fuel efficiency may be a less urgent concern than it was in the 1970s, CAFE standards may also be used to reduce GHG emissions.

DoE proposes that the new PEF take effect in 2027, so it may be used to determine compliance with NHTSA's anticipated CAFE standards for 2027-2032. The NPRM confirms that “NHTSA will propose standards for MYs 2027 and beyond in an upcoming notice.”

Notably, the DoE proposal also hinted that the expected CAFE standards will not necessarily align with EPA's new proposed standards. In response to a request from the Alliance for Auto Innovators for an increase in the PEF, DoE stated that while harmonization of the regulations may be desirable if appropriate for simplification, “EPA regulations for greenhouse gases are separate from the DOT regulations for fuel economy [and] the regulations ultimately have different purposes.” Divergence of the two interdependent sets of standards is a longstanding concern of the auto industry, and may pose future compliance challenges.

LITIGATION OVER ELECTRIFICATION POLICIES, MAJOR QUESTIONS DOCTRINE, DELEGATION, AND *CHEVRON*

EPA's proposal – aimed at disruptive transformation of the automotive industry and transportation in the United States – faces an uncertain legal future. Court challenges to vehicle emissions standards promulgated in 2021 and earlier seek to restrict both the scope of federal and state government authority to regulate vehicle GHG emissions, and the means they may use to reduce those emissions. More broadly, pending and anticipated legal challenges to the authority of federal executive agencies to force profound economic and structural changes put much of the Administration's transportation electrification program in some legal jeopardy.

California Clean Air Act Waiver to Enforce Advanced Clean Cars Program

The long-running dispute over California's authority to set separate, more stringent, GHG emissions standards has entered a new chapter. In *Ohio, et al. v. EPA*,⁷ 17 states and a coalition of industry groups and trade associations are challenging EPA's March 2022⁸ decision to reinstate a waiver of Clean Air Act preemption, allowing California (and other states) to enforce its "Advanced Clean Cars Program" standards and requirements. Final briefs were filed in March 2023 and oral arguments are scheduled for September before the U.S. Court of Appeals for the District of Columbia Circuit.

EPA initially granted this waiver in 2013, rescinded it during the Trump Administration in the SAFE Rule, and then reinstated it under the Biden Administration in 2022. The challenged California regulations include greenhouse gas emission standards that are stricter than those set by EPA, and zero-emission vehicles sales mandates. California authority to set more stringent or additional GHG emissions standards for vehicles is significant. Because generally it is not economically feasible for automakers to design and manufacture two different versions of their vehicles for the U.S. market, more stringent California standards are likely to become de facto national standards.

The District of Columbia Circuit will consider several arguments, including:

- (1) Whether relevant provisions of the Advanced Clean Cars Program are preempted by federal law;
- (2) Whether the waiver violates the "equal sovereignty doctrine," by treating California (and following states) differently than other states; and
- (3) Whether EPA erroneously found that excepting California from federal GHG standards meets the statutory requirements for a waiver.

There also remains the longstanding unresolved question of whether DOT (NHTSA) exclusive authority under the Energy Policy Conservation Act to regulate matters "related to fuel economy standards" separately preempts States from regulating GHG emissions. The prior Administration adopted the position that EPCA preempts such state regulation. The current Administration (NHTSA) rescinded that regulatory interpretation and purported to vacate all prior NHTSA regulatory actions and statements suggesting that EPCA preempts state law regulating auto emissions. Today, NHTSA is officially

⁷ *Ohio, et al. v. EPA* (D.C. Cir., No. 22-1081).

⁸ <https://www.epa.gov/regulations-emissions-vehicles-and-engines/notice-decision-reconsideration-previous-withdrawal>.

agnostic about the legal effect of EPCA on the power of states to regulate motor vehicle GHG emissions, stating that question may only be determined by the courts.

The final outcome of *Ohio v. EPA* (potentially in the U.S. Supreme Court) may settle the question of whether California (and Clean Air Act Section 177 States that have adopted California's standards) may set more stringent GHG emissions standards than those set by EPA, or whether the Clean Air Act requires a single national set of GHG vehicle emission standards.

Further, More Aggressive Set of Standards Issued By CARB in Late 2022

In November 2022, California issued additional, more stringent standards entitled "Advanced Clean Car Program II" (ACCP II), intended to take effect in MY 2026. EPA has not yet acted on California's request for a waiver for ACCP II, and unless and until EPA grants a waiver, those latest standards presumably are not enforceable. A final decision in *Ohio v. EPA* may also effectively determine the viability of much of California's ACCP II.

More Latitude for State Clean Energy Laws?

The Supreme Court recently decided a "dormant commerce clause" case that may allow individual States' laws to foster and promote clean energy production and use (e.g. incentivizing utilities in a state to purchase electricity generated by renewable energy sources, including wind and solar power generated in other states), even if such laws effectively favor out-of-state renewable electricity over out-of-state fossil fuel-generated electricity. In *National Pork Producers Council v. Ross*,⁹ the majority held that the fact that a state law has "extraterritorial" effect alone does not violate the commerce clause of the US Constitution.

In a fractured set of opinions, a majority of the justices agreed that the primary concerns of dormant commerce clause jurisprudence are state laws that discriminate against interstate commerce (e.g. by favoring in-state businesses) or impose burdens on interstate transportation. It thus appears that non-discriminatory state laws designed to encourage the use of renewable energy sources will not be held to violate the Commerce Clause simply because they have extraterritorial effects on power producers in other states.

EPA GHG Emission Standards for MY 2023-2026 Vehicles

A federal court challenge to EPA's existing GHG vehicles emissions standards, through 2026, is also continuing. In *Texas, et al. v. EPA*,¹⁰ 15 states

⁹ No. 21-468 (Slip Op. May 11, 2023).

¹⁰ *Texas, et al. v. EPA* (D.C. Cir., No. 22-1031).

petitioned the court for review of EPA’s December 2021 regulations¹¹ setting GHG emissions standards for MY 2023-2026 vehicles. The petitioners challenge EPA’s authority to adopt the final rule, which replaced less-stringent GHG emissions standards for the same model years that were finalized by the Trump Administration’s SAFE Rules.

Among other theories, the challengers argue that the standards run afoul of the “major questions doctrine” (adopted by the Supreme Court in *West Virginia v. EPA*, discussed below), in part because EPA projects that compliance will require auto OEMs to manufacture electric vehicles and proportionately reduce production of internal combustion engines vehicles. The challenging states contend that vehicle electrification is not an emissions reduction method authorized by the Clean Air Act, and Congress did not authorize the major effects that that switching to electric-powered vehicles would have on the electrical grid and the energy and fossil fuels sector. Oral arguments are scheduled for the same month as *Ohio v. EPA*, September 2023. *Texas v. EPA* is among the first major federal environmental cases testing lower courts’ interpretation of the Supreme Court’s holding in *West Virginia v. EPA*, which applied the major questions doctrine to the Clean Air Act.

New Proposed Power Plant Emissions Standards

On May 8, 2023, EPA proposed new GHG emission standards for coal and gas-fired power plants. The new proposal responds to the Supreme Court’s 2022 decision in *West Virginia v. EPA*, which struck down the Agency’s previous “Clean Power Plan.” That regulation sought to impel electric power “generation shifting” from higher GHG emitting generation sources to lower GHG emitting sources. In the new rule, EPA proposes to require air pollution control technologies that can be installed directly at regulated facilities, including carbon capture and sequestration/storage (CCS) and low-GHG hydrogen co-firing or natural gas co-firing. EPA estimates that the proposal, if finalized, “would avoid up to 617 million metric tons of total carbon dioxide through 2042, which is equivalent to reducing the annual emissions of 137 million passenger vehicles, roughly half the cars in the United States.” If this regulation is adopted, court challenges are likely.

Major Questions Doctrine, Sic Transit *Chevron* Deference?

Opponents of EPA’s new proposed vehicle emission standards have already indicated they plan to challenge the anticipated final rules. The linchpin of such a challenge is likely to be the “major questions doctrine” adopted by the

¹¹ <https://www.federalregister.gov/documents/2021/12/30/2021-27854/revise-2023-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-standards>.

Supreme Court last term in *West Virginia v. EPA*. The Court's decision in that case struck down EPA's Clean Power Plan and EPA's assertion of broad authority to regulate power generation systems' GHG emissions. The majority opinion adopted and relied upon the major questions doctrine. That doctrine holds that in "extraordinary cases" involving executive agency assertion of expansive power having "economic and political significance," the question of whether Congress granted that power to the agency may be subject to a stricter standard of judicial review. Where it applies, the new heightened standard requires an Executive agency to have "clear congressional authorization" to conduct the expansive and far-reaching regulation – otherwise the agency lacks the power to engage in such regulation. The Court struck down the Clean Power Plan, holding that EPA lacked clear congressional authorization to impose systemic GHG emissions standards that would effectively compel fuel-switching or closure of existing power plants.¹²

Creating further uncertainty about established administrative law, the Supreme Court recently granted *certiorari* to hear a case presenting the question of whether the Court should overturn the *Chevron v. NRDC* doctrine, which essentially holds that federal courts should defer to a reasonable agency interpretation of ambiguous statutory provisions. *Loper Bright Enterprises v. Raimondo*¹³ involves a challenge to a rule issued by the National Marine Fisheries Service that requires the fishing industry to pay the cost of government compliance observers on commercial fishing boats, even though the authorizing statute is silent on cost reimbursement. The DC Circuit upheld the rule based on *Chevron* deference, and fishing companies sought Supreme Court review on multiple grounds. The Court's grant of review is limited to a single question, "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers . . . granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." The Court will hear arguments in *Loper Bright Enterprises* next term, and likely issue a decision by June 2024.

It is far from clear, however, how the doctrine the Supreme Court majority adopted for the first time in *West Virginia* would apply in a challenge to EPA vehicle emissions standards. In an appropriate case, federal courts may now apply a major question analysis (instead of the two-step *Chevron* test) to strike down agency regulations. However, the Supreme Court did not clearly define the contours of the major question doctrine or how courts should determine whether heightened scrutiny applies to an agency regulation (e.g., what

¹² See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

¹³ *Cert. granted* May 1, 2023.

constitutes an “extraordinary case” or a “major question” or regulation having “vast economic and political significance”).

EPA’s new vehicle emissions standards, along with other Biden Administration actions and regulations, clearly are intended to spur a transformation of U.S. automotive transportation and appear likely to be both disruptive and “economically significant.” If the major questions doctrine were to apply, EPA’s vehicle emissions standards might survive heightened scrutiny.

Unlike the Clean Power Plan, which relied on a gap-filling provision of the Clean Air Act, Section 202(a) is a core provision of the Act and a primary grant of EPA regulatory authority. And while the stringency of the new proposed standards is unprecedented, EPA does not appear to have departed from its established general method to regulating vehicle emissions. EPA has a decades-long record of regulating vehicle emissions in a similar manner under Section 202(a). And in the 16 years since the Supreme Court ruled that the Clean Air Act authorized EPA to regulate carbon dioxide emissions in *Massachusetts v. EPA*, Congress has not acted to change the law.

CONTINUING UNCERTAINTY COMPLICATES PLANNING

A broad challenge to EPA’s proposed standards and NHTSA’s anticipated fuel economy standards by auto manufacturers currently appears unlikely. Early response to the new EPA proposal from automakers generally does not express strong opposition, instead noting their already-in-progress transition to electric vehicles, while expressing concern about the stringency of the standards and the ambitious timetable. The industry’s long product design, development, and production cycles do not afford manufacturers the flexibility to defer major vehicle electrification decisions and actions (including retooling and building new manufacturing facilities and supply chains) while waiting for regulations to be finalized, and potentially lengthy litigation to determine the ultimate application of the increasingly stringent standards adopted and proposed for MY 2023-2032.

However, ongoing legal challenges to existing GHG emission regulations by others, and the near certainty of future legal challenges to final regulations through MY 2032 vehicles, maintains an environment of legal and economic uncertainty for auto manufacturers and legions of other stakeholders.

The auto industry may also face a renewed challenge of complying with multiple competing standards for GHG emissions. The prior Administration endeavored to establish “one national program” that would apply consistent federal standards issued by EPA and NHTSA and eliminate separate CARB standards. Today, neither CARB nor U.S. DOT has expressly committed to fully harmonizing their standards with those promulgated by EPA. CARB’s

ZEV mandates could significantly limit manufacturers' flexibility when choosing compliance paths. And NHTSA is expected to propose fuel economy standards for MY 2027-32 soon. Based in part on DoE's statement in its PFC revision proposal, this Administration is not necessarily committed to effectively uniform federal standards.

EPA's multiple emissions standards proposals are lengthy and complex, and interested parties should review the proposals closely for specific provisions that may affect them. Some of the EPA's supporting analysis, assumptions, and standards may be revised or refined in response to public comment. Interested stakeholders such as auto manufacturers, equipment manufacturers, fuels and biofuel manufacturers, electric power producers, states, and others have a limited period to comment on provisions of the proposed rules that could significantly affect their business and interests.