

**BEFORE THE
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
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**“The Federal Clean Air Act: California’s Waivers—
A Half-Century of Cooperative Federalism in Air Quality Management”**

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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before you today. I am Richard Frank, Professor of Environmental Practice and Director of the California Environmental Law & Policy Center at the U.C. Davis School of Law.

I have been asked to provide a brief historical overview of the State of California’s pioneering efforts to reduce vehicular emissions of air pollutants under the federal Clean Air Act and California state law. This is a remarkable success story, one that has played out with relative consistency over the past 50 years. That regulatory history reflects a key, longstanding partnership between state and federal air quality regulators during both Republican and Democratic presidential administrations. That partnership has in turn allowed California to develop and implement air pollution control strategies that have, over the years, proven to be a model for other states, the nation and other countries.

The Clean Air Act—An Example of Cooperative Federalism

Like most of the landmark environmental laws passed by Congress in the late 1960's and 1970's, the Clean Air Act (CAA) is an example of cooperative federalism—a sharing of air quality implementation powers and duties between federal and state regulators. For example, the CAA contemplates that state and regional air quality regulators will play a substantial role in issuing and enforcing air emission permits for *stationary* sources of air pollution such as factories and power plants, under general oversight and standards promulgated by the U.S. Environmental Protection Agency (USEPA).

However, Congress saw a more limited role for state and local governments when it comes to *vehicular* sources of air pollution. Given the inherently mobile nature of such sources, Congress saw fit beginning with the Air Quality Act of 1967 to give primary authority for regulating vehicular air emissions to federal regulators. Conversely, Congress decided, as a general proposition, to *preempt* the power of states to adopt their own vehicle emission standards. That preemption clause became what is now section 209(a) of the CAA.

In doing so, however, Congress concluded that California—with its preexisting history and experience in regulating vehicular air emissions—deserved to retain under federal law California's special role in regulating those emissions.

The Story, Structure & Evolution of CAA § 209(b)

The legislative history of both the federal Air Quality Act of 1967 and the successor CAA of 1970 demonstrates that Congress was well aware of both the acute air pollution problems California was facing when those laws were enacted and—even more importantly—the substantial experience and expertise California air quality regulators already had achieved, especially when it came to controlling air pollution from motor vehicles. For example, California established the first tailpipe emission standards in the nation in 1966, a year before the federal Air Quality Act became law. (Those pioneering California standards focused on two conventional air pollutants: carbon monoxide and hydrocarbons.) In 1967, the California Legislature enacted the Mulford-Carrell Act, which committed the State of California to an aggressive, statewide policy of air pollution control and created the Air Resources Board to lead those efforts. Five years later, California’s Air Resources Board (ARB) adopted the nation’s first oxides of nitrogen emission standards for motor vehicles. California’s air quality regulators also were undertaking research and development on vehicle emission control technologies before their federal counterparts.

In recognition of California’s pioneering efforts, Congress determined that California should be afforded special status under the Clean Air Act, and granted California a substantial exemption from Congress’ general ban on state authority to adopt vehicle emission standards. That exemption took the form of what is now CAA section 209(b). That provision retains the authority of California—and only

California—to enact and enforce its own regulations limiting emissions from new motor vehicles. The key condition on that grant of authority is that California’s vehicle emission standards be “at least as protective of public health and welfare” as federal emission standards for motor vehicles promulgated by USEPA for the rest of the nation.

The unique section 209(b) authority granted to California was predicated on Congress’ stated hope and expectation that California would pioneer air pollution control standards and technologies that could serve as models for the United States as a whole. This is a textbook application of the venerable, federalism-based principle made famous by U.S. Supreme Court Justice Louis Brandeis nearly a century ago: “It is one of the happy incidents of our federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments...”

Under CAA section 209(b), California’s authority to enact its own new vehicle emissions standards under federal law is not unfettered. Instead, section 209(b) makes clear that California must—on an emission standard-by-standard basis—seek a *waiver* from USEPA from the general preemptive provisions of section 209(a). And section 209(b) imposes distinct procedural requirements on both California and USEPA with respect to each waiver that California air quality regulators ask USEPA to approve.

First, as part of its waiver request, California must determine that its proposed motor vehicle emission standard “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.” (Critically, until the 1977 Clean Air Act Amendments, it was the *USEPA Administrator* that was to make the above-quoted finding with respect to each section 209(b) waiver request submitted by California; the 1977 Amendments modified the statutory waiver criteria to instead grant the power to make that key statutory finding to California air quality regulators.)

Second, under section 209(b), upon receipt of a waiver request from California, the USEPA Administrator—after notice and an opportunity for public hearing—*must* grant California’s waiver request unless s/he makes one or more of the following findings:

- That the determination of [California] is arbitrary and capricious;
- That [California] does not need such [California] standards to meet compelling and extraordinary conditions; or
- That such [California] standards and accompanying enforcement procedures are not consistent with section [202 of the CAA].

Over the past half century, both reviewing courts and USEPA’s own administrative decisions have held that the burden is on those challenging California’s waiver request to prove that California hasn’t satisfied the section 209(b) statutory criteria; that the proper scope of USEPA’s waiver hearing is limited; and that USEPA is required to give substantial deference to California’s policy judgments in adopting

its vehicle emission standards—i.e., that USEPA is not permitted to “second-guess” the wisdom of California’s regulatory policies.

The 50-Year History of California’s Section 209(b)’s Waiver Process

As noted above, California’s waiver authority has been a key component of federal air pollution control law since 1967—a full 50 years. It has been codified as section 209(b) of the CAA since 1970.

Over that half-century, California waiver requests under section 209(b) have frequently been pursued and obtained by the State’s Air Resources Board.¹ During that time, and with one prominent exception noted below, USEPA has under both Republican and Democratic presidential administrations consistently approved those requests under section 209(b). According to the ARB, it has requested and been granted over 100 separate waiver determinations from USEPA since 1967. Armed with this waiver authority, California and ARB have adopted, implemented and enforced a wide array of innovative vehicle emission control strategies, including:

- First-in-the-nation tailpipe emission standard for hydrocarbons, carbon monoxide, oxides of nitrogen and (in 1982) particulate matter emissions from diesel-fueled vehicles;

¹ ARB was itself created by the California Legislature in 1967, and is having its own 50th anniversary this year.

- Catalytic converters, beginning with 1977 model year vehicles;
- Required incorporation of on-board diagnostic or “check engine” light systems, beginning with 1988 model year passenger vehicles;
- The nation’s first greenhouse gas emission standards for passenger vehicles, mandated by the California Legislature in 2002 (AB 1493 [Pavley]) and approved by ARB in 2004; and
- California’s Advanced Clean Cars Program, which requires auto manufacturers to consider the combined effects of engines, transmissions, tire resistance, etc., on both conventional (“criteria”) and greenhouse gas pollutant emissions.

Critically, and as envisioned by Congress a half-century ago, USEPA has over the years modeled many *federal* vehicle emission standards upon those previously perfected and adopted by California under section 209(b). Thus, technologies and regulatory policies pioneered in California have quite often wound up having national application.

The Notable Exception: Federal Rejection, & Subsequent Approval, of California’s Waiver Request to Implement Its Pavley GHG Emission Standards

In the 50-year history of CAA section 209(b), USEPA has only once denied a waiver requested by California. That occurred in 2008, when California sought USEPA approval of its first-in-the-nation greenhouse gas emission standards adopted in compliance with the 2002 Pavley legislation. In a break with its longstanding precedent, USEPA during the George W. Bush Administration denied California’s

waiver request to apply those GHG emission standards for light-duty motor vehicles for the 2009 and later model years. In doing so, USEPA departed from its prior, longstanding administrative interpretation of the section 209(b) statutory waiver criteria, declaring that the earlier interpretation should not apply to GHG emissions. Specifically, USEPA concluded that California did not need its GHG emission standards to meet what USEPA considered “compelling and extraordinary conditions.”

Former California Governor Arnold Schwarzenegger, represented by then-California Attorney General Jerry Brown, promptly sued USEPA in the U.S. Circuit Court of Appeals for the District of Columbia, challenging the legality of USEPA’s construction and application of section 209(b) in denying California’s waiver request.

That lawsuit was eventually rendered moot. President Barack Obama was elected in November 2008 and took office in January 2009. California promptly sought reconsideration of the Bush Administration’s earlier denial of its waiver request. In the spring of 2009, USEPA formally reversed its (i.e., the Bush Administration’s) earlier decision and granted California’s waiver request, allowing the state to implement the Pavley GHG emission standards. In doing so, USEPA expressly renounced the statutory interpretation of section 209(b) that had formed the basis

of the prior administration’s waiver denial, indicating that the earlier, unprecedented USEPA interpretation should no longer be followed.²

Congress Has Repeatedly Built & Expanded Upon the Success of CAA Section 209(b)

A remarkable and critically-important feature of the “cooperative federalism” principle embodied in CAA section 209(b) is that fact that Congress has on repeated occasions built upon and expanded California’s—and other states’—authority to adopt and enforce California’s more stringent vehicle emission standards.

In 1977, Congress enacted the first set of major amendments to the 1970 Clean Air Act. As noted above, one of the key 1977 revisions was to transfer responsibility for determining whether California’s proposed vehicle emission standards were at least as protective as those adopted by USEPA, from USEPA to the State of California.

But another key innovation—one that even more clearly reflects Congress’ satisfaction with California’s unique role in administered CAA emission controls—was a new provision allowing other states to “opt into” California’s vehicle emission standards.

Under new CAA section 177, states other than California were in 1977 for the first time given a choice: they could be subject to the national vehicle emission standards

² A year later, California’s Pavley GHG emission standards were effectively “federalized” and adopted as USEPA’s own by the Obama Administration as a part of a global settlement of multiple lawsuits filed by the automobile industry and others brokered by White House officials.

adopted by USEPA or, alternatively, choose to adopt as their own California's more stringent emission standards. Section 177 provides that states can opt in to those California standards that have previously been the subject of USEPA waiver approvals, provided that: a) the vehicle emission standards adopted by the state are identical in all respects to California's; b) both California and the affected state adopt the standards at least two years before the model year of affected vehicles.; and c) the state opting in to California's standards has a USEPA-approved state implementation plan to attain one or more National Ambient Air Quality Standards (i.e., the affected state has at least some areas that are not in full compliance with the NAAQSs).

As Congress anticipated, over the past 40 years a large number of states have indeed opted into California's section 209(b) vehicle emission standards. According to ARB data, for example, 12 other states³ have exercised their authority under section 177 to opt into California's Zero Emission Vehicle standards (for which California previously obtained a section 209(b) waiver). When added to California's 12% of the national automotive market, these "section 177" states account for fully 35% of all affected motor vehicles sold in the United States. That translates into some 15 million vehicles sold annually.

A second important congressional expansion of California's section 209(b) waiver authority concerns so-called "nonroad" engines and equipment such as outboard

³ New York, Massachusetts, Vermont, Maine, Pennsylvania, Connecticut, Rhode Island, Washington, Maryland, Oregon, New Jersey and Delaware.

boat, personal watercraft and lawnmower engines. (These types of engines are considerably less efficient and higher polluting than current-era motor vehicle engines.) In 1990 amendments to the CAA, Congress for the first time granted USEPA authority to regulate these nonroad engines and vehicles. As part of that grant of authority, Congress adopted CAA section 209(e). Section 209(e), in turn, is modeled on section 209(a) and (b). Specifically, Congress in section 209(e)(1) generally preempts states from adopting their own nonroad engine and vehicle emission standards. But section 209(e)(2)(A) grants California—and, again, only California—authority to adopt its own nonroad engine and vehicle emission standards, provided (again) that California “determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”

Section 209(e)(2) requires California to seek and obtain prior USEPA approval before implementing its more-stringent nonroad engine and vehicle emission standards. The section uses the term “authorization” rather than section 209(b)’s “waiver” terminology. But the operative—and narrow—grounds upon which USEPA can disapprove California’s request for an authorization under section 209(e)(2) are virtually identical to those set forth in section 209(b) and discussed above.

Moreover, the 1990 CAA Amendments similarly incorporate into section 209(e) the state opt-in provisions first enacted by Congress for motor vehicle standards under

CAA section 177. Section 209(e)(2)(B) provides that states other than California may choose to adopt California's nonroad engine and vehicle emission standards rather than USEPA's, subject to the same conditions set forth in section 177.

California has over the years frequently availed itself of the authority to adopt its own, more stringent nonroad engine and vehicle emission standards. It has sought and obtained section 209(e)(2)(A) authority from USEPA on approximately 30 separate occasions since 1990. No such California request has ever been denied by USEPA.

Looking Ahead: CAA Section 209 in the Trump Administration

My conclusion—one that is shared by many observers—is that California's delegated authority to adopt vehicle and engine emission standards more stringent than those enforced nationally by USEPA has been a remarkably successful experiment in cooperative federalism. With the one exception of the Bush Administration's section 209(b) waiver denial in 2008, California and nine different presidential administrations have worked harmoniously and well to foster regulatory and technological innovations in air pollution control. The flexibility reflected in CAA section 209 has permitted California to pioneer emission control standards and technologies that in many cases have been replicated by other states, USEPA and, indeed, foreign jurisdictions as well.

A key question for California policymakers is whether that cooperative federalism model and history will be replicated in the Trump Administration. Two distinct concerns have been raised in this regard: first, whether the Trump Administration's USEPA will attempt to revoke section 209 waivers and authorizations previously sought by and granted to California. And, second, whether the Trump Administration will be less likely to grant new section 209 waivers and authorizations that California seeks in the future.

Should the Committee seek more information on this particular topic, I will generally leave it to other witnesses to address these issues. By contrast, I will offer only a few brief thoughts.

I believe it unlikely that the Trump Administration will be successful in revoking previously granted federal waivers and authorizations. This is true for two related reasons. First, any attempt by USEPA to revoke such existing section 209 waivers and authorizations would require initiation and completion of a new, formal USEPA rulemaking proceeding subject to full public notice and comment. Such a rulemaking proceeding would take a considerable amount of time—certainly months, and perhaps years. California could then challenge any such a USEPA revocation in the courts—as it did with respect to the Bush Administration's unprecedented denial of California's waiver request in 2008. Second, California might enlist an unlikely ally in objecting to such revocations: the automotive industry. That industry needs considerable lead-time to incorporate California's

(and USEPA's) emission control requirements into their new models. And the regulated community desires and requires certainty and predictability above all else. The prospect of a lengthy new administrative proceeding, followed by likely, even longer litigation-related delays should USEPA actually decide to revoke a previously granted California waiver or authorization, could disrupt considerably the auto industry's efforts to adapt its manufacturing systems for upcoming model years. In short, the cure of a section 209 revocation may be more painful to the regulated community than the regulatory status quo.

By contrast, it is relatively more likely that the current USEPA will look with skepticism upon future section 209 waivers and authorizations sought by California, at least as to California's proposed, future greenhouse gas emission control standards. The experience of 2008 shows that a presidential administration has the ability to advance an interpretation of section 209(b) waiver criteria different from and less hospitable to California's interests than that applied traditionally by USEPA over the past half century. And USEPA Administrator Scott Pruitt intimated during his Senate confirmation proceedings that he is not necessarily predisposed to look favorably upon such future waiver requests advanced by California.

This concludes my prepared testimony. Thank you again for the opportunity to appear before you today. I would be pleased to answer any questions the Committee may have.

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