

MJB&A Issue Brief ■ August 3, 2018

## Summary of Proposed Rulemaking: Safer and Affordable Fuel-Efficient Vehicles for Model Years 2021-2026

On August 2, 2018, the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) released the proposed Safer and Affordable Fuel Efficient (SAFE) Vehicles Rule. The proposed SAFE Rule would amend existing and establish new fuel economy and greenhouse gas (GHG) emissions standards for passenger cars and light trucks for model years (MYs) 2021 through 2026. The proposed standards would freeze Corporate Average Fuel Economy (CAFE) (i.e., fuel economy standards) and GHG standards at 2020 levels for MYs 2021 through 2026. Additionally, EPA is proposing to withdraw the waiver granted to California for the GHG and Zero Emissions Vehicles (ZEV) components of its vehicle regulations.

Comments will be due 60 days after publication of the proposal in the Federal Register. NHTSA and EPA will jointly hold three public hearings on this proposal in the Washington, D.C., Detroit, and Los Angeles areas, with specific dates and locations announced in a supplemental Federal Register notice.

### Key Takeaways

- The “preferred alternative” to existing standards in the proposal would impose new fuel economy standards for MYs 2022 through 2026 and amend the 2021 MY fuel economy standards. EPA would also amend its carbon dioxide (CO<sub>2</sub>) emissions standards for MYs 2021 through 2025 and include new standards for MY 2026. Thus, the rule proposes to freeze fuel economy and emissions standards at MY 2020 levels through MY 2026.
- In addition to the preferred alternative, the proposal also includes eight additional alternatives for comment: the current requirements (i.e., baseline/no-action) and seven alternatives that are slight variations on the preferred alternative and that would lessen requirements compared to the current standards finalized in 2012.
- In addition, EPA proposes to no longer account for GHGs other than CO<sub>2</sub> in emission standards starting in 2021, meaning that the effective grams of CO<sub>2</sub> per mile GHG standard is proposed to be slightly higher in 2021 (and beyond) compared to current and proposed 2020 standards.
- The analysis underlying the proposal relies on the finding that compliance costs are expected to be significantly higher than what EPA and NHTSA projected in the 2012 final rule analysis and 2016 mid-term evaluation. As a result, the proposal states that the proposed standards will improve the rate of fleet turnover in comparison to the MYs 2021 through 2026 standards set in the 2012 rulemaking.
- The proposal states that the proposed standard will result in an increase in fuel consumption and costs, but that these increases will be offset by additional benefits including fewer annual fatalities as a result of lower

vehicle miles traveled, similar air quality impacts due to improved fleet turnover under the proposed standards, and similar atmospheric CO<sub>2</sub> concentrations by 2100.

- EPA proposes to withdraw the waiver granted to California for the GHG and ZEV components of its vehicle regulations. The withdrawal of the waiver is based on the argument that the Energy Policy and Conservation Act (EPCA) preempts all state standards related to fuel economy, which are linked to the CO<sub>2</sub> emission standards. It also states that California does not need its GHG or ZEV standards to meet compelling and extraordinary conditions “because those standards address environmental problems that are not particular or unique to California.” Further, EPA proposes to find that the California standards are technologically infeasible.
- Separately, the proposal would preclude the use of Section 177 by other states to adopt the California emission standards based on the argument that Section 177 only applies to nonattainment of criteria pollution.
- The proposal states that EPA is obligated to set CO<sub>2</sub> emission standards for vehicles given that EPA has made the endangerment finding for GHGs. Thus, this rule does not propose to alter or undermine the endangerment finding.

## Background

In 2012, EPA and NHTSA worked together to develop fuel economy and GHG standards for cars and light duty vehicles. On October 15, 2012, EPA issued a final rule establishing GHG standards for MYs 2017 through 2025. Additionally, NHTSA set final fuel economy standards for MYs 2017 through 2021 and developed augural standards for MYs 2022 through 2025.<sup>1</sup> EPA’s standards for MYs 2022 through 2025 were also subject to a midterm evaluation by no later than April 1, 2018. In this evaluation, EPA was required to determine whether to amend or finalize the standards for MYs 2021 through 2025. On January 12, 2017, former EPA Administrator Gina McCarthy published the midterm evaluation, determining that the GHG standards for MY 2022 through 2025 remained appropriate and should not change.

After the change of administration, on March 22, 2017, EPA and NHTSA published a notice of intent to reconsider the midterm evaluation<sup>2</sup> and on April 13, 2018, EPA published a revised midterm evaluation concluding that the standards for MYs 2022 through 2025 were too stringent and committing to issuing less stringent standards.<sup>3</sup> States, environmental groups, and others, including several electric utilities, are challenging EPA’s determination that the existing GHG emission standards for cars and trucks must be revised.

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<sup>1</sup> EPA and NHTSA, Final Rule: 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards,” 77 Fed. Reg. 62,624 (October 15, 2012), available at: <https://www.gpo.gov/fdsys/pkg/FR-2012-10-15/pdf/2012-21972.pdf>.

<sup>2</sup> EPA and NHTSA, Notice of Intent to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles,” 82 Fed. Reg. 14,671 (March 22, 2017), available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-03-22/pdf/2017-05461.pdf>

<sup>3</sup> EPA, Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 83 Fed. Reg. 16,077 (April 13, 2018), available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-04-13/pdf/2018-07364.pdf>.

### Proposed CAFE and CO<sub>2</sub> Standards

In the proposal, EPA and NHTSA include a “preferred alternative”<sup>4</sup> that would freeze fuel economy and emissions standards at 2020 levels for vehicle MYs 2021 through 2026. NHTSA and EPA would amend the MY 2021 fuel economy and emissions standards to MY 2020 levels and establish new fuel economy and emissions standards for MYs 2022 through 2026 at MY 2020 levels.

In addition, beginning in MY 2021, EPA would reduce the stringency of emissions standards by excluding the CO<sub>2</sub>-equivalent emissions contributions<sup>5</sup> from air conditioning refrigerants (which include fluorinated gases, potent GHGs) and leakage, as well as nitrous oxide and methane emissions, from the calculation of tailpipe CO<sub>2</sub> emissions to comply with emissions standards.<sup>6</sup> The proposal states that these exclusions are “in the interests of harmonizing with the CAFE program,” which “cannot account for such issues.” The proposal requests comment separately on the proposed exclusion of air conditioning refrigerants and leakage and on the proposed exclusion of nitrous oxide and methane emissions in calculating emissions. It also requests comment on “whether to change existing methane and nitrous oxide standards that were finalized in the 2012 rule...[and] whether they should be revised to be less stringent or more stringent based on any updated data.”

The standards applicable to a vehicle are calculated based on type and footprint of vehicle, and automakers’ individual vehicle fleet will determine their actual requirements. (EPA requests comment on “whether vehicular footprint is the most suitable attribute upon which to base standards.”) However, based on projections of the U.S. light duty fleet, the proposal includes Table 1 with the average estimated requirements for passenger cars and light trucks.

**Table 1: Average Estimated CAFE and CO<sub>2</sub> Requirements for Passenger Cars & Light Trucks**

Model Year	CAFE (mpg)	CO <sub>2</sub> (g/mi)
2017	34.0	254
2018	34.9	244
2019	35.8	236
2020	36.9	227
2021	36.9	241
2022	36.9	241
2023	36.9	241
2024	37.0	241
2025	37.0	240
2026	37.0	240

<sup>4</sup> In this memorandum, we also refer to the preferred alternative as the “proposed standards.”

<sup>5</sup> Calculated using the Global Warming Potential (GWP) of each gas.

<sup>6</sup> The stringency of emissions standards as finalized in the 2012 rulemaking included adjustments reflecting the use of air conditioning refrigerants with reduced GWP and/or the use of technologies that reduce refrigerant emissions leaks, as well as optional offsets for nitrous oxide and methane emissions stemming from the air conditioning usage.

As shown in Table 1, the estimated CO<sub>2</sub> emissions requirements for the proposed standard increase between MYs 2020 and 2021 due to the proposed exclusion from the GHG standards of non-CO<sub>2</sub> gases (i.e., air conditioning refrigerants leakage and nitrous oxide and methane emissions) after MY 2020. In addition, these averages appear to become slightly less stringent over time in this above table as modeling projects that the vehicle fleet will shift slightly toward larger footprint passenger vehicles and light trucks. The proposal provides detailed information on the selection of these fleet assumptions used throughout the proposal for modeling and requests comment on those assumptions.

In addition to this preferred alternative, the proposal includes seven additional alternatives in its analysis and proposal. These are described in more detail in an appendix to this memorandum.

### **Justification for Proposed CAFE and CO<sub>2</sub> Standards**

EPCA requires NHTSA to set fuel economy standards at the maximum feasible stringency that NHTSA believes manufacturers can achieve in that model year. EPCA also requires NHTSA to determine the maximum feasible stringency by considering four statutory factors of technological feasibility, economic practicability, the effect of other motor vehicle standards on fuel economy, and domestic energy conservation. However, the proposal states that “NHTSA has the authority to (and traditionally does) consider other relevant factors, such as the effect of the CAFE standards on motor vehicle safety and consumer preferences,” and that the setting of standards ultimately depends on “a weighting and balancing of these factors, and the balance may shift depending on the information before NHTSA about the expected circumstances in the model years covered by the rulemaking.” The proposal notes that while the consideration of safety is not a statutory requirement, “NHTSA also considers safety as closely related to, and in some circumstances a subcomponent of economic practicability.”

The proposal provides detail on the reasoning and analysis underlying the proposed standards compared to the 2012 standards.<sup>7</sup> The following summarizes the justifications as discussed in the “Summary of Rationale” section of the proposal as well as in the “Technical Foundation for NPRM analysis.”

#### *Emissions Reducing and Fuel Economy Improving Technologies Can (And Have Been) Also Be Used to Improve Other Vehicle Attributes*

EPA and NHTSA note that there are multiple technologies that automakers could implement to reduce CO<sub>2</sub> emissions and improve fuel economy. However, these technologies could also be implemented to target other vehicle attributes, such as improving torque and hauling capabilities or improving acceleration. The proposal notes that automakers implement these technologies in a way that achieves “fewer than 100% of the possible fuel saving/emissions reductions benefits” because “this is what consumers want,” rather than an exclusive focus on fuel economy improvements. The proposal further states that past assumptions overstated how much fuel economy or emissions reductions can be achieved at the cost of certain technologies, and therefore, the cost of achieving certain emissions reductions is higher than previously assessed. Thus, the proposal notes that the proposed standards are based on the fleet as it stands today “with the technology it has and as that technology has been used, and consider what technology remains on the table at this point, whether and when it can realistically be available for widespread use in production and how much it would cost to implement.”

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<sup>7</sup> Throughout the proposal EPA and NHTSA refer to the current standards, established in 2012 and reaffirmed in the 2017 Mid-term Evaluation, as the “2016 standards.” However, to avoid confusion, we use the term 2012 standards throughout this summary.

In the detailed description of standard modeling, the proposal explores technologies that could be used to reduce CO<sub>2</sub> emissions or increase fuel economy. It requests “comments on all assumptions for fuel economy and CO<sub>2</sub> technology costs, effectiveness, availability, and applicability to vehicles in the fleet,” including numerous questions about the market viability of electric vehicles.

#### *Incremental Fuel Economy Benefits Are Subject to Diminishing Returns*

The proposal provides two reasons to support its conclusion that additional fuel economy improvements are more expensive: 1) each percentage increase in fuel economy results in a decreasing effect on gallons consumed, assuming a constant vehicle miles traveled, and 2) technologies to reduce emissions or improve fuel economy get more expensive as greater improvements are required because the “low-hanging fruit” has been picked. The proposal states that low fuel prices mean that the savings associated with these decreasing fuel savings are not enough to justify the cost of implementing new technologies. Additionally, the proposal dismisses arguments that consumers do not sufficiently consider future fuel savings when making vehicle purchasing decisions, noting that if consumers want fuel efficient cars, standards are not necessary given the resources that exist for consumers seeking fuel economy information and that there are vehicles that are more fuel efficient available. The proposal requests comment on approaches for considering how consumers value fuel savings, “the development and use of potential consumer choice model in compliance simulations,” and “willingness-to-pay” for electrification technologies and fuel economy.

#### *There Has Been a Shift in Consumer Preferences*

The proposal states that, in light of lower fuel prices, car buyers are choosing to purchase less fuel-efficient vehicles, such as crossovers and SUVs. In addition, consumers are demonstrating preferences for “more powerful engines” and heavier vehicles, both of which decrease fuel efficiency.

#### *The Proposal Would Increase Fleet Turnover*

In the “Summary of Rationale,” the proposal states that the age of the vehicle fleet has been increasing due to “[h]igher vehicle prices, which result from more-stringent fuel economy standards (sic).” The proposal notes that the analysis supporting the rule finds that the proposed standards would lower the average vehicle prices by about \$2,100 compared to the 2012 standards. The proposal also notes that increased turnover will better allow the market to take advantage of fuel economy improvements that have already occurred, in addition to other benefits as noted below. The proposal states that as manufacturers try to pass the costs of fuel efficiency increase technologies “on to consumers in the form of higher new vehicle prices, rather than absorbing them and hurting profitability, this can affect consumers’ ability to afford new vehicles.” The agencies seek comment on the impact that increased prices, interest rates, and financing terms are likely to have on the new vehicle market.

While modeling summarized in the proposal estimates that vehicles will be retired, or “scrapped” more frequently under the proposed standards, the Technical Foundation section of the proposed rule notes that in its modeling, “average fuel economy was not a meaningful value with respect to its influence on the total number of new vehicles sold.” Instead, other factors such as GDP growth and participation in the labor force were indicators of new vehicle sales. Nevertheless, the proposal states that this model likely fails to address individual consumer choices, and that it remains “reasonable to assume that the changes in prices, fuel economy, and other attributes expected to result from their proposed action to amend and establish fuel economy and GHG emission standards are likely to increase total sales of new cars and light trucks during future model years.” EPA and NHTSA request comment “on the relationship between price increases, fuel economy, and new vehicle sales, as well as methods to appropriately account for these relationships.”

#### *Safety Impacts*

The proposal states that the proposed standards will prevent more than 12,700 on-road fatalities over the lifetime of vehicles through MY 2029. The proposal summarizes analysis of several factors that can affect vehicle safety. While it states that the fuel economy standards do not require mass reduction, NHTSA modeled increases in fatalities associated with projected vehicle weight impacts due to the fuel economy standards and found that the proposed standards would save 160 lives over the life of MY 1997 to MY 2029 passenger cars compared to the 2012 standards. In comparison, the modeling results showed much larger safety impacts from lower VMT under the less stringent fuel efficiency standards and the impact of a greater fleet turnover leading to faster adoption of emerging vehicle safety technologies. Thus, the proposal's analysis suggests that the increased safety is in large part associated with less VMT under the proposed standards, with only half of the impacts arriving from safety features or design aspects of newer cars being added to the fleet.

The proposal seeks comment on changes to the safety analysis made in this proposal and notes a series of questions on which it seeks particular comment such as the sales and scrappage models, risk assumptions of older vehicles, and changes in the fleet mix of passenger cars and light trucks. NHTSA notes that though it expects vehicles to become safer going forward to about 2035, it does not have corresponding cost information for technologies enabling this improvement. However, its fleet turnover analysis is dependent on assuming lower costs leading to higher turnover and thus safety improvements. NHTSA states that it will consider approaches and requests comment on an adjustment needed to account for this potential factor.

#### *Negligible Impacts on Fuel Consumption and Air Quality*

Compared to existing standards, the proposal's Summary of Rationale includes the estimate that the proposed standards will result in a half a million barrels per day, or about a 2 to 3 percent, increase in oil consumption. More detailed assessments provided later in the proposal estimate that fuel consumption per year would increase over the 2012 standards by 4 percent per year by 2024 and 9.2 percent by 2035. Furthermore, the proposal states that dependence on foreign oil or balance of payments concerns are likely to remain "fallow" due to "significant recent increases in U.S. oil production and corresponding decreases in oil imports."

Additionally, the proposal states that improving fleet turnover will increase the rate at which older, more polluting vehicles are taken off the road. The proposal also notes that less efficient vehicles will affect consumers by making driving more expensive, thereby, reducing the overall vehicle miles traveled (and associated emissions). The modeling assumes a 20 percent "rebound effect": a 5 percent reduction in cost per mile of travel (i.e., increase in fuel efficiency) will result in a 1 percent increase in vehicle miles traveled. This is a doubling of the previous EPA and NHTSA assumption of a 10 percent rebound effect (used in the original 2012 standard modeling), and the proposal states the higher rebound effect more accurately reflects the literature in this area.

The proposed Summary of Rationale also states that revisions to the standards will not "noticeably impact" criteria or toxic air pollutants. Additionally, it also states that the proposal will have only a 0.08 of a percent increase by 2100 on atmospheric CO<sub>2</sub> concentrations (789.76 ppm CO<sub>2</sub> compared to 789.11 ppm CO<sub>2</sub>). More detailed assessments provided in the proposal estimate that CO<sub>2</sub> emissions, in keeping with fuel consumption results, would increase in comparison to the original standards by 4 percent per year by 2024 and 9.2 percent by 2035. The proposal states that, "[i]n the context of climate change, NHTSA believes it is hard to say that increasing CAFE standards is necessary to avoid destructive or wasteful use of energy as compared to somewhat-less-rapidly-increasing CAFE standards."

## Proposed Withdrawal of California's Clean Air Act Preemption Waiver

The proposal would withdraw the waiver granted to California for the GHG and ZEV components of its vehicle regulations on the basis that EPCA preempts all state standards that “relate to” fuel economy standards and also preempts state GHG emission standards because they are “unavoidably and overwhelming dependent upon substantially increasing fuel economy standards.” EPA also proposes to conclude that other states may not adopt California’s GHG standards pursuant to Section 177 on the basis that that provision is focused on criteria pollutants and National Ambient Air Quality Standards (NAAQS) nonattainment.

EPA is proposing to withdraw the waiver for these programs standards relating to MYs 2021 through 2026 “because these are the model years at issue in NHTSA’s proposal.” However, EPA is also soliciting comment on “whether one or more of the grounds supporting the proposed withdrawal of this waiver would also support withdrawing other waivers that it has previously granted.” EPA also requests comments on “the appropriate burden and standard of proof for withdrawing a previously issued waiver, taking into consideration that different approaches may apply to the various criteria of Section 209(b) and that EPA is not merely responsible for evaluating a request by California and comments thereon but is proposing withdrawal of a grant of preemption.”

The following details the specific rationales proposed for the preemption analysis.

### *Energy Policy and Conservation Act*

The proposal notes that NHTSA has long asserted federal preemption of certain state emission standards in rulemakings. NHTSA explains that it did not consider EPCA preemption for the 2012 standards because following the finalization of the rules, California amended its GHG regulations to allow manufacturers to comply with the EPA requirements and thereby be deemed to comply with the California standards. Thus, NHTSA, at the time, “erroneously saw this as obviating consideration of EPCA preemption.” Now, however, in this proposal, NHTSA states that Congress intended to have broad preemption for state fuel economy standards, and there are no exceptions made for state laws that are consistent with or identical to federal requirements. Rather, NHTSA states in the proposal that an objective of EPCA was “to create a national fuel economy standard” and that subsequent actions by Congress affirm this broad intent.

In terms of vehicle emission standards, the proposal finds that this preemption “necessarily governs state regulations over greenhouse gas emissions.” The proposal notes that because “there is but one pool of technologies for reducing tailpipe CO<sub>2</sub> emissions and increasing fuel economy available now and for the foreseeable future, regulation of CO<sub>2</sub> emissions and fuel consumption are inextricably linked.” By contrast, the proposal states that standards that do not relate to fuel economy would be outside of the scope of EPCA preemption (e.g., standards that directly regulate vehicles air conditioning units emissions of GHGs). Thus, states could proceed with such narrowly tailored rules provided that the standards do not include tailpipe CO<sub>2</sub> emissions. NHTSA invites comments on the extent to which a state standard can have some incidental impact on fuel economy or CO<sub>2</sub> emissions without being “related to” fuel economy standards.

With respect to prior case law, the proposal explains that NHTSA and EPA disagree with the decisions by two Federal District Courts that held that the GHG emission standards in Vermont and California were not preempted under EPCA (*Green Mountain Chrysler v. Crombie* and *Central Valley Chrysler-Jeep, Inc. v. Goldstone*). The proposal states that the decisions “erroneously concluded that ‘related to’ language in EPCA’s preemption clause should be construed ‘very narrowly’” and that the courts failed to recognize case law relating to the broad effect of other preemption statutes and Federal preemption practice. The proposal agrees with the vehicle manufacturers’ arguments in their appeal in *Green Mountain Chrysler* that the emission standards are “related to” the federal fuel economy standards because the emission standards are “not simply related to, but actually the functional equivalent

of, the Federal fuel economy standards” and the assigning of the purpose of the state standard for a purpose other than energy conservation is not sufficient to distinguish them and avoid preemption.

The proposal also disagrees with district court findings that once EPA grants a waiver, it effectively makes it a federal standard. As a result, any conflict between that rule and another federal rule, such as the EPCA, was a conflict among federal regulations. NHTSA disputes this “federalization” of waiver-approved rules and concludes that even waiver-approved rules are subject to EPCA preemption.

The proposal states that the state rules are also preempted impliedly given that the state regulations have the effect of regulating CO<sub>2</sub> emissions, and therefore, fuel economy. NHTSA further explains that it disagreed with the district court’s reasoning that the state standards would be consistent with the federal standards and thus could not conflict with Congress’ intent for a single, nationwide fuel economy standard.

NHTSA also states that it “considers its proposed decision on the maximum feasible CAFE standards for MY 2021-2026 to be severable from its decision on EPCA preemption,” and requests comments on the severability of these actions.

### *ZEV Mandates*

The proposal explains that the ZEV mandates require a certain number or percentage of vehicles sold or delivered for sale within a state be ZEVs. NHTSA states in the proposal that “ZEV mandates directly relate to fuel economy and thereby expressly preempted.” The proposal states that this “expensive and market-distorting mandate for manufacturers to eliminate vehicle tailpipe CO<sub>2</sub> emissions (and thus petroleum fuel use) for part of their fleets has always interfered with NHTSA’s balancing of statutory factors in establishing maximum feasible fuel economy standards.” NHTSA further notes that the ZEV mandates interfere with achieving the goals of EPCA, and thus are impliedly preempted, because they force the development and commercial deployment of ZEVs regardless of the technological feasibility and economic practicability of doing so, in conflict with the factors NHTSA must consider in establishing fuel economy standards.

The proposal seeks comment on “the extent to which compliance with the ZEV mandate frustrates manufacturers’ efforts to comply with CAFE standards.”

### *Clean Air Act Preemption*

The proposal notes that the Clean Air Act (CAA) preempts state emission standards for vehicles except for the California waiver. The CAA requires EPA to grant a waiver unless EPA finds that:

- A) California was arbitrary and capricious in its finding that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards;
- B) California does not need such state standards to meet compelling and extraordinary conditions; or
- C) California’s standards and accompanying enforcement procedures are not consistent with Section 202(a) of the Clean Air Act, which lays out the technological feasibility and lead-time requirements for federal vehicle emission standards.

EPA is proposing to withdraw the January 9, 2013 waiver of preemption for California’s Clean Car Program, ZEV mandate, and GHG standards that are applicable for MYs 2021 through 2025. The proposal states that “EPA’s authority to reconsider and withdraw the grant of a waiver for the [the California] program is implicit in section 209(b) given that the authority to revoke the grant of authority is implied in the authority for such a grant.” The proposal cites the “judicial principle that agencies possess inherent authority to reconsider their decisions.”



The proposal also states that it is appropriate for EPA to approve certain actions while deferring actions on others even if California submits them as a package. Similarly, EPA also believes its authority to withdraw the grant of a waiver should also apply on a “granular level,” i.e., for particular years of the program.

EPA outlines several proposed reasons for this withdrawal, including:

- If NHTSA determines the state standards are preempted under the EPCA, then EPA must withdraw the waiver.
- California does not need its GHG and ZEV standards to meet compelling and extraordinary conditions “because those standards address environmental problems that are not particular or unique to California, that are not caused by emissions or other factors particular or unique to California, and for which the standards will not provide any remedy particular or unique to California.” The proposal states that the standards will not have a meaningful effect on the conditions leading to climate change. Of note, the proposal also states that “while potential conditions related to global climate change in California could be substantial, they are not sufficiently different from the potential conditions in the nation as a whole to justify separate standards under CAA section 209(b)(1)(B).” The proposal further states that in the waiver application, California did not “show or purport to show a causal connection between its GHG standards and reducing any adverse effects of climate change *in* California.” Furthermore, the proposal states that “California also does not need the ZEV requirements to meet “compelling and extraordinary” conditions in California given that the FCV “travel provision” allow manufacturers to generate credits in section 177 states as a means to satisfy those manufacturers’ obligations.”
- California’s GHG and ZEV standards are inconsistent with section 202(a) because there is inadequate lead time to allow for the development of the technology necessary to meet the requirements or give appropriate consideration to compliance costs. The proposal states that in particular, the reliance on “ZEV-type” technology for achieving the GHG standards is inappropriate given the technological feasibility of ZEVs and that since “the ZEV and GHG standards are intertwined...EPA believes that this provides further justification for withdrawing the waiver of preemption for both standards.” If California relies on emerging technology, EPA explains that it will review California’s prediction of future technological developments and whether California has a “reasoned explanations for the time period selected.” The proposal also notes that EPA has previously found that the costs must be excessive for EPA to find the California standards are inconsistent with 202(a). Now, however, the proposal states that EPA’s prior finding that a “doubling or tripling” of vehicle cost is not excessive to be incorrect. Instead, EPA states that the it should “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.” EPA states that the “proposal indicates challenges for the adoption of all ZEV technologies such as lack of required infrastructure and a lower level of consumer demand” and that it “believes it is now unlikely that manufacturers will be able to generate requisite credits in section 177 States in the lead time provided.”

In addition, EPA proposes to conclude that states may not adopt California’s GHG standards pursuant to section 177 because the text and purpose of that provision is limited to providing states the ability to adopt and enforce standards designed to control criteria pollutants to address NAAQS nonattainment. The proposal states that “it would be illogical to require approved nonattainment SIP provisions as a predicate for allowing states to adopt California’s standards if states could use this authority to adopt California standards that addressed environmental problems other than nonattainment of criteria pollutant standards.” EPA specifically seeks comment on how and

when this new interpretation should be adopted and implemented. For example, if finalized, should it apply as of the effective date of the rule or at a later date, such as MY 2021 in order to allow for planning and transition.

Finally, similar to the EPCA preemption discussion, the proposal notes that EPA considers its proposed decision to withdraw the California waiver to be severable from the proposed standards for MY 2021 through 2025.

### **Next Steps**

As noted above, NHTSA and EPA will accept comments for 60 days following the publication of the proposal in the Federal Register. Public hearings will be announced in a separate Federal Register notice for Washington, DC; Detroit, MI; and Los Angeles, CA.

## Appendix: Regulatory Alternatives—Additional CAFE and CO<sub>2</sub> Standards Under Consideration

While the proposed rule includes a preferred alternative, NHTA and EPA also conducted analysis and are seeking comment on eight additional alternatives: the current requirements (i.e., baseline/no-action) and seven alternatives that are slight variations on the preferred alternative and would lessen requirements compared to the current standards finalized in 2012. The preferred standard is the least stringent of the alternatives considered. The Table below summarizes each option on which the proposal is seeing comment.

### Additional Regulatory Alternatives

Alternative	Stringency of Standard (through 2026)		Inclusion of Design Element in Alternative	
	Year Standards Begin Annual Increases <sup>8</sup>	Annual % Increase of Stringency	Credit Availability for A/C Efficiency and Off-Cycle Technologies <sup>9</sup>	Inclusion of A/C Refrigerants and Leakage, Nitrous Oxide and Methane Emissions
<i>2012/ Current Standards</i>	<i>Continues annual increases</i>	<u>Cars and Trucks:</u> Increase annually according to 2012 rulemaking (between on average 3-5% per year); MY 2026 set at 2025 levels	No change	Included for all MYs
<i>1 (Preferred)</i>	N/A; standards freeze at MY 2020	<u>Cars and Trucks:</u> N/A; 0%/year	No change	Not included as of MY 2021
2	2021	<u>Cars and Trucks:</u> N/A; 0.5%/year	No change	Not included as of MY 2021
3	2021	<u>Cars and Trucks:</u> N/A; 0.5%/year	Phase out adjustments over MYs 2022-2026	Not included as of MY 2021
4	2021	<u>Cars:</u> 1%/year <u>Trucks:</u> 2%/year	No change	Not included as of MY 2021

<sup>8</sup> Standards as finalized in the 2012 rulemaking remain in place until the year specified in this column.

<sup>9</sup> The 2012 rulemaking allows vehicle manufacturers to generate credits for air conditioning units with improved efficiency for use under EPA's GHG program. Similarly, vehicle manufacturers can generate credits for off-cycle technology employment for use under the CAFE and GHG programs. EPA and NHTSA offer credits for off-cycle technologies because they can achieve fuel economy improvements and emissions reductions that may not be adequately captured in test procedures used to demonstrate compliance with the corresponding standards.

Alternative	Stringency of Standard (through 2026)		Inclusion of Design Element in Alternative	
	Year Standards Begin Annual Increases <sup>8</sup>	Annual % Increase of Stringency	Credit Availability for A/C Efficiency and Off-Cycle Technologies <sup>9</sup>	Inclusion of A/C Refrigerants and Leakage, Nitrous Oxide and Methane Emissions
5	2022	<u>Cars:</u> 1%/year <u>Trucks:</u> 2%/year	No change	Not included as of MY 2022
6	2021	<u>Cars:</u> 2%/year <u>Trucks:</u> 3%/year	No change	Not included as of MY 2021
7	2021	<u>Cars:</u> 2%/year <u>Trucks:</u> 3%/year	Phase out adjustments over MYs 2022-2026	Not included as of MY 2021
8	2022	<u>Cars:</u> 2%/year <u>Trucks:</u> 3%/year	No change	Not included as of MY 2022

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## About Us

MJB&A provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information we encourage you to visit our website, [www.mjbradley.com](http://www.mjbradley.com).