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THE OBAMA ADMINISTRATION'S EFFORTS TO RAISE FUEL ECONOMY STANDARDS

SUCOMMITTEE ON REGULATORY AFFAIRS,
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Chairman Jordan, Ranking Member Kucinich, Members of the Subcommittee, thank you for inviting me to testify on the Obama administration's efforts to raise fuel economy standards. I am Marlo Lewis, a senior fellow in energy and environmental policy at the Competitive Enterprise Institute (CEI). We are a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI specializes in regulatory policy. We accept no government funding and rely entirely on individuals, corporations and charitable foundations for our financial support.

Mr. Chairman, Committee Members, the Environmental Protection Agency (EPA) is carrying out a power grab of breathtaking proportions. EPA is regulating fuel economy and determining national policy on climate change. EPA claims simply to be implementing the Clean Air Act. But the Act was enacted in 1970, almost two decades before global warming emerged as a public concern and five years before Congress enacted the nation's first fuel economy statute. The Clean Air Act was neither designed nor intended to regulate greenhouse gases, and it provides no authority to regulate fuel economy.

This is not the occasion to review the Supreme Court's reasoning in *Massachusetts v. EPA*, the case which set the stage for EPA's regulation of fuel economy and greenhouse gases. I would simply say here that Congress has an independent responsibility to judge whether EPA's actions

do or do not comport with the statutory schemes Congress has created. A simple thought experiment suggests that EPA's overreach is profound.

Imagine that Congressmen Waxman and Markey, instead of introducing a cap-and-trade bill,[1] had introduced legislation authorizing EPA to do exactly what it is doing now – that is, regulate greenhouse gases through the Clean Air Act as the agency sees fit. How many of you would have voted for such a bill? What would have been its chances of enactment?

Since one of the selling points for H.R. 2454, the American Clean Energy and Security Act, was precisely that it would preclude EPA from regulating greenhouse gases under various Clean Air Act authorities, an "EPA, Go Forth and Regulate" bill would likely have been dead on arrival. And that's after an almost 20 year campaign of global warming advocacy by the U.N., the environmental movement, corporate and political leaders, pundits, activist scientists, and Hollywood celebrities. The notion that Congress authorized EPA's greenhouse gas regulatory agenda in 1970 defies common sense.

I. EPA Is Regulating Fuel Economy; the Clean Air Act Provides No Authority

Greenhouse gas emission standards for motor vehicles implicitly – and obviously – regulate fuel economy. EPA and the National Highway Traffic Safety Administration (NHTSA) make this clear, even if they do not say it in so many words, in their joint May 2010 greenhouse gas/fuel economy Tailpipe Rule.

As the agencies acknowledge, no commercially proven technologies exist to filter out or capture carbon dioxide (CO_2) emissions from fossil fuel-powered vehicles. Consequently, the only way to decrease grams of CO_2 per mile is to decrease fuel consumption per mile, i.e., increase fuel economy.

The Tailpipe Rule also targets other greenhouse gas emissions from new motor vehicles, such as hydrofluorocarbons (HFCs) from vehicle air conditioning systems. However, according to EPA and NHTSA, CO_2 constitutes 94.9% of vehicular greenhouse gas emissions, and "there is a single pool of technologies for addressing these twin problems [climate change and oil dependence], i.e., those that reduce fuel consumption **and thereby** reduce CO_2 emissions as well."[2]

That EPA is regulating fuel economy is also evident from the administration's current plan to increase average fuel economy to 54.5 miles per gallon by 2025. The plan derives from EPA, NHTSA, and the California Air Resources Board's (CARB's) *Joint Interim Technical Assessment*, which proposed a range of fuel economy targets from 47 mpg to 62 mpg. As the document explicitly states, the mpg targets are determined by CO_2 reduction scenarios:

> Four scenarios of future stringency are analyzed for model years 2020 and 2025, starting with a 250 grams/mile estimated fleet-wide level in MY 2016 and lowering CO_2 scenario targets at the rate of 3% per year, 4% per year, 5% per year, and 6% per year.[3]

The 54.5 mpg target represents a negotiated compromise between the 4% per year (51 mpg) and 5% per year (56 mpg) CO_2 reduction scenarios.[4]

Does section 202 of the Clean Air Act, the provision through which EPA is promulgating motor vehicle greenhouse gas emission standards, say anything about fuel economy? It did not in 1970, but as amended in 1977, it does.

Section 202(b)(4)(C) authorizes EPA to grant an automaker a temporary waiver from oxides of nitrogen (NO_X) emission control standards if the waiver is necessary to develop innovative power train or emission control systems that have "a potential for long-term air quality benefit or the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy Conservation Act after the waiver expires." No waiver may apply to more than 5% of a manufacturer's production or more than 50,000 vehicles, or engines, whichever is greater.

So when Congress amended the Clean Air Act in 1977, it spoke directly to the issue of fuel economy in section 202, and what it granted EPA was a limited authority to waive NO_X emission standards. Had Congress wanted, in addition, to grant EPA authority to develop or adopt fuel economy standards, it could easily have said so. It did not.

Congress, through separate statutes – the 1975 Energy Policy Conservation Act (EPCA) and 2007 Energy Independence and Security Act (EISA) – gave NHTSA sole responsibility to prescribe fuel economy standards.[5] The Secretary of Transportation is to consult with the EPA Administrator before prescribing fuel economy standards,[6] and EPA is to calculate the fuel economy of vehicles and monitor automakers' compliance with fuel economy standards.[7] But prescribing fuel economy standards is NHTSA's responsibility, not EPA's.

II. The Greenhouse Protection Racket

Because EPA regulation of fuel economy is contrary to the statutory scheme Congress created, EPA's actions are vulnerable to both legal challenge and legislative repeal. But that is the case only if the auto industry, which would have standing to sue, and which has many friends in Congress, has the will to fight.

Obtaining industry buy-in thus became a key political objective of the Obama administration. To achieve it, the administration pursued what might be called a strategy of regulatory extortion. Using CARB as the heavy, EPA endangered the auto industry's economic viability. Then EPA offered to remove the threat it had created in return for a protection fee: the industry's conditional support for EPA's new career as fuel economy regulator.

In February 2009, EPA Administrator Lisa Jackson commenced a rulemaking[8] to reconsider Bush EPA Administrator Stephen Johnson's denial[9] of California's request for a waiver to establish its own greenhouse gas motor vehicle emission standards. Because the waiver would also allow other states to adopt the California program, because states would be implicitly regulating fuel economy, and because automakers would have to reshuffle the mix of vehicles delivered for sale in each "California" state to achieve the same average fuel economy, Jackson's proceeding threatened to balkanize the U.S. auto market.

The National Automobile Dealers Association clearly explained the threat in a January 2009 report titled *Patchwork Proven*.[10] Consumer preferences differ from state to state, so the same automaker typically sells a different mix of vehicles in each state. Only by sheer improbable accident would the average fuel economy (or grams CO_2-equivalent/mile) of an automaker's vehicles delivered for sale in one state be the same as that in another state. But if EPA granted the California waiver, each automaker would have to achieve the same average fuel economy (grams CO_2-equivalent/mile) in every state opting into the California program. If all 50 states adopted the program, then each automaker would have to manage 50 separate fleets, reshuffling the mix in each state regardless of consumer preference. A more chaotic scheme would be difficult to imagine.

The patchwork threat gave EPA and CARB the whip hand in closed-door negotiations with the auto industry over EPA's greenhouse gas/fuel economy regulations. As part of the "Historic Agreement"[11] brokered by Obama Environment Czar Carol Browner, California and other states agreed to consider compliance with EPA's greenhouse gas emission standards as compliance with their own.[12] But in return, notes Chairman Issa,

> participating automobile manufacturers, as well as their representative trade associations, waived their legal rights to:
>
> 1. Pursue litigation challenging California's regulation of GHG emissions, including litigation concerning preemption under the Energy Policy and Conservation Act (EPCA);
> 2. Contest any final decision by EPA granting California's waiver request; and
> 3. Contest any final fuel economy regulations issued by either EPA or NHTSA.[13]

III. The Mysterious Disappearing, Reappearing Patchwork

In January 2010, Alaska Senator Lisa Murkowski sponsored a Congressional Review Act resolution of disapproval (S. J. Res. 26)[14] to nullify the legal force and effect of EPA's Endangerment Rule.[15] The Endangerment Rule is the trigger for the Tailpipe Rule and the prerequisite for all other EPA greenhouse gas regulations. Sen. Murkowski is neither a climate skeptic nor an opponent of greenhouse gas regulation per se. But in her view, "politically accountable members of the House and Senate, not unelected bureaucrats, must develop our nation's energy and climate policies."[16]

In a letter to Sen. Jay Rockefeller (D-W.Va.), EPA Administrator Jackson warned that enactment of S. J. Res. 26, by overturning the Endangerment Rule on which the Tailpipe Rule depends, would "undo" the "historic agreement," leaving California and other states free to create a regulatory patchwork inimical to the health of the U.S. auto industry.[17]

Jackson neglected to mention that the patchwork threat exists only because she, reversing her predecessor's decision, granted the waiver in the first place.[18] Had Jackson reaffirmed Johnson's denial, there would have been no patchwork threat, hence, no need for an "historic agreement" to protect the auto industry from regulatory excess.

The peril of a "regulatory patchwork" was one of EPA Administrator Johnson's reasons, in December 2007, for denying California's request for a waiver.[19] Waiver proponents roundly rejected Johnson's reasoning at the time. In a joint letter to Johnson dated January 23, 2008, California Gov. Arnold Schwarzenegger and 13 other governors asserted that the patchwork was a figment, arguing that the waiver would create two easily managed standards, a federal standard and a California standard.[20] One day later, at a hearing of the Senate Environment and Public Works Committee, five witnesses – David Doniger of Natural Resources Defense Council, Connecticut Gov. M. Jodi Rell (R), Maryland Gov. Martin O'Malley (D), and Pennsylvania Gov. Edward G. Rendell (D) – included the same talking point in their testimonies.[21]

Yet the patchwork threat was real, and it provided the leverage EPA and CARB needed to cow the auto industry into submission. Then, after EPA finalized the Endangerment Rule, the agency and its allies warned that Congress would unleash a patchwork if the rule were overturned. None mentioned that they had changed their tune; none acknowledged that Administrator Johnson had been correct.

IV. EPA Should Not Have Granted the Waiver

Administrator Jackson approved the California waiver in late June 2009.[22] There are several reasons she should not have granted the waiver. As Johnson explained in his waiver denial decision, EPA had traditionally granted California waivers to adopt its own vehicle emission standards because of "compelling and extraordinary [air quality] conditions" created by the state's geography, meteorology, and number of vehicles. He presented three reasons why California does not face such conditions with respect to greenhouse gases:

1. There is nothing extraordinary about greenhouse "pollution" in California, because greenhouse gas concentrations are essentially uniform throughout the globe, and are not affected by California's geography and meteorology.

2. California's vehicles emit greenhouse gases, but so do mobile and stationary sources throughout the world. Again, the state is not "extraordinary" with respect to the "global air pollution" linked to climate change.

3. Even if one assumes that "extraordinary and compelling" refers not to the "global air pollution" itself but its potential impacts, such as heat waves, drought, and sea-level rise, California's vulnerability is not "sufficiently different" from the rest of the nation to justify waiving federal preemption of state motor vehicle emission standards.

As my colleague Sam Kazman quipped approvingly, "They call it global warming, not California warming."

I would restate Johnson's argument as follows. California needs to adopt tougher-than-federal motor vehicle *emission standards* because, given the state's unusual geography, meteorology, and number of vehicles, California cannot otherwise attain, or even come close to attaining, federal *air quality standards*. This statutory rationale for granting waivers has no application to greenhouse gas emissions, because *there are no federal air quality standards (NAAQS) for greenhouse gases*.

Another reason Jackson should have upheld Johnson's decision is that granting the waiver would authorize California to do that which Congress has prohibited – regulate fuel economy. EPCA clearly states:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.[23]

This is a very strong statement of preemption. States are prohibited from adopting laws or regulations "related to" fuel economy standards. This broad language bars the adoption of fuel economy standards packaged as something else or commingled with other measures. The threat of auto market balkanization – the necessary effect of Jackson's reconsideration of California's request for a waiver – is exactly what the EPCA preemption was designed to prevent.

V. The Waiver Conflicts with EPCA's Prohibition of State Laws or Regulations "Related to" Fuel Economy

That the California greenhouse gas motor vehicle emissions law, AB 1493, is highly "related to" fuel economy is evident from CARB's 2004 Staff Report presenting the agency's "initial statement of reasons" for its regulatory proposal.[24] The Staff Report's recommended options for reducing greenhouse gas emissions are identical in substance, and often in detail, to fuel saving options presented in the National Research Council (NRC)'s 2002 fuel economy report.[25] See the table below.

CARB GHG Reduction Technologies	NRC Fuel Economy Technologies
Near Term 2009-2012	
Intake Cam Phasing	Intake Valve Throttling
Exhaust Cam Phasing	Variable Valve Timing
Dual Cam Phasing	Multi-Valve, Overhead Camshaft
Coupled Cam Phasing	
Discreet Variable Valve Lift	Variable Valve Lift
Turbocharging	Turbocharger or Mechanical Supercharger
Electrically Assisted Turbocharging	
Cylinder Deactivation	Cylinder Deactivation
Variable Charge Motion	
Variable Compression Ratio	Variable Compression Ratio
Gasoline Direct Injection	Direct Injection Gasoline Engine
5-Speed Automatic Transmission	5-Speed Automatic Transmission
6-Speed Automatic Transmission	6-Speed Automatic Transmission
6-Speed Automated Manual	Automated Shift Manual Transmission
Continuously Variable Transmission	Continuously Variable Transmission
Engine Friction Reduction	Engine Friction Reduction
Advanced Multi-Viscosity Lubricants	Low Friction Lubricants
Electric Power Steering	Electric Power Steering
Electric Hydraulic Power Steering	
Improved Alternator	
Electrification of Engine Accessory subsystems	Engine Accessory Improvement
Aggressive Transmission Shift Logic	Automatic Transmission Aggressive Shift Logic
Early Torque Converter Lockup	
Variable Displacement AC Compressor	
Aerodynamic Drag Coefficient	Aero Drag Reduction
Improved Rolling Tire Resistance	Improved Rolling Resistance
Mid-Term 2013-2015	
Electromagnetic Camless Valve Actuation	Electromagnetic Camless Valve Actuation
Electrohydraulic Camless Valve Actuation	Electrohydraulic Camless Valve Actuation
Gasoline Direct Injection Lean Burn	Gasoline Direct Injection Lean Burn
Gasoline Homogenous Compression Ignition	
Electric Water Pump	
42-Volt 10kW Integrated Starter-Generator ISG (Start Stop)	42-Volt Electric Systems ISG

Diesel – HDSI	Direct Injection Diesel Engines
Weight Reduction	Weight Reduction
Long-Term 2015 & Beyond	
Mild Hybrid Vehicle	Mild Hybrid Vehicle
Moderate Hybrid Vehicle	Moderate Hybrid Vehicle
Advanced Hybrid Vehicle	Parallel Hybrid Vehicle
Diesel, Advanced Multi-Mode	

A few options in the CARB list are not included in the NRC list. In each case, however, the CARB option is a fuel-saving technology, not an emission-control technology.

The text of AB 1493 clearly implies that CARB is to regulate fuel economy. AB 1493 requires CARB to achieve "maximum feasible" greenhouse gas reductions that are also "cost-effective," defined as "Economical to an owner or operator of a vehicle, taking into account the full life-cycle costs of the vehicle."[26] CARB rightly interprets this to mean that the reduction in "operating expenses" over the average life of the vehicle (assumed to be 16 years) must exceed the "expected increases in vehicle cost [purchase price] resulting from the technology improvements needed to meet the standards in the proposed regulation."[27] Virtually all of the "operating expenses" to be reduced are expenditures for fuel. The CARB program cannot be "cost-effective" unless CARB regulates fuel economy.

In a letter earlier this year to House Energy and Power Subcommittee Chairman Ed Whitfield (R-Ky.), CARB Executive Officer James Goldstene attempts to explain why EPCA does not preempt California's greenhouse gas motor vehicle emission standards:

> CARB has never claimed that there is no relation between the pollution [CO_2] emitted by burning fossil fuels and the rate at which they are burned [gallons of fuel consumed per distance traveled, i.e. fuel economy]. CARB merely maintains the fact that pollution control and fuel economy are not identical — fuel economy and pollution control regulations have different policy objectives, utilize different incentive and flexibility features, and there are technologies that reduce pollution that are not counted under fuel economy measures, and some fuel economy improvements do not reduce emissions commensurately.[28]

That doesn't cut it. Let me count the ways.

1. A greenhouse gas emission standard does not have to be "identical" to a fuel economy standard to be "related to" it.

2. CARB is hardly one to maintain that fuel economy and greenhouse gas standards "have different policy objectives" when CARB's big selling point (touted elsewhere in Goldstene's letter) is that combining EPA's greenhouse gas standards with NHTSA's corporate average fuel economy (CAFE) standards yields 33% more fuel savings.

3. The fact that EPA's greenhouse gas standards utilize "different incentives and flexibility features" is irrelevant. Neither greenhouse gas regulation nor fuel economy regulation is defined by those features and incentives. The CAFE program, for example, would still be a fuel economy program even if it did not allow for payments of fines in lieu of compliance or award credits for flex-fuel vehicle sales.

4. Although some technologies — e.g., improved sealants for automobile air conditioning systems — "are not counted under fuel economy measures," such technologies address only 5.1% of motor vehicle greenhouse gas emissions.[29] The remaining 94.9% can only be addressed by fuel-saving technologies. For that overwhelming lion's share, fuel economy improvements do reduce greenhouse gas emissions "commensurately."

In short, being "highly related" to fuel economy, California's AB 1493 program violates EPCA's express prohibition.

VI. CARB: Fuel Economy Retro

Finally, Administrator Jackson should have declined to reconsider Johnson's decision because CARB's program conflicted with fuel economy reforms Congress had enacted in the 2007 Energy Independence and Security Act (EISA).[30] EISA replaced the "flat rate" standards of the original CAFE program, which applied to an automaker's entire fleet, with "attribute-based" standards that vary according to a vehicle's "footprint" – the area formed by the wheel base multiplied by the track width. The fleet-wide, flat-rate approach encouraged automakers to increase production and sale of smaller vehicles rather than improve fuel economy across all vehicle types. Congress switched to the attribute-based approach in hopes of encouraging compliance via technological innovation.

Although California's greenhouse gas emission standards are calibrated in CO_2-equivalent grams per mile rather than miles per gallon, they are flat-rate, not attribute-based. As in the pre-EISA federal program, there is one average standard for all light vehicles and one for all heavier vehicles. As CARB noted only last year:

> The AB 1493 regulations set separate greenhouse gas emission standards for both passenger cars and light-duty trucks (PC/LTD1) and heavier light-duty trucks and medium-duty passenger vehicles (LDT2/MDPV). . . .Compliance is determined on a fleet-wide basis, meaning that while each individual model can be above or below the standard, the average of a manufacturer's fleet must meet the standard or else the manufacturer incurs debits that must be equalized within five years.[31]

VII. Tainted Process

Since the "historic agreement" flouts the substance of federal law, it is not surprising that the process by which it was reached flouts federal procedural requirements. The negotiations appear to directly conflict with the Presidential Records Act, which states:

> Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.[32]

Far from documenting the negotiations of the "historic agreement," White House environment czar Carol Browner required participants to observe a "vow of silence" and forbade them to take notes. "We put nothing in writing, ever," CARB Chairman Mary Nichols told the *New York Times*.[33]

For all we know, the negotiations went something like this:

> Are you auto guys going to come along quietly? Or do we have to let the California Air Resources Board muss ya up? Look, pretty nice car company you got there. Or at least it used to be before you went broke. Everybody needs protection. You need protection. Promise not to cross us, and nobody gets hurt.

In his September 30, 2011 to Administrator Jackson,[34] Chairman Issa notes three circumstances suggesting that the Obama administration may have tied its offer of bailout money to automakers' participation in the "historic agreement":

1. The administration reached agreements to bailout GM and Chrysler just three weeks after the "historic agreement" was struck.

2. Former EPA Associate Administrator Lisa Heinzerling served on "the Presidential Task Force charged with bailout negotiations and was also a primary negotiator of the 'Historic Agreement.'"

3. One domestic manufacturer received over $200 million in federal support for the development of electric vehicles – "two loans being authorized in the weeks leading up to the agreement, and one authorized on May 20, 2009, the day after the 'Historic Agreement' was announced. . . ."

In light of these circumstances and the patchwork threat, Chairman Issa cannot be blamed for wondering whether the administration made the auto industry an offer it could not refuse.

VIII. The Taint Continues

The more recent negotiations culminating in the EPA/NHTSA/CARB greenhouse gas/fuel economy standards for model years 2017-2025 also appear to be less than clean.

Citing Jeremy Anwyl,[35] CEO of Edmunds.Com, and Jack Nerad[36] of Kelley Blue Book, in an August 11, 2011 letter[37] to White House Counsel Kathryn Ruemmler, Chairman Issa contends that although the Administration conferred with environmentalists, automakers, and union labor, there was no one at the table representing "the very consumers who will be asked to buy a new generation" of higher-priced vehicles. The 54.5 mpg standard was the product of an off-the-record political negotiation. From this point on, the rulemaking process will be a "mere formality" – a criticism also voiced by Amy Sinden of the pro-regulatory Center for Progressive Reform.[38]

The Administrative Procedure Act "does provide agencies with the option of conducting a negotiated rulemaking," notes Issa. However, "such a process is subject to additional transparency requirements, such as those required under FACA [Federal Advisory Committee Act]. FACA requires the head of the lead agency to: (i) make an official determination that a negotiated rulemaking committee serves the public interest;[39] (ii) publish in the *Federal Register* a notice that lists the persons proposed to represent the affected interests, describes the agenda of the negotiation, and solicits public comment;[40] and (iii) keep minutes and records.[41] EPA and NHTSA, the lead federal agencies in the negotiation, did not take those steps.

IX. Outside the Scope of Law

Next we come to the elephant in the room – what Chairman Issa describes as EPA and NHTSA's regulating "outside the scope of law." EPA and NHTSA plan to establish fuel economy standards for model years 2017-2025 – a nine-year period. But EPCA limits the setting of fuel economy standards to "not more than 5 model years."[42] No matter how hard or long the lawyers squint at the page, 5 does not mean 9.

Apparently, the Obama administration thinks it can finesse the discrepancy by basing MYs 2022-2025 fuel economy standards solely on EPA's authority to set vehicle emission standards under section 202 of the Clean Air Act. This is bizarre. EPA will pretend to establish greenhouse gas emission standards rather than fuel economy standards, but will do so by specifying CO_2 reduction percentages that the agency avows, and everybody knows, convert directly into fuel economy standards.

Let me state the obvious. When Congress enacted and amended section 202 of the Clean Air Act, it did not transfer the power to regulate fuel economy from NHTSA to EPA. Nor did Congress authorize any agency to disregard EPCA's explicit limit on setting fuel economy standards for "not more than 5 model years."

Chairman Issa points out another conflict between the Obama administration's nine-year plan and EPCA. EPCA obligates the Secretary of Transportation to consider "economic practicability" when setting fuel economy standards.[43] But, observes Issa, "At this time it is impossible for NHTSA to adequately consider economic practicality for fuel standards in MYs 2022-25, primarily because car manufacturers themselves do not have product plans for that year, and market conditions are unknown 14 years into the future."[44]

X. Harmonized and Consistent?

In *Massachusetts v. EPA*, the Court rejected the argument that EPA "cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT." The Court did not explain why it rejected that argument. It simply asserted, "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[45]

Would the Court see no inconsistency between NHTSA's approval of a nine-year fuel economy standards program and EPCA's five-year limitation? Would it see no inconsistency between NHTSA and EPA's off-the-record stakeholder negotiations and FACA? Would it see no inconsistency between NHTSA's support for the California waiver and EPCA's prohibition of state laws and regulations "related to" fuel economy?

A familiar refrain we hear from the agencies is that EPA and CARB's greenhouse gas standards are "harmonized and consistent" with NHTSA's fuel economy standards. Yet the same officials contend that if Congress were to overturn EPA's greenhouse gas component of the Tailpipe Rule, Americans would consume 25% more oil (an additional 19.1 billion gallons) over the lifetime of the same vehicles. How can that be?

CARB Executive Director David Goldstene addresses the issue in his aforementioned letter to Chairman Whitfield:

> That the National Program [NHTSA + EPA] achieves greater emissions reductions and fuel savings than the CAFE standards alone is a result of the different underlying statutory authority that results in different program components. The four key differences are: 1) unlike the Energy Policy Conservation Act (EPCA), the CAA allows for the crediting of direct emission reductions and indirect fuel economy benefits from improved air conditioners, allowing for greater compliance flexibility and lower costs; 2) EPCA allows Flexible Fuel Vehicle (FFV) credits through model year 2019, whereas the EPA standard requires demonstration of actual use of a low carbon fuel after model year 2015; 3) EPCA allows for the payment of fines in lieu of compliance but the CAA does not; and 4) treatment of intra firm trading of compliance credits between cars and light trucks categories.[46]

Difference 1) doesn't get us anywhere near 19.1 billion gallons in additional fuel savings. According to the Tailpipe Rule, CO_2 emissions due to air conditioner-related loads on automobile engines account for only 3.9% of total passenger car greenhouse gas emissions, and various technologies could reduce air conditioner-related CO_2 emissions by 10% to 30%.[47] Even a 30% reduction of the 3.9% of motor vehicle emissions associated with air conditioner engine load would decrease fuel consumption by only 1.1%.

Differences 2) and 3) are likely the big factors. Per difference 2), automakers cannot comply with EPA's greenhouse gas standards by manufacturing flexible-fueled vehicles. And per difference 3), automakers cannot pay fines in lieu of compliance with EPA's greenhouse gas standards.

Because of differences 2) and 3), EPA will always be able to make NHTSA's fuel economy standards more stringent than they would be if administered under the statutory scheme Congress created. The so-called National Program is "harmonized and consistent" only in the sense that EPA and CARB are now calling the shots. The consistency and harmony is that of the first mate singing "aye aye, sir" to the captain. Yet, to repeat the obvious, Congress delegated the captaincy to NHTSA, not EPA or CARB.

In a July 11, 2011 letter to Chairman Whitfield responding to questions from Energy and Commerce Committee members,[48] EPA Associate Administrator David McIntosh also attempts to vouch for the harmony and consistency of the National Program.

In his question to EPA, Rep. John Shimkus (R-Ill.) pointed out that EISA extended the CAFE credit granted to manufacturers of FFVs, phasing it out in 2020, whereas EPA's greenhouse gas regulations allow credits "only during the period from model years 2012 to 2015." After that, "EPA will only allow FFV credits based on a manufacturer's demonstration that the alternative fuel is actually being used in the vehicles." Shimkus asked:

> How can this rule be characterized as "harmonized and consistent" if the way EPA treats FFV [credits] is markedly different than the way Congress mandated FFV credits be treated under CAFE?

McIntosh replied:

> EPA treats FFVs for model years 2012-2016 the same as under EPCA [as amended by EISA]. Starting with model year 2016, EPA believes the appropriate approach is to ensure that FFV emissions are based on demonstrated emissions performance, which will correlate to actual usage of alternative fuels. This approach was supported by several public comments."

So, starting in 2016, EPA will not give an automaker a CAFE credit for building FFV vehicles unless the automaker can demonstrate that its customers actually use alternative fuels — a requirement inconsistent with EISA. Several people submitting comments on EPA's greenhouse gas standards supported this approach. And that, apparently, is all the justification EPA needs to override the policy set forth in law.

In sum:

- In 2016-2020, NHTSA gives credits for building FFVs.
- In 2016-2020, EPA does not give credits for building FFVs.
- The two policies are harmonized and consistent.
- And 2 + 2 = 5.

The two sets of standards are "harmonized and consistent" only in the sense that EPA's rules trump NHTSA's rules and the statutory scheme Congress authorized in EISA.

Shimkus also asked: "Could the logical reason for Congress's silence on FFVs in section 202(a) be that Congress never envisioned the Clean Air Act would be used to regulate fuel economy?" Associate Administrator McIntosh did not reply to this question.

XI. Conclusion

EPA's allies typically fall back on two arguments. If we allow EPA to regulate fuel economy, we will use less oil and reduce oil dependence more than if NHTSA acts alone under its EPCA authority. That does appear to be the case, but it is irrelevant. Public policy is not a game in which he who proposes the biggest reduction in oil consumption wins.

Congress typically spends years debating changes in fuel economy policy because so many competing interests come into play. Fuel economy standards have serious downside risks.[49] If pushed too far too fast, fuel-economy standards can price low-income households out of the new-car market. They can force automakers to pay more attention to what agencies want than what consumers want, jeopardizing auto industry sales and jobs. They inevitably induce vehicle down-weighting, contributing to fatalities and serious injuries in collisions.[50]

If Members of Congress believe that NHTSA, left to its own devices, will not regulate aggressively enough, they can always advance their agenda the old-fashioned way: Draft a bill, try to find co-sponsors, try to persuade the majority to hold hearings, and try to persuade colleagues and the public to support it.

But first and foremost, they should be jealous of their constitutional prerogatives. They should not applaud and cheer when EPA poaches powers Congress delegated to another agency, disregards Congress's prohibition of fuel economy regulation by states, behaves like a protection racket, and flouts procedural safeguards for transparency and accountability in rulemaking.

A similar apologetic is that EPA must act because Congress has failed to take "meaningful action" on global warming. As one prominent opponent of Sen. Murkowski's resolution of disapproval put it, if the public has to wait for Congress to pass legislation to control greenhouse gas emissions, "that might not happen in a year or two, or five or six or eight or 10."[51] Perhaps, but the fact that Congress is still debating climate policy is reason for EPA not to act, not an excuse for an administrative agency to legislate from the bureau.

The legislative process is slow by constitutional design. That it is easier to block than pass legislation works to promote moderation and continuity in policymaking. It helps ensure that big changes in public policy are properly vetted and enjoy broad public support. The legislative process is more valuable than any result EPA might obtain by doing an end run around it. Members of Congress should understand this better than anyone else.

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[1] H.R. 2454, *American Clean Energy and Security Act of 2009*, p. 692, http://www.gpo.gov/fdsys/pkg/BILLS-111hr2454pcs/pdf/BILLS-111hr2454pcs.pdf.

[2] EPA, National Highway Traffic Safety Administration, *Final Tailpipe Rule*, 75 FR, pp. 25424, 25323 (emphasis added), http://www.globalwarming.org/wp-content/uploads/2011/08/Final-Tailpipe-Rule.pdf

[3] EPA, NHTSA, CARB, *Interim Joint Technical Assessment Report: Light Duty Vehicle Greenhouse Gas Emission Standards and Fuel Economy Standards for Model Years 2017-2025*, September 2010, p. viii, http://www.epa.gov/oms/climate/regulations/ldv-ghg-tar.pdf.

[4] Id at ix.

[5] 49 U.S.C. § 32902(a).

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