

## ENVIRONMENTAL AND ENERGY LAW

December 2021

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*Over the past several years, the United States EPA and California Air Resources Board have accelerated the statutory and regulatory push to lower emissions from a wide range of mobile emissions sources. In 2021, these efforts have included proposed increases in fuel economy standards for passenger cars and light duty trucks, reductions in permissible emissions, and a strong push toward battery electric vehicles and other “alternative fuels” such as fuel cell technology. Manufacturers of mobile sources, and industries that use these mobile sources, will continue to be impacted by these fast-changing regulations and policies.*

## Mobile Emissions Sources and the Regulatory Push Toward Lower or Zero Emission Vehicles

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

The Environmental and Energy Law Committee assists all members whose practice relates to environmental and energy areas consisting of regulatory compliance, permitting issues and litigation. The Committee conducts monthly conference calls and publishes newsletters to keep our members abreast of current issues relating to the energy field and environmental practice. The members also present educational seminars, and provide an opportunity to network with fellow practitioners in those fields to enhance practice opportunities across the country and internationally. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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The Biden administration has committed to addressing climate change and “Environmental Justice,” which EPA defines as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Air emissions from mobile sources such as passenger cars, motorcycles, trucks, buses, trains, airplanes, off-road recreational vehicles, lawn equipment and more contribute to a significant percentage of total greenhouse gas emissions in the United States. U.S. EPA and the California Air Resources Board are therefore implementing increasingly stringent regulations and pushing mobile sources toward lower or zero emissions in the form of electric batteries, hydrogen fuel cell and other “alternative fuels.”

### **Executive Order Sets 2030 Goal to Limit Vehicle Emissions**

On August 5, President Biden issued an “Executive Order on Strengthening American Leadership in Clean Cars and Trucks” (Order). Signed and announced in Detroit alongside representatives from Ford, General Motors, Stellantis and the United Auto Workers, the Order sets a goal for 50% of all new passenger cars and light trucks sold in 2030 to be zero-emission vehicles (ZEV), which for purposes of the Order includes battery electric, plug-in hybrid

electric or fuel cell electric vehicles. According to EPA, transportation is the single largest source of greenhouse gas emissions – 29% – with passenger cars and trucks accounting for 58% of all transportation sources.

The Order also called on EPA and the U.S. Department of Transportation to consider promulgating new emissions and fuel economy standards. As discussed below, both agencies released proposed rules in August that, if promulgated, would reverse the Trump administration’s standards and set federal GHG emissions standards for passenger cars and light trucks to achieve greater pollution reductions through model year 2026.

### **EPA and NHTSA Propose Regulations for Passenger Cars and Light-Duty Trucks**

On August 10, EPA issued its proposed GHG emissions rule, “Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards,” 86 Fed. Reg. 43276, which would set an industry-wide target of 171 grams of carbon dioxide (CO<sub>2</sub>) per mile by model year 2026, a 17% decrease from the Trump administration’s goal of 205 grams of CO<sub>2</sub> per mile.

EPA’s proposed GHG standards for light-duty vehicles are 10% more stringent than the Trump-era rules for 2023 model year vehicles. The GHG standards would become 5% more stringent each year through 2026 model year vehicles, but EPA accepted

comments on even tighter standards for model year 2026. If these standards are promulgated, light-duty vehicles would average 38.2 mpg (compared to 32.2 mpg under the 2020 Trump administration rule), which EPA estimates would avoid 2.2 billion tons of CO<sub>2</sub> emissions through 2050. EPA received approximately 30,000 written comments on its proposed rule.

Separately, but in coordination with EPA, the National Highway Transportation Safety Administration (NHTSA) also proposed a rule on August 10, "Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks." NHTSA's proposed rule, formally published in the federal register on September 3, 2021, would increase fuel efficiency by 8% annually for model years 2024-2026 rather than 1.5%, as previously set. It would also increase the estimated model year 2026 fleetwide average by 12 mpg compared with model year 2021. NHTSA states that its proposed standards would achieve a fleet average almost 9 mpg higher than those set during the Trump administration. Public hearings on the proposed NHTSA rule were held on October 13 and 14, 2021, and in November 2021 the White House began an interagency review of EPA's drafted final rule that may result in even lower emissions limits for passenger cars and light duty trucks than what EPA had previously proposed.

These recent developments come on the heels of the COP26 Climate Summit in Glasgow, Scotland, where EPA Administrator

Michael Regan stated that "what [the EPA] will finalize will be much more aggressive and much more comprehensive" than the proposed plan from August 2021.

### **Other Mobile Source Developments**

On September 7, the California Air Resources Board (CARB) proposed that all new medium- and heavy-duty trucks sold in the state must have zero emissions beginning in 2040. This is an entirely new provision in a draft truck fleet climate regulation that in effect would amend the state's landmark 2020 truck manufacturer zero-emission sales mandate rule. This rule is intended to complement CARB's Advanced Clean Trucks regulation adopted in June 2020, which requires medium- and heavy-duty truck makers to begin selling a certain percentage of zero-emission models in the state beginning in model year 2024.

On September 8, New York Governor Kathy Hochul signed a bill banning the sale of gas-powered cars, light-duty trucks and off-road vehicles by 2035. New medium- and heavy-duty vehicles will have until 2045 to meet the same goal. The law puts New York in the company of California, which became the first U.S. state to advance a ban that will effectively end the leasing and sale of traditional internal combustion engine vehicles by 2035. Massachusetts is considering a similar goal, and other states may follow. These state developments further signal the growth of the U.S. electric vehicle market.

California continues to work toward development of the Advanced Clean Car II (ACC II) regulations, which may further reduce GHG and criteria pollutant emissions from new light- and medium-duty vehicles starting with model year 2026 and promote increased ZEV production and sales. The next ACC II public workshop was held on October 13, 2021, where CARB presented updated analyses and proposals to amend its Low Emission Vehicle regulation to further reduce emissions and to amend its ZEV regulation.

California's Lithium-ion Car Battery Recycling Advisory Group continues to meet quarterly as the state moves toward proposing the first regulations in the country regarding the recovery and recycling of electric vehicle batteries. At its September 28 meeting, the Board publicly endorsed research and survey results conducted by UC Davis, which will be publicly available on December 15, after the Advisory Group reviews the rough draft, which was released on November 2, 2021. By April 2022, California law requires the Advisory Group to issue policy recommendations based on these results that will then be used to draft future regulations on lithium-ion battery recycling. This may ultimately spur EPA and other states to follow suit.

Finally, EPA continues to reconsider its 2019 withdrawal of the waiver of preemption to the state of California, which effectively revoked California's authority to administer its ZEV and GHG emission standards within its Advanced Clean Car (ACC) program. EPA

issued its notice for reconsideration on April 28, 2021 and accepted public comment through July 6, 2021. These developments follow EPA and NHTSA's September 27, 2019 rule, "The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program," (SAFE 1), which had determined that EPA could reconsider the waiver to California and that portions of the ACC program should be withdrawn due to NHTSA's action under the Energy Policy & Conservation Act as well as the Clean Air Act's preemption provisions.

### **EPA Enforcement of Non-Compliant Aftermarket Parts**

EPA continues to escalate efforts to stop sales of illegal after-market "defeat devices" prohibited by Title II of the Clean Air Act. EPA began its National Compliance Initiative (NCI) in 2019 and has been busy in the intervening years conducting studies, updating agency guidance, and pursuing enforcement actions against manufacturers, sellers and installer who violate Section 203(a)(3) of the Clean Air Act. Section 203(a) prohibits the persons from rendering inoperative or tampering with motor vehicle emissions controls or selling products that the seller knows or should know will be used to bypass emission controls on motor vehicles.

As part of its NCI, EPA commissioned a study published last year estimating the impact of sales of these aftermarket defeat devices between 2009 and 2020 which according to EPA has resulted in 570,000 tons of excess

nitrogen oxides and 5,000 tons of particulate matter from diesel trucks alone.

Additionally, as part of its NCI, EPA has issued two new guidance documents that will help EPA with its enforcement efforts. The first is “EPA Tampering Policy - The EPA Enforcement Policy on Vehicle and Engine Tampering and Aftermarket Defeat Devices under the Clean Air Act” issue by former OECA head Susan Bodine in November 2020. EPA’s new “Tampering Policy” replaces and supersedes a number of EPA vehicle emission guidance documents dating back to 1974. The Tampering Policy is broader than any single EPA past guidance on the subject and covers civil enforcement for aftermarket emission cheating devices in both motor vehicles and non-road engines (ATVs, lawn mowers, etc.). The guidance also provides more clarity and potentially a narrower view of EPA’s long-standing policy that EPA will forego enforcement when an aftermarket parts seller or installer has a “reasonable basis” to conclude that the conduct or part does not adversely affect emissions.

In September 2021, EPA also issued a new Clean Air Act Title II Vehicle & Engine Civil Penalty Policy. This new civil penalty policy supersedes the Agency’s prior version issued in 2009 and provides additional guidance to EPA Regions in how to calculate penalties for after-market defeat devices. Although the guidance is still new, it may result in higher EPA civil penalties during enforcement.

In addition to studies and new guidance, EPA has continued to step up enforcement against violators. EPA reported resolving 31 aftermarket defeat device civil enforcement cases for FY2020, the most in the Agency’s history. In September 2021, EPA announced two high profile settlements. The first involved a settlement resolving alleged sales by Xtreme Diesel Performance, LLC (XDP) of at least 27,000 aftermarket “defeat devices,” primarily designed for diesel pickup trucks between January 1, 2015 and May 31, 2017. These alleged “defeat devices” included EGR delete kits, empty exhaust pipes, and electronic tuning devices. The second was a settlement with Jeg’s Automotive Inc. of Delaware, Ohio, to pay a \$300,000 civil penalty for selling aftermarket motor vehicle parts that EPA alleges violated the Clean Air Act. As part of the settlement, Jeg’s also agrees to perform a supplemental environmental project valued at \$275,000 to replace three school buses for Columbus City Schools in areas of environmental justice concern. EPA’s continued enforcement focus in the aftermarket vehicle space emphasizes the need for aftermarket parts manufacturers and distributors to prioritize Clean Air Act compliance.

In conclusion, through new and pending regulations, guidance, and enforcement, 2021 has been a busy year for EPA and CARB in the mobile source space, and 2022 should bring as much if not more changes to this important area of environmental law.

## Past Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

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SEPTEMBER 2020

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Ivan M. Rodriguez and Justin C. Warner

SEPTEMBER 2019

[Settling the Split: The Supreme Court Clarifies Unavailability of Punitive Damages for Seamen in \*Dutra Group v. Batterton\*](#)

Michael A. Golemi, Don Haycraft, and Jody M. Schisel-Meslin

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SEPTEMBER 2014

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