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**DEPARTMENT OF JUSTICE**



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October 9, 2019

Via Overnight Mail and Email

Andrew Wheeler, Administrator  
Office of the Administrator  
U.S. Environmental Protection Agency  
WJC South Building  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Christopher Lieske  
Office of Transportation and Air Quality  
U.S. Environmental Protection Agency  
2000 Traverwood Drive  
Ann Arbor, MI 48105

RE: Petition for Clarification/Reconsideration of the Safer, Affordable Fuel-Efficient (SAFE) Vehicles Rule, Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019)

Dear Administrator Wheeler and Mr. Lieske:

Please find attached a Petition for Clarification/Reconsideration submitted on behalf of the California Air Resources Board and the California Attorney General Xavier Becerra with respect to the above reference action(s), Docket ID EPA-HQ-OAR-2018-0283.

Sincerely,

*M. Elaine Meckenstock*  
M. ELAINE MECKENSTOCK  
Deputy Attorney General

(Attachment)

**BEFORE THE HONORABLE ANDREW WHEELER, ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN RE PETITION FOR  
CLARIFICATION/RECONSIDERATION  
OF THE SAFER AFFORDABLE FUEL-  
EFFICIENT (SAFE) VEHICLES RULE  
PART ONE: ONE NATIONAL  
PROGRAM, 84 Fed. Reg. 51,310 (Sept.  
27, 2019)

**SUBMITTED BY THE CALIFORNIA AIR RESOURCES BOARD  
AND CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA**

On August 24, 2018, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) published a joint proposal in the Federal Register. “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986 (Aug. 24, 2018) (hereafter, Proposal). On September 19, 2019, EPA and NHTSA issued a document finalizing some of the actions they had proposed, including EPA’s withdrawal of parts of a preemption waiver it issued to California in 2013 (hereafter, Final Actions). On September 27, 2019, the Final Actions were published in the Federal Register. “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,” 84 Fed. Reg. 51,310 (Sept. 27, 2019).

We are deeply troubled by the agencies’ Final Actions, which undermine important public health and environmental protection programs while creating unnecessary and harmful uncertainty for States, as well as for auto manufacturers and related industries. We believe the Final Actions are not only harmful, but also unlawful: neither agency has authority for the actions taken, and, indeed, the agencies’ actions fly in the face of the relevant statutes and the cooperative federalism model that Congress established decades ago and that it has strengthened and reaffirmed many times since. The multiple legal infirmities with the Final Actions will be decided by the courts.

But there is an issue causing significant and unnecessary uncertainty now that EPA can and should resolve quickly, without the need for litigation.<sup>1</sup> Specifically, CARB and California Attorney General Xavier Becerra petition EPA for clarification and reconsideration of the scope

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<sup>1</sup> This petition does not reflect all issues with the Final Actions on which California, CARB, or the California Attorney General may seek reconsideration or other administrative remedies. Rather, we are submitting this single-issue petition now in an attempt to quickly reduce or eliminate confusion concerning the scope of EPA’s action(s). In addition, we note that, while the exhaustion requirements of Section 307(d)(7) of the Clean Air Act do not apply here, Section 307(b) indicates that EPA must consider petitions for reconsideration such as this one.

of EPA’s action(s) purporting to withdraw portions of the waiver EPA granted to California in 2013. As discussed below, contradictory statements in the Final Actions have created confusion over whether EPA withdrew California’s waiver for its GHG and Zero Emission Vehicle (ZEV) standards only for model years 2021 through 2025, as EPA had proposed, or whether EPA expanded the withdrawal to cover earlier model years as well.

CARB has received inquiries about this issue from regulated parties and other stakeholders, and we respectfully ask that EPA clarify and reconsider the statements that are creating this confusion. CARB and the public are entitled to know, promptly and unambiguously, the temporal scope of EPA’s waiver withdrawal. Indeed, “elementary fairness compels clarity in the statements ... setting forth actions with which the agency expects the public to comply.” *General Electric v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (internal quotation omitted).

**I. EPA’S STATEMENTS IN THE FINAL ACTIONS HAVE CREATED CONFUSION ABOUT THE MODEL YEARS COVERED BY THE PURPORTED WITHDRAWAL OF CALIFORNIA’S WAIVER FOR ITS GHG AND ZEV STANDARDS**

In the Final Actions, EPA makes statements that are creating confusion, and, indeed, appear contradictory, concerning the temporal scope of its action(s)—specifically, which model years are covered by the purported withdrawal of California’s waiver for its GHG and ZEV standards. In some places, EPA’s statements indicate that it has limited its action(s) to the model years for which it proposed to withdraw and for which it now claims to have authority to withdraw—namely model years 2021 through 2025. In other places, however, EPA’s statements suggest action(s) with a broader scope—one that would include earlier model years. As discussed below, these statements are difficult to reconcile and are creating untenable uncertainty that EPA must resolve.

**A. EPA Proposed to Withdraw California’s Waiver for GHG and ZEV Standards Only for Model Years 2021 through 2025**

In the Proposal, EPA expressly “propos[ed] to withdraw the January 9, 2013 waiver of preemption” for California’s GHG and ZEV standards “that are *applicable to new model year (MY) 2021 through 2025.*” 83 Fed. Reg. at 43,240 (emphasis added); *see also* 83 Fed. Reg. at 43,243 (“EPA is proposing to withdraw the grant of a waiver of preemption for California to enforce the GHG and ZEV standards ... *for MY 2021–2025.*”) (emphasis added); 83 Fed. Reg. at 43,245 (“EPA is proposing to withdraw the grant of waiver of preemption for CARB’s GHG and ZEV standards *for 2021 MY through 2025 MY...*”) (emphasis added); 83 Fed. Reg. 43,250 (“EPA is proposing to withdraw the waiver of preemption for the GHG and ZEV requirements *for MYs 2021 through 2025.*”) (emphasis added). The scope of EPA’s proposed waiver withdrawal was the same (model years 2021 through 2025) in the part of the Proposal that was based on NHTSA’s proposed action concerning preemption under the Energy Policy Conservation Act (EPCA). 83 Fed. Reg. at 43,240 (articulating this scope of proposed action for all of the “multiple grounds” on which EPA proposed to withdraw); *id.* at 43,240 n.522 (“EPA proposes to withdraw the waiver for these model years because these are the model years at issue in NHTSA’s proposal.”).<sup>2</sup>

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<sup>2</sup> EPA solicited comment on “whether one or more grounds supporting the proposed withdrawal of this waiver would also support withdrawing other waivers that it has previously granted.” 83 Fed. Reg. at 43,240 n.552. This reference to “other waivers” can only reasonably be read as meaning waivers other than the 2013 waiver for California’s Advanced Clean Cars program, which includes the GHG and ZEV standards. This is plain from the distinction between “this waiver”—that is, the 2013 waiver—and “other waivers,” and from the distinction in the preceding footnote between the waiver “granted with respect to California’s GHG and ZEV program.” and “other waivers.” 83 Fed. Reg. at 43,240 n.551. EPA also makes clear, elsewhere, that it granted a *single* waiver in January 2013 for California’s Advanced Clean Cars program and that “aspects of” that single waiver involve California’s GHG and ZEV standards. 84 Fed. Reg. at 51,323. EPA’s solicitation of comments on potential withdrawals of “other waivers” was not, therefore, a request for comments on withdrawing *other model years of the 2013 waiver*. Moreover, EPA has not identified, and cannot identify, any comment asking EPA to withdraw the GHG and ZEV portions of California’s 2013 waiver for model years before 2021.

In the Proposal, EPA also indicated that it understood that a waiver withdrawal involving model years before 2021 would be problematic. EPA found that “a late modification [to standards] carries attendant hardships for technologically advanced manufacturers who might have made major investment commitments.” 83 Fed. Reg. at 43,252. Connecting this concern to the scope of the proposed withdrawal, EPA then stated its conclusion that “today’s proposal, when finalized, would be sufficiently ahead of the compliance deadline for MY 2021 through 2025 and thus, manufacturers would not incur any hardships. Indeed, the expectation is that the proposed withdrawal would provide notice to manufacturers of the intended compliance deadline modifications for MYs 2021 through 2025.” *Id.*

There is, thus, no question as to the scope of withdrawal action proposed by EPA. That scope was expressly, unequivocally, and repeatedly limited to model years 2021 through 2025.

**B. In the Final Actions, EPA Confirms that the Proposed Withdrawal Was Limited to Model Years 2021 through 2025 and Indicates EPA Has Finalized What It Proposed**

In the Final Actions, EPA expressly states that it has finalized what it proposed and confirms the temporal scope of the proposal as limited to model years 2021 through 2025, thereby indicating that the waiver withdrawal covers only those model years.

Specifically, EPA asserts that it has finalized “EPA’s proposed determination.” 84 Fed. Reg. at 51,331 (describing EPA as “finaliz[ing] its proposed determination”). And it makes this assertion as to all purported grounds for EPA’s action(s), including its reliance on NHTSA’s action as a basis for waiver withdrawal. 84 Fed. Reg. at 51,328.

EPA also correctly restates the scope of the action it proposed as involving only model years 2021 through 2025. 84 Fed. Reg. at 51,329 (“On August 24, 2018, EPA proposed to withdraw this waiver of preemption with regard to the GHG and ZEV standards of its Advanced

Clean Car (ACC) program *for MY 2021–2025.*”) (emphasis added); *see also id.* at 84 Fed. Reg. at 51,337 (acknowledging “proposed withdrawal of the waiver [was for] *for MY 2021–2025*”) (emphasis added).

EPA’s statements that it has finalized what it proposed lead naturally to the conclusion that EPA has not withdrawn California’s waiver for GHG and ZEV standards for model years other than 2021 through 2025.

**C. In the Final Actions, EPA Only Asserts Authority to Withdraw for Model Years 2021 through 2025**

EPA’s discussion of its purported authority to withdraw California’s waiver is likewise limited to model years 2021 through 2025. In the Final Actions, EPA concludes the discussion of its withdrawal authority by stating that “it has authority under [Clean Air Act] section 209 to reconsider its prior grant of the [Advanced Clean Cars] waiver and to withdraw the waiver *for MY 2021–2025* GHG and ZEV standards, consistent with the SAFE proposal.” 84 Fed. Reg. at 51,377 (emphasis added). There is no such conclusion concerning EPA’s authority to withdraw California’s waiver for earlier model years. Nor is there any indication, in the Final Actions, that EPA has reconsidered, let alone departed from, its conclusion in the Proposal that a withdrawal for earlier model years could would cause hardships to manufacturers and their investment commitments.

EPA does contend that it generally has authority to withdraw a previously granted waiver “in appropriate circumstances,” 84 Fed. Reg. at 51,331, but it never asserted in the Proposal and never asserts in the Final Actions that model years earlier than 2021 present such circumstances here. *See also* 84 Fed. Reg. at 51,332 (similarly asserting authority to withdraw “under appropriate circumstances”). Indeed, much of EPA’s discussion of potentially “appropriate”

circumstances involves hypothetical scenarios in which “predictions” about future model years, made at the time of the waiver request, “may have been inaccurate.” 84 Fed. Reg. at 51,332; *see also id.* (asserting authority to reconsider “where leadtime concerns arise after the grant of an initial waiver”). Hypothetical scenarios concerning *future* requirements, and related lead time concerns, do not speak to authority to withdraw a waiver for *prior, current, or even imminent* model years. This discussion of “appropriate” circumstances, thus, does not expand EPA’s clear conclusion, quoted above, that its authority to withdraw here is limited to model years 2021 through 2025.

EPA’s discussion and conclusion about the scope of its authority, like its assertion that it finalized the action it proposed, indicate that EPA has withdrawn California’s waiver for its GHG and ZEV standards only for model years 2021 through 2025.

**D. Yet, in the Final Actions, EPA Also Makes Statements that at Least Arguably Suggest a Withdrawal for Earlier Model Years**

However, other EPA statements in the Final Actions create confusion by suggesting a broader scope to EPA’s waiver withdrawal. For example, while EPA states that it has “finalize[d] EPA’s proposed determination,” it also states that its “January 2013 grant of a waiver of CAA preemption for [the GHG and ZEV standards] was invalid, null, and void” and “is hereby withdrawn on that basis, effective on the effective date of this joint action.” 84 Fed. Reg. at 51,328. These statements are ambiguous and confusing. EPA simultaneously asserts that it is finalizing its “proposed determination,” the scope of which was plainly limited to model years 2021 through 2025 (as discussed above), *and* uses language suggesting EPA is withdrawing California’s waiver for its GHG and ZEV standards for all model years at issue in the 2013 waiver grant (including those before 2021).



Exacerbating the ambiguity, EPA states that its “finding that California’s GHG and ZEV standards are preempted as a result of NHTSA’s finalized determinations, issued in this joint action, with respect to EPCA’s preemptive effect on State GHG and ZEV standards, is effective upon the effective date of this joint action.” 84 Fed. Reg. at 51,338. EPA then goes on to say that “[t]his finding is separate and apart from findings with respect to EPA’s 2013 waiver for CARB’s Advanced Clean Car Program as it pertains to its 2021 through 2025 MY relating to GHG and ZEV standards and accompanying withdrawal of the waiver, pursuant to CAA section 209(b)(1).” *Id.* It is unclear from these statements whether EPA intends its purported separation of these two “findings” to have implications for the scope of its waiver withdrawal, in part because EPA only references withdrawal in the second sentence. But this text at least arguably suggests that EPA is withdrawing California’s waiver for model years prior to 2021, pursuant to its reliance on NHTSA’s action.

EPA sows further confusion by stating, on the one hand, that “EPA’s 2013 waiver for CARB’s Advanced Clean Car Program (*as it pertains to its 2021 through 2025 MY* relating to greenhouse gas emissions and the ZEV mandate) is withdrawn,” and, on the other hand, that “[t]his is separate and apart from EPA’s determination that it cannot and did not validly grant a waiver with respect to those California State measures which are preempted under NHTSA’s determination in this document that EPCA preempts State GHG and ZEV programs, *which, as explained above, is effective on the effective date of this joint action.*” 84 Fed. Reg. at 51,350 (emphasis added). Again, it is unclear what significance, if any, EPA intends to impart by its use of the word “withdrawn” with respect to model years 2021 through 2025 and its failure to use that word with respect to its ambiguously described “determination” concerning the “valid[ity]” of the waiver.

The challenges in understanding these statements are magnified when they are read in the context of the entire document in which EPA claims to be taking only the action it proposed—an action that included only model years 2021 through 2025 *even in the context of EPA’s consideration of NHTSA’s action*. This confusion is only increased by EPA’s discussion of its authority to withdraw, which, as discussed above, does not purport to provide grounds for any withdrawal for model years prior to 2021. In the end, then, the Final Actions contain a collection of statements concerning the model years covered by EPA’s action(s) that are impossible to reconcile.

## **II. CARB AND THE CALIFORNIA ATTORNEY GENERAL REQUEST THAT EPA IMMEDIATELY CLARIFY AND RECONSIDER ITS CONFUSING STATEMENTS**

The uncertainty created by EPA’s statements concerning the model years affected by EPA’s action(s) is untenable for California, the regulated community, and other stakeholders, including other States that have adopted California’s standards. Regulated parties and other stakeholders have been seeking guidance from CARB as to these questions, but the State’s ability to provide such guidance is limited because the statements that are causing the confusion are EPA’s. Accordingly, we seek clarification and reconsideration of EPA’s perplexing collection of statements regarding the model years covered by the withdrawal of California’s waiver for its GHG and ZEV standards. EPA should explain the intended meaning of these statements, revising them as necessary, and clarify exactly which model years are implicated in its waiver withdrawal action(s), quickly, officially, and publicly.<sup>3</sup> To be clear, we are seeking

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<sup>3</sup> CARB/California notes that EPA has, in the past, sought to clarify confusing, ambiguous, or erroneous language in Federal Register notices via later, additional Federal Register notices. *See, e.g.*, 76 Fed. Reg. 79,574 (Dec. 22, 2011) (seeking to “revise minor misstatements” and “clarify” prior Federal Register notice); 73 Fed. Reg. 6,962 (Feb. 6, 2008) (clarifying scope of prior order published in the Federal Register); 70 Fed. Reg. 13,195 (March 18, 2005) (clarifying solicitation previously published in the Federal Register); 54 Fed. Reg. 13,740 (Apr. 5, 1989) (clarifying and providing more detail about prior Federal Register notice); 43 Fed. Reg. 53,817 (Nov. 17, 1978) (clarifying EPA’s procedures in response to questions).

clarification from EPA as to the scope of its *waiver withdrawal action(s)*, not as to any position EPA holds concerning the lawfulness of California's GHG and ZEV standards (e.g., whether they are preempted by EPCA).

To the extent that EPA's response to this petition would result in final action(s) beyond the scope of what EPA proposed, or would contain analyses or justifications not included in the Proposal (such as purported justifications for broader withdrawal authority), then EPA must withdraw at least the portion of the Final Actions that extend beyond the Proposal, issue a revised proposal, and accept and consider public comment before taking any final action.

Dated: October 9, 2019

Respectfully submitted,  
FOR THE STATE OF CALIFORNIA  
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Attorney General  
ROBERT W. BYRNE  
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DAVID A. ZONANA  
Supervising Deputy Attorneys General

By: /s/ M. Elaine Meckenstock  
M. ELAINE MECKENSTOCK  
Deputy Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Clarification/Reconsideration was served on October 9, 2019 by overnight courier and email on the following:

Andrew Wheeler, Administrator  
Office of the Administrator (Room 3000)  
U.S. Environmental Protection Agency  
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*/s/ Ida Martinac*

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