

4 Takeaways From EPA's Vehicle GHG Emission Review

By **Juan Carlos Rodriguez**

Law360 (April 3, 2018, 9:25 PM EDT) -- The U.S. Environmental Protection Agency's decision to pull the rug out from under Obama-era greenhouse gas vehicle emission standards has put the agency on a collision course with California, which has long been on the cutting edge of climate change regulation, while also introducing uncertainty for the auto industry.

As part of a 2012 rulemaking that established a program for reducing greenhouse gas emissions from cars and trucks, while also setting corporate average fuel economy, or CAFE, standards for model year 2017 to 2025 light-duty vehicles, the EPA was required to conduct a midterm evaluation to determine whether standards for model year 2022 to 2025 vehicles were still appropriate.

In the last days of the Obama administration, the EPA published its decision that the standards were appropriate and no changes were needed.

Yet the Trump EPA, heeding input from automakers that the requirements would be too tough to meet under current market conditions, on Monday withdrew the Obama administration's midterm evaluation and set in motion the process to complete its own review.

Here are four takeaways from the EPA's decision to reject the Obama-era standards.

California Won't Go Quietly

The EPA's move could trigger a legal battle with the Golden State, which has led the nation's efforts in reducing pollution from automobiles thanks to a special Clean Air Act waiver that allows it to set its own standards. The 2012 greenhouse gas and CAFE standards were a joint effort between the EPA, the National Highway Traffic Safety Administration, California and the auto industry.

If the EPA decides to lower the standards for 2022 to 2025 vehicles, California could choose to keep the Obama-era standards, possibly creating a situation where the U.S. has two emissions standards: one for California and the 12 states that use its standards, and another for every other state.

EPA Administrator Scott Pruitt has been explicit about his feelings that California should not "dictate" auto emissions standards to the rest of the country and that there should continue to be one national standard, and has said publicly the EPA is assessing whether to continue to allow the state's CAA waiver.

Michael Steel, a partner at Morrison & Foerster LLP, called the national standard comments a “dog whistle” signaling an intent to challenge California.

“That’s basically a shot saying, ‘We may not allow California to have the independence that it has had since the Clean Air Act was enacted back in 1970 and may basically try to overrule California’s independence by either revoking their waiver or denying a future waiver as to these standards,’” Steel said.

Litigation on the Horizon

If it comes to the dramatic conclusion that the EPA rescinds California’s waiver, it would be sure to spark highly charged litigation that would almost certainly be a U.S. Supreme Court-worthy matter.

But even before that point, there will be ample opportunities for litigation over greenhouse gas standards. To begin with, there are some parties that may wish to mount a challenge to the EPA’s notice of withdrawal of the Obama administration’s midterm review.

While the agency was careful to say the move “is not a final agency action,” which in theory would protect it from challenges under the Administrative Procedure Act, Irene Gutierrez, an attorney with the Natural Resources Defense Council, said simply stating that may not be a shield against lawsuits.

“Folks have challenged things that are not final rules, and all of that depends on the particular circumstances of the notice in question,” she said. “We’re evaluating our options.”

In fact, the Alliance of Automobile Manufacturers filed a petition for review of the Obama midterm review in the D.C. Circuit, but dropped the case after only a couple of weeks due to the Trump administration saying it would review the decision.

Further down the line, once the EPA and NHTSA finalize a new set of standards for 2022 to 2025 vehicles, that final rule could, depending on how interested parties feel about it, be challenged as well, and that could take a year or two to resolve.

Industry Faces Uncertain Future

Jacqueline Glassman, a partner at King & Spalding LLP, said greenhouse gas and CAFE regulation is a complex endeavor, and compliance with those standards is dependent upon economic conditions, consumer demand and the state of technology.

“It’s always been a long-term outlook that requires a shorter-term look at where the market and economy is,” Glassman said.

In this case, the EPA said recent data shows consumers aren’t likely to buy enough electric or hybrid vehicles to enable states to meet the greenhouse gas standards because the cars cost too much and gasoline is priced low enough to spur them to purchase different types of vehicles.

Elise Paeffgen, a senior associate at Alston & Bird LLP, said it’s crucial for automakers to have the best data and regulations that reflect that information.

“This is an industry where regulatory certainty as early on as possible is important so that they can plan

the developments for those upcoming model years,” she said.

But there’s no guarantee gasoline prices will remain low, Steel said. He said that combined with the potential for litigation that ties up the standards in court for years, and the desire of many states to keep pushing for tougher tailpipe standards, manufacturers may be creating more problems for themselves by getting weaker standards now.

He also noted that the U.S. could lose its competitive edge in the electric and hybrid vehicle market if Europe and China proceed.

“I think the Chinese are probably going full steam ahead on this,” he said.

Environmental Concerns Not Exclusive to Activists

Environmental groups blasted the Trump EPA’s Monday withdrawal of the midterm review, saying weaker standards would imperil environmental quality and human health since greenhouse gases can cause serious health problems.

And on Tuesday, the attorneys general from Connecticut, Delaware, Iowa, Illinois, Massachusetts, Maryland, Maine, New Mexico, New York, Oregon, Virginia and Washington, D.C., as well as dozens of mayors from those and other states, declared their support for the Obama-era standards, citing the same reasons.

Even automakers didn’t want to appear insensitive to environmental concerns.

Bill Ford, executive chairman of the Ford Motor Co., and Jim Hackett, Ford’s president and CEO, said in a March 27 blog post: “We support increasing clean car standards through 2025 and are not asking for a rollback.”

They endorsed the idea of a national standard but also said the company believes the U.S. must deliver on carbon dioxide reductions consistent with the Paris Climate Accord — which Trump has disavowed, with Pruitt’s support.

And Toyota Motor North America Inc. spokeswoman Karen Nielsen said the company supports the goal of progressively stronger fuel economy standards and reductions in greenhouse gas emissions.

“We are an industry leader in developing and deploying advanced powertrain technology vehicles — including hybrid, plug-in hybrid and fuel-cell electric vehicles — that significantly reduce emissions or even emit zero greenhouse gases,” she said in a statement.

Nielsen said that by 2050, Toyota is aiming to have reduced CO2 emissions of its vehicles by 90 percent compared to 2010.

--Editing by Philip Shea and Breda Lund.