Legal Issues Pertaining to the Adoption of California Auto Emission Standards (Including GHG Standards) by Other States

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This memo briefly describes how other states can adopt California's auto emission standards under Section 177 of the Clean Air Act, including discussion of the impact of California's proposed regulations adding greenhouse gas ("GHG") limits to the current "LEV II" standards.

California's authority to set its own vehicle emission standards.

Section 209(a) of the Clean Air Act prohibits any state from establishing motor vehicle emission standards. However, Section 209(b) exempts California from this preemption, allowing it to adopt vehicle emission standards that are more stringent than the federal ones. (The current federal emissions standards are called the "Tier 2" standards.) When California does so, it must apply to EPA for a "waiver of preemption." EPA may deny this waiver only in very limited circumstances, and has never yet done so.

Which states can adopt California's automobile emission standards?

Section 177 of the Act allows any state that either (a) currently does not meet any of the National Ambient Air Quality Standards ("NAAQS"), or (b) was out of compliance but now meets a NAAQS, to adopt California's auto emission standards. NAAQS exist for six "criteria" pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, sulfur dioxide and particulate matter ("PM").[1]

Currently, almost every state is eligible to adopt California's standards, and even the eight that previously were not (Hawaii, Iowa, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma and South Dakota) may be eligible as a result of EPA's 2005 Clean Air Mercury Rule and Clean Air Interstate Rule. For purposes of this memo, "177 State" means any state that is eligible to adopt California's standards. As yet, 11 states have done so: Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington.

It is important to note that EPA approval is not needed for any 177 State to adopt California's standards. Furthermore, EPA regulations also allow auto dealers in any state that borders a 177 State that has adopted California standards to sell California-certified cars as well.

What are the air-quality benefits of adopting California's emission standards?

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[1] Specifically, Section 177 allows states with an approved State Implementation Plan ("SIP") – *i.e.,* a plan to achieve or maintain compliance with a NAAQS – to adopt California's standards. Vermont may also adopt California standards even though it is in attainment of all NAAQS because it is part of an "ozone transport region" established under Section 184 of the Act.

For a variety of technical reasons, there is no simple answer to this question, and results will vary depending on the composition of each state's vehicle fleet. However, these benefits can be estimated by looking at the analysis that was done for three states that have already adopted the LEV II standards, New York, Massachusetts and Vermont. The results ("HC" is hydrocarbons) are as follows:

Annual Emissions Benefits of the LEV II Program in 2020

State	HC reduced (tons)	% HC reduction Over Tier 2	Toxics reduced (tons)	% Toxics Reduction Over Tier 2
NY	10,020	15%	502	25% for each toxin
MA	3,300	17%	185	25% for each toxin
VT	510	14%	29	19% for each toxin
Total	13,830	Average reduction 15.3%	716	Average reduction 23%

May a 177 State adopt only a single California emission standard, e.g., for NOx or GHGs?

No. A 177 State must adopt *all* of California's emissions standards as a package. Section 177 is based on the idea that automakers will not have to cope with more than two sets of emissions standards, *i.e.,* federal standards and California standards. If a 177 State were to adopt California's NOx standard but not the rest of the California standards, this would result in what Section 177 calls a "third vehicle", a car which would have to meet California's standards for some pollutants, but federal standards as to other ones. Section 177 guarantees the automakers that they will not have to meet more than two regulatory regimes by explicitly prohibiting any requirements that result in such "third vehicles".

What happens if California changes it standards?

177 States have two choices when adopting California standards. They can either adopt them with a citation to the appropriate part of the California Code of Regulations ("CCR"), or adopt them via a cite to the CCR as of a specific date. In the first case, the 177 state's regulations will automatically incorporate any changes standards in the California regulations. In the second, the state would have to administratively or legislatively adopt each set of revised standards in order to remain "identical to" the California standards. If it failed to do so, it would automatically revert to the federal standards.

What is the status of California's Greenhouse Gas ("GHG") standards?

On December 27, 2005, the California Air Resources Board ("CARB") submitted its proposed GHG regulations to EPA for review under Section 209(b) of the Clean Air Act. Although the regulations contemplate becoming effective as of Model Year 2009, that date is not feasible; Model Year 2009 begins on January 2, 2008, and EPA will not decide whether to grant the waiver until the end of 2007. Moreover, whatever EPA's decision is, it will almost certainly be appealed to the U.S. Court of Appeals for the District of Columbia Circuit. Unlike previous regulations, the auto industry maintains that the GHG regulations are illegal and will not comply with them until EPA -- or the D.C. Circuit -- approves them. In addition, claiming that they are preempted by the Energy Policy and Conservation Act, (the federal fuel economy statute) the auto industry has challenged the regulations in federal courts in California as well as two 177 states that have adopted them, Rhode Island and Vermont. Trial in the Vermont case ended on May 8, 2007, and on September 12, 2007, the Court ruled that the regulations were not preempted by EPCA.

May a 177 State adopt California's emissions standards, but not the Zero Emission Vehicle ("ZEV") sales mandate?

Legally, the answer is probably not, because two courts have held that the ZEV sales mandate is an "emission standard" under Section 177; as such, a state must adopt it along with the rest of California's standards. *AAMA VI*, 208 F.3d 1, 6-7 (1st Cir. 2000); *MVMA VII*, 152 F.2d 196, 200-201 (2d Cir. 1998). As a practical matter, however, EPA has taken the position that a state can adopt California's standards without the ZEV mandate (60 FR 4728-29), and some 177 States (e.g., Vermont prior to 2004, and Maine) have done so. The auto industry has not been willing to sue these states for excluding the ZEV sales mandate, and environmental groups are unwilling to risk losing the LEV II standards on the basis that they are incomplete without the ZEV mandate. It is also difficult to imagine how the auto industry could show how they are injured (necessary for Constitutional standing purposes) by the absence of the ZEV mandate.

May a 177 State adopt California's emissions standards, but without the "fleet average" provision?

Certain LEV II standards (*e.g.,* the "NMOG" standard covering non-methane hydrocarbons) are set in the form of a sales-weighted average to be met across a manufacturer's entire fleet, and it is clear that a 177 State may adopt these fleet average standards. The question is whether a 177 State may ignore the fleet average and simply elect to require that any vehicle sold within its borders must be a vehicle certified for sale in California. This approach may be more attractive in states that have a significantly different mix of vehicle models than California, and it is also the easiest statute to implement and administer.

States have done both; for example, Massachusetts did not adopt the NMOG fleet average, but New York did. Adopting LEV II standards without

California's fleet averaging provisions probably violates Section 177's requirement that a 177 State adopt standards "identical" to California's[2], although it is highly unlikely that either side would litigate this issue. On the other hand, the auto industry has grumbled about other states adopting a California fleet average, on the grounds that CARB established the fleet average figure for the California vehicle market, and requiring auto makers to meet this same figure in markets that are both smaller and demographically different from California is unfair. Most recently, when Vermont revised its standards in 2005 to include the California greenhouse gas limits, the auto industry sued and claimed -- among other things -- that for these reasons the GHG fleet average violated Section 177. However, the industry dropped this claim during the course of the litigation.

May a 177 State adopt California's emissions standards for one class of vehicles but not another?

There are several sets of LEV II standards, one for passenger cars and "light" light duty trucks (up to 3,750 lbs), one for "medium light duty" trucks (3,751-8,500 lbs) medium duty trucks (8,501-10,000 lbs) and heavier medium duty trucks (10,001-14,000 lbs). (NB: Terminology about truck weight classes can be confusing; the best way to refer to these standards is by the actual weight figures.)

Some states have just adopted the passenger car/LDT standards up to 8,500 lbs (e.g., Connecticut, New Jersey); others (Massachusetts, Maine and Vermont) have adopted all of them. The issue has never been litigated, and it would appear that the automakers do not object to a state not adopting the heavier set of standards.

May a 177 State permit, but not mandate, California-certified vehicles?

Yes, but the air-quality benefits will be almost impossible to predict, and thus the state will almost certainly not get any SIP credits from EPA for doing so.

May the 9 states that agreed not to adopt California standards as part of the National Low Emission Vehicle Program now adopt the LEV II standards?

Yes. These nine states (Connecticut, Delaware, Pennsylvania, Maryland, New Hampshire, New Jersey, Rhode Island, Virginia and the District of Columbia) agreed to forebear adopting California standards only through Model Year 2006 (63 Fed. Reg. 931 (January 7, 1998)). They are free to adopt LEV II for any later model year, and five of them (Connecticut, New Jersey, Maryland,

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[2] While this issue has not been litigated, this conclusion follows from the reasoning that both the First and Second Circuits used to decide that the ZEV sales mandate is an emission standard that 177 States are required to adopt. *MVMA VII*, 152 F.2d at 200; *AAMA V*, 163 F.3d at 84; *AAMA VI*, 208 F.3d at 7.

Pennsylvania and Rhode Island) have already done so. The Connecticut and Rhode Island programs are scheduled to be in effect as of Model Year 2008, New Jersey as of MY 2009, and Maryland and Pennsylvania in MY 2011.

When may a 177 State adopt California standards?

177 States may adopt California's emission standards as soon as the California Air Resources Board ("CARB") promulgates them. However, Section 177's "leadtime" requirement bars states from enforcing such standards until Model Years beginning two years after the date of adoption. *MVMA III*, 17 F.3d 521, 533-534 (2d Cir. 1994).

"Model year" has a specific technical meaning under Section 177; a given model year actually begins on January 2 of the *previous* calendar year. In other words, in order for a 177 State to adopt California standards for model year 2009, the 177 State must adopt those standards 2 years before January 2, 2008, in other words before January 2, 2006. 40 C.F.R. 85.2301-2304.

In which 177 States does current law already authorize adoption of California's standards? In which would additional legislation be needed?

State statutes range from those requiring the state's executive branch to adopt California standards, to laws permitting adoption, to laws forbidding any such action without new legislation. Below are examples of five different approaches: mandating adoption, specifically authorizing adoption, generally permitting adoption, permitting it under certain circumstances, and prohibiting adopting.

a. Mandatory adoption

Massachusetts law (Mass. Gen. Laws c. 111 s. 142K), mandates that the state Department of Environmental Protection:

> adopt motor vehicle emissions standards based on the California's duly promulgated motor vehicle emissions standards of the state of California unless, after a public hearing, the department establishes, based on substantial evidence, that said emissions standards and a compliance program similar to the state of California's will not achieve, in the aggregate, greater motor vehicle pollution reductions than the federal standards and compliance program for any such model year.

Likewise, **Connecticut** law (2004 Conn. Pub. Acts. 84) requires "the Commissioner of Environmental Protection … to implement the light duty motor vehicles emissions standards of the state of California."

b. Specifically authorizing adoption

Other states have specifically "authorized" their environmental agencies to opt-in to the California programs. In **Maine**, for example, the legislature stated that the "Board may adopt and enforce standards that meet the requirements of the federal Clean Air Act, Section 177." 38 Maine Rev. Stat. Ann. 585-D. Maine then used this authority in adopting LEV II.

c. Permitting adoption

Most states have delegated broad authority to the state environmental agency that would allow the agency to adopt the California standards. For example, **Alabama** law provides ADEM (here referred to as "the commission") with such authority:

> As the state of knowledge and technology relating to the control of emissions from motor vehicles may permit or make appropriate, and in furtherance of the purposes of this chapter, the commission may provide by rules and regulations for the control of emissions from any class or classes of motor vehicles. Al. Code 22-28-12(a).

It is worth noting that several states that have adopted LEV II administratively have used such broad statutory authorization. For example, **Vermont** DEQ adopted LEV under a law providing that DEQ "may provide rules for the control of emissions from motor vehicles." 10 Vermont Stat. Ann. § 567.

Delaware law gives DENREQ extremely broad authority to adopt auto emission standards, and new legislation would not be needed (Del. C. Title 7, § 6703):

> The Department shall have the power to formulate and promulgate, amend and repeal codes, rules and regulations establishing standards and requirements for the control of air contaminants from motor vehicles.

North Carolina authorizes the Environmental Management Commission "to adopt motor vehicle emission standards" (NC Gen. Stat. 143-215.107(a)(6). (N.B.: it is possible to read this authorization as only applying to "standards" used in connection with a vehicle inspection and maintenance program.)

South Carolina appears to give very broad authority to DHEC, which "shall develop and enforce standards as may be necessary governing emissions or discharges into the air, streams, lakes, or coastal waters of the State, including waste water discharges." SC Code 48-1-100(B). While this does not explicitly reference motor vehicle emissions, presumably such emissions are included within "emissions . . . into the air."

Mississippi's statutory language is similar to South Carolina's; the Commission on Environmental Quality may "adopt, modify or repeal and promulgate . . . emission standards for the state under such conditions as the commission may prescribe for the prevention, control and abatement of pollution." Miss. Code Title 17, § 49-17-17(h).

d. Permitting adoption in certain circumstances

Rhode Island takes the approach of generally empowering its agencies to adopt "regulations . . . relating to emission standards for new motor vehicles and new motor vehicle engines" and requires that such regulations "shall not be more stringent than the mandatory standards established by federal law or regulation." However, the agency is specifically empowered to go beyond the federal standard if "the regulations are needed for the attainment or maintenance of air quality standards." RI Gen. Laws 23-23-5 (22). Such a determination was used when Rhode Island adopted the original LEV program and LEV II standards.

e. Prohibiting adoption

Georgia law (Ga. Code 12-9-46(a)(3)) provides that the state Natural Resources Board may "prescribe by rule or regulation emission standards or emission limitations limiting the amounts of allowable exhaust emissions of hydrocarbons, nitrogen oxides, and carbon monoxide and evaporative emissions of hydrocarbons from responsible motor vehicles as defined in this article." Nevertheless:

> In no event shall the emission limitations be stricter than those required by the USEPA pursuant to the federal Clean Air Act, as amended, for the particular vehicle to which such limitations apply.

In other words, forget it.

Louisiana has a similar statute (RS 30:2054(B)(8)), which authorizes DEQ:

> To establish and implement a program for the control and abatement of motor vehicle emissions in accordance with R.S. 30:2060 and other applicable state and federal laws, particularly the Clean Air Act as amended, but not to exceed the requirements provided in such Act unless specifically authorized.

In 2003, the **New Hampshire** legislature removed the ability of the Department of Environmental Services to adopt LEV II or any other California auto emissions regulations without specific legislation; New Hampshire state agencies are not permitted to "propose or adopt a rule . . . that incorporates by reference any code, rule, or document from another state government without

specific authority in the authorizing legislation or specific legislative approval for such a rule." New Hampshire Revised Statutes Annotated 541-A:3-b.

Virginia law (Virginia Code Title 10.1 §1307(b)) limits the State Air Pollution Control Board to adopting only certain authorized measures, which in turn are limited to I/M standards. Virginia Code Title 46.2 §§ 1176 et seq.