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THE SAFE VEHICLES RULE: HOW THE TRUMP ADMINISTRATION'S COURSE CHANGE ON VEHICLE EMISSIONS REFLECTS A LARGER POLICY SHIFT AWAY FROM ENVIRONMENTALLY FRIENDLY REGULATIONS

*Meghan Claiborne**

“[A] stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress.”¹

In his first two years as President, Donald J. Trump has focused on a systematic dismantling of the American regulatory framework, with environmental regulations coming under particularly fierce attack. This article reviews the President’s recent withdrawal and replacement of fuel emissions regulations, and how this decision represents a more general adoption by the Trump Administration of the antiquated notion that economic prosperity and environmental regulation cannot exist harmoniously in modern society.

On August 2, 2018, just shy of the one-year anniversary of the Trump Administration’s withdrawal of the United States from the Paris Climate Accord,² the U.S. Environmental Protection Agency (EPA) and U.S. Department of Transportation’s National Highway Traffic Safety Administration (NHTSA) released a notice of proposed rulemaking—the Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule).³ The purpose of the SAFE Vehicles Rule is “to correct the national automobile fuel economy and greenhouse gas emissions standards to give the American people greater access to safer, more affordable vehicles that are cleaner for the environment.”⁴ The direct effect of the proposed rule is to scrap Obama-era standards that were put in place to gradually raise average fuel economy for passenger cars and light trucks under test conditions from 37 miles per gallon in 2020 to 50 miles per

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¹ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *Motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017) (internal quotations omitted).

² U.S. DEP’T. OF STATE, *Communication Regarding Intent to Withdraw from Paris Agreement* (August 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>.

³ EPA, *U.S. EPA and DOT Propose Fuel Economy Standards for MY 2021–2026 Vehicles* (Nov. 11, 2018), <https://www.epa.gov/newsreleases/us-epa-and-dot-propose-fuel-economy-standards-my-2021-2026-vehicles>.

⁴ *Id.*

gallon in 2025.⁵ By contrast, the new SAFE Vehicles Rule freezes the average fuel economy level standards indefinitely at the 2020 levels.⁶

To understand the full impact of this proposed rule requires going back to 1970 with the passage of the Clean Air Act of 1970 (the “Act”).⁷ The Act established, for the first time, a national system of air quality standards and represented a major shift in the collective view away from the previous misconception that environmental protection and economic success could not be compatible. Paul G. Rogers, Chair of the House Subcommittee on Health and the Environment during the Act deliberations, characterized the Act as a signal from Congress in its “firm belief that economic growth and a clean environment are not mutually exclusive goals.”⁸

Another significant effect of the Act was the granting to California of the right to seek a waiver of federal air quality standards to enact its own, stricter standards—a hard fought for exception that recognized California’s ongoing battle with dire environmental issues and previously enacted pollution regulations. This right to seek an amendment, which was later expanded to apply to other states in 1977, is currently codified as 42 U.S.C. § 7543.⁹

Fast forward to 2007 and the passage of the Energy Independence and Security Act of 2007 which required the Department of Transportation (DOT) to set corporate average fuel economy (CAFE) standards at a “maximum feasible level” for new cars and trucks.¹⁰ The new CAFE standards, finalized in October 2012, steadily increased the average fuel efficiency requirements for new passenger vehicles for model years 2017-2025.¹¹ The CAFE increases were split into two phases: the first phase included final standards for model years 2017-2021 to increase fuel efficiency standards to 37 miles per gallon. The second phase set “augural” standards for model years 2022-2025 to increase fuel efficiency from 37 to 54.5 miles per gallon, and was to be finalized in future

⁵ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 165, 42988 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pt. 85 and 86) available at <https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-16820.pdf>.

⁶ *Id.*

⁷ Paul Rogers, *EPA History: The Clean Air Act of 1970*, EPA JOURNAL, (January/February 1990) <https://archive.epa.gov/epa/aboutepa/epa-history-clean-air-act-1970.html>.

⁸ *Id.*

⁹ 42 U.S.C. § 7543 (West).

¹⁰ 49 U.S.C. § 32902 (West).

¹¹ 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 199 (Oct. 15, 2012) (to be codified at 40 C.F.R. Pt. 85, 86, and 600), available at <https://www.gpo.gov/fdsys/pkg/FR-2012-10-15/pdf/2012-21972.pdf>.

rulemaking.¹² The CAFE standards were part of a coordinated effort between NHTSA and the EPA specifically requested by the Obama Administration (the “National Program”) to “respond to the country’s critical need to address global climate change and to reduce oil consumption”.¹³ As part of the National Program, the EPA was to set greenhouse gas emissions standards for model years 2017-2025 consistent with both phases of CAFE standards to allow automobile manufacturers to “continue building a single light-duty national fleet that satisfies all requirements under both programs.”¹⁴

The EPA and NHTSA, along with the California Air Resources Board (CARB)—responsible for promulgating California’s stricter regulations pursuant to California’s Act waiver—agreed to conduct a midterm review by 2018 to assess whether second phase augural standards for model years 2022-2025 needed to be adjusted. On January 13, 2017, during the final week of the Obama Administration, the EPA, DOT, NHTSA and CARB issued a final determination following the midterm review (the “Final Determination”).¹⁵ By the EPA’s own estimates in the Final Determination, the CAFE phase two augural standards were projected to reduce major greenhouse gas emissions by 540 million metric tons, reduce American oil consumption by 1.2 billion barrels and save consumers nearly \$100 billion in fuel costs.¹⁶ The EPA further found that the existing model years 2022-2025 standards would “have no adverse impact on automobile safety.”¹⁷ The EPA concluded that the phase two CAFE standards were reasonable, feasible for automakers to meet and would go into force without modification.¹⁸

On February 21, 2017, in response to the Obama Administration’s Final Determination, the Auto Alliance sent a letter to Scott Pruitt, then-Administrator of the EPA, requesting the EPA to withdraw the Final Determination for a number of reasons, including because “[i]f left unchanged, [the CAFE phase

¹² *Id.* at 62624.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Final Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation*, EPA (January 13, 2017), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100QQ91.PDF?Dockey=P100QQ91.PDF>.

¹⁶ *Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022–2025*, EPA (July 2016), available at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/draft-tar-final.pdf>.

¹⁷ *Id.* at ES-4.

¹⁸ *Id.* at p.29.

two] standards could cause up to *1.1 million* Americans to lose jobs due to lost vehicle sales.”¹⁹

Shortly thereafter, on March 22, 2017, the EPA issued a Notice of Intention to reconsider the Final Determination of the phase two CAFE standards,²⁰ and on April 13, 2018 the EPA withdrew the Obama Administration’s Final Determination in favor of resuming the midterm evaluation.²¹ California, along with 16 other states and the District of Columbia, filed suit in the United State Court of Appeal for the District of Columbia seeking to set aside the EPA’s withdrawal of the Final Determination.²² This litigation is currently ongoing.

This brings us back to August 2, 2018 when, following the withdrawal of the Final Determination and recommencement of the CAFE midterm review, the Trump Administration, via the EPA and NHTSA, proposed the SAFE Vehicles rule that freezes fuel efficiency standards at roughly 37 miles per gallon through at least 2026. In doing so, just 20 months after the issuance of the Final Determination, the EPA flipped its position and declared the prior-phase two CAFE standards “no longer appropriate” or “reasonable.”²³

The EPA estimates that the freezing of fuel efficiency standards under the SAFE Vehicles rule will reduce “societal costs”—including costs to auto manufacturers of improving technology—by over half a trillion dollars and will reduce highway fatalities by 12,700 lives through model year 2029.^{24,25} The EPA concedes, however, that under the proposed rule “U.S. fuel consumption would increase by about half a million barrels per day (2–3 percent of total daily consumption, according to the Energy Information Administration).”²⁶ The EPA

¹⁹ Letter from M. Bainwol, President and CEO, Auto Alliance, to G. Scott Pruitt, Administrator, Environmental Protection Agency (Feb. 21, 2017), *available at* <https://autoalliance.org/wp-content/uploads/2017/02/Letter-to-EPA-Admin.-Pruitt-Feb.-21-2016-Signed.pdf>.

²⁰ Notice of Intention To Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles, 82 Fed. Reg. 54 (March 22, 2017), *available at* <https://www.govinfo.gov/content/pkg/FR-2017-03-22/pdf/2017-05316.pdf>.

²¹ Notice of Withdrawal of Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 72 (April 13, 2018), *available at* <https://www.govinfo.gov/content/pkg/FR-2018-04-13/pdf/2018-07364.pdf>.

²² Case Nos. 18-1114(L), 18-1118(Con.), 18-1139(Con.), 18-1162(Con.) (D. Col. Cir.).

²³ SAFE Vehicles Rule, 83 Fed. Reg. 165, at 42986.

²⁴ *Id.*

²⁵ *Id.* at 42,995. The basis for the reduction in fatalities under the proposed rule is “improved fleet turnover as more consumers will be able to afford newer and safer vehicles” because technology costs will be reduced with lower fuel efficiency requirements. Other safety benefits would come from “avoiding the increased driving that would otherwise result from higher fuel efficiency”—in other words consumers will drive less with higher consumption cars, and thus there will be fewer overall fatalities.

²⁶ *Id.*

Assistant Administrator, Bill Wehrum, admitted that “[i]f we lock in the 2020 standards, we’re not getting as much emissions reductions as we otherwise would, and that translates into incrementally less protection of health and the environment.”²⁷

Significantly, the SAFE Vehicles rule also revokes the right of California and other allied states to seek waivers under the Act to set their own standards on the grounds that such waivers impermissibly conflict with the Energy Policy Conservation Act—a 1975 law passed in response to the then-existing energy crisis that gives the DOT the sole power to set standards “relating to fuel economy.” Notably, the Trump Administration’s argument is not novel, but rather was already unsuccessfully employed by the auto industry when it attempted to challenge individual states’ right to set independent rules in two different federal courts in 2007.²⁸ The argument was rejected by both courts.

The impact of the SAFE Vehicles rule far exceeds fuel emissions—it is a deliberate effort by the Trump Administration to undermine 50 years of collaborative efforts between federal and state governments and private companies to encourage environmentally conscious technological innovations. More broadly, this proposed rule is another concrete example of the Trump Administration’s decision to disregard the health and safety of future generations by abandoning 50 years of working towards pro-environment regulations and legislation in favor of limited, temporary economic gains.

The SAFE Vehicles Rule slashes incentives for automakers to increase fuel efficiency, especially in a market of low gas prices when higher-fuel consumption vehicles such as SUVs remain popular. It also hamstring individual states like California that have for almost 50 years been free to set their own, more stringent environmental standards as seen fit by those local governments. A Brookings Institute analysis of the SAFE Vehicles rule found that it would “needlessly upend a settled regulatory framework that has brought together disparate interests, delivered predictability to automakers, improved cars, and reduced pollution.”²⁹

²⁷ Evan Halper, et al., *California vows to fight Trump EPA’s move to freeze fuel economy rules*, LA TIMES (Aug. 2, 2018), <http://www.latimes.com/politics/la-na-pol-trump-fuel-economy-20180802-story.html>.

²⁸ *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

²⁹ Shoshana Lew and Jason S. Miller, *The Trump administration’s fuel-efficiency proposal is unnecessary and harmful*, THE BROOKINGS INSTITUTE (Aug. 3, 2018), <https://www.brookings.edu/blog/the-avenue/2018/08/03/the-trump-administrations-fuel-efficiency-proposal-is-unnecessary-and-harmful/>.

Not surprisingly, the EPA’s cost/benefit calculations under the SAFE Vehicles Rule have been widely called into question. In a joint article, Dan Sperling, Distinguished Blue Planet Prize Professor of Engineering and Environmental Science at the University of California, Davis, along with Nit Lutsey, Director of U.S. Policy and Electric Vehicle Research at the International Council on Clean Transportation, concluded that the EPA’s argument that increased vehicle prices associated with stricter CAFE standards would induce people to hold onto vehicles longer—thus leading to more crashes as a result of the increased number of older, less-safe vehicles on the road—is flawed.³⁰ The pair argued that despite increased efficiency standards having been implemented around the globe for years, there is no evidence of any such effect.³¹ They also argue that the SAFE Vehicles Rule will result in the loss of \$130 billion in fuel savings to the American public, as well as an increase in the climate-causing emissions by over 870 million tons of carbon dioxide.³² Antonio M. Bento, a professor of public policy and economics at the University of Southern California whose research is cited throughout the proposed SAFE Vehicles rule, similarly stated that “I don’t know how they are going to defend this analysis. . . . I just don’t think it’s correct.”³³ Even the EPA’s new Administrator, Andrew K. Wheeler, is said to have “sharply questioned the auto fatality numbers” and expressed concern that the rollback of emissions standards rules “might be vulnerable in court.”³⁴

The notice and comment period for the proposed SAFE Vehicles rule ended on October 26, 2018. In the days leading up to this, President Trump repeatedly offered unsupported criticism of scientific evidence of the detrimental effect of manmade greenhouse emissions on climate change. Concurrently, President Trump reinforced his position that he would not risk short-term revenue decreases or job losses for the sake of pro-environment regulations or international agreements.

For example, on October 14, 2018, President Trump conceded in an interview with 60 Minutes that global warming is not a hoax, but argued, without support, that while “[s]omething’s changing it’ll change back again. . . . But I

³⁰ Nic Lutsey and Dan Sperling, *Trying To Make Sense Of Trump’s Rollback Of Vehicle Standards*, FORBES (Aug. 2, 2018), <https://www.forbes.com/sites/danielsperling/2018/08/02/trying-to-make-sense-of-trumps-rollback-of-vehicle-standards/#46b77471e71a>.

³¹ *Id.*

³² *Id.*

³³ Brad Plumer, *Trump Officials Link Fuel Economy Rules to Deadly Crashes. Experts Are Skeptical*, NY TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/climate/trump-fuel-economy.html>.

³⁴ Coral Davenport, *Top Trump Officials Clash Over Plan to Let Cars Pollute More*, NY TIMES (Jul. 27, 2018), <https://www.nytimes.com/2018/07/27/climate/trump-auto-pollution-rollback.html>.

don't know that it's manmade. I will say this. I don't wanna [sic] give trillions and trillions of dollars. I don't wanna lose millions and millions of jobs. I don't wanna [sic] be put at a disadvantage.”³⁵

Two days later, on October 16, 2018, President Trump gave an interview with several AP White House reporters in which he dubbed himself as “truly an environmentalist,” but not at the expense of jobs for the country.³⁶ President Trump expressed distrust for previous environmental agreements—presumably such as the Paris Accord—accusing counterpart countries of simply trying to obtain an “economic advantage” and explaining that the United States “would have been at a tremendous economic disadvantage if we entered into certain agreement.”³⁷

If the President's actions and words have left any room for doubt on his Administration's stance as to pro-environmental regulations, on October 18, 2018, Donald J. Trump, in his official capacity, along with other officials, filed a Writ of Mandamus with the Supreme Court in the litigation initiated in 2015 by 21 youth plaintiffs asserting the government's affirmative actions in causing climate change violate plaintiffs' due process rights, the Fifth Amendment's equal protection principles, unenumerated rights preserved under the Ninth Amendment and the Public Trust Doctrine.³⁸ In the Writ, President Trump, *et al.*, specifically urged the Court to make the determination that there exists no fundamental right to “*a climate system capable of sustaining human life*.”³⁹

In sum, the Trump Administration has abandoned any duty owed to future generations of Americans to leave behind a regulatory framework capable of withstanding the reality of world in which we live. The withdrawal of the CAFE phase two standards in favor of the SAFER Vehicles rule is but one example in a long list of regulatory changes over the past two years that threatens the sustainability of the United States. Even if the resulting damage is not immediate, it is undeniably real, and the Trump Administration does a disservice to the American people, both present and future, by ignoring it.

³⁵ *President Trump on Christine Blasey Ford, his relationships with Vladimir Putin and Kim Jong Un and more*, CBS NEWS (Oct. 15, 2018), last visited Nov. 11, 2018, video and transcript available at <https://www.cbsnews.com/news/donald-trump-full-interview-60-minutes-transcript-lesley-stahl-2018-10-14/>.

³⁶ *Read the transcript of AP's interview with President Trump*, AP NEWS (Oct. 17, 2017), last visited Nov. 11, 2018, <https://www.apnews.com/a28cc17d27524050b37f4d91e087955e>.

³⁷ *Id.*

³⁸ *Juliana v. U.S.*, 15-01517, Dkt. 1 (Aug. 12, 2015), available at <https://www.courtlistener.com/recap/gov.uscourts.ord.123110/gov.uscourts.ord.123110.1.0.pdf>.

³⁹ *In re United States of America, et al.*, No. 18-505, Petition For a Writ of Mandamus (October 18, 2018), available at https://www.supremecourt.gov/DocketPDF/18/18-505/67251/20181017183026537_In%20re%20United%20States%20-%20-%20Petition%20for%20Mandamus.pdf.