

US-Calif. Emission Talks Breakdown Could Spark Legal War

By **Juan Carlos Rodriguez**

Law360 (February 21, 2019, 9:19 PM EST) -- The Trump administration on Thursday dramatically ended negotiations with California over a controversial proposal to roll back greenhouse gas emissions standards for automobiles and revoke the Golden State's special permission to craft its own limits, setting the stage for an imminent legal battle royale.

The California Air Resources Board, the U.S. Environmental Protection Agency and the National Highway Traffic Safety Administration had been in talks over the federal agencies' decision to weaken emissions standards, which could result in two sets of limits — one for California and the dozen or so other states that use its regulations, and another for the rest of the country.

Automakers had been furiously lobbying both sides to come to an agreement for one national standard, but the White House said Thursday the negotiations were going nowhere.

"Despite the administration's best efforts to reach a common-sense solution, it is time to acknowledge that CARB has failed to put forward a productive alternative since the SAFE Vehicles Rule was proposed," the White House said in a statement.

It said the EPA and NHTSA will proceed toward finalizing the Safer Affordable Fuel-Efficient Vehicles Rule, likely freezing emissions standards for model year 2022 to 2026 vehicles and rejecting a 2012 Obama administration rule that mandated increased efficiency through 2025. The rule would also likely revoke the EPA's waiver issued to California allowing it to set its own emissions standards.

In separate statements, CARB Chair Mary Nichols and state Attorney General Xavier Becerra defended the state's position in negotiations, slammed the administration's move and promised to fight.

"Despite our best efforts to suggest ways the current rules could be updated to give more flexibility and reduce compliance costs, the Trump administration continues with standards that fly in the face of science, logic and any effort to protect public health," Nichols said in a statement.

Becerra said California and other states "are prepared to defend" the state's standards.

The SAFE Vehicles Rule was unveiled in August and reflected the administration's belief that the Obama-era standards were too strict and that California should not be able to craft its own greenhouse gas regulations. The rule proposed setting lower corporate average fuel economy, or CAFE, standards for

model year 2022 to 2026 light-duty vehicles, saying the Obama-era standards are no longer feasible for automakers to meet.

Negotiations never seemed likely to yield a compromise, as California consistently characterized the EPA's move as shirking its duty to protect human health and the environment, while federal officials made clear they do not believe one state should have the power to dictate emissions standards for the other 49.

Last fall, CARB adopted a new regulation mandating that automakers seeking to sell vehicles in the state must comply with the standards the state agreed to under the Obama administration, regardless of what the EPA does.

There is already a legal challenge in the D.C. Circuit to the EPA and NHTSA's decision to withdraw the Obama administration's midterm evaluation of the 2012 rule, which had determined that the greenhouse gas standards for model year 2022 to 2026 light-duty vehicles were still appropriate. That withdrawal paved the way for the SAFE Vehicles Rule.

Irene Gutierrez, an attorney at Natural Resources Defense Council who is representing the group in that case, said the administration and green groups are on another collision course.

"The administration's announcement confirms what folks have been speculating for months — that we're likely headed to litigation," Gutierrez said.

If the EPA finalizes an emissions rule along the lines of what it proposed, legal challenges will likely target the agency's basis for departing from the Obama-era standards as presented in the administrative record and the technological findings that underlie those findings, said Gary S. Guzy, senior of counsel at Covington & Burling LLP.

And of course, rule opponents would address the fundamental question of California's ability to set independent standards.

"The California waiver was established by Congress about 50 years ago so that would be quite extraordinary [if the agency revoked it]," Guzy said.

And Jeff Holmstead, a partner at Bracewell LLP, said challengers may also direct their fire to the EPA and NHTSA's findings of adverse effects stemming from higher emissions standards. The agencies have asserted that lowering the standards will mean the cost of vehicles will not rise as much, allowing more people to buy them, thus getting older, less safe cars and light trucks off the road, which in turn will save lives.

He also said there will be questions over whether the Energy Policy and Conservation Act, which authorizes the NHTSA to set CAFE standards, preempts California from having its own emissions standards.

"All this is going to be decided by the D.C. Circuit and the Supreme Court," Holmstead said. "I think these are very big issues; you're going to have states on both sides and major portions of U.S. industry on both sides."

It's also important to remember that the EPA hasn't issued California a waiver just for greenhouse gas

emissions, but also for a variety of other emissions-related issues such as nitrogen oxides and other pollutants, said Darrin Gambelin, counsel at Downey Brand LLP.

“If EPA does revoke California’s waiver, it could open up the floodgate for the agency if it wants to continue to roll back other standards,” Gambelin said. “This could be just the tip of the iceberg if they want to go that direction.”

--Additional reporting by Bonnie Eslinger. Editing by Philip Shea and Kelly Duncan.

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