NACAA
national association of clean air agencies

June 10, 2021

Docket Management Facility
M-30
Attention: Docket No. NHTSA-2021-0030
U.S. Department of Transportation
West Building
Ground Floor, Room W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the U.S. Department of Transportation's National Highway Traffic Safety Administration's (NHTSA) Notice of Proposed Rulemaking (NPRM), "Corporate Average Fuel Economy (CAFE) Preemption," which was published in the *Federal Register* on May 12, 2021 (86 Fed. Reg. 25,980).[1] NACAA is the national, nonpartisan, non-profit association of air pollution control agencies in 41 states, including 115 local air agencies, the District of Columbia and four territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

In this action, NHTSA proposes to fully and categorically repeal and withdraw the regulatory text and appendices of the September 27, 2019, "Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program" ("SAFE 1") (84 Fed. Reg. 51,310)[2] – a joint rulemaking by NHTSA and the U.S. Environmental Protection Agency – "in which NHTSA codified regulatory text and made additional pronouncements regarding the preemption of state and local laws related to fuel economy standards."

NHTSA proposes this action because, after conducting a comprehensive review of, and reconsidering, the actions it took in "SAFE 1," it has "significant concerns" and "substantial doubts" about whether "SAFE 1" was a proper exercise of its statutory authority regarding preemption under the Energy Policy and Conservation Act (EPCA). NHTSA is correct in arriving at these conclusions because it lacks the authority for its "SAFE 1" preemption rule and must take swift action to finalize this proposal.

For nearly half a century after EPCA was signed into law, NHTSA did not issue regulations directly defining the scope or effect of preemption established by Section 32919 of the law. NHTSA observes in its proposal that on "multiple occasions" throughout its history, the agency incorporated into its substantive analyses of CAFE standard rulemakings an assessment of state motor vehicle emission programs,

[1] https://www.govinfo.gov/content/pkg/FR-2021-05-12/pdf/2021-08758.pdf
[2] https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20672.pdf

including those of California, as part of its examination of the regulatory landscape and existing auto industry practices. But the 2019 "SAFE 1" Rule marked the first time that NHTSA codified regulations that expressly defined the scope of preemption for state emission standards.

The "SAFE 1" Rule improperly and significantly undermined reliance on California's authority. For California and states that implement California's motor vehicle emissions program under Section 177 of the federal Clean Air Act, their GHG and ZEV programs are vitally important. Such programs enable long-term planning and yield critical emission reductions that will contribute significantly to states' abilities to meet their climate goals and their statutory obligations to attain and maintain the health-based National Ambient Air Quality Standards (NAAQS) for criteria pollutants. It is also necessary to acknowledge that these programs, and the overall Advanced Clean Car program which embodies them, are important to many non-177 states, which benefit from the emission reductions and resulting critical public health benefits that accrue when California and Section 177 states lead the way.

In "SAFE 1," NHTSA sought to unreservedly prohibit the GHG and ZEV programs adopted by California and Section 177 states by declaring them preempted under EPCA. In the preamble to "SAFE 1," NHTSA described the provisions of its portion of the rule as "[making] explicit that State programs to limit or prohibit tailpipe GHG emissions or establish ZEV mandates are preempted"; made other statements highlighting its intent to "assert preemption"; and characterized the regulation as "implementing" a preemption requirement. For NHTSA to issue binding rules and speak with the force of law on preemption, as it did in "SAFE 1," it must possess authority – granted by Congress – to do so. However, neither EPCA nor any other statute authorizes NHTSA to adopt binding legislative rules that implement express preemption under EPCA. For that reason, NHTSA must repeal the "SAFE 1" action.

NHTSA also explains in its proposal that even if it did not have "significant concerns" and "substantial doubts" about the "infirm" authority upon which "SAFE 1" rests, repealing "SAFE 1" is an appropriate action because NHTSA no longer believes it is necessary to speak with the force and effect of law regarding matters of EPCA preemption and prefers instead to remain silent on these matters in its codified regulations. We agree that there was and is no need for NHTSA's "SAFE 1" action and that the action should be repealed on this ground, particularly given the federalism implications of NHTSA's action.

For these reasons, NHTSA must take swift action to finalize this proposal.

Finally, NHTSA's claims in "SAFE 1" of EPCA preemption have been flatly rejected by two federal courts.[3,4] Also compelling is the opinion of the U.S. Supreme Court in *Massachusetts v. EPA*: "But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities [with respect to the regulation of carbon dioxide]. EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U. S. C. §7521(a)(1), a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act, §2(5), 89 Stat. 874, 42 U. S. C. §6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[5]

[3] *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).
[4] *Cent. Valley Chrysler-Jeep Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).
[5] *Massachusetts v. EPA*, 549 U.S. 497, 29 (2007).

Thank you for the opportunity to comment on this very important and welcome action. If you have questions, please contact either of us or Nancy Kruger, Deputy Director of NACAA.

Sincerely,

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