

July 6, 2021

U.S. Environmental Protection Agency
Office of Transportation and Air Qualityvia *regulations.gov*

Re: California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Comment; Docket ID No. EPA-HQ-OAR-2021-0257

To Whom It May Concern:

The Southern Environmental Law Center (SELC) offers the following comments on the U.S. Environmental Protection Agency's (EPA's) reconsideration of its actions under *The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program* (SAFE-1 Rule). SELC is a non-profit, non-partisan organization working in six states—Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee—and at the federal level to promote clean water and healthy air, protect natural areas, and advance cleaner and more equitable transportation alternatives, smarter growth, and community revitalization while addressing our current climate crisis.

The SAFE-1 Rule promulgated during the Trump administration was fundamentally flawed. It is abundantly clear that EPA's withdrawal of California's 2013 Advanced Clean Car (ACC) program waiver was unlawful, and that California has the authority to adopt greenhouse gas (GHG) motor vehicle emission standards under Section 209(b)(1)(B) of the Clean Air Act. We agree with the strong case made by others against these actions, and they should be rescinded. Since Virginia passed legislation to adopt the ACC program under Section 177 of the Clean Air Act this year, and we were deeply involved in the effort to adopt this legislation, our comments will focus on EPA's improper interpretation of Section 177 in the SAFE-1 Rule, as well as the agency's impermissible expansion of its role under the provision to restrict the California motor vehicle emission standards that eligible states are permitted to adopt. This Final Action must be rescinded.

Eligible states have adopted California motor vehicle emission standards, including, more recently, GHG emission standards, under Section 177 since model year 1993.¹ The authority granted by Section 177 of the Clean Air Act to adopt more stringent tailpipe emissions standards is an important tool Congress gave to states to address motor vehicle emissions, and it aligns with the cooperative federalism structure of the regulation of motor vehicle emissions. Like states before it, Virginia made an individualized decision to adopt the ACC standards—which are currently more stringent than the federal tailpipe emission standards—because it determined that these standards are in the best interest of the Commonwealth's residents and environment. Adoption of these standards will help to decrease GHG and criteria air pollution in Virginia, improve public health, and provide economic and consumer benefits. There are also tremendous

¹ Cal. Air Res. Bd., *States that have Adopted California's Vehicle Standards under Section 177 of the Federal Clean Air Act* (Aug. 19, 2019), https://ww2.arb.ca.gov/sites/default/files/2019-10/ca_177_states.pdf.

opportunities for other states in the Southeast to utilize and benefit from the adoption of the California motor vehicle emission standards under Section 177 in the future.

I. EPA’s interpretation of Section 177 in the SAFE-1 Rule was improper and must be rescinded.

Under Section 177, states with State Implementation Plan (SIP) provisions approved under Part D of Subchapter I of the Clean Air Act are granted authority to “adopt and enforce for any model year standards relating to the control of emissions from new motor vehicles or new motor vehicle engines,” provided “such standards are identical to the California standards for which a waiver has been granted.”² In the SAFE-1 Rule, EPA chose to interpret Section 177 as only allowing for the adoption of the California motor vehicle emission standards that apply to criteria pollutants, based on its conclusion that SIP “nonattainment designations exist only as to criteria pollutants and [GHGs] are not criteria pollutants.”³ This interpretation, however, mistakenly conflates “nonattainment areas” and “nonattainment pollutants.” Section 177 establishes a threshold requirement for the *states* that may adopt the California motor vehicle emission standards, not the *pollutants* for which standards may be adopted. The provision contains no modifier for the word “standards” that suggests Congress intended to limit the adoption of standards in this way; instead, under a plain reading of the statute, the “standards” that may be adopted under Section 177 are the same “standards” for which a waiver has been granted under Section 209(b)(1).⁴

Furthermore, EPA has a very limited role under Section 177. Section 177 gives eligible states—not EPA—the binary choice of adopting the federal motor vehicle emission standards or the California motor vehicle emission standards. EPA plays no role in the implementation of the provision, and it is not required to approve eligible states’ adoption of the standards.⁵ Instead, states’ adoption of California tailpipe standards is subject only to the well-defined criteria in the statute: (1) California must have adopted the standards at least two years in advance of the first applicable model year; (2) EPA must have granted a waiver for such standards; and (3) the state must adopt the standards at least two years in advance of the first model year to which they apply.⁶ EPA’s sole, narrow role under Section 177 is establishing regulations to determine the applicable timeframe for model years.⁷

This division of roles and authority supports the cooperative federalism structure that underlies Sections 209 and 177. While EPA retains a one-time review of the California standards

² 42 U.S.C. § 7507.

³ 86 Fed. Reg. 22,421, 22,426 (Apr. 28, 2021).

⁴ Eligible states may adopt “any model year standards” if “such standards are identical to the California standards for which a [Section 209(b)(1)] waiver has been granted.” 42 U.S.C. § 7507.

⁵ “States are not required to seek EPA approval under the terms of [S]ection 177,” 77 Fed. Reg. 62,624, 62,637 n.54 (Oct. 15, 2012), and EPA does not “conduct a separate waiver proceeding for each state” that adopts standards under Section 177. *Ford Motor Co. v. U.S. Env’t Prot. Agency*, 606 F.2d 1293, 1298 (D.C. Cir. 1979).

⁶ 42 U.S.C. §§ 7507(1), (2).

⁷ “California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).” 42 U.S.C. § 7507. “Section 177 charges the EPA with the single, narrow responsibility to issue ‘regulations’ in order to define the commencement of a model year under § 177.” *Motor Vehicle Mfrs. Ass’n v. NYSDEC*, 17 F.3d 521, 535 (2d Cir. 1994).

during the wavier process (which itself is highly deferential⁸), Section 177 appropriately provides significant discretion to states to determine what is best for a particular state and its residents. The legislative history shows that Section 177 was adopted to address concerns that the Section 209(a) preemption of the adoption of state motor vehicle emissions standards unduly restricts important state interests, including the “legitimate police powers of States, . . . effective protection of public health, [and] . . . economic growth and employment opportunities in nonattainment areas for automotive pollutants.”⁹ As recognized in the structure of Section 177, individual states are in the best position to understand the policies and practices needed to protect and improve their environment, public health, and local economies. The SAFE-1 Rule ignores plain statutory language, legislative intent, and the lengthy history of cooperative federalism in air pollution regulation.

Finally, EPA’s interpretation of Section 177 in the SAFE-1 Rule also creates a “third vehicle” problem—a key concern for vehicle manufactures, and something the legislative history and plain language of the statute guard against. Section 177 establishes a binary choice between the federal and California motor vehicle emission standards, and explicitly provides that states are not authorized “to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a ‘third vehicle’) or otherwise create such a ‘third vehicle.’”¹⁰ The legislative history similarly reflects the view that Section 177 “should not place an undue burden on vehicle manufacturers who will be required, in any event, to produce vehicles meeting the California standards for sale in California.”¹¹ Cherry-picking which California motor vehicle emissions standards may or may not be adopted by eligible states, however, inherently creates a three-vehicle environment; there will be vehicles designed to meet the federal emissions standards, vehicles designed to meet the complete California emission standards, and vehicles designed to meet the SAFE-1 Rule-limited California emission standards that may be adopted under Section 177. This is contrary to the provision’s express prohibition against creating a “third vehicle.”

For these reasons, EPA’s interpretation of Section 177 in the SAFE-1 Rule was improper and must be rescinded.

II. Virginia and other states in SELC’s region illustrate the significant opportunities available to states that adopt standards under Section 177.

As discussed above, Section 177 provides eligible states with substantial autonomy in deciding which motor vehicle emission standards—the federal standards or California standards—are in the best interest of the state and its residents. Transportation emissions can have significant environmental and public health impacts, and these standards are an important

⁸ As EPA notes, “EPA has consistently interpreted Section 209(b) to require issuance of a waiver unless EPA finds that at least one of the three criteria is met,” which is different from most waiver proceedings that generally require EPA to make findings before granting a waiver. 86 Fed. Reg. at 22,423. “This reversal of the normal statutory structure embodies and is consistent with the congressional intent of providing deference to California to maintain its own new motor vehicle emissions program.” *Id.* at n.7.

⁹ H.R. Rep. 95-294, 209 (1977).

¹⁰ 42 U.S.C. § 7507.

¹¹ H.R. Rep. 95-294, 210.

tool available to states to help address and mitigate these impacts. Virginia’s recent adoption of the California ACC program highlights some of the important and compelling reasons states choose to adopt available emission standards,¹² and other states in the Southeast (none of which, to date, have adopted the ACC program) illustrate the significant opportunities that exist for states that may choose to adopt the California tailpipe standards in the future.

The transportation sector is the largest source of carbon dioxide (CO₂) emissions in most of the Southeast, and CO₂ emissions are a major driver of climate change.¹³ For example, the transportation sector produces 47% of Virginia’s CO₂ emissions,¹⁴ and about 70% of those emissions are from light-duty vehicles.¹⁵ Virginia—like all states in the Southeast—is already experiencing the impacts of climate change. The Hampton Roads region has one of the highest rates of sea level rise on the East Coast, with scientists predicting a rise of 1.5 to 2 feet by 2050.¹⁶ Extreme weather events—including heavy precipitation, high tides, storm surges, and heat waves—also continue to increase.¹⁷ Climate change has significant public health effects and hotter temperatures, which contribute to poor air quality, can exacerbate asthma and increase threats from infectious diseases.¹⁸ Virginia will also have to contend with significant economic costs associated with climate change. For example, projected reconstruction costs of homes in Virginia at risk from storm surge damage is \$92 billion dollars, and the Commonwealth will also have to make investments to ensure its existing and new infrastructure is resilient to a changing climate.¹⁹ Moreover, there is increasing evidence that the impacts of climate change are most likely to be felt by people of color and under-resourced communities. For these and many other reasons, Virginia has established a goal of net-zero GHG emissions across its economy, including the transportation sector, by 2045.²⁰

Since transportation is the leading source of CO₂ emissions in Virginia, a key part of reaching this goal will be addressing motor vehicle CO₂ emissions. In Virginia, adoption of the ACC program is estimated to reduce CO₂ emissions by approximately 48 million metric tons

¹² During the 2021 session, Virginia’s General Assembly passed legislation that requires the Virginia Air Pollution Control Board to adopt California’s Clean Car program. H.B. 1965 (Special Session 1, 2021). The law went into effect on July 1, 2021. Va. Code § 10.1-1307.04.

¹³ These CO₂ emission figures are based on 2018 emissions. U.S. Energy Info. Admin., *State Carbon Dioxide Emission Data Tables*, tbl. 4 (Mar. 2, 2021), <https://www.eia.gov/environment/emissions/state/>. The transportation sector is the largest source of CO₂ in every state in SELC’s region except for Alabama, where it is the second largest source. *Id.*

¹⁴ *Id.*

¹⁵ U.S. Env’t Prot. Agency, *2017 National Emissions Inventory (NEI) Data* (Jan. 2021), <https://www.epa.gov/air-emissions-inventories/2017-national-emissions-inventory-nei-data#datas>.

¹⁶ Nat’l Oceanic and Atmospheric Admin., U.S. Dep’t of Commerce, *Global and Regional Sea Level Rise Scenarios for the United States*, (2017), <https://bit.ly/2EUv033>.

¹⁷ Tom Steinfeld & Chris Coil, Georgetown Climate Ctr., and Hans-Peter Plag, Old Dominion Univ., *Understanding Virginia’s Vulnerability to Climate Change*, <https://www.georgetownclimate.org/files/report/understanding-virginias-vulnerability-to-climate-change.pdf> (last visited June 25, 2021).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Va. Code § 67-101(10).

though 2040.²¹ Similarly, addressing CO₂ pollution in other states in the Southeast will also mean tackling emissions from the transportation sector, and adoption of California’s tailpipe emission standards is one of the most direct ways states can reduce these emissions.

The adoption of the California motor vehicle emission standards also helps to reduce criteria pollutant emissions. Major metropolitan areas in the Southeast—like Washington, D.C., Atlanta, and Birmingham—often suffer from elevated concentrations of ozone, nitrogen oxides (NO_x), particulate matter (PM), and volatile organic compounds (VOCs), and these pollutants can have serious public health impacts.²² Further, studies show that low-income communities and communities of color are disproportionately impacted by transportation emissions.²³

In Virginia, adoption of the ACC program (including the GHG emission standards, which also help to reduce criteria pollutant emissions²⁴) are expected to reduce net cumulative emissions of PM_{2.5} by approximately 1,600 metric tons, NO_x by approximately 32,000 metric tons, and VOCs by approximately 36,000 metric tons, through 2040.²⁵ Further, the widespread transition to zero-emission vehicles by 2050, which would be aided by adoption of the zero emission vehicle standards that are part of the ACC program, is expected to yield more than \$1.3 billion in avoided annual health costs in Virginia—including costs of 115 premature deaths, more than 1,780 asthma attacks, and nearly 8,190 lost work days.²⁶ In many cases, similar or better avoided annual health costs have also been modeled in the Southeast with the adoption of zero-emission vehicles.²⁷

Adoption of the ACC program is also good for the economy and consumers. In addition to the economic benefits associated with reducing transportation emissions, adoption of the ACC

²¹ Va. Dep’t of Env’t Quality, *Clean Vehicles*, <https://www.deq.virginia.gov/air/clean-vehicles> (last visited June 28, 2021); Greenlink Analytics, *Pathways to Rapid Reductions in Virginia’s Transportation Emissions: Clean Car Standards* 8 (Jan. 22, 2021), https://www.georgetownclimate.org/files/report/Final_VA-Transportation-Policy-Phase1_01222021.pdf.

²² See Env’t Am., U.S. PIRG, & Frontier Grp., *Trouble in the Air: Millions of Americans Breathed Polluted Air in 2018* (Winter 2020), https://uspirg.org/sites/pirg/files/reports/EnvironmentAmerica_TroubleintheAir_scrn.pdf; Am. Lung Ass’n, *State of the Air* (2021), <https://www.lung.org/getmedia/17c6cb6c-8a38-42a7-a3b0-6744011da370/sota-2021.pdf>. For example, an estimated 750 premature deaths related to on-road vehicle emissions occurred in Virginia in 2016. *Transp., Equity, Climate & Health Project, Preliminary Results Slides*, <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2343/2020/10/TRECHPrelimResultsSlides.pdf> (last visited June 28, 2021).

²³ See e.g., Ctrs. for Disease Control & Prevention, *CDC Health Disparities and Inequality Report – United States, 2013*, 62 *Morbidity and Mortality Weekly Report* 3 (Nov. 22, 2013), <https://www.cdc.gov/mmwr/pdf/other/su6203.pdf>.

²⁴ See, e.g., 74 Fed. Reg. 32,774, 32,763 (July 8, 2009) (“There is a logical link between the local air pollution problem of ozone and California’s desire to reduce GHGs as one way to address the adverse impact that climate change may have on local ozone conditions . . . it would be appropriate to consider [California’s] GHG standards as designed in part to help address [the problem].”).

²⁵ Greenlink Analytics, *Pathways to Rapid Reductions in Virginia’s Transportation Emissions: Clean Car Standards* 11-13 (May 25, 2021), https://www.georgetownclimate.org/files/report/Final_VA-Transportation-Policy-Phase2_05212021.pdf.

²⁶ Am. Lung Ass’n, *The Road to Clean Air* 10 (Sept. 2020), <https://www.lung.org/getmedia/99cc945c-47f2-4ba9-ba59-14c311ca332a/electric-vehicle-report.pdf>. Even greater savings are estimated in other states in the Southeast.

²⁷ For example, Georgia could see almost \$1.7 billion in avoided annual health costs, including costs of 147 premature deaths, 2,665 asthma attacks, and over 12,200 lost work days. *Id.* North Carolina could see over \$1.6 billion in avoided annual health costs, including costs of 141 premature deaths, 2,384 asthma attacks, and over 10,000 lost work days. *Id.*

program is expected to result in cumulative net growth of over 29,000 jobs through 2040, with a total of approximately \$21 billion in net benefits over that same period in Virginia.²⁸ Adoption of the ACC program can also increase consumer choice. Automobile manufacturers have been primarily sending available electric vehicle inventory to states that have already adopted the ACC program. This means residents in the Southeast often do not have access to the full range of electric vehicles available on the market.²⁹ By adopting the ACC program, consumers in SELC's states will gain more access to electric vehicle inventory, and purchasing an electric vehicle can result in significant savings for buyers. Owning an electric vehicle saves the typical driver between \$6,000 and \$10,000 over the lifetime of the vehicle as compared to a gas car due to reduced fuel and maintenance costs.³⁰

III. Conclusion

The authority granted to states under Section 177 represents an important tool to address motor vehicle emissions, and states are in the best position to know which tailpipe standards—the federal standards or the California standards—are in the best interest of their residents and their environment. In the SAFE-1 Rule, EPA improperly interpreted Section 177 and impermissibly expanded its role under the provision to constrain states' ability to adopt the California motor vehicle emission standards. These actions seek to limit states' authority under Section 177 in ways that contravene the plain language of the statute and are not supported by the legislative history. This Final Action must be rescinded.

Sincerely,



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²⁸ Greenlink Analytics, *Pathways to Rapid Reductions in Virginia's Transportation Emissions: Clean Car Standards* 13, 14 (Jan. 22, 2021), https://www.georgetownclimate.org/files/report/Final_VA-Transportation-Policy-Phase1_01222021.pdf.

²⁹ See Connor Smith, Atlas Pub. Pol'y, *Transportation Electrification in the Southeast: State of Technology Deployment & Investment in Manufacturing* (Oct. 2020), <https://cleanenergy.org/wp-content/uploads/Transportation-Electrification-in-the-Southeast-2.pdf>.

³⁰ Consumer Reports, *Electric Vehicles Save Consumers Money* (Oct. 2020), <https://advocacy.consumerreports.org/wp-content/uploads/2020/10/EV-TCO-Overall-Fact-Sheet-FINAL-3.pdf>.