

## Calif. Bets On Biden With Move To End Gas Car Sales

By **Keith Goldberg**

*Law360 (September 24, 2020, 5:14 PM EDT)* -- California Gov. Gavin Newsom's executive order phasing out new gas-powered car sales further inflames a fight with the Trump administration over vehicle emissions policy and is a big bet on a potential Joe Biden presidency endorsing the Golden State's bold move, experts say.

California and the federal government are slugging it out in the D.C. Circuit over the revocation of the state's Clean Air Act waiver that allowed it to set its own vehicle emissions standards and run a zero-emission vehicle, or ZEV, program. Newsom on Wednesday reiterated California's defense of its CAA authority with his order directing the California Air Resources Board to craft regulations that lead to zero-emission vehicles making up all new car and light truck sales in the state by 2035.

California's first-in-the-nation policy would also require for ZEVs to make up all new in-state sales of medium- and heavy-duty vehicles, including trucks and buses, by 2045.

Experts say it's a policy shift that hinges on Biden defeating President Donald Trump in the November election, since there's no chance the Trump administration would reinstate California's CAA waiver or grant a new waiver for the state to carry out an even more ambitious vehicle emissions program than the one covered by the revoked waiver.

"California is acting in line with its legal interpretations and in defiance of the Trump administration's interpretations," said Caitlin McCoy, a staff attorney with Harvard Law School's Environmental and Energy Law Program. "The governor's order is a bet on either the courts agreeing with California or a potential Biden administration agreeing with California."

The ability for California to get waivers from the U.S. Environmental Protection Agency to deal with its specific air pollution problems was enshrined in the CAA when it was enacted. Phasing out sales of new non-ZEVs without a new CAA waiver would be legally risky, experts say.

"The question of whether the state can proceed without a waiver is I think a novel one: Does an engine ban 'relate to the control of emissions,' which is preempted by the Clean Air Act without a waiver?" UCLA environmental law professor Ann Carlson said. "There would certainly be a huge legal battle if the state proceeded without a waiver."

To get a new CAA waiver, California would have to convince the EPA that a 100% ZEV target is needed to

"meet compelling and extraordinary conditions" under Section 209 of the statute, said Crowell & Moring LLP counsel Amanda Shafer Berman.

"I think they have a good argument that given everything that's happening out there — the extraordinary, repeated fires observed for a couple years in a row now — they have those extraordinary and compelling conditions," said Berman, a former senior attorney with the environmental defense section of the U.S. Department of Justice's Environment and Natural Resources Division.

While Newsom clearly linked the 100% ZEV goal to reducing greenhouse gasses and combating climate change, experts say that leaning on reductions in conventional air pollutants might be a better path to securing a legally defensible CAA waiver.

"CARB would have to couch it as a [nitrogen oxide] or other [National Ambient Air Quality Standard] pollutant strategy," said Craig Moyer, who heads Manatt Phelps & Phillips LLP's energy and environmental practice. "They tee that issue up by reference to all the ozone reducing potential, but that is a pretty expensive way to support the rule."

A Biden EPA would likely grant California a new waiver, or at the very least reinstate the revoked waiver. That wouldn't be the case if Trump is reelected, given his hostility to climate change regulation and the legal war his administration is waging with California over vehicle emissions policy.

In revoking California's 2013 CAA waiver, the Trump administration argued that the Energy Policy and Conservation Act gives the U.S. Department of Transportation the right to set national fuel economy standards and preempts similar state programs. Several states have chosen to adopt California's standards and many of them have joined California in challenging the revocation.

The waiver revocation preceded the EPA and DOT rolling back Obama-era GHG standards and setting new national Corporate Average Fuel Economy, or CAFE, standards, which California and others have also challenged in the D.C. Circuit.

The EPA has never revoked a waiver from California and the state has told the D.C. Circuit that the move flies in the face of the EPCA, the CAA and the U.S. Supreme Court's landmark ruling in 2007's *Massachusetts v. EPA*, in which the justices said GHGs are an air pollutant under the CAA.

"If California wins its challenge to the revocation of the current waiver in the D.C. Circuit, it would significantly strengthen the state's request for a waiver for the 2035 ZEV policy," UCLA's Carlson said.

One might argue that the D.C. Circuit fight looms over California's plans to phase out new gas-powered cars, but Crowell & Moring's Berman believes it's actually the opposite.

Everyone is now aware of the state's unprecedented next step to reduce vehicle pollution, including the D.C. Circuit judges poised to determine whether California can regain its authority over vehicle emissions, Berman said.

"To some degree, California is adding a bit of litigation risk on its side," Berman said. "Maybe this gives some of the D.C. Circuit judges pause as to what exactly they're allowing if they side with the state in the current litigation."

However, the D.C. Circuit isn't expected to issue decisions until sometime next year. California is likely

banking on the litigation being mooted by a Biden election win, experts say.

And even if California's plan for emissions-free vehicles runs into resistance from the courts or a reelected Trump, Berman said it still brings to the forefront the notion of drastic climate change action. Newsom's executive order could have a ripple effect on other similarly minded states or the EPA under a future Democratic administration, she said.

"California is shifting the conversation in a way that will serve the governor's goal of saying, 'Hey, actions at the margins aren't really cutting it anymore. We're already facing extreme conditions and we need extreme steps,'" Berman said.

--Editing by Kelly Duncan and Orlando Lorenzo.