

# NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

## Division of Air Resources

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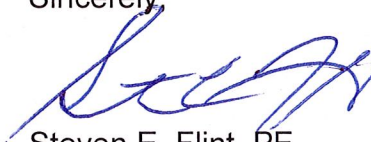
Ms. Mary Nichols, Chair  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

Dear Chair Nichols:

The New York State Department of Environmental Conservation is pleased to offer the attached comments in support of the Air Resources Board adoptions of regulatory revisions to remove the 'deem to comply' provisions from the Advanced Clean Cars program. New York has adopted identical provisions, pursuant to Section 177 of the Clean Air Act, and anticipates proposing revisions to our regulations to remain consistent with the actions taken by California.

Please feel free to contact me at (518) 402-8452 if there are any questions.

Sincerely,



Steven E. Flint, PE  
Director, Division of Air Resources

Attachment



Department of  
Environmental  
Conservation

## Comments on CARB Deem to Comply Provision

The New York State Department of Environmental Conservation (DEC) offers the following comments on the California Air Resources Board's (CARB) recent Initial Statement of Reasons (ISOR) for the proposed amendments to the Low Emission Vehicle III Greenhouse Gas Regulation. New York strongly supports CARB's proposed revisions to the "deem to comply" provision in response to the recently proposed rollback of federal greenhouse gas (GHG) emission standards for model years 2021-2026 under the joint SAFE Vehicle Rule<sup>1</sup>. New York also strongly supports California's right to continue its own emissions reduction programs under Section 209 of the Clean Air Act (CAA).

CARB's deem to comply revision is reasonable and warranted considering recent actions by the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) proposal to rollback federal GHG standards for model years 2021-2026. New York fully supports CARB's position that the deem to comply provisions only apply to the current federal GHG standards initially adopted in 2012. A freeze, or rollback, of the federal standards represents a substantial change from standards agreed upon as part of the deem to comply provision. New York believes that California is acting well within its authority under Section 209 of the CAA to repeal the deem to comply provision should EPA and NHTSA continue their ill-advised pursuit of reduced standards.

New York adamantly opposes any revisions that will weaken the existing model year 2021-2026 GHG standards adopted in 2012. As shown in the mid-term review conducted by CARB, EPA, and NHTSA, the current standards are technologically and economically feasible. Automobile manufacturers have already accounted for these standards in their production plans and are responding accordingly. New York, and other states that adopted California standards, agreed to a national program with slightly less stringent GHG standards than those initially provided by the California program with the understanding that reduced stringency would be offset by applying the standards nationwide. Reducing the stringency of the standards even further from those established under California's Advanced Clean Cars program defeats past collaboration towards a unified national program and will lead to two sets of standards – a strong, technically-rigorous standard in California, New York and the other states adopting California standards and a weaker federal standard applicable to the rest of the country.

The CAA, under Section 209, specifically grants California authority to regulate motor vehicle emissions provided certain limited conditions are met, and a waiver of federal preemption is granted by EPA. EPA granted the waiver to California for its Advanced Clean Cars program in 2013. The CAA also provides that other states can adopt the California standards under Section 177, and New York and several other States have done so. New York has a long history of adopting California's motor

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<sup>1</sup> <https://www.federalregister.gov/documents/2018/08/24/2018-16820/the-safer-affordable-fuel-efficient-safe-vehicles-rule-for-model-years-2021-2026-passenger-cars-and>



vehicle emissions control programs under Section 177, including greenhouse gas standards, to achieve its air quality objectives.

The GHG standards proposed by EPA and NHTSA will have adverse environmental impacts for criteria and toxic pollutants, in addition to a dramatic increase in GHG emissions. There are several areas in New York either categorized as non-attainment or maintenance areas under National Ambient Air Quality Standards (NAAQS). The proposed standards will result in significant increases in emissions of volatile organic compounds (VOCs), sulfur dioxide (SO<sub>2</sub>), NO<sub>x</sub>, fine particulate matter (PM<sub>2.5</sub>) among others. This will make it difficult, if not impossible, for New York to achieve and maintain its air quality goals as required by the NAAQS and its State Implementation Plan (SIP) commitments. This proposal will clearly lead to increased cardiovascular and respiratory related illness, hospitalization, and deaths.

EPA and NHTSA have decided that they need to withdraw the Section 209 waiver granted to California, thus preventing California or any other state from having different standards. This approach is based on their interpretation that the Energy Policy & Conservation Act (EPCA) preempts states from adopting standards related to fuel economy. This is incorrect. In *Massachusetts v EPA*, 549 U.S. 497 (2007) (*Massachusetts*) the Court opined *'But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.'* In addition, two federal District Court cases ruled specifically on this point.<sup>2</sup> The same reasoning applies here, California has clear authority under Section 209 of the Act to regulate emissions, including GHGs, from motor vehicles. EPA and NHTSA bootstrap their argument by saying that the California standards are not as protective as the federal standards in the aggregate, an absurd statement.

Despite this clear and unambiguous language from the Supreme Court, EPA and NHTSA persist in this claim. Beyond this, they go so far as to claim that the California ZEV mandate is also preempted under the same interpretation. The preemption of California's ZEV mandate is an integral part of the proposed standards. It appears that EPA and NHTSA only gave the effects of the ZEV mandate, or its preemption, a cursory review. The ZEV program was first adopted by California in 1990, and by New York in 1993, has been the subject of multiple EPA waivers, and several court actions. At no time has any mention of preemption ever been raised. Now, 28 years after its adoption, NHTSA claims supremacy over this program.

New York and the other states that have committed to the Zero Emission Vehicle Action Plan have made substantial progress enabling the transition to electric vehicles. Since the original action plan, New York has adopted the *Drive Clean*<sup>3</sup> consumer

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<sup>2</sup>*Green Mountain Chrysler Plymouth v Crombie*, 508 F.Supp.2d 295 (2007), *Central Valley Chrysler-Jeep v Goldstene*, 529 F.Supp.2d 1151 (2007/2008).

<sup>3</sup> <https://www.nyserda.ny.gov/All-Programs/Programs/Drive-Clean-Rebate>

rebate program, a municipal vehicle and EVSE rebate program<sup>4</sup>, the *Charge Ready*<sup>5</sup> EV infrastructure rebate program and expanded electric vehicle charging infrastructure across the state. New York has more than doubled the number of publicly available charging stations over the past five years. This year, New York State increased its *Charge NY* EV infrastructure goal from 3,000 (in 2018) to 10,000 publicly available outlets by 2021. In support of this new goal, Governor Cuomo announced the expansion of a high-speed Level 3 fast chargers along the NYS Thruway and a new \$250 million electric vehicle expansion initiative, *Evolve NY*<sup>6</sup>, to address critical infrastructure needs. The First Phase of Evolve NY (ending 2019) will install up to 200 interstate fast chargers, fast chargers at airports, and development of an EV Model Communities program.

In closing, New York strongly supports CARB's proposed revisions to the deem to comply provision, as well as California's right to continue its own emissions reduction programs under Section 209 of the CAA. New York will stand with California and utilize all available options to protect our citizens and the environment should EPA and NHTSA decide to ignore established science and disregard their mission to protect human health and the environment by rolling back existing standards.

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<sup>4</sup> [https://www.dec.ny.gov/docs/administration\\_pdf/zevfacts2017.pdf](https://www.dec.ny.gov/docs/administration_pdf/zevfacts2017.pdf)

<sup>5</sup> <https://www.nyserda.ny.gov/About/Newsroom/2018-Announcements/2018-09-18-Governor-Cuomo-Launches-First-Electric-Vehicle-Charging-Station-Installation-Rebate-Initiative-for-Public-and-Private-Locations>

<sup>6</sup> <https://www.nypa.gov/innovation/programs/evolveny>