

1. Potential Preemption under EPCA

--EPCA's preemption clause provides:

"When an average fuel economy standard prescribed under [49 U.S.C. Chapter 329] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter."

--When determining maximum feasible fuel economy, NHTSA had to consider four factors, including not only "the need of the Nation to conserve energy," "technological feasibility," and "economic practicability," but also "the effect of other Federal motor vehicle standards on fuel economy." *Id.*, 89 Stat. at 905, recodified as amended at 49 U.S.C. § 32902(f). When considering this last factor, NHTSA classified California emission standards for which EPA had issued waivers of CAA preemption as Federal motor vehicle standards whose effects the agency had to consider in standard-setting.

—The U.S. District Court for the District of Vermont rejected a claim that EPCA expressly or impliedly preempts GHG-emission standards for which EPA issues a waiver of CAA preemption. *Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295. Regarding express preemption, the court stated, among other things, that "Congress could not have considered an EPA-approved California emission standard to be automatically subject to express preemption as a 'law or regulation relating to fuel economy standards,' because it required that NHTSA take into consideration the effect of such standards when determining maximum feasible average fuel economy." *Id.* at 354 (quoting 49 U.S.C. § 32902(f))

2. Potential Preemption under Clean Air Act

Section 209 (a) of the Clean Air Act contains a broad prohibition preempting States from "adopt[ing] or ... enforc[ing] any standard relating to control of emissions from new motor vehicles or new motor vehicle engines". Section 209 (b) provides an exception: EPA "shall" waive application of this prohibition to California provided that California "determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." EPA will not grant a waiver if it makes any one of three adverse findings: a) that California's protectiveness determination is arbitrary and capricious; b) that California does not need such standards "to meet compelling and extraordinary conditions"; or c) that the California standards and accompanying enforcement procedures "are not consistent with section [202 (a)]." CAA Section 209 (b) (1) (A), (B), and (C).