



Center for Progressive Reform Editorial Memorandum

TO: Editorial Page Editors and Writers
FROM: Rena Steinzor, President, Center for Progressive Reform
RE: NHTSA's Modest Emissions Standards Would Preempt More Vigorous State Standards
DATE: April 28, 2008

On Tuesday, April 22, the U.S. Department of Transportation's National Highway Traffic Safety Administration issued proposed regulations governing mileage standards for automakers. Buried deep in the text of the proposal was what can only be described as a gift to automakers: the Department asserts that its regulation, if adopted, would preempt stricter emissions standards adopted by the states. In effect, the provision takes aim at efforts by California and 12 other states – Connecticut, New Mexico, Maine, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Oregon and Washington – to combat global warming by reducing polluting emissions from automobiles, the largest source of greenhouse gas emissions.

The Proposed Standards

Taken on their own, the mileage standards are not particularly demanding of the automotive industry – at least not any time soon. The standards would implement provisions in the 2007 energy bill, which fixed in law a mileage standard for 2020, but left to the Department of Transportation the task of setting standards that would achieve the “maximum achievable” fuel efficiency between now and then. The new Corporate Average Fuel Efficiency (CAFE) standard adopted by Congress requires automakers to improve mileage to an average of 35 miles per gallon for their fleet of light trucks and automobiles by 2020. Individual vehicles need not meet that standard. Rather, the standard applies as a fleet-wide average that includes an automakers' entire range of car and light truck offerings.

Congress left it to the Department of Transportation to establish intermediate standards for the period between now and 2020. The Department's proposal would ratchet overall fuel efficiency standards up to a 31.6 miles per gallon by 2015 – 35.7 miles per gallon for cars and 28.6 miles per gallon for light trucks. Based on their particular offerings, individual automakers would be assigned their own averages.

In the case of automobiles, the standards would demand practically nothing of manufacturers until 2011. The standard requires an average of 27.5 miles per gallon in 2010, a figure that the industry has already achieved, in large part because of the surge in

sales of hybrid automobiles. Between 2011 and 2013, the standard increases to 34 miles per gallon, before coasting into a 35 mile per gallon standard in 2015.

The standard was based in large part on a cost-benefit analysis conducted by the National Highway Traffic Safety Administration, which compared the costs to automakers of improving efficiency with the benefits to consumers. Notably, NHTSA's calculations assumed a \$2.86 per gallon price for gasoline, about 65 cents below the current average across the United States. Had a more accurate cost been used, the benefits to consumers would have increased, justifying greater expenditures by industry, and higher mileage.

Overall, the standards are an improvement over current standards, but last year's energy bill left the Department no choice but to tighten standards. Indeed, given its seven-year track record, we have come to expect the Bush Administration to do as little as possible to benefit the environment, if corporate profits are at stake. So even these modest improvements in the standards are something of a surprise.

But two facts overshadow the modest increases in fuel efficiency contemplated by the regulation. First, the proposed standard plainly does not do what Congress specifically directed the Administration to do: to set standards that would achieve the "maximum achievable" fuel efficiency by 2015. Second, the regulation would undercut efforts by the states to impose stricter standards on automobiles sold within their borders.

Preempting State Standards

In the face of federal inaction on climate change, it has been the states, acting individually and in state compacts, that have led the way. Seventeen states and 684 cities across the country have pledged to reduce emissions of atmospheric greenhouse gases at least 10 percent below 1990 levels by no later than 2020. Chief among the state leaders has been California, which has historically been ahead of the federal government on environmental matters.

In recognition of that historic leadership role, Congress wrote into the Clean Air Act a specific authorization for California to adopt stricter tailpipe emissions standards, upon receipt of a waiver from the Environmental Protection Agency. The law also allowed other states to "piggyback" onto the California standard. The logic behind the provisions was sound. On its own, California is the world's tenth largest economy – easily large enough that it makes economic sense for automobile manufacturers to build cars to comply with California standards. States that also adopt California's standards would simply expand the market for such "California cars." EPA administrators under Republicans and Democrats alike have approved stricter California standards dozens of times. But not this Administration. Last year, EPA Administrator Stephen Johnson overrode the recommendations of EPA's experts and denied California's waiver, a dispute that is now headed to court.

The new standards from the Department of Transportation throw further fuel on the fire because they assert without apparent statutory basis, that the new mileage rules would

“preempt” stricter state tailpipe emissions standards. In recent years, the Bush Administration, and the Department of Transportation in particular, have tried to make aggressive use of preemption. Of course, the Constitution’s doctrine of federal supremacy makes clear that where federal and state laws conflict, federal laws trump. But in this instance, as in previous cases, the Department of Transportation has asserted that its *regulations* preempt state law. In 2005, the Department announced in preambles to separate regulations governing seatbelts and roof-crush standards that its regulations would preempt state tort laws. Later that year, the Department announced that its regulation on rear-object detection systems on trucks would preempt state statutes and regulations, as well as common law claims. The agency issuing all of these preemption assertions was NHTSA. (For more information on the Bush Administration’s penchant for preemption, read CPR’s *The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety*, by CPR Member Scholars William Funk, Sidney Shapiro and David Vladeck, available online at http://www.progressivereform.org/articles/Truth_Torts_704.pdf).

Conclusion

Not by accident, NHTSA announced its new mileage standards on Earth Day, and cast the regulations in friendly environmental terms, undoubtedly an effort to improve the public’s assessment of the Administration’s woeful record on the environment. In fact, the new standards would do more harm than good. The Administration failed to live up to its statutory obligation to write standards that would achieve the “maximum achievable” mileage, and simultaneously asserted that stronger standards from the states are invalid.

I hope you’ll be able to find space for this important issue on your editorial pages.

The Center for Progressive Reform is a nonprofit research and educational organization whose network of scholars across the nation is dedicated to protecting health, safety, and the environment through analysis and commentary. For more information, contact Matthew Freeman at 301-762-8980 or at mfreeman@progressivereform.org. Visit CPR on the web at www.progressivereform.org.