

CALIFORNIA'S MOTOR VEHICLE
EMISSIONS PROGRAM:

Should Your State Adopt It?



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The State Environmental Resource Center (SERC) researches state environmental policies and assembles information and tools to help legislators make important decisions on key environmental issues. SERC identifies the most innovative and effective state policies and exposes anti-environmental legislative trends. Through a comprehensive website, free weekly e-mail newsletter, and direct access to knowledgeable staff members, SERC shares its findings with legislators, groups, and concerned citizens across the nation.

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CALIFORNIA'S MOTOR VEHICLE EMISSIONS PROGRAM: Should Your State Adopt It?

This booklet aims to help citizens across the country assess whether, and how, to go about adopting California's greenhouse gas emission standards for motor vehicles. It briefly explains the interaction between the California low emissions vehicle (LEV) program and the state's new greenhouse gas control law, describes approaches to achieving adoption elsewhere, and identifies some of the key legal, policy and political questions to consider.

Why the States?

In light of recent federal inaction on addressing global warming, many citizens across the country are looking to the states to take the lead. It was, after all, legislation adopted by California and other states that prodded Congress into enacting the first federal Clean Air Amendments with teeth in 1970. Before seeking to have the California greenhouse gas standards enacted in your state, however, it is important to consider your strategy carefully.

The federal Clean Air Act explicitly allows states to opt into the California low emissions vehicle (LEV) program. This program aims to stimulate the development of technologies to reduce emissions of "conventional" pollutants (i.e., hydrocarbons, nitrogen oxides and carbon monoxide). However, once the California Air Resources Board adopts implementing rules for its sweeping new greenhouse gas program, it too will become part of the LEV program, and states

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that have adopted the California LEV program will be legally obliged to adopt the California greenhouse gas program.

You must also think about the politics of your state. Unless your state officials have sufficient commitment to resist the powerful lobbying campaign you can expect from the auto industry, you are not likely to succeed. A failed attempt could slow national momentum and help build resistance in other states.

What Does the New California Greenhouse Gas Law—the Pavley Law—Do?

California adopted the Pavley law (named after California Assemblywoman Fran Pavley) in 2002. It requires the California Air Resources Board (“CARB”) to adopt regulations by January 1, 2005, that achieve the “maximum feasible and cost-effective reduction” of “greenhouse gases” from passenger vehicles, light trucks and any other vehicles determined by CARB to be primarily used for noncommercial personal transportation. These regulations would not be limited to emissions from the vehicles’ engines: by using the term “greenhouse gases,” the legislature encouraged CARB to consider other sources of vehicle greenhouse gases, such as air conditioning fluids, some of which are considerably more potent greenhouse gases than CO₂.

The regulations cannot take effect before January 1, 2006, to give the legislature time to review them. The regulations will apply to any vehicles manufactured in model year 2009 and thereafter. California is currently in the process of formulating and taking comment on the regulations called for in the Pavley law.

The California law was crafted carefully to meet the arguments that opponents were expected to level against it. To quiet the fears of motorists, it prohibits CARB from adopting a number of potentially very effective means of controlling vehicle greenhouse gas emissions. For example, the state may not impose any additional fees or taxes on motor vehicles, fuel or vehicle miles traveled; it also may not ban the sale of any category of vehicle, mandate a reduction in vehicle weight, reduce highway speed

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limits or limit allowable vehicle miles traveled.

In addition, the law requires CARB to grant credits for any reductions in greenhouse gases before the effective date of the regulations. Early reduction credits will be calculated based on greenhouse gas emissions from model year 2000 vehicles.

In general, the federal Clean Air Act (CAA) leaves power in the hands of the states to require whatever pollution control programs are necessary to attain federal health standards. However, when Congress adopted the federal motor vehicle control program in 1970, it prohibited states from regulating tailpipe emissions from new motor vehicles. But because of California’s pre-existing program, and the severity of its air pollution problem, Section 209(b) of the CAA allows California alone to adopt its own new motor vehicles emission standards, provided it obtains a waiver of the federal standards from the U.S. Environmental Protection Agency

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(EPA). EPA must grant a waiver if the Administrator finds that the California standards “will be, in the aggregate, at least as protective of public health and welfare” as the federal standards.¹ Since California’s program has traditionally led the nation, it has not been hard for EPA to make this finding.

While other states may not establish their own new vehicle standards, Section 177 of the CAA allows them to adopt California standards rather than the federal program, so long as California and the state adopt the standards at least two years before the model year to which they apply. The state’s standards must be identical to California’s — the law prohibits state standards that would have the effect of requiring manufacture of a “third vehicle.”

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What Is the Status of the Pavley Law?

CARB is currently in the process of developing the regulations required by the Pavley law. The agency has held a number of hearings where it has described potential approaches to implementing the law, such as:

- Manufacturer Specific Standards that would require either the same percentage reduction or the same magnitude of reduction in greenhouse gas emissions from each manufacturer's fleet. CARB could adopt standards segmented into weight classes or could leave the company to decide for itself what mix of vehicles to produce in order to meet the standard.
- Attribute-Based Standards that would be based on vehicle attributes thought to correlate with CO₂-equivalent emissions, such as horsepower, dimensions or weight.

CARB has also described several options for implementing the early-emission-reduction credit program required by the law. The fundamental question is whether to compare a manufacturer's pre-

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2009 emissions to the 2000 emissions of its own fleet—or to the emissions of the industry as a whole. A system comparing a manufacturer's own emissions could result in issuing credits to a company whose overall past performance was below the average, while denying credits to a company that has made cars with low emissions.

In September 2003, the Alliance of Automobile Manufacturers ("AAM"), a trade association of the major American and foreign

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automakers, wrote a threatening letter to CARB that illustrates the kind of opposition states adopting the California program can expect. The AAM letter warned that the alternatives being considered by the CARB staff would put the agency "on a collision course with federal law." AAM observed that states are prohibited by federal law from adopting fuel economy standards and claimed that any rule establishing standards for CO₂ emission standards for motor vehicles "would be functionally equivalent to setting new fuel economy standards."

AAM also referred to EPA's rejection of a petition asking for federal regulation of greenhouse gas emissions from motor vehicles. There EPA stated that such federal regulation would be inconsistent with Congress' decision to entrust fuel economy standard setting to the Department of Transportation.²

California has strong arguments against these claims. The industry argument represents a fundamental misunderstanding of the relationship between the Pavley law and federal fuel economy regulations. The Pavley law makes clear that it is an air pollution control initiative taken under California's authority under the Clean Air Act to curb motor vehicle emissions. The Pavley law directs CARB to set standards for all greenhouse gases, not just CO₂.



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Greenhouse gases include, for example, hydrochlorofluorocarbon refrigerants used in automobile air conditioners. Thus AAM's "collision course with federal law" argument is based on the association's mischaracterization of the California law as solely a CO₂

The federal fuel economy law and its legislative history contain clear statements that Congress did not wish to preempt California's power to regulate new motor vehicle emissions under the Clean Air Act

control program, and its claim that any measure aimed at CO₂ is a forbidden fuel economy measure, rather than an allowed pollution-control measure.

In addition, the industry argument mischaracterizes the Clean Air Act, the federal law of preemption and the fuel economy law. As discussed above, the Clean Air Act preserved California's authority to establish its own emission standards for new motor vehicles. The federal fuel economy law and its legislative history contain clear statements that Congress did not wish to preempt California's power to regulate new motor vehicle emissions under the Clean Air Act. As a matter of constitutional law, the Supreme Court has often held that an exercise of a state's "police power" (for example, to protect public health) is not preempted unless that was the clearly expressed intent of Congress.

Nevertheless, in June 2002 a federal district judge endorsed a similar preemption argument in a case involving California's zero emission vehicle (ZEV) program. He prohibited CARB from enforcing the 2001 ZEV amendments during 2003-4 because they use federal fuel economy ratings to determine how much "credit" is earned by each vehicle towards the state's ZEV mandate. Since the California ZEV provisions are "related to" federal fuel economy standards, the court held, they are preempted by the federal fuel

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economy law.³ The Supreme Court has repeatedly rejected such a "related to" test for preemption,⁴ and CARB therefore appealed the district judge's decision to the U.S. Court of Appeals for the Ninth Circuit. Subsequently CARB reached an agreement with the auto industry in which the industry dropped the litigation in return for more time to meet the 2001 ZEV program requirements.⁵ In light of this development, and the differences between the ZEV mandate and the Pavley law, the court's action may be of little consequence to the greenhouse gas program.

Which States Can Adopt the California Greenhouse Gas Program⁶?

States that do not meet any one of the National Ambient Air Quality Standards ("NAAQS") may adopt California's standards Under Section 177 of the CAA. The following states are thus eligible to adopt California's standards:

Alabama	Montana
Arizona	Nevada
Colorado	New Hampshire
Connecticut	New Jersey
Delaware	New Mexico
District of Columbia	New York
Georgia	Ohio
Guam	Oregon
Idaho	Pennsylvania
Illinois	Puerto Rico
Indiana	Rhode Island
Kentucky	Texas
Louisiana	Utah
Maine	Vermont ⁷
Maryland	Virginia
Massachusetts	Washington
Minnesota	Wisconsin
Missouri	Wyoming

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In addition, EPA recently adopted a new eight hour average NAAQS for ozone. After EPA designates non-attainment areas for the new NAAQS, and EPA approves State Implementation Plans ("SIP") for these areas, the following states will also become eligible to adopt California motor vehicle standards:

Arkansas	North Carolina
Florida	South Carolina
Michigan	Tennessee
Mississippi	

Also, dealers in states that border any state that has adopted the California standards are permitted to sell California-certified cars as well.

What Is Required if a State Opts Into the California Program?

The Clean Air Act (CAA) is clear that automakers should not have to make cars to satisfy more than two sets of standards. Thus a state adopting California's motor vehicle emissions standards under CAA's Section 177 must adopt California's entire auto emissions program, including the low emissions vehicle (LEV) program for conventional pollutants. Likewise, a state that opts into the LEV program must also adopt California's greenhouse gas standards when the regulations are adopted.

The California LEV program has undergone a number of changes since it was adopted. The original zero emission vehicle (ZEV) sales mandate has been modified by a "ZEV II" package that requires a more gradual introduction of ZEVs into the fleet of new cars sold in California. Initially, the regulations mandated that 2 percent, 5 percent and 10 percent of the new car fleet be ZEVs by 1998, 2001 and 2003, respectively. Under amendments adopted in 2001, automakers can obtain credits towards the ZEV requirement for early introduction, increased range and improved vehicle efficiency. The 2001 changes also established a new cate-

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gory of "Partial ZEV" (PZEV) vehicles that allows hybrid gasoline-electric vehicles to be used to satisfy half of the manufacturer's ZEV obligation.

To date, four states have adopted the California ZEV program—New York, Massachusetts, Vermont and New Jersey. Taken together, these states represent about one-fourth of the market for new motor vehicles sold in the country.

Can States that Adopted the National LEV Program Adopt the California Program?

Yes. The National Low Emission Vehicle (NLEV) program was based on an agreement among the auto companies, EPA, eight states⁸ and the District of Columbia. Under this agreement, the states and the district agreed they would not adopt California standards if the auto companies supplied vehicles cleaner than those otherwise required under the CAA.⁹ This agreement expires in model year 2006, so when the California greenhouse gas standards take effect in model year 2009, the states will no longer be limited by the agreement.

How Does a State Adopt the California Greenhouse Gas Program?

The mechanism for adopting the California greenhouse gas program will depend on state law. Section 177 of the CAA does not require that a state obtain approval from EPA when it adopts the California program. Section 177 provides that a state "may adopt and enforce" California standards for new motor vehicle emissions with only two conditions: the standards must be adopted at least two years before the model year in which they will apply, and the standards must be identical to California standards for which EPA has granted a waiver of federal preemption.

This last point could be significant. While other states may adopt California standards without EPA approval, California may

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not enforce its own standards until EPA reviews them and determines that they will be “at least as protective of public health and welfare as applicable Federal standards.” EPA has authority to refuse to grant a waiver if California has acted arbitrarily or if it “does not need” such standards “to meet compelling and extraordinary conditions.” In the past, EPA has routinely issued waivers for California’s more stringent program, but there is no guarantee that the pattern will continue.

Is Legislation Necessary to Adopt the California Program?

It depends on the current clean air legislation in your state. Massachusetts law, for example, already mandates that the state environmental agency adopt California motor vehicle emission control regulations.¹⁰ A number of states have broad ranging statutory authority to adopt California’s standards.¹¹ Some states have more general authority to adopt emission standards for new motor vehicles.¹² Many states simply have broad authority to adopt regulations limiting “air pollution.”¹³ In such states, the state agency

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probably has the authority to adopt the California program without seeking new legislation. Some state agencies with general authority may still want explicit legislative authority before adopting the California LEV program.

Some states have specific legislation that would prevent the agency from adopting the California program. In some states, the agency may not adopt any measures not identified specifically in the authorizing statute itself.¹⁴ In a number of other states that ostensibly provide authority for additional regulation, any such regulation is subject to review or even veto by the state legislature or some executive branch regulatory review mechanism.

Crafting the Proposal

As the previous discussion suggests, crafting legislation to adopt the California program is not as simple as saying, “We want California’s greenhouse program here.”

To minimize legal risk, citizens should make use of an attorney experienced in the complex constitutional and Clean Air Act issues involved to evaluate questions of legal strategy. For example, would a program in your state make it easier, or more difficult, for the industry to attack the California program? Or, is there anything about your state, or the federal courts that would have jurisdiction to review preemption issues related to your state’s program, that would make the program a particularly attractive target for industry litigation?

You may want to consider initially seeking only to have your state adopt the California LEV program for “conventional” tailpipe pollutants. When California adopts regulations to implement the Pavley law, which will then become part of the California LEV program, it could be argued that under the “no third vehicle” rule of Section 177 of the CAA, states that have adopted the California LEV program are bound to adopt the California greenhouse gas law as well. Even if your state does not accept this argument, state officials will probably be more inclined to consider adopting the California program once they can see exactly what California’s program looks like.

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A state government that adopted the LEV program and subsequently declined to adopt the greenhouse gas program would be in violation of the CAA Section 177's rule against "third vehicles." Since neither EPA nor the auto industry would be likely to challenge such state inaction, however, it would fall to citizens to decide whether to ask a court to order the state to adopt the California greenhouse program.¹⁵

You should anticipate that the auto industry will vigorously oppose adoption of the California greenhouse gas program in your state.

Assessing the Political Risks

Beyond the legal strategic questions, citizens also need to evaluate the political environment: What is the chance of success with the state air agency or legislature? How might their campaign affect the fate of the California legislation or of other states that are adopting such programs?

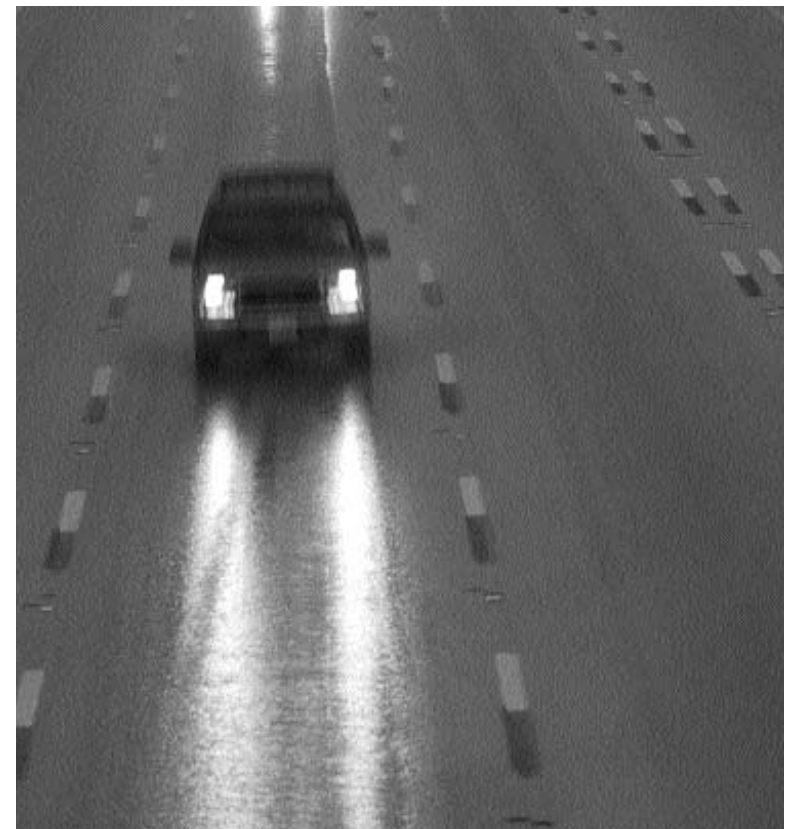
You should anticipate that the auto industry will vigorously oppose adoption of the California greenhouse gas program in your state. Currently the industry is working hard to weaken the California program through the regulatory process in California and through the federal courts. If that campaign fails, the industry will fight hard to keep the California program from "spreading" into other jurisdictions.

At this point, you should not expect to receive any support from the EPA. As seen above, EPA's response to a citizens' petition was to issue a very damaging legal interpretation, and the agency submitted a troublesome "friend of the court" brief in a case challenging CARB's ZEV II program. Thus the federal government can-

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not be counted upon to support your effort.

These unfortunate facts should be weighed carefully when considering whether to urge your state to adopt a greenhouse gas reduction program. It suggests that you need to be sure your state's elected officials are willing to adopt and defend greenhouse gas regulation. At this juncture, it may make sense to consider the more modest step of urging your state to adopt the California LEV program for "conventional" pollutants. As more states have adopted the LEV program, it is becoming less controversial with the industry.¹⁶ Any state that has the LEV program in place will be in a strong position to adopt the California greenhouse gas program once the California regulations are in place.



Should Your State Adopt It?**Notes**

- 1 The Administrator may also refuse to waive federal standards in California if the "State standards and accompanying enforcement procedures are not consistent" with the federal program, or if California's determination is "arbitrary and capricious," or if the program is not needed to "meet compelling and extraordinary conditions." CAA, Section 209(b).
- 2 68 Fed. Reg. 52922, 52925 (September 8, 2003). Separately, EPA has also endorsed industry arguments that CO₂ is not an "air pollutant" subject to regulation under the Clean Air Act. *Ibid.* at 52925-29.
- 3 Order Granting Plaintiff's Motion for Preliminary Injunction and Issuing Preliminary Injunction in Central Valley Chrysler-Plymouth, et al. v. CARB, CV-F-02-5017 (D.C.E.D. Calif. 2002).
- 4 For example, Justice Scalia disparaged the test with the comment that "as many a curbstone philosopher has observed, everything is related to everything else." *California Div. Of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 325 (1997).
- 5 Before this agreement was reached, however, the federal government filed a "friend of the court" brief agreeing with the industry argument that, insofar as the compliance criteria for the program "are defined in reference to [federal] fuel economy standards," the California 2001 ZEV program is preempted by federal law. The government's brief did, however, explicitly decline to express a view on whether the federal fuel economy standard would preempt a state law that did not make specific reference to fuel economy standards. Brief Amicus Curiae of the United States in Appeal of Order Granting Preliminary Injunction in Central Valley Chrysler-Plymouth, Inc., et al., v. CARB, Civ. No. 02-16395 (9th Cir.). The arguments against preemption are stated in a friend of the court brief filed by the Natural Resources Defense Council and other public interest groups in the Court of Appeals.
- 6 The following discussion relies heavily on a Memorandum prepared by David Bookbinder, Sierra Club, David Doniger, Natural Resources Defense Council, and Seth Kaplan, Conservation Law Foundation, "Legal Issues Pertaining to the Adoption of California GHG Emission Standards by other States" (Sept. 24, 2002).
- 7 Vermont may adopt California standards even though it is in attainment because it is part of an "ozone transport region" established under § 184 of the Clean Air Act.
- 8 The eight states are Connecticut, Delaware, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Virginia.
- 9 63 Fed. Reg. 931 (January 7, 1998).
- 10 For example, Massachusetts. (Mass. Gen. Laws C. 111 s. 142K).

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- 11 For example, Connecticut (Conn. Gen. Stat. Ann. §22a-174g); Vermont (10 Vermont Stat. Ann. §567).
- 12 For example, Rhode Island (RI Gen. Laws 23-23-5(22)).
- 13 For example, New Hampshire (NH Rev. Stat. Ann. 125-C:4); New York (Environmental Conservation Law §19-0301); New Jersey (NJPS Title 26:2C-8.1a).
- 14 For example, Virginia (Art. 22, §§10.1-1307, 46.2-1176).
- 15 Some states have, for example, adopted the California LEV program without the ZEV mandate. In the absence of challenge by the industry or environmentalists, however, these programs have not been changed, even though they are in apparent violation of Section 177.
- 16 It should be noted that, except in California, EPA has so far taken a "hands off" approach. The Administration has so far not involved itself in New York, Maryland, and New Jersey, each of which has adopted the California program.



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