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# A Leader in Following: Colorado's Adoption of California Clean Car Standards

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Sarah M. Keane and Samantha R. Caravello

In November 2018, Colorado became the latest state to adopt California's greenhouse gas (GHG) standards for passenger cars and light trucks, a direct rebuke to the Trump administration's proposed rollback of the corresponding federal standards. Notably, Colorado is one of the first non-coastal states to do so (and the only such state with the rules currently in place), and the eight regulators that unanimously approved the standards represent a wide variety of political and industrial interests. Because section 177 of the federal Clean Air Act (CAA or the Act) provides states with the binary choice of adopting California's car standards or the federal standards (and does not allow states to adopt their own standards, which could result in a "third car" (i.e., vehicles meeting standards other than the federal or California car standards)), Colorado was faced with deciding whether to stick with the federal standards (even if severely weakened) or to join California and a number of other states to avoid the proposed weakening of standards in Colorado and maintain the status quo. Colorado chose to follow California's path to avoid backsliding if the federal government weakens its standards. If the federal standards are indeed rolled back, Colorado's status as a low-emission vehicle state may help tilt the balance for car manufacturers away from promoting cleaner vehicles only in select states and instead toward manufacturing a nationwide fleet of lower-emitting vehicles.

Section 202 of the CAA authorizes the Administrator of the U.S. Environmental Protection Agency (EPA) to issue emission standards for air pollutants from new motor vehicles (42 U.S.C. § 7521), and section 209 generally prohibits states from adopting their own motor vehicle emission standards. 42 U.S.C. § 7543(a). When the predecessors to these provisions were first enacted in 1967, California had already begun regulating motor vehicle emissions. Recognizing California's efforts, as well as the unique topography, weather, and population growth in the state that resulted in especially poor air quality, Congress drafted the legislative provision that would become section 209 to allow any state that had adopted motor vehicle emission standards at least as protective as the federal standards prior to March 30, 1966, to request a waiver of the

prohibition on separate state standards. 42 U.S.C. § 7543(b); *see also History*, Cal. Air Resources Board, <https://ww2.arb.ca.gov/about/history> (last visited Mar. 29, 2019). Only one state had established such standards, meeting the conditions necessary to request a waiver: California. CAA section 177 allows other states to adopt California's standards rather than the federal standards. 42 U.S.C. § 7507. However, in all cases, the CAA prohibits any other formulation of standards that could create a third car.

In 2004, California approved the nation's first-ever motor vehicle GHG emission standards for model years (MY) 2009–2016. Since that time, the state's low-emission vehicle (LEV) standards have made it a consistent leader in requiring ever-more-efficient vehicles. The California LEV standards set fleet-wide GHG targets that get more stringent over time. *See* Cal. Code Regs. tit. 13, § 1961.3(a)(1) (2018). Manufacturers can meet the targets by making standard internal combustion engine (ICE) cars cleaner and by introducing more electric vehicles, hybrids, and other low-emitting cars into the market. The standards, which apply only to new passenger vehicles and light trucks (pickups and SUVs), are "footprint"-based—each size of car or light truck has its own standard that declines over time. *See id.* This way, manufacturers are not incentivized to promote cars over trucks or to otherwise impact consumer choice.

Not counting Colorado, 12 states and the District of Columbia have adopted California's standards and are commonly referred to as "LEV states" or "section 177 states." Most of these states also have adopted California's zero-emissions vehicle (ZEV) standards, which require vehicle manufacturers to produce an increasing number of ZEVs and plug-in hybrids each year through 2025. *See id.* § 1962.2(b)(1). It is likely that California's ZEV standards will be amended in coming years to add requirements for 2026 and beyond.

In 2010, EPA and the National Highway Traffic Safety Administration (NHTSA) announced a rule that would align the federal and California standards for MY 2012–2016, allowing automakers to produce and market a single national fleet. 75 Fed. Reg. 25,324 (May 7, 2010). In 2012, EPA and NHTSA issued regulations for MY 2017–2025. 77 Fed. Reg. 62,624 (Oct. 15, 2012). California likewise adopted MY 2017–2025 standards in 2012, and the state determined that compliance with the federal standards would demonstrate compliance with the California standards as well. *See Advanced Clean Cars Program*, Cal. Air Resources Board, <https://ww2.arb.ca.gov/index.php/our-work/programs/advanced-clean-cars-program/about> (last visited Mar. 29, 2019).

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*Ms. Keane and Ms. Caravello are attorneys at the law firm Kaplan Kirsch & Rockwell LLP. Attorneys at Kaplan Kirsch & Rockwell have represented two parties—the Environmental Coalition (comprised of the Environmental Defense Fund, the Natural Resources Defense Council, and Sierra Club) and Colorado Communities for Climate Action—in clean car standards proceedings in Colorado. They may be reached at [skeane@kaplankirsch.com](mailto:skeane@kaplankirsch.com) and [scaravello@kaplankirsch.com](mailto:scaravello@kaplankirsch.com), respectively.*

Due to the longtime frame involved and related limitations on statutory authority, the agencies separated the MY 2017–2025 standards into two phases: phase one for MY 2017–2021, and phase two for MY 2022–2025. The agencies—and California—committed to conducting a midterm evaluation to assess the appropriateness of maintaining the standards for phase two.

The federal midterm evaluation was underway in November 2016, when Donald Trump was elected president. In January 2017, outgoing EPA Administrator Gina McCarthy issued a final determination that the MY 2022–2025 standards should remain in effect. EPA, EPA-420-R-17-001, Final Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (2017), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf>. Two months later, the new EPA Administrator, Scott Pruitt, announced an intent to reconsider the January 2017 final determination, and in April 2018, EPA issued a new final determination finding that the MY 2022–2025 standards were not appropriate and should be revised, 83 Fed. Reg. 16,077 (Apr. 13, 2018). California’s midterm evaluation concluded that the state’s MY 2022–2025 LEV standards should remain in effect. Cal. Air Resources Board, California’s Advanced Clean Cars Midterm Review (2017), [https://www.arb.ca.gov/msprog/acc/mtr/acc\\_mtr\\_summaryreport.pdf](https://www.arb.ca.gov/msprog/acc/mtr/acc_mtr_summaryreport.pdf).

In August 2018, EPA and NHTSA issued a proposed rule rolling back the federal standards for MY 2021–2026. 83 Fed. Reg. 42,986 (Aug. 24, 2018). Unlike the original rule, which would have gradually tightened GHG emission standards over time, the proposed rule would lock in the MY 2020 standards through MY 2026—relieving vehicle manufacturers of any obligation to increase fuel efficiency or decrease GHG emissions. A final rule has not yet been issued, but given public statements made by the Trump administration, it seems likely the agencies will proceed with the rollback of the original standards. EPA also has proposed revoking California’s section 209 waiver, which, if upheld, would prohibit that state—and other states that have followed California’s lead under section 177—from maintaining GHG and ZEV standards in the event of a federal rollback.

### **LEV Standards in Colorado**

Colorado’s Air Quality Control Commission (the Commission) is a nine-member body appointed by Colorado’s governor and charged with adopting an air-quality-management program that promotes clean and healthy air and protects the state’s scenic and natural resources. The commissioners have a diverse range of affiliations and experiences. Science, engineering, medicine, and business are all represented, with some commissioners affiliated with public entities and others with private industry, including the oil and gas sector. Commissioners hail from across the state. Some are from the metro Denver area and Colorado’s Front Range, notable for its struggles with air quality generally and ozone pollution in particular, and others are from Colorado’s Western Slope.

Colorado’s commitment to promoting clean and healthy air and reducing GHG emissions and other harmful air pollutants began long before the LEV standards came into consideration. Colorado struggled with a serious multi-pollutant problem in the 1970s and 1980s—referred to locally as the “brown

cloud”—and ultimately developed strong regulations to reduce emissions contributing to the dirty smog and other air quality problems (although the state still struggles to meet federal ozone standards, as referenced elsewhere in this article). In 2004, Colorado passed the first voter-led Renewable Energy Standard, requiring electricity providers to obtain a minimum percentage of their power from renewable energy sources. Colorado also has imposed strong emission control measures on oil and gas operations in the state, which will reduce emissions of ozone precursors and methane, a potent GHG. In 2017, then-Governor John Hickenlooper issued an executive order announcing a goal to reduce statewide GHG emissions by more than 26 percent by 2025, as compared to 2005 levels. Colo. Exec. Order No. D 2017-015 (July 11, 2017).

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As part of the state’s effort to meet that ambitious target, in June 2018, Governor Hickenlooper issued another executive order directing the Colorado Department of Public Health & Environment (CDPHE) to develop a proposed rule that, if adopted by the Commission, would establish a Colorado LEV program incorporating the requirements of California’s program. Colo. Exec. Order. No. B 2018 006 (June 18, 2018). The Commission and CDPHE had already been evaluating the California LEV standards and the possibility of a Colorado program, with the Commission hosting public meetings on the topic beginning in late 2017 and continuing through the following year. But Governor Hickenlooper’s executive order kicked the process into high gear.

The CDPHE developed a proposal, and the Commission began the official rulemaking process in August 2018. Because section 177 allows states to either adopt California’s motor vehicle emission standards or remain with the federal standards, with no room for variation, the rule itself was relatively straightforward. But the decision to adopt California’s standards in Colorado was nevertheless controversial, and a variety of stakeholder groups both supporting and opposing the adoption of LEV standards became parties to the proceeding.

Parties in favor of the rule, primarily environmental organizations and local governments and the state’s air pollution control division, touted the rule’s ability to reduce emissions of both GHGs and local pollutants like ozone, which those

groups stress is particularly important given the federal government's proposal to roll back its vehicle standards. They also pointed to consumer cost savings that would result from the LEV rule's impact on fuel efficiency of cars and trucks (relative to an anticipated relaxation of federal standards). Opponents, primarily automobile manufacturer and dealer groups, countered that, in their view, LEV standards would increase the cost of new vehicles, reduce consumer choice, and hurt the automobile industry.

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In November 2018, after parties to the proceeding submitted written opening and rebuttal statements (which included expert reports and testimony), the Commission held a two-day hearing. After many hours of testimony, additional opportunities for public comment, and incisive questioning, the Commission voted unanimously (with one recusal) to adopt the standards, effective for MY 2022 and after.

The Commission deliberated and voted as part of the public process, giving observers insight into the commissioners' thinking. It was clear from their statements that the commissioners carefully weighed the arguments made by the parties, including: (1) the existence of any factors unique to Colorado that would make implementation of the rule more or less challenging in the state; (2) conflicting cost estimates for the rule, with opponents estimating high costs based on EPA data generated to support the proposed federal rollback, and supporters using EPA's previous, peer-reviewed data to demonstrate the rule's net positive effect; and (3) the need to proceed with strong GHG emission standards to reduce climate-change pollution and protect air quality in the face of federal government retrenchment. After considering these and other arguments, the Commission voted unanimously to adopt the rule. This vote demonstrated the Commission's keen awareness of the need for regulations that protect public health and the environment and that are based on strong, evidence-based science and technical data. The Commission's unanimous vote is especially meaningful considering the varied political and professional affiliations of the commissioners.

### Colorado LEV Standards Face Challenges

In January 2019, the Colorado Automobile Dealers Association (CADA) filed a lawsuit in Colorado state court challenging the Commission's adoption of the LEV standards. Complaint for Judicial Review of Final Agency Action, *Colo.*

*Auto. Dealers Ass'n v. Colo. Dep't of Pub. Health & Env't*, No. 2019CV30343 (Denver Cty. Dist. Ct. Jan. 28, 2019). In its complaint, CADA alleges the rule violates the Colorado Air Pollution Prevention and Control Act (the State Air Act), claiming that the CDPHE's air division did not undertake certain statutory prerequisites before the rule's adoption and because its analyses of the rule's impacts were flawed. The complaint also alleges that the Commission failed to properly follow certain procedural requirements during the rulemaking process, and that it violated the separation of powers doctrine by allowing the rulemaking to proceed upon the timetable set out in then-Governor Hickenlooper's executive order, even though the Commission is an independent state body. Most of CADA's arguments were fully briefed during the LEV rulemaking process and directly considered by the Commission prior to adoption of the new rule. CADA will likely face an uphill battle to convince the court that the rule should be set aside, considering the substantial amount of deference afforded by Colorado courts to the actions of state agencies and the sound foundation and strong record for the rule.

In addition, in early 2019, a bill was proposed in the Colorado Senate, SB19-053, which would have forbidden the Commission from passing motor vehicle emissions standards equivalent to those of California or any that are more stringent than the federal standards. The bill was not advanced out of committee for full consideration by the Colorado Senate. Although it is unclear how the bill, if successful, would have impacted the implementation of the already-adopted LEV standards, it likely would have prevented the state from updating its LEV rules in the future, when changes to California's standards may require the amendment of Colorado regulations to ensure that they are identical to California's and to prevent the prohibited third car.

### If Upheld, the LEV Standards Will Benefit All Coloradans

Colorado's adoption of the LEV standards will allow the state to receive the full benefit of GHG emission standards even if EPA moves forward with the expected rollback of federal clean car standards (assuming that California's section 177 waiver remains in place). In the absence of current federal standards, Colorado's LEV program will result in major GHG emission reductions over time. The CDPHE estimates that LEV will reduce the Colorado vehicle fleet's GHG emissions by approximately 30 million tons of carbon dioxide over the lifetime of MY 2022–2031 vehicles, as indicated in CDPHE's Regulatory Analysis and other supporting documentation submitted in the LEV rulemaking process. (All documents from the rulemaking are available at <https://drive.google.com/drive/folders/1mdVofJCLxxoa3h66DnUdFsYcUsbT0KiK>.) As estimated by other parties to the rulemaking, these emissions reductions are equivalent to saving between \$2.1 and \$6.6 billion in avoided climate damage through 2040, using standard social cost of carbon estimates. Many local governments in Colorado have been trying to make headway on reducing climate pollution in the state, but it is big statewide regulations such as the LEV rule that will really move the needle toward progress on this issue.

If the federal rules are rolled back, the Colorado LEV standards will also lead to reductions in non-GHG air pollutants that are harmful to human health, either directly or

as precursors to ozone formation. Because EPA is not proposing to roll back the non-GHG portions of the federal clean-car standards, Colorado's LEV standards will not provide additional direct regulation of criteria pollutants emitted from cars' tailpipes. However, the increase in fuel efficiency resulting from the LEV standards will reduce the amount of fuel burned—and hence, the amount of fuel needed to be processed into gasoline—resulting as a practical matter in substantial reduction of criteria pollutant emissions. For decades, Colorado's Front Range region has struggled with high levels of ground-level ozone and other pollutants due in part to the geography of the region, as well as nearby oil and gas production and an increasing population. These areas will benefit from an increase in fuel efficiency that reduces emissions of ozone precursors.

The LEV standards will also have economic benefits. Increases in fuel efficiency will result in meaningful savings for the owners of cars and light trucks. While manufacturers may need to increase the purchase price of new cars somewhat to cover the cost of innovative pollution-reduction technology, any increases will be offset by gasoline savings over the life of the car. According to the Final Economic Impact Analysis for the Colorado LEV rule, the CDPHE estimates that for the average MY 2025 vehicle, fuel savings will be \$2,624 to \$3,118, depending on the discount rate used, and purchasers will realize \$1,216 to \$1,682 in savings after deducting the added technology costs of the vehicle. Expert testimony presented by other parties to the LEV rulemaking suggests that the actual savings may be considerably more, because the CDPHE staff relied on conservative assumptions. And because most people either finance new cars or buy used cars, and thus do not pay a car's new sticker price up front, they will see those savings almost immediately despite the cost of the pollution-reduction technology.

The LEV standards are also important because they will benefit *all* Coloradans. Purchasers of used LEV vehicles will see the greatest economic benefits, because any increase in the cost of a new car due to the LEV regulations will be essentially wiped away through depreciation by the time the vehicle enters the used car market, but the purchaser will continue to receive fuel savings benefits over the life of the vehicle. Because lower-income households are more likely to buy a used car than a new car, they will benefit from the standards by realizing fuel savings right away without having to make a large up-front investment. And because lower-income households spend a greater percentage of their income on fuel (compared with higher income households), spending less at the gas pump will help these households free up more dollars to spend elsewhere. Additionally, rural Coloradans, who tend to log more miles than urban residents on a day-to-day basis, as well as those drivers of light-duty trucks and SUVs, will enjoy the greatest comparative fuel savings.

### **Colorado's LEV Status Makes it a Regional Leader**

Colorado is currently the only non-coastal state to have adopted California's LEV standards, creating a LEV island in the middle of the country. During Colorado's LEV rulemaking, auto manufacturers and dealers raised concerns that this isolation will negatively impact Colorado dealerships and consumers in several ways. For example, auto dealers argued that

they will be unable to trade inventory with dealers in neighboring states, leaving dealers with unwanted cars on their lots and preventing them from satisfying customer requests. Some parties also argued that vehicle purchasers living near Colorado's borders will be harmed by not being able to buy cars in neighboring states, or that Colorado dealers will suffer losses when consumers choose to buy non-LEV cars out-of-state, thwarting the LEV regulations.

While implementing the LEV standards will certainly require thoughtful planning and a proactive approach to addressing these and other issues, the manufacturers' and dealers' fears seem largely overstated. National automakers, not local dealers, are responsible for ensuring that LEV-certified vehicles are made available in Colorado and that the fleet average GHG emissions across LEV states meet the standards. The LEV standards will not restrict what dealers can sell or what inventory they can trade with other dealers, nor will they prevent a Colorado resident from traveling to and purchasing a vehicle in a neighboring, non-LEV state.

The real story of geography here is not that Colorado is an island, but that its adoption of the LEV standards may spur other states to do the same. While Colorado is the first and only interior state to adopt the current iteration of California's LEV standards, other states in the region have previously flirted with adoption. In 2008, Arizona adopted clean car regulations that would have required vehicles to meet California's standards beginning in MY 2011. However, in early 2012, Arizona regulators revoked the state's clean-car program. A similar story played out in New Mexico, which in 2007 adopted regulations that would have required vehicles to meet California's standards beginning in MY 2011, but then repealed the program in 2013.

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Recent news suggests, however, that New Mexico is ready to give the standards another go. In late January, New Mexico's new governor signed an executive order committing the state to several initiatives aimed at reducing GHG emissions and promoting clean energy, including a plan to join Colorado as an LEV state and to adopt California's ZEV standards as well. While politics is likely responsible for much of the back and forth on LEV standards in states such as New Mexico and Arizona, it stands to reason that as more non-coastal states like Colorado successfully implement the LEV standards, neighboring states are more likely to commit as well. This will result in a lower total cost of ownership for LEV cars and will reduce climate and other pollution. As a greater share of the U.S. market is covered by LEV standards requiring greater

fuel efficiency, the more likely it becomes that manufacturers will develop one national fleet—a fleet that meets the LEV standards.

## Colorado's Role in the National Conflict Over Car Standards

With the passage of the LEV standards in Colorado—and 2018 elections resulting in a Democratic governor, attorney general, and state Senate and House majorities—the state is now more likely to dive into the national fight over vehicle emission standards and whether California can retain its CAA waiver. On May 1, 2018, a group of 17 states—led by California—filed a petition in the U.S. Court of Appeals for the D.C. Circuit challenging EPA's determination that the MY 2022–2025 standards were not appropriate and should be revised. *Petition for Review, California v. U.S. Envtl. Prot. Agency*, No. 18-1114 (D.C. Cir. May 1, 2018). In February 2019, Colorado's new attorney general, Phil Weiser, filed an *amicus* brief in support of the state petitioners, noting Colorado's strong interest in reducing emissions of GHGs and other pollutants, as well as the state's interest in predictability and certainty in the federal regulatory process. See Brief of the State of Colorado as *Amicus Curiae* in Support of Petitioners, *California*, No. 18-1114 (Feb. 14, 2019), [https://coag.gov/sites/default/files/colorado\\_amicus\\_brief\\_filestamped\\_002.pdf](https://coag.gov/sites/default/files/colorado_amicus_brief_filestamped_002.pdf). The brief cited Colorado's recent adoption of California's LEV standards as “directly responsive to EPA's failure to act appropriately” in the federal rulemaking. Numerous other entities have joined in the lawsuit as well, whether as parties or *amici*: local governments from across the country (including Boulder County in Colorado) and nonprofit organizations on the side of the petitioners, and two car-manufacturer industry groups on the side of the respondents.

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If EPA completes its rulemaking and decides to both roll back the federal car standards and revoke California's waiver, the legal status of LEV regulations in states like Colorado

would fall into limbo, depending on whether implementation of any ruling is stayed pending a decision by the D.C. Circuit. Though the current federal administration seems set on its deregulatory path for vehicle standards, all signs point to Colorado lending its weight as a regional leader on vehicle-pollution regulation, standing firmly on the side of sound, science-based policy, to help ensure that those standards remain in place.

## An Exciting Time in State Policy and Innovation

Colorado is moving forward with potential adoption of California's ZEV standards as well, in addition to considering a host of complementary policies. In January, newly elected Governor Jared Polis issued a multifaceted executive order aimed at accelerating transportation electrification across the state. Colo. Exec. Order No. B 2019 002 (Jan. 17, 2019). The order first directs the CDPHE to propose a ZEV rule to the Commission no later than May 2019 for possible adoption in the summer or fall. It also calls for the creation of an interagency working group to help coordinate electrification infrastructure and policy, and recommit Colorado to a seven-state initiative promoting electric vehicle infrastructure that was put into place by Governor Hickenlooper. The order further directs the Colorado Department of Transportation to develop a plan that will align transportation investments and programs with strategies to support electric-vehicle deployment and expand mobility options. Finally, the order revises the state's spending plan for money obtained from the Volkswagen emissions settlement, directing all future spending to focus solely on supporting electrification of the transportation sector. Colorado state legislators are also considering bills in the 2019 legislative session regarding clean transportation, including one that would extend the state's tax credit for the purchase of new electric vehicles and one that would allow increased utility investment in electric vehicle infrastructure.

Colorado's adoption of the LEV standards was an important step forward for the state in its goals to reduce GHGs and other harmful air pollution from the transportation sector—a foundation upon which future efforts can be built. The standards will have significant public health, environmental, and economic benefits for all Coloradans. Those benefits and Colorado's climate and energy goals are a critical part of the story, but they are not the whole story. The symbolic aspect of Colorado's decision must be noted as well. Colorado retains an ethos of western independence. Commissioners carefully evaluated but ultimately rejected claims that adopting California's LEV standards would cede control of state climate policy to California, a state with different geography, demographics, and politics. Colorado instead recognized that adopting the LEV standards would be a choice to follow strong science and sound policy and keep its commitment to reducing the state's GHG emissions. Colorado made that choice by maintaining the status quo and adopting the California LEV rules as a backstop to the proposed federal rollbacks. 🌳