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EPA's Retreat On GHGs Reshapes Preemption Debate

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The U.S. Environmental Protection Agency's Feb. 18 **rescission** of its 2009 greenhouse gas endangerment finding is the first domino to fall as the Trump administration unravels federal GHG regulation under the Clean Air Act.

The EPA justifies the rescission primarily on grounds that it lacks authority under the CAA to regulate GHGs in response to global climate change concerns. But if the EPA disavows authority to set GHG standards for mobile and stationary sources, states will inevitably seek to fill the regulatory void.

And this raises the threshold question of whether the CAA preempts states from developing their own GHG programs, and whether it bars state common-law claims seeking damages for climate-related harms.

The rescission is limited to CAA Section 202 — which governs mobile source emission standards — and the EPA has not entirely disclaimed its CAA authority to regulate GHGs.

The agency acknowledges that the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA* established a basis for GHG regulation under the CAA, by holding that GHGs fall within the act's capacious definition of "air pollutant."

However, the EPA argues that subsequent decisions — including 2011's *American Electric Power Co. v. Connecticut* and 2014's *Utility Air Regulatory Group v. EPA* — limit the reach of *Massachusetts v. EPA*, and vest the agency with discretion to decide "whether and how" to regulate GHGs under other provisions of the CAA.

Under this reading, the EPA retains nominal authority to regulate GHG with local or regional impacts, while declining to exercise it — a posture with significant consequences for both the scope of federal regulation and the preemptive force of the CAA.

As a practical matter, if the CAA only authorizes the EPA to regulate GHGs as pollutants of local or regional concern, the legal predicate for existing GHG regulation no longer exists.

Under the EPA's narrow reading of its authority, any emission limit or standard premised on a determination that GHGs cause or contribute to global climate change must fall — leaving us, in effect, with no federal GHG regulation at all.

Preemption General Principles

Under long-standing jurisprudence, state law is preempted when a court determines that Congress so intended. The touchstone of any preemption analysis is congressional intent, and, as the Supreme Court said in its 2008 decision in *Altria Group v. Good*, Congress "may indicate pre-emptive intent through a statute's express language or through its structure and purpose."

Importantly, preemption analysis begins with a presumption against federal displacement of state law — particularly, as the high court said in *Altria*, "when Congress has legislated in a field traditionally occupied by the States." When a statute is ambiguous as to preemptive intent, courts will not invoke preemption.

The Supreme Court has recognized implied preemption in three circumstances. In *Cipollone v. Liggett Group*, the court said in 1992 that state action is implicitly preempted under field preemption where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it."

State law is also preempted where it presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" — that is, obstacle preemption, as articulated in the court's 1941 decision in *Hines v. Davidowitz*.

And lastly, state law is preempted where compliance with both state and federal law would be impossible — i.e., impossibility preemption.

Mobile Sources: How Rescission Could Open the Door to State GHG Standards

The CAA contains an express preemption provision under Section 209(a), which — absent a waiver from the EPA — prohibits any state from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."

The EPA's disavowal of any authority to regulate GHG under Section 202 opens the door to an argument that states are no longer preempted under Section 209(a) from controlling emissions "subject to this part."

The EPA and industry, however, assert that the preemption language in Section 209(a) is broader than the authority articulated in Section 202. Moreover, the term "subject to this part" does not refer to "any standard" but to "new motor vehicles or new motor vehicle engines."

Under this interpretation, Section 209(a) preempts any state attempt to impose regulations governing new motor vehicles for which emission

standards have been promulgated under Part A of CAA Title II. This position is supported by legislative history and case law, which point to the need for a national standard for mobile sources, rather than a patchwork of state standards.

As the U.S. District Court for the District of Massachusetts said in 1997 in *American Automobile Manufacturers Association v. Mass. Dept. of Environmental Protection*: "Congress preempted the field of vehicle emission regulation for two reasons: 'to ensure uniformity through the nation and to avoid the undue burden on motor vehicle manufacturers which would result from different state standards.'"

Those states that view the stakes for mitigating GHG and global climate change as a critical path forward, however, are likely to see the rescission as providing an opening to regulation. There is little doubt that these issues will be litigated, creating additional uncertainty as states seek to regulate the field vacated by the EPA.

Stationary Sources: A Patchwork of State GHG Regulation on the Horizon

The CAA also includes an express provision designed to preclude preemption of state regulation of stationary sources.

Section 116 of the CAA prohibits the act from being interpreted or applied in a manner that would limit a state or locality from issuing emissions limits or standards for "air pollutants" from stationary sources, as long as they are not less stringent than federal standards or limits in state implementation plans.

Because GHGs are air pollutants under the act, states retain broad authority to issue their own standards for GHGs, even if the EPA declines to do so.

In other words, if the EPA rescinds stationary-source GHG regulation, a state could adopt those standards as its own. Where states have historically deferred to the EPA on this level of regulation, the rescission creates both the incentive and the opening to act independently — leading to a patchwork of GHG standards across the country.

State Common Law: The Rescission Weakens the Case for Preemption

In *AEP*, the Supreme Court held that the CAA displaced federal common law claims seeking to cap GHG emissions — but expressly declined to decide whether the CAA also preempts state common-law claims.

In the rescission, the EPA argues that preemption principles still apply, because the agency retains residual authority to decide "whether and how" to regulate GHGs under the CAA.

The Supreme Court is now poised to address this issue directly, having **granted certiorari** on Feb. 23 in *County Commissioners of Boulder County v. Suncor Energy USA Inc.* — a case in which the Colorado

Supreme Court held that the CAA does not preempt state common-law climate claims.

Considering the savings clauses in the CAA — including Section 116, and the preservation of rights under "any statute or common law" to seek enforcement of emissions standards under Section 304(e) — the Hawaii Supreme Court similarly concluded in 2023 that the CAA does not preempt state common law climate claims, in *City & County of Honolulu v. Sunoco LP*.

The U.S. Court of Appeals for the Fourth Circuit also reached this conclusion in 2022, in *Mayor and City Council of Baltimore v. BP PLC*. All of these courts found neither express preemption nor field preemption, reasoning that the CAA's cooperative federalism structure affirmatively preserves a role for state law in regulating air pollution.

The EPA's rescission strengthens the states' antipreemption arguments in two related ways.

First, to the extent that CAA preemption of state common law depends on the existence of a federal regulatory scheme that speaks directly to GHG emissions, the EPA's disavowal of authority to regulate GHGs as a global climate threat undermines the very premise of preemption. If the federal government is not regulating the field, there is no federal scheme for state law to obstruct.

Second, the rescission weakens the EPA's retained-authority argument. It is difficult to maintain that the CAA preempts state common law because the EPA retains discretion to act, when the EPA has affirmatively disclaimed the authority that would justify that discretion.

As the Supreme Court takes up *Suncor*, it will confront a regulatory landscape fundamentally different from the one that existed when *AEP* was decided — one in which the federal government has largely vacated the field that state common law now seeks to occupy.¹

Conclusion

States with existing climate legislation, clean energy mandates or significant exposure to climate-related harms will view the rescission as both a threat and an opportunity — a federal retreat that simultaneously undermines coordinated national standards and opens space for state action.

The extent to which this new framework shifts CAA preemption analyses will create substantial uncertainty as these issues are litigated.

¹ In a lawsuit filed March 12 in the U.S. District Court for the Eastern District of California, the U.S. Department of Justice and the U.S. Department of Transportation are challenging California's state GHG emissions standards for light-duty vehicles as preempted under a different federal statute, the Energy Policy and Conservation Act. U.S. and U.S.

Dept. of Transp. v. Cal. Air Resources Board ,Case No. 2:26-450 (E.D. Cal.). The EPCA directs the National Highway Traffic Safety Administration to establish the "maximum feasible" fuel economy standards for vehicles and expressly preempts conflicting fuel economy standards. 49 U.S.C. § 32919.

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