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Auto GHG Rule Delays Threaten To Create New ‘Lead Time’ Legal Risks

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The Trump administration’s chronic delays in completing its rollback of Obama-era vehicle greenhouse gas and fuel economy rules are threatening to introduce a new legal risk to the rulemaking, given a looming statutory “lead time” deadline for the Transportation Department to complete its standards.

Under federal fuel economy law, the National Highway Traffic Safety Administration (NHTSA) must set “new” efficiency standards 18 months before the start of a model year, meaning that if the administration’s rollback is not complete by April 1 it could open the administration to fresh legal attacks on planned changes to still-preliminary MY22 standards.

NHTSA and EPA are also planning to scale back already-final rules for fast-approaching MY21 vehicles, though some observers say it may be easier for the administration to defend those changes in court because it is relaxing that year’s standards rather than strengthening them or issuing new requirements.

Critics, however, could argue that the short notice for changes to next year’s rules also makes them legally vulnerable.

Despite the looming legal risks, sources tracking the rule are increasingly suggesting the agencies will struggle to complete the rollback by the end of March, which would represent yet another slip in the rule's timeline after EPA Administrator Andrew Wheeler said in early January to expect a final rule within the next month "or so."

"Last I heard, they are going to be hard pressed to get it out by April 1," says one industry source. "They still have a lot of work to do."

Given that delay, the source adds, "there is a concern over any legal challenge for" MY22 standards.

NHTSA [has long cited](#) an April 1 statutory requirement to publish its upcoming final rule, which is pegged to the 18-month lead time mandate for the MY22 standards under the Energy Policy and Conservation Act (EPCA).

Another source tracking the issue also cites indications the rule will come out around the "end of March," and that significant sections remain incomplete and in need of revision. These issues were highlighted by a leaked draft of the rule summarized by Sen. Tom Carper (D-DE) in [a Jan. 22 letter](#) that suggested the administration at one point calculated the plan would cause net costs to society instead of benefits.

The final rule has repeatedly slipped, amid questions about how Trump officials will ultimately justify the measure given indications that correcting numerous flaws experts cited in the August 2018 proposal could slash or negate its claimed benefits.

Inside EPA recently noted that as many as \$200 billion in previously estimated benefits disappear when correcting methodological errors in the draft rule, based on the Carper letter.

The 2018 proposal maintains the lead time concerns are moot for the current rulemaking because NHTSA is proposing to weaken, not create or strengthen, fuel economy standards, though it also references the April 1 cutoff date for changes that strengthen the program.

"NHTSA . . . interprets EPCA as allowing amendments to reduce a standard's stringency up until the beginning of the model year in question," the proposal text states.

But under its joint 2012 vehicle standards rule with EPA, NHTSA finalized fuel economy rules through MY21, while floating "augural" standards that signaled the requirements the agency might adopt through MY25 -- though Trump officials have repeatedly downplayed the importance of the latter standards because they are not binding.

'Augural' Standards

The industry source says the lead time requirement may now carry added significance for MY22 because it is the first year of the "augural" standards. That complicates the administration's attempt to argue that is weakening existing rules, rather than creating a "new" standard.

The term augural reflects the fact that EPCA barred the Obama administration from formally codifying fuel economy standards beyond MY21 as part of the 2012 rulemaking, in contrast to EPA's ability to set Clean Air Act standards beyond that year, with the current EPA program extending out to MY25.

While NHTSA has claimed it is weakening its own fuel economy program, in the case of the MY22 standards, agency officials would be vulnerable to claims "they are adjusting them down from nothing," given that augural standards are essentially "vaporware," the source says.

That introduces new legal risk tied to the looming April 1 deadline for MY22 standards, even as the administration last year blew by the April 2019 timeframe needed to forestall any lead time-based claim against MY21 changes.

It is not certain that the agencies will miss the April 1 deadline, but the window for completing the rule this month appears to have closed.

The White House Office of Management & Budget is still scheduling meetings with outside groups, recently posting a Feb. 25 meeting with the California Air Resources Board, as well as a March 5 meeting with the Automotive Technology Leadership Group.

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