

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN “CLEAN DIESEL”  
MARKETING, SALES PRACTICES, AND  
PRODUCTS LIABILITY LITIGATION

MDL No. 2672 CRB (JSC)

**ORDER GRANTING VOLKSWAGEN’S  
MOTION TO DISMISS WYOMING’S  
COMPLAINT**

\_\_\_\_\_  
This Order Relates To:  
MDL Dkt. No. 3354

*Wyoming v. Volkswagen Group of America, Inc.*,  
No. 16-cv-6646 (N.D. Cal.)  
\_\_\_\_\_

From approximately May 2006 to November 2015, Volkswagen AG conspired to and did defraud the U.S. Environmental Protection Agency (EPA) by surreptitiously installing software in its “clean diesel” vehicles that masked true nitrogen oxide (NOx) emission levels. In response, the U.S. Department of Justice (on behalf of EPA) filed civil and criminal actions against Volkswagen to enforce the Clean Air Act (CAA), and Volkswagen ultimately pled guilty to three criminal felony counts and settled the civil charges in three partial consent decrees.<sup>1</sup>

The State of Wyoming now brings claims against Volkswagen based on the operation of the “clean diesel” vehicles within the State. At least eight other States (and one political subdivision) have filed similar actions in state courts. The question before the Court is whether Wyoming’s action is permitted by the Clean Air Act. For the reasons that follow, the Court concludes that it is not and accordingly GRANTS Volkswagen’s motion to dismiss.

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<sup>1</sup> See MDL Dkt. Nos. 2103, 3155, 3226 (EPA Consent Decrees); *United States v. Volkswagen AG*, No. 16-CR-20394, Dkt. 68 (E.D. Mich. Mar. 10, 2017) (Rule 11 Plea Agreement).

## BACKGROUND

### I. New Vehicle Certification Process

The Clean Air Act, as amended, vests EPA with significant authority to set and enforce motor-vehicle emission standards. 42 U.S.C. § 7521(a). Pursuant to that authority, EPA has set emission limits for, among other pollutants, NO<sub>x</sub> and diesel particulate matter. 40 C.F.R. § 86.1811-04. The Clean Air Act also requires EPA to administer a certification program to ensure that all vehicles introduced into United States commerce satisfy these and other emission standards. 42 U.S.C. § 7525(a). As part of that certification program, each vehicle manufacturer must submit a detailed application to EPA for each model year and for each test group of vehicles that it intends to sell in the United States. 40 C.F.R. § 86.1844-01 (listing required content). If, after review and the testing of vehicles, EPA determines that the application is complete and that the vehicles meet the applicable standards, EPA will issue a certificate of conformity. 42 U.S.C. § 7525(a)-(b); *see also* 40 C.F.R. § 86.1848-01.

Among the information a manufacturer must include in an application for certification is a list of all auxiliary emission control devices (AECDs) installed in the vehicles. 40 C.F.R. § 86.1844-01(d)(11). AECDs sense factors such as engine and vehicle speed for purposes of activating and deactivating vehicle emission controls. *Id.* § 86.1803-01. EPA regulations permit the use of AECDs during certain driving conditions, such as at high altitude if the use is justified to protect the vehicle, or during engine start-up. *See id.* §§ 86.1803-01; 86.1810-09(f)(2). But an application for certification must include “a justification for each AECD . . . and [a] rationale for why it is not a defeat device.” *Id.* § 86.1844-01(d)(11).

A defeat device is an AECD “that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use,” subject to limited exceptions. 40 C.F.R. § 86.1803-01. EPA prohibits the installation of defeat devices in all new passenger vehicles, *see id.* §§ 86.1809-10, 86.1809-12, and the Clean Air Act gives EPA authority to bring a civil action against any disobedient manufacturer, 42 U.S.C. §§ 7522(a)(3)(B); 7524(b). The Clean Air Act also prohibits manufactures from introducing into commerce any new motor vehicle that is not covered by a certificate of conformity, and similarly

1 grants EPA authority to enforce that restriction. 42 U.S.C. §§ 7522(a)(1); 7524(b). And even if a  
 2 manufacturer obtains a certificate of conformity, the certificate is not deemed to cover vehicles  
 3 that are not as described in the manufacturer’s application for certification “in all material  
 4 respects.” 40 C.F.R. § 86.1848-10(c)(6).

5 While less important for present purposes, California also plays an important role in the  
 6 certification of new vehicles, as Congress has permitted California to adopt its own vehicle  
 7 emission standards, which other States may follow. *See Engine Mfrs. Ass’n v. EPA* (“EMA”), 88  
 8 F.3d 1075, 1079-80 (D.C. Cir. 1996); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. N.Y. State Dept. of*  
 9 *Env’tl. Conserv.* (“MVMA”), 17 F.3d 521, 525-27 (2d Cir. 1994). The California Air Resources  
 10 Board (CARB) runs that certification program, which is materially similar to EPA’s. *See MVMA*,  
 11 17 F.3d at 527.

## 12 **II. Volkswagen’s “Clean Diesel” Vehicles**

13 In or around May 2006, Volkswagen began working on a line of environmentally-friendly  
 14 diesel engine vehicles for sale in the United States. (Compl. ¶¶ 81-82, 102.) Diesel engines are  
 15 generally more fuel efficient than gasoline engines, but historically have emitted greater amounts  
 16 of air pollution, including nitrogen oxides. (*Id.* ¶¶ 82, 93.) To lower NOx emissions, Volkswagen  
 17 equipped its “clean diesel” vehicles with an exhaust recirculation device and a diesel particulate  
 18 filter. During the design process, however, it quickly became apparent to Volkswagen’s engineers  
 19 that there was a material problem with the emission-control system; specifically, if the  
 20 recirculation device was activated as often as needed to bring NOx emissions within EPA limits,  
 21 the vehicles would produce too much particulate matter, which would clog and break the  
 22 particulate filter. (*Id.* ¶¶ 86-90, 100-05.)

23 Rather than altering the design of its cars, Volkswagen decided to develop and install  
 24 software in the vehicles to detect and evade U.S. NOx emission standards. (*Id.* ¶¶ 106-08.) The  
 25 software is able to detect whether a vehicle is undergoing emissions testing on a dynamometer, or  
 26 being driven normally on the road. (*Id.* ¶¶ 96-98, 107-08.) During emissions testing the vehicle’s  
 27 emission-control system will perform in a mode that enables the car to satisfy NOx emission  
 28 standards. (*Id.* ¶¶ 107-08.) When the vehicle is on the road, however, the software reduces the

1 effectiveness of the emission controls. (*Id.*) Programmed in this manner, the software constitutes  
2 a defeat device. (*Id.* ¶¶ 91-92); *see* 40 C.F.R. § 86.1803-01.

3 Volkswagen installed its defeat device in nearly 600,000 “clean diesel” vehicles, model  
4 years 2009 through 2016. (Compl. ¶¶ 83, 137.) But the company did not disclose the defeat  
5 device in its applications for new-vehicle certification, or in meetings with EPA and CARB staff  
6 during the certification process. (*Id.* ¶¶ 127-30, 136, 142, 163-71.) Only by installing the defeat  
7 device in its vehicles was Volkswagen able to obtain EPA and CARB certificates of conformity.  
8 In fact, these vehicles release NOx at factors up to 40 times higher than EPA limits. (*Id.* ¶¶ 107,  
9 143.)

10 In mid-2014 a research group at West Virginia University published a study, which  
11 identified significant discrepancies in the level of NOx emitted from certain of Volkswagen’s 2.0-  
12 liter “clean diesel” vehicles during on-road testing as compared to on a dynamometer. (*Id.* ¶ 143.)  
13 Following the study, CARB and EPA attempted to determine the cause. Volkswagen, however,  
14 continued to conceal the defeat device—offering false explanations for the excess on-road  
15 emissions and implementing a software recall to “optimize” emissions. (*Id.* ¶¶ 149-51, 164-71.)  
16 Nevertheless, by the spring of 2015 it became clear to regulators that the software updates had not  
17 worked. (*Id.* ¶¶ 179, 187.) And with certification of certain model-year 2016 “clean diesel”  
18 vehicles at risk, Volkswagen finally explained in September 2015 that certain of its vehicles used  
19 defeat-device software. (*Id.* ¶¶ 202-05.)

20 The public learned about Volkswagen’s emissions scheme in the fall of 2015, when EPA  
21 issued two Notices of Violation of the Clean Air Act and announced that the company had  
22 admitted to deliberately cheating on emissions tests. (*Id.* ¶¶ 207-08, 212-14.) Hundreds of  
23 lawsuits were subsequently filed against Volkswagen and consolidated before this Court as part of  
24 this multidistrict litigation. The Department of Justice also filed a criminal indictment against  
25 Volkswagen AG before the Honorable Sean F. Cox in the Eastern District of Michigan. (*See* No.  
26 16-CR-20394 (E.D. Mich.), Dkt. Nos. 1, 32.) In March 2017, Volkswagen AG pled guilty to three  
27 criminal felony counts, including conspiracy to defraud the United States and to violate the Clean  
28 Air Act, by making false statements and representations to EPA in violation of 18 U.S.C. § 371

1 and 42 U.S.C. § 7413(c)(2)(A). (*Id.*, Dkt. No. 68.) The company also has settled claims related to  
 2 the scheme brought by classes of U.S. consumers, franchise dealers, and reseller dealerships, as  
 3 well as claims by EPA, CARB, the FTC, and certain States.<sup>2</sup>

4 As part of Volkswagen’s plea agreement and EPA consent decrees, the company has  
 5 agreed to pay \$4.3 billion in civil and criminal penalties, to invest \$2.0 billion in Zero Emission  
 6 Vehicle technology, to recall and/or repair the affected vehicles, and to contribute \$2.925 billion to  
 7 an emissions mitigation trust. (Dkt. No. 3495 at 9.) The trust is expected to fully mitigate the  
 8 environmental harm caused by Volkswagen’s emissions scheme, and the States will be  
 9 beneficiaries. (Dkt. No. 2103 at 10-11.) As a beneficiary, Wyoming is expected to receive  
 10 approximately \$8 million from the trust. (Dkt. Nos. 2103-1 at 207; 3228-1 at 164.) Wyoming  
 11 residents who owned or leased an affected vehicle did or can also receive compensation as part of  
 12 the consumer settlements.

### 13 **III. Wyoming’s Lawsuit and State Implementation Plan**

14 In November 2016, Wyoming filed a complaint against Volkswagen AG; Volkswagen  
 15 Group of America, Inc.; Audi AG; Audi of America, LLC; Porsche AG; and Porsche Cars North  
 16 America, Inc. (collectively, “Volkswagen”) in the United States District Court for the District of  
 17 Wyoming. The Judicial Panel on Multidistrict Litigation later transferred the case to this Court.  
 18 (*See Wyoming v. Volkswagen Group of America Inc. et al.*, No. 3:16-cv-06646-CRB (N.D. Cal.).)  
 19 Of the nearly 600,000 “clean diesel” vehicles Volkswagen sold in the United States,  
 20 approximately 1,196 were registered in Wyoming as of November 1, 2015. (Compl. ¶ 225.)  
 21 Wyoming contends that each day one of those vehicles is operated in the State (and each day a  
 22 non-resident drives an affected vehicle in the State), Volkswagen violates two provisions in  
 23 Wyoming’s State Implementation Plan (SIP).

24 Before discussing those two provisions further, a bit of background on SIPs may be  
 25 helpful. Title I of the Clean Air Act requires each State to develop a SIP to implement, maintain,

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26  
 27 <sup>2</sup> Volkswagen has settled environmental-type claims with at least Maine, Massachusetts, New  
 28 York, and Pennsylvania. (Dkt. No. 3126.) Unlike Wyoming, each of these States has adopted  
 California’s emission standards. Volkswagen also settled certain consumer-protection claims with  
 at least 41 States. (*See* Dkt. No. 2834-3.)

1 and enforce EPA’s national ambient air quality standards (NAAQS). 42 U.S.C. § 7410(a)(1).  
 2 Each State has significant discretion in developing its SIP, but the SIP must include control  
 3 measures and “enforceable emission limitations.” *Id.* § 7410(a)(2)(A). The Clean Air Act  
 4 contemplates that each SIP will be based primarily on State regulation of stationary sources, such  
 5 as factories and power plants. *See EMA*, 88 F.3d at 1078 (explaining that many statutory  
 6 requirements for SIPs relate to the regulation of stationary sources); *MVMA*, 17 F.3d at 525 (“The  
 7 states have broad license to institute their own programs for the reduction of air pollution,  
 8 principally through the regulation of stationary sources, such as industrial stacks and vents.”).  
 9 States may also regulate the operation of motor vehicles within their borders, but subject to certain  
 10 limitations discussed below.

11 Each State must submit its SIP to EPA for approval; EPA must then determine if the SIP  
 12 “meets all of the applicable requirements” of the Clean Air Act. 42 U.S.C. § 7410(k)(3). Once  
 13 approved, “a SIP becomes federal law and must be carried out by the state.” *Cal. Dump Truck*  
 14 *Owners Ass’n v. Nichols*, 784 F.3d 500, 503 (9th Cir. 2015).

15 EPA approved Wyoming’s first SIP in 1972 and approved non-substantive, organizational  
 16 changes in 2004. *See* 37 Fed. Reg. 10842 (May 31, 1972); 69 Fed. Reg. 44965 (July 28, 2004)  
 17 (codified in 40 C.F.R. § 52.2620). Two provisions of the State’s SIP are at issue in this case. The  
 18 first is an “anti-tampering” rule, which provides that:

19 No person shall intentionally remove, alter or otherwise render ineffective or  
 20 inoperative, . . . any . . . air pollution control device or system which has been  
 21 installed on a motor vehicle or stationary internal combustion engine as a  
 requirement of any federal law or regulation.

22 *Rules Wyo. Dep’t of Env’t. Quality, Air Quality*, ch. 13, § 2(a). Wyoming contends that  
 23 Volkswagen violated this provision by “intentionally install[ing] software on the Subject Vehicles  
 24 that renders certain air pollution control devices . . . inoperable or ineffective during normal  
 25 driving conditions.” (Compl. ¶ 235.) As noted above, the State contends that a “separate violation  
 26 occurs each day a Subject Vehicle is driven in Wyoming.” (*Id.* ¶ 236.)  
 27  
 28

1 The second SIP provision at issue is an “anti-concealment” rule, providing that:

2 No person shall cause or permit the installation or use of any device, contrivance or  
3 operational schedule which, without resulting in reduction of the total amount of air  
4 contaminant released to the atmosphere, shall dilute or conceal an emission from a  
source.

5 *Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 1, § 4(a). Wyoming’s SIP defines a “source”  
6 as “any property, real or personal, or person contributing to air pollution.” *Id.* ch. 1, § 3. The  
7 State contends that Volkswagen violated this provision by “install[ing] software in the Subject  
8 Vehicles that conceals the vehicles’ actual emissions of nitrogen oxides by activating air pollution  
9 control systems only when the vehicles are undergoing emissions testing and not during normal  
10 on-road operating.” (Compl. ¶ 228.) As with the tampering claim, the State contends that a  
11 “separate violation occurs each day a Subject Vehicle is driven in Wyoming.” (*Id.* ¶ 229.)

#### 12 **IV. Volkswagen’s Motion to Dismiss and the Other State Cases**

13 Currently before the Court is a motion by Volkswagen to dismiss Wyoming’s complaint,  
14 in which Volkswagen argues that Wyoming’s claims are expressly and impliedly preempted by  
15 the Clean Air Act. Volkswagen also contends that the Court lacks personal jurisdiction over the  
16 German Defendants (Volkswagen AG, Audi AG, and Porsche AG), because these entities have  
17 not purposefully taken actions in or directed towards Wyoming. (Dkt. No. 3354.)

18 As noted in the introduction and in footnote 2, this is not the only State case against  
19 Volkswagen related to the “clean diesel” emissions scandal. And among the others, Volkswagen  
20 previously removed 16 to this Court; 8 of which included anti-tampering, concealment, or  
21 environmental claims similar to Wyoming’s. Unlike Wyoming’s action, though, the other States  
22 asserted claims only under state law (not EPA-approved SIPs). As a result, in May of this year the  
23 Court remanded those cases—or more specifically the 12 State cases remaining after 4 of the 16  
24 cases settled. The Court did so because the States’ claims did not necessarily raise a substantial  
25 and disputed federal question, *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S.  
26 308 (2005), and Volkswagen’s preemption defense did not support “arising under” jurisdiction,  
27 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987). See *In re Volkswagen “Clean Diesel”*  
28 *Mktg., Sales Practices, and Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 2258757, at



1 \*1, 5-9 (N.D. Cal. May 23, 2017); (Dkt. No. 3259.)

2 A number of these States, and one political subdivision of a State, have filed or joined  
3 amicus briefs in support of Wyoming’s opposition to Volkswagen’s motion to dismiss. (*See* Dkt.  
4 Nos. 3418 (New Hampshire); 3437 (Harris County, Texas); 3450 (Alabama, Illinois, Minnesota,  
5 Ohio, Tennessee, and Texas (the “Joint Amicus Brief”)).) The Court held on a hearing on  
6 Volkswagen’s motion to dismiss on August 1, 2017.

## 7 DISCUSSION

### 8 I. Preliminary Matters

9 Volkswagen has moved to dismiss Wyoming’s complaint pursuant to Federal Rule of Civil  
10 Procedure 12(b)(6). The Court will dismiss an action under that rule if the action is not supported  
11 by a cognizable legal theory. *Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007). Before  
12 addressing the merits of that inquiry, however, the Court resolves two preliminary matters:  
13 (1) whether Volkswagen’s challenge should be addressed to the Court of Appeals instead of this  
14 Court; and (2) whether preemption even applies given that Wyoming seeks to enforce an EPA-  
15 approved SIP.

#### 16 A. Jurisdiction

17 Federal district courts have jurisdiction to resolve SIP enforcement actions, which may be  
18 initiated by EPA, a State, or by citizen suit. 42 U.S.C. § 7604; *Bayview Hunters Point Cmty.*  
19 *Advocates v. Metro. Transp. Com’n*, 366 F.3d 692, 695 (9th Cir. 2004); *Trustees for Alaska v.*  
20 *Fink*, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994). But challenges to the validity of a SIP provision  
21 must be brought in the United States Court of Appeals. *See Cal. Dump Truck*, 784 F.3d at 502  
22 (court of appeals has exclusive jurisdiction over a preemption suit that, “as a practical matter,  
23 challenges the SIP itself”); *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d  
24 1062, 1073 (9th Cir. 2008) (district court lacks jurisdiction “to hold, in effect, that the EPA  
25 improperly approved an invalid SIP”). Specifically, Section 307(b)(1) of the Clean Air Act  
26 provides that:



1 A petition for review of the [EPA] Administrator’s action in approving or  
 2 promulgating any implementation plan . . . which is locally or regionally applicable  
 may be filed only in the United States Court of Appeals for the appropriate circuit.

3 42 U.S.C. § 7607(b)(1).

4 Wyoming and the six States joining the Joint Amicus Brief argue that Section 307(b)(1)  
 5 applies because Volkswagen is in effect challenging EPA’s approval of provisions in the State’s  
 6 SIP. The Court disagrees. Volkswagen does not, “as a practical matter, challenge[] the SIP  
 7 itself.” *Cal. Dump Truck*, 784 F.3d at 502. It is undisputed that Wyoming may use its SIP to  
 8 regulate vehicle tampering and emissions’ concealment that occurs within its borders, such when a  
 9 car is in the shop for repair in the State and a mechanic physically disconnects the catalytic  
 10 converter. *Cf. United States v. Econ. Muffler & Tire Ctr., Inc.*, 762 F. Supp. 1242, 1244 (E.D. Va.  
 11 1991) (anti-tampering violation where repair shop replaced factory-installed three-way catalytic  
 12 converters with two-way catalytic converters); EPA, *Mechanics: An Important Law that Affects*  
 13 *You: Don’t Tamper with Emissions Controls!*, Air and Radiation (Sept. 1993) (“Tampering  
 14 includes: Removing such devices as the catalytic converter . . .”). Volkswagen instead  
 15 challenges a particular application of the SIP’s tampering and concealment provisions, arguing  
 16 that Wyoming cannot use those rules to regulate a defeat device installed when a vehicle is  
 17 manufactured.

18 A challenge to “a particular interpretation or application” of a SIP, which if accepted  
 19 would not invalidate the SIP, is not governed by Section 307(b)(1) and instead is properly  
 20 considered by the district court. *Utah Power & Light Co. v. EPA*, 553 F.2d 215, 218 (D.C. Cir.  
 21 1977). This Court accordingly has jurisdiction to consider Volkswagen’s motion.

22 **B. Interpretive Framework**

23 Courts have long recognized that Congress has the authority to preempt state law. *See,*  
 24 *e.g., Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citing *Maryland v. Louisiana*, 451 U.S.  
 25 725, 746 (1981)). But Wyoming contends that preemption is inapplicable because the Ninth  
 26 Circuit has held that, “[o]nce approved by the EPA, a SIP becomes federal law.” *Cal. Dump*  
 27 *Truck*, 784 F.3d at 503. Instead of conducting a preemption analysis, then, Wyoming asks the  
 28 Court to utilize traditional canons of statutory interpretation to fit the State’s SIP and the Clean Air

1 Act “into a harmonious whole.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133  
2 (2000).

3 *California Dump Truck* is part of a line of Ninth Circuit cases holding that EPA-approved  
4 SIPs are federal law or “have the force and effect of federal law.” *See, e.g., Ass’n of Irrigated*  
5 *Residents v. EPA*, 790 F.3d 934, 947 n.8 (9th Cir. 2015); *El Comite*, 539 F.3d at 1066; *Safe Air for*  
6 *Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007); *Bayview*, 266 F.3d at 695; *Trs. for Alaska*,  
7 17 F.3d at 1210 n.3. In none of these cases, however, has the Ninth Circuit addressed whether a  
8 particular application of a SIP may be preempted even after EPA approval. Instead, the Ninth  
9 Circuit has referred to SIPs as federal law in the contexts of holding that a SIP requires further  
10 EPA approval to be amended, *Safe Air for Everyone*, 488 F.3d at 1092; is enforceable in federal  
11 court, *Trs. for Alaska*, 17 F.3d at 1210 n.3; and “trump[s] any inconsistent state law,” *Irrigated*  
12 *Residents*, 790 F.3d at 947 n.8. These holdings undeniably support that EPA-approved SIPs have  
13 a status different from traditional state law. But it may be more accurate to characterize SIPs as  
14 having characteristics of both state and federal law. After all, Wyoming drafted and proposed the  
15 SIP, not Congress or EPA, and Wyoming’s tampering and concealment provisions remain in the  
16 State’s Rules and Regulations. *See Rules Wyo. Dep’t of Env’tl. Quality, Air Quality*, ch. 1, § 4(a)  
17 (anti-concealment rule); ch. 13, § 2(a) (anti-tampering rule).

18 For present purposes, though, whether Wyoming’s SIP is federal law or some combination  
19 of state and federal law is not material. That is because the clause of the Clean Air Act at issue,  
20 Section 209(a), expressly provides that “No State . . . shall adopt or *attempt to enforce any*  
21 *standard relating to the control of emissions from new motor vehicles . . .*” 42 U.S.C. § 7543(a)  
22 (emphasis added). By prohibiting States from attempting to enforce any covered standard, Section  
23 209(a) not only preempts certain state law, but also prohibits certain state action. Accordingly,  
24 whether characterized as state or federal law, if Wyoming seeks to use its SIP to enforce a  
25 standard within the purview of Section 209(a), it is taking action that the Clean Air Act prohibits  
26 States to take.

27 Further, whether the analysis is characterized as preemption or purely as the interpretation  
28 of a federal regulatory scheme, the Court’s task is the same: to examine the text of Section 209, to

1 consider its context within the Clean Air Act, and to consider relevant precedents and authorities  
 2 that speak to Congress’s purpose and intent. *See, e.g., Dolan v. U.S. Postal Service*, 546 U.S. 481,  
 3 486 (2006) (interpreting federal law outside preemption context; “[i]nterpretation . . . depends  
 4 upon reading the whole statutory text, considering the purpose and context of the statute, and  
 5 consulting any precedents or authorities that inform the analysis”); *Medtronic, Inc. v. Lohr*, 518  
 6 U.S. 470, 485-86 (1996) (interpreting federal law within preemption context; “the purpose of  
 7 Congress is the ultimate touchstone,” as discerned from “the language of the pre-emption statute  
 8 and the statutory framework surrounding it,” as well as the “structure and purpose of the statute as  
 9 a whole”) (internal quotation marks omitted). And to the extent there is a difference between the  
 10 preemption analysis and standard statutory interpretation, the preemption framework actually  
 11 *benefits* Wyoming. That is because of the presumption that “the historic police powers of the  
 12 States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose  
 13 of Congress.” *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S.  
 14 218, 230 (1947)); *see also Pac. Merch. Shipping Ass’n v. Goldstene* (“*Pac. Merch. II*”), 639 F.3d  
 15 1154, 1167 (9th Cir. 2011) (applying the presumption against preemption in considering whether  
 16 the Submerged Lands Act preempted state environmental laws, “[g]iven the historic presence of  
 17 state law in the area of air pollution”) (internal quotation marks omitted).

18 Wyoming does not contend that Congress lacked the authority necessary to enact Section  
 19 209(a), which expressly prohibits States not only from adopting certain laws, but also from taking  
 20 certain action. The Court therefore continues by applying the above interpretive framework  
 21 (including the presumption against preemption) in determining whether the Clean Air Act bars  
 22 Wyoming’s claims.

## 23 **II. The Clean Air Act and Wyoming’s Claims**

### 24 **A. The Regulation of Motor Vehicle Emissions**

25 Before addressing how Section 209 of the Clean Air Act impacts Wyoming’s claims, a bit  
 26 more background is needed on how the Act generally regulates motor-vehicle emissions. That  
 27 background starts with the fact that, although environmental regulation “traditionally has been a  
 28 matter of state authority,” *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000), the

1 Clean Air Act and amendments thereto have made “the States and the Federal Government  
2 partners in the struggle against air pollution.” *Jensen Family Farms, Inc. v. Monterey Bay Unified*  
3 *Air Pollution Control Dist.*, 644 F.3d 934, 938 (9th Cir. 2011) (quoting *General Motors Corp. v.*  
4 *United States*, 496 U.S. 530, 532 (1990)). With respect to emissions from stationary sources,  
5 States still have substantial discretion to set and enforce pollution standards. But the regulation of  
6 motor-vehicle emissions has become “a principally federal project.” *EMA*, 88 F.3d at 1079; *see*  
7 *also Nat’l Ass’n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, 627  
8 F.3d 730, 733 (9th Cir. 2010) (“[T]he [Clean Air] Act gives the states the job of regulating  
9 stationary sources of pollution, but the EPA . . . [is] responsible for regulating emissions from  
10 motor vehicles and other mobile sources.”). As noted by the D.C. Circuit in *Engine*  
11 *Manufacturers*:

12           The regulatory difference is explained in part by the difficulty of subjecting motor  
13 vehicles, which readily move across state boundaries, to control by individual  
14 states. [T]he possibility of 50 different state regulatory regimes [also] raised the  
15 spectre of an anarchic patchwork of federal and state regulatory programs, a  
prospect which threatened to create nightmares for the manufacturers.

16 *EMA*, 88 F.3d at 1079 (internal quotation marks omitted); *see also* Ann E. Carlson, *Iterative*  
17 *Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097, 1104 (2009) (noting that  
18 policymakers have long debated the proper division of authority between the federal government  
19 and the States with respect to environmental regulation, but that “[c]ommentators generally accept  
20 the need for federal uniformity in regulating national product markets like automobiles”).<sup>3</sup>

21           The Clean Air Act accomplishes this policy by giving EPA significant authority to set and  
22 enforce vehicle emission standards, and by taking away similar authority from the States. As  
23

24 \_\_\_\_\_  
25 <sup>3</sup> The exception to this rule, as alluded to above, is that California may set its own vehicle  
26 emission standards (subject to EPA approval) and other States may adopt California’s standards.  
27 *See* 42 U.S.C. §§ 7507; 7543(b); *Jensen*, 644 F.3d at 938 n.3. Through this exception, Congress  
28 recognized that California is a leader in regulating vehicle emissions. *See MVMA*, 17 F.3d at 526.  
The effect is that “motor vehicles manufactured for sale in the United States must be either  
‘federal cars’—certified to meet federal vehicle emission standards as set by the EPA—or  
‘California cars’—certified to meet that state’s standards.” *Id.* at 526-27. Wyoming has not  
adopted California’s standards. Vehicles sold in Wyoming must therefore be certified to meet  
federal emission standards.

1 noted above, EPA is tasked with setting emission limits for new vehicles introduced into  
 2 commerce, 42 U.S.C. § 7521(a)(1); setting standards governing the use of emission-control  
 3 devices in those vehicles, *e.g.*, *id.* § 7521(a)(4)(A), (m); and running a certification and testing  
 4 program to ensure that new vehicles meet these standards, *id.* § 7525. EPA also has authority to  
 5 enforce these standards by, among other things, refusing to certify vehicles that do not meet all  
 6 regulatory requirements and bringing civil enforcement actions against violators. *Id.* §§ 7522(a);  
 7 7524; 7525(a). The Clean Air Act also requires vehicles to meet EPA emission standards during  
 8 their “useful life,” 42 U.S.C. § 7521(a)(1), (d), and EPA has authority to audit and inspect vehicles  
 9 after certification, *id.* § 7541(b)-(c).

10 In contrast, Section 209(a) of the Act provides that:

11 No State or any political subdivision thereof shall adopt or attempt to enforce any  
 12 standard relating to the control of emissions from new motor vehicles or new motor  
 13 vehicle engines subject to this part. . . .

14 42 U.S.C. § 7543(a). Referred to as “[t]he cornerstone of Title II,” *MVMA*, 17 F.3d at 526, it is  
 15 through Section 209(a) that Congress seeks avoid the “anarchic patchwork of federal and state  
 16 regulatory programs” that could otherwise result if each State were free to adopt or enforce new  
 17 motor vehicle emission standards. *EMA*, 88 F.3d at 1079.

18 Section 216 of the Clean Air Act defines “new motor vehicle,” as “a motor vehicle the  
 19 equitable or legal title to which has never been transferred to an ultimate purchaser.” 42 U.S.C.  
 20 § 7550(3). The Act does not define “standard,” but in *South Coast Air Quality* the Supreme Court  
 21 looked to the term’s dictionary definition when interpreting Section 209(a), noting that a  
 22 “standard” is “that which ‘is established by authority, custom, or general consent, as a model or  
 23 example; criterion; test.’” *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246,  
 24 253 (2004) (quoting Webster’s Second New Int’l Dictionary 2455 (1945)). The Court in *South*  
 25 *Coast* then provided “examples of requirements contained in Title II of the CAA that would  
 26 properly be considered ‘standards relating to the control of emissions’ for federal preemption  
 27 purposes.” *Jensen*, 644 F.3d at 939 (quoting 42 U.S.C. § 7543(a)) (citing *South Coast*, 541 U.S.  
 28 246). The first example is a “regulation requiring that vehicles or engines not emit more than a

1 certain amount of a given pollutant.” *Id.* (citing *South Coast*, 541 U.S. at 253). The second is a  
2 “requirement[] that a vehicle or engine be equipped with a certain type of pollution-control device,  
3 or that a vehicle or engine include some other design feature relating to emissions control.” *Id.* at  
4 940 (citing *South Coast*, 541 U.S. at 253).

5 Section 209(a) does not just prohibit States from adopting emission standards that conflict  
6 with EPA standards; the provision instead bars States from “adopt[ing] or attempting to enforce  
7 any standard” within Section 209(a)’s reach. 42 U.S.C. § 7543(a) (emphasis added). Thus, even  
8 if a State “does not establish new or conflicting emission standards,” its efforts to enforce new  
9 vehicle emission standards, including EPA’s standards, will be prohibited. *Sims v. State of Fla.,*  
10 *Dept. of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1455 (11th Cir. 1989); *see also id.*  
11 (“[E]nforcement of the Clean Air Act before the first sale of new motor vehicles is the sole and  
12 exclusive prerogative of the federal government.”).

13 The Clean Air Act does include a savings clause, which permits States to establish and  
14 enforce “in-use” vehicle restrictions. *Pac. Merch. Shipping Ass’n v. Goldstene* (“*Pac. Merch. P.*”),  
15 517 F.3d 1108, 1115 (9th Cir. 2008). Specifically, Section 209(d) provides that:

16 Nothing in this part shall preclude or deny any State or political subdivision thereof  
17 the right otherwise to control, regulate, or restrict the use, operation, or movement  
18 of registered or licensed motor vehicles.

19 42 U.S.C. § 7543(d).

20 By allowing States to regulate “registered or licensed motor vehicles,” as opposed to new  
21 motor vehicles, Section 209(d) preserves States’ inherent authority to police conduct within their  
22 borders, and also enables them to develop additional tools to meet the EPA-established NAAQS.  
23 Inspection and maintenance programs are an example of “in use” regulations. *See* 42 U.S.C.  
24 § 7541(h)(2). Under such programs, States may require vehicle testing after sale to the ultimate  
25 purchaser to identify vehicles emitting excessive pollutants. *See* 42 U.S.C. §§ 7511a(a)(2)(B),  
26 (b)(4); 7541(h)(2). Such programs generally “require noncomplying vehicles to be repaired as a  
27 prerequisite to continuing to operate within a given area.” EPA, Office of Inspector General,  
28 *EPA’s Oversight of the Vehicle Inspection and Maintenance Program Needs Improvement*, Rpt.



1 No. 2007-P-00001 at 5 (Oct. 5, 2006). Other “in use” controls include transportation planning  
 2 regulations, such as “carpool lanes, restrictions on car use in downtown areas, and programs to  
 3 control the extended idling of vehicles.” *EMA*, 88 F.3d at 1094; *see also* 42 U.S.C.  
 4 § 7408(f)(1)(A) (listing other examples of transportation control measures). Anti-tampering and  
 5 concealment laws can also be applied as “in use” regulations, prohibiting the disabling of  
 6 emission-control systems and the use of devices that conceal on-road emissions. *See* Arnold W.  
 7 Reitze Jr., *Air Pollution Control Law: Compliance and Enforcement* § 10-5(d) (2001) (“[M]any  
 8 states prohibit the operation of motor vehicles when air pollution devices have been removed,  
 9 altered, or rendered inoperative.”).

10 In some circumstances, the dividing line between Section 209(a) and 209(d) can be more  
 11 difficult to decipher. Imagine, for example, that a State requires all vehicles within it, once driven  
 12 off the new-car lot, to be equipped with an emission-control device that is not required by EPA  
 13 regulations. The State may argue that this standard is not “relat[ed] to the control of emissions  
 14 from *new motor vehicles*,” 42 U.S.C. § 7543(a) (emphasis added), but instead regulates “the use,  
 15 operation or movement of registered or licensed motor vehicles,” *id.* § 7543(d). A State regulation  
 16 of this sort, however, could significantly reduce the Clean Air Act’s effectiveness in preventing  
 17 the type of “anarchic patchwork of federal and state regulatory programs” that would “threaten[]  
 18 to create nightmares for the manufacturers.” *EMA*, 88 F.3d at 1079 (citation omitted). Vehicle  
 19 manufacturers would likely feel pressure to install the emission-control device required by the  
 20 State in its new vehicles. And if other States also established shortly-off-the-lot emission-control  
 21 requirements, manufacturers could face the “possibility of 50 different state regulatory regimes,”  
 22 which Congress sought to avoid. *Id.*

23 The court in *Allway Taxi* identified this tension, noting that the Clean Air Act’s purpose of  
 24 “preventing obstruction to interstate commerce” would be defeated if “a state or locality [were]  
 25 free to impose its own emission control standards the moment after a new car is bought and  
 26 registered.” *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972),  
 27 *aff’d*, 468 F.2d 624 (2d Cir. 1972). To avoid such a result, the court looked not only at the new  
 28 versus “in use” dividing line, but also considered who would face the burden of complying with



1 the relevant regulation. If the “burden of compliance would be on individual owners and not on  
2 manufacturers and distributors,” the court reasoned that the regulation “would cause only minimal  
3 interference with interstate commerce,” and would be a permissible “local regulation of the use or  
4 movement of motor vehicles after they have reached their ultimate purchasers.” *Id.* Applying that  
5 standard, the court held that a city ordinance requiring certain exhaust emission devices to be  
6 installed on taxis upon resale or reregistration was not preempted by the Clean Air Act. *Id.* at  
7 1123-24.

8 In *Engine Manufacturers*, the D.C. Circuit cited favorably to *Allway*, noting that the  
9 “*Allway Taxi* interpretation, postponing state regulation so that the burden of compliance will not  
10 fall on the manufacturer, has prevented the definition of ‘new motor vehicle’ from ‘nullifying’ the  
11 motor vehicle preemption regime.” *EMA*, 88 F.3d at 1086. EPA has also embraced *Allway Taxi*,  
12 explaining that a State’s “in use” regulations cannot “amount to a standard relating back to the  
13 original design of the engine by the original engine manufacturer.” EPA, *Control of Air Pollution;*  
14 *Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad*  
15 *Compression-Ignition Engines At or Above 37 Kilowatts*, 59 Fed. Reg. 31306-01, 31330 (June 17,  
16 1994) (“EPA expects that the principles articulated in *Allway Taxi* will be applied by the courts to  
17 any State adoption of in-use controls.”).

#### 18 **B. Applying Section 209**

19 The dispute between Wyoming and Volkswagen centers on whether Wyoming’s claims are  
20 prohibited attempts to enforce new-vehicle emission standards, § 209(a); or permitted attempts to  
21 regulate the operation of registered vehicles within the State, § 209(d). As noted above, there is no  
22 question that the State’s tampering and concealment SIP provisions can be applied in a manner  
23 that is permitted under Section 209(d). In the example of a mechanic disabling a vehicle’s  
24 catalytic converter in the repair shop, the tampering and concealment clearly occurs after the  
25 vehicle is registered and in use, and the mechanic’s tampering is also entirely intrastate conduct  
26 that “would cause only minimal interference with interstate commerce.” *Allway Taxi*, 340 F.  
27 Supp. at 1124. But what about the situation here, where Volkswagen installed a defeat device in  
28 thousands of vehicles before they were introduced into interstate commerce?

1 As an initial matter, it is clear that a rule that prohibits a person from installing a defeat  
2 device in a vehicle prior to registration is a “standard relating to the control of emissions from new  
3 motor vehicles.” 42 U.S.C. § 7543(a). This conclusion follows from the Supreme Court’s *South*  
4 *Coast* decision and the text of Section 209(a). As noted above, the Court in *South Coast* defined a  
5 “standard” in part as a “criterion [or] test,” and reasoned that an example of a “standard relating to  
6 the control of emissions” would be a requirement that a vehicle “must be equipped with a certain  
7 type of pollution-control device.” 541 U.S. at 253. Like a requirement that a vehicle contain a  
8 certain pollution-control device, a requirement that a vehicle not contain a defeat device is also a  
9 criterion or test, compliance with which can readily be determined. And EPA’s rule prohibiting  
10 defeat devices also “relat[es] to the control of emissions,” because a defeat device by definition  
11 “reduces the effectiveness of [a vehicle’s] *emission control* system.” 40 C.F.R. § 86.1803-01  
12 (emphasis added). States accordingly may not adopt their own rules prohibiting defeat devices in  
13 new vehicles, nor may they attempt to enforce EPA’s rule barring defeat devices in new vehicles.  
14 *See Sims*, 862 F.2d at 1455.

15 Even though EPA’s rule prohibiting defeat devices is a standard covered by Section  
16 209(a), amicus curiae Harris County contends that Section 209(a) prohibits States only from  
17 enforcing that standard before the initial sale of EPA-approved vehicles. That conclusion is clear,  
18 Harris County suggests, because Section 209(a) provides that States may not adopt or attempt to  
19 enforce “standard[s] relating to the control of emissions from *new motor vehicles*.” 42 U.S.C.  
20 § 7543(a) (emphasis added). Once title to a vehicle has been transferred to the ultimate purchaser,  
21 though, the vehicle is no longer new, *see* 42 U.S.C. § 7550(3), and so Harris County contends that  
22 the prohibitions covered by Section 209(a) would no longer apply. Applying that reading here,  
23 Harris County contends that Section 209(a) does not bar Wyoming’s claims because  
24 Volkswagen’s “clean diesel” vehicles have been certified already, and in some cases have been on  
25 the roads in Wyoming for 7 years.

26 Harris County is correct that Section 209(a) keeps States from intruding into EPA’s new-  
27 vehicle certification process and its pre-sale regulation of vehicles; but the provision’s text and  
28 context, and Congress’s purpose in enacting it show that even after a vehicle is introduced into

1 commerce certain State regulation comes within Section 209(a)'s bounds.

2 Starting with the text of Section 209(a), the provision speaks most directly to *what* States  
 3 are prohibited from regulating, not *when* they are prohibited from doing so. States are prohibited  
 4 from attempting to enforce “any standard relating to the control of emissions from new motor  
 5 vehicles.” The provision does not state, however, that States are prohibited from attempting to  
 6 enforce such standards only *before the sale* of new vehicles. The consequence of this distinction  
 7 is most readily observable in the context of fraud-against-EPA type claims. If, after certification,  
 8 it is discovered that a manufacturer tampered with vehicles during testing, and the manufacturer's  
 9 vehicles accordingly did not comply with EPA's new-vehicle emission standards, the Clean Air  
 10 Act vests EPA with authority to bring a civil action, and in some instances even a criminal action,  
 11 against the manufacturer. *See* 42 U.S.C. §§ 7413(c)(2); 7522(a); 7524(b). But because Section  
 12 209(a) prohibits States from enforcing “standard[s] relating to the control of emissions from new  
 13 motor vehicles,” both before and after the vehicles enter into commerce, States cannot do the  
 14 same.

15 Reading Section 209(a) in this way also furthers Congress's purpose in enacting the  
 16 provision. By barring State enforcement of new-vehicle emission standards, both before and after  
 17 the initial sale of a vehicle, Section 209(a) keeps States from interfering with EPA investigations  
 18 and enforcement actions based on fraud or deceit against the Agency during the new-vehicle  
 19 certification process. If States were also permitted to police such deception, there could be a  
 20 multiplicity of redundant investigations and enforcement actions, “rais[ing] the spectre of an  
 21 anarchic patchwork of federal and state regulatory programs, . . . [and] threaten[ing] to create  
 22 nightmares for the manufacturers.” *EMA*, 88 F.3d at 1079 (internal quotation marks omitted).<sup>4</sup>

23 \_\_\_\_\_  
 24 <sup>4</sup> As noted above, States *can* implement inspection and maintenance programs, whereby the State  
 25 tests vehicles for “in use” compliance with EPA emission standards. Congress made this explicit  
 26 through Section 207(h)(2) of the Clean Air Act, which provides that, “Nothing in [Section 209(a)]  
 shall be construed to prohibit a State from testing, or requiring testing of, a motor vehicle after the  
 date of sale of such vehicle to the ultimate purchaser . . . .” 42 U.S.C. § 7541(h)(2).

27 Compliance testing, however, differs from fraud-against-EPA type claims. It is one thing to  
 28 determine that a car being driven within a State is out-of-compliance with EPA emission  
 standards, and to require the vehicle to be repaired as a prerequisite for continuing operation. *See*  
*EPA's Oversight of the Vehicle Inspection and Maintenance Program Needs Improvement, supra*

1 In what appears to be the only other case to address whether a State may bring claims  
2 against a manufacturer based on the installation of a defeat device in new vehicles, the court in *In*  
3 *re Office of Attorney General* interpreted Section 209(a) similarly. *See In re Office of Attorney*  
4 *General of State of New York*, 269 A.D.2d 1 (N.Y. App. Div. 2000). There, following settlements  
5 between EPA and a group of vehicle manufacturers who installed defeat devices in heavy-duty  
6 vehicles, the State of New York subpoenaed the manufacturers for all documents they had  
7 provided to EPA as part of the Agency’s investigation. *Id.* at 3-5. In opposing a motion to quash,  
8 the State argued that the “preemptive effect of the Clean Air Act is not so broad that it forecloses  
9 the regulation of [vehicles] after they have been sold and placed in use.” *Id.* at 5. The New York  
10 appellate court rejected this argument, reasoning that all of the State’s claims had their “genesis in  
11 the manufacturers’ purported concealment or misrepresentation of their violations of the Federal  
12 emissions standards,” *id.* at 11-12, and so effectively sought to use state law “to penalize the  
13 manufacturers for producing engines which failed to comply with the Federal standards  
14 promulgated pursuant to the CAA,” *id.* at 11. Thus, even though the vehicles at issue had already  
15 entered into commerce, the court reasoned that Section 209(a) preempted the State’s action.

16 The Supreme Court’s decision in *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S.  
17 341 (2001) also supports reading Section 209(a) as prohibiting State claims predicated on deceit  
18 against EPA during new-vehicle certification. The plaintiffs there argued they were injured by an  
19 FDA-approved medical device, which they asserted FDA would not have approved but for  
20 misrepresentations during the FDA approval process. The Court held that the plaintiffs’ claims  
21 “conflict[ed] with, and [were] therefore impliedly pre-empted” by the Federal Food, Drug, and  
22 Cosmetic Act, as amended by the Medical Device Amendments of 1976. *Id.* at 343, 348. Noting  
23 that “the federal statutory scheme amply empowers the FDA to punish and deter fraud against the  
24 Administration,” using a “variety of enforcement options,” the Court reasoned that this flexibility

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25  
26 at 14. It is quite another to allege that a manufacturer deceived EPA into certifying an entire  
27 model year of vehicles. Wyoming does not contend otherwise. Nor could it reasonably rely on  
28 Section 207(h)(2) because its suit is not based on in-use testing by the State, but rather on  
Volkswagen’s disclosure (following EPA and CARB investigations) that the company had  
installed a defeat device in hundreds of thousands of vehicles.

1 would be constrained if applicants were forced to comply with the FDA’s regulations “in the  
2 shadow of 50 States’ tort regimes.” *Id.* at 348, 350. The Court also reasoned that the state-law  
3 claims would “dramatically increase the burdens facing potential applicants—burdens not  
4 contemplated by Congress in enacting the FDCA and the MDA,” and which could discourage  
5 would-be applicants from seeking approval of devices with potentially beneficial uses. *Id.* at 350.

6 Although *Buckman* was an implied preemption case, the Court’s analysis is instructive in  
7 interpreting the scope of Section 209(a). Like the FDA in the realm of medical devices, Congress  
8 has vested EPA with significant authority to regulate and enforce new-vehicle emission standards.  
9 If, despite this authority, States could bring actions against vehicle manufacturers based on deceit  
10 of EPA during new-vehicle certification, manufacturers would be forced to comply with EPA  
11 regulations “in the shadow of 50 State” regimes, which would “dramatically increase the burdens”  
12 manufactures would face in bringing new vehicles to market. 531 U.S. at 350. These additional  
13 burdens would hamper Congress’s purpose in enacting Section 209(a), and counsel against a  
14 cabined reading of Section 209(a) that would only prohibit States from interfering with the initial  
15 sale of EPA-approved vehicles.

16 Having established (1) that EPA’s rule prohibiting the installation of defeat devices in new  
17 vehicles is a standard that Section 209(a) bars States from enforcing; and (2) that Section 209(a)  
18 proscribes States from enforcing this standard even after the relevant vehicles are introduced into  
19 commerce, one more question remains: Is Wyoming attempting to enforce this standard through  
20 its tampering and concealment claims against Volkswagen?

21 The answer is yes. Although the relevant SIP provisions do not use the term “defeat  
22 device,” their application here is ultimately predicated on Volkswagen installing such a device in  
23 its “clean diesel” vehicles during manufacturing. That is not only conduct EPA prohibits, but is  
24 also conduct that EPA has already investigated, and which culminated in civil consent decrees, a  
25 guilty plea, and billions of dollars in penalties and mitigation costs, some of which will  
26 compensate Wyoming and its residents, and together which will fully mitigate the environmental  
27 harm caused by Volkswagen’s conduct. If Wyoming (and other States) are allowed to hold  
28 Volkswagen responsible for the same conduct, they will be effectively “penalize[ing]

1 [Volkswagen] for producing engines which failed to comply with the Federal standards,” and for  
 2 “conceal[ing] or misrepresent[ing] [those] violations.” *In re Office of Attorney General*, 269  
 3 A.D.2d at 11-12.<sup>5</sup>

4 Wyoming makes three principal arguments against this conclusion, each of which is  
 5 addressed in turn here. First, the State asserts that Section 209(a) prohibits only State conduct that  
 6 “force[s] new action.” (Dkt. No. 3404 at 26.) Applying that standard, Wyoming asserts that its  
 7 claims are not barred because its SIP “does not create any obligations above and beyond what the  
 8 EPA has already established.” (*Id.*) Section 209(a) does not include this “new action”  
 9 requirement, however. Rather, it prohibits any “attempt to enforce” a standard relating to the  
 10 control of emissions—which includes enforcement of an already existing EPA standard. *See Sims*,  
 11 862 F.2d at 1455 (Section 209(a) bars even state law that “does not establish new or conflicting  
 12 emission standards”).

13 In support of this “new action” requirement, Wyoming relies on *Metropolitan Taxicab*  
 14 *Board of Trade v. City of New York*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009). The question there was  
 15 whether, under the “adopt” prong of Section 209(a), a local regulation incentivizing the purchase  
 16 of hybrids “related to” emissions from new vehicles. To make that determination the court  
 17 reasoned that the Supreme Court’s *Travelers* decision<sup>6</sup>—an ERISA preemption case—required a  
 18 finding that the local regulation “effectively mandates” the purchase of hybrids in order to be  
 19 preempted (i.e., that the regulation requires new action). *Id.* at 95; *see also id.* at 94, 96. The  
 20 court’s analysis (right or wrong)<sup>7</sup> is inapplicable here, where the focus is on Section 209(a)’s  
 21 “attempt to enforce” prong. EPA prohibits manufacturers from installing defeat devices in new  
 22

23 <sup>5</sup> Nor do the States seek a simple slap on the wrist. Wyoming seeks civil penalties of up to  
 24 \$37,500 “per violation per day,” with a separate violation occurring “each day a Subject Vehicle is  
 25 driven in Wyoming.” (Compl. ¶¶ 222, 229, 236.) Based on Wyoming’s allegation that, as of  
 26 November 1, 2015, there were 1,196 subject vehicles registered in the State (*id.* ¶ 231), penalties  
 27 could total \$44.85 million per day and \$16.4 billion per year. And that is just Wyoming.

28 <sup>6</sup> *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

<sup>7</sup> Although the Second Circuit affirmed the decision, it reasoned that the district court’s “attention  
 to economic impact was misguided” under the circumstances. *Metro. Taxicab Bd. of Trade v. City  
 of New York*, 615 F.3d 152, 158 (2d Cir. 2010).



1 motor vehicles, and Section 209(a) prohibits Wyoming from “attempt[ing] to enforce” that rule,  
2 whether or not Wyoming’s enforcement action requires “new action” on behalf of Volkswagen.

3 Second, Wyoming contends that this case is similar to *Counts v. General Motors, LLC*,  
4 237 F. Supp. 3d 572 (E.D. Mich. 2017), where the court held that Section 209(a) did not preempt  
5 certain contract, fraudulent concealment, and deceptive advertising claims brought against GM by  
6 consumers who alleged that they purchased GM vehicles that contained a defeat device. The  
7 court’s conclusion there, however, was based on a distinction between attempts to enforce EPA  
8 regulations (which are preempted) and attempts to hold GM liable for misrepresentations it made  
9 to consumers about its vehicles’ emissions more generally (which the court held were not  
10 preempted). *See id.* at 592. Whether that distinction is correct is not relevant here; Wyoming is  
11 not attempting to hold Volkswagen liable for deceptive statements made to the State’s residents;  
12 the State is instead attempting to hold Volkswagen liable for using a defeat device in its vehicles.

13 Third, Wyoming argues that it is not attempting to enforce EPA’s standard prohibiting the  
14 installation of defeat devices in new vehicles, because its claims are based only on the *operation*  
15 of Volkswagen’s defeat device within the State. Framed in this way, Wyoming contends that its  
16 claims are permitted under the Clean Air Act’s savings clause, § 209(d).

17 The operation of Volkswagen’s defeat device on the roads of Wyoming, however, cannot  
18 be so easily separated from its installation. For one thing, *all* defeat devices perform by reducing  
19 the effectiveness of emission control systems during “normal vehicle operation and use.” 40  
20 C.F.R. § 86.1803-01. That is how a defeat device works. Under Wyoming’s reading, then, every  
21 defeat device installed in a new vehicle that is later registered in the State will violate its  
22 tampering and concealment rules, without any additional action by the manufacturer who installed  
23 the device. Thus, even if Wyoming is regulating the *use* of defeat devices, it is also effectively  
24 regulating their installation.

25 Further, Wyoming’s claims are materially distinguishable from “in use” vehicle  
26 regulations permitted under Section 209(d). As noted above, courts and EPA have recognized  
27 that, consistent with Congress’s purpose in enacting Section 209, permissible “in use” regulations  
28 “cause only minimal interference with interstate commerce,” and the “burden of compliance” with



1 an in-use regulation is generally “on individual owners and not on manufacturers and  
2 distributors.” *Allway Taxi*, 340 F. Supp. at 1124; *see also* 59 Fed. Reg. 31306-01, 31330  
3 (explaining that a State’s “in-use” regulations cannot “amount to a standard relating back to the  
4 original design of the engine by the original engine manufacturer”). For example, in the case of a  
5 mechanic who disconnects a vehicle’s catalytic converter in the repair shop, the regulated conduct  
6 occurs within a single state and the burden of compliance is on the mechanic and the owner of the  
7 vehicle. The same is true of transportation planning regulations, such as carpool lanes, *see EMA*,  
8 88 F.3d at 1094, and with inspection and maintenance programs.

9 In contrast, Wyoming’s tampering and concealment claims place the burden of compliance  
10 on Volkswagen as the manufacturer. To ensure accurate emissions’ reporting and the full use of  
11 vehicle emission controls, Volkswagen must uninstall the defeat-device software. And even then,  
12 modifications to the vehicles are needed for them to perform as represented. (*See* Compl. ¶ 104  
13 (noting that if the vehicles’ emission-control system operated fully, as currently configured,  
14 “particulate matter would . . . clog and break the engine’s diesel particulate filter”).) Wyoming’s  
15 regulations therefore amount to impermissible State “standard[s] relating back to the original  
16 design of the engine by the original engine manufacturer.” 59 Fed. Reg. at 31330. Further,  
17 Wyoming’s claims (and those of other States) threaten to interfere with interstate commerce,  
18 because they are predicated on conduct that occurred during the manufacture of hundreds of  
19 thousands of vehicles intended for distribution throughout the United States. This, of course, does  
20 not mean that Volkswagen cannot be held responsible for the consequences of its actions. As is  
21 readily apparent from this MDL, Volkswagen has indeed been held responsible. But because  
22 Volkswagen’s conduct took place during manufacturing, Congress determined that EPA, not the  
23 50 States, was best situated to regulate it.<sup>8</sup>

24  
25  
26 <sup>8</sup> Wyoming contends that Volkswagen “continued to tamper with pollution controls through a  
27 software recall for vehicles already sold to consumers.” (Dkt. No. 3404 at 29 (citing Compl.  
28 ¶¶ 151-52, 164-71).) But as Volkswagen notes, its updates as part of the recall brought emissions  
down relative to the original software. (*See* Compl. ¶ 152.) The updates therefore did not violate  
Wyoming’s concealment provision (because the updates brought on-road emissions closer to  
dynamometer testing emissions), or Wyoming’s tampering provision (because the updates did not  
“render ineffective or inoperative” the emission control systems).

**CONCLUSION**

Wyoming, by attempting to apply its SIP’s tampering and concealment rules to Volkswagen’s use of a defeat device, seeks to “enforce [a] standard relating to the control of emissions from new motor vehicles.” 42 U.S.C. § 7543(a). Because the Clean Air Act prohibits States from enforcing such standards, Wyoming’s claims cannot go forward and the Court accordingly GRANTS Volkswagen’s motion to dismiss Wyoming’s complaint. Finding that amendment of the complaint would be futile, the Court dismisses the complaint with prejudice.

Having concluded that Wyoming’s claims are expressly prohibited by the Clean Air Act, the Court does not consider whether the claims are also impliedly preempted, or whether the Court has personal jurisdiction over the German Defendants.

**IT IS SO ORDERED.**

Dated: August 31, 2017



CHARLES R. BREYER  
United States District Judge

United States District Court  
Northern District of California

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