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California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act

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Summary

California has adopted regulations requiring new motor vehicles to reduce emissions of greenhouse gases (GHGs), beginning in model year 2009. The Clean Air Act, however, generally preempts states from adopting their own emission standards for mobile sources of air pollution. In order for the regulations to go into effect, therefore, the state must obtain a waiver of the Clean Air Act's preemption from the U.S. Environmental Protection Agency.

California requested this waiver on December 21, 2005, but EPA has yet to rule on the state's request, in part because it was waiting for the Supreme Court to decide whether greenhouse gases could be considered air pollutants under the Clean Air Act, and thus subject to EPA's regulatory authority. With that case (*Massachusetts v. EPA*) decided April 2, 2007, EPA held two public hearings on the California waiver request in late May, and has promised a decision on the waiver by the end of 2007.

The agency is under pressure to act more quickly. The state has threatened to sue EPA if a decision is not announced by October, and Florida's Senator Nelson has submitted legislation (S. 1785) to require a decision no later than September 30. Fourteen other states have adopted California's GHG regulations. Their regulations cannot go into effect unless California is first granted a waiver, so there is broader interest and more at stake than might otherwise be the case.

This report reviews the nature of California's, EPA's, and other states' authority to regulate emissions from mobile sources, discusses the applicability of that authority to greenhouse gases, and provides analysis of issues related to the California waiver request. The conditions for granting or denying a waiver request under the Clean Air Act establish four tests: whether the standards will be at least as protective of public health and welfare as applicable federal standards; whether the state's determination in this regard is arbitrary and capricious; whether the state needs such standards to meet compelling and extraordinary conditions; and whether the standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act. California appears to have a strong case that it has met these tests.

This report does not discuss the issue of whether California is prohibited from regulating greenhouse gases by the Corporate Average Fuel Economy (CAFE) requirements of the Energy Policy and Conservation Act of 1975 (EPCA). Under EPCA, the authority to set fuel economy standards is reserved for the federal government, and specifically, the National Highway Traffic Safety Administration. In several court cases (not yet decided), and in other venues, the auto industry has maintained that the regulation of greenhouse gases is simply another method of regulating fuel economy, and, therefore, that California's GHG standards are preempted by EPCA. Detailed discussion of this issue is beyond the scope of this report.

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California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act

Introduction

Every federal law imposing environmental standards raises the question of whether the states are allowed to set stricter standards. In deference to states' rights, the usual approach used by Congress is to allow stricter state standards; for example, the Clean Air Act allows stricter state standards for stationary sources of air pollution (power plants, refineries, etc.). For mobile sources of air pollution, however — cars, trucks, planes, etc. — a lack of national uniformity creates a problem, since manufacturers would potentially face the task of complying with different standards in each state. Such standards would fragment the national market, increasing costs and complicating the manufacture, sale, and servicing of the affected products. For this reason, the mobile source portion of the Clean Air Act (Title II) generally does not allow states to "adopt or attempt to enforce" their own emission standards for new motor vehicles or engines.[1] In general, it allows only federal standards for motor vehicle emissions.

There is an exception to this rule, however, in Section 209(b) (42 U.S.C. 7543), which provides that:

> The [EPA] Administrator shall, after notice and opportunity for public hearing, waive application of this section [the prohibition of State emission standards] to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.[2]

Only California adopted such standards before March 30, 1966, so only California can qualify for such a waiver.

Faced with severe air pollution problems, especially in Los Angeles and the San Joaquin Valley, California has regularly developed more stringent standards for motor vehicle emissions than those required by federal law. In order to impose these

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[1] Clean Air Act, Section 209(a), 42 U.S.C. 7543(a). See also S.Rept. 91-1196 (1970), p. 32.

[2] As will be discussed in greater detail below, there are three conditions placed on the grant of such waivers: The Administrator is to deny a waiver if he finds: 1) that the state's determination is arbitrary and capricious; 2) that the state does not need separate standards to meet compelling and extraordinary conditions; or 3) that the state's standards and accompanying enforcement procedures are not consistent with Section 202(a) of the Act.

standards, the state has requested and been granted Section 209(b) waivers at least 53 times since 1967.[3] (Although only California may be granted a waiver under this section, elsewhere in the Act, as discussed later in this report, there is authority for other states to adopt California's standards if EPA grants California a waiver.)

Using Section 209(b) waivers, California has served as a laboratory for the demonstration of cutting edge emission control technologies, which, after being successfully demonstrated there, were adopted in similar form at the national level. Catalytic converters, cleaner fuels, and numerous other advances were introduced in this way. Currently, waivers allow California to require that a portion of each manufacturer's sales meet Zero Emission Vehicle (ZEV) and Partial ZEV requirements, which has stimulated the sale of electric and hybrid vehicles.

California's Greenhouse Gas Requirements

On July 22, 2002, California became the first state to enact legislation requiring reductions of greenhouse gas (GHG) emissions from motor vehicles. The legislation, AB 1493, required the California Air Resources Board (CARB) to adopt regulations requiring the "maximum feasible and cost-effective reduction" of GHG emissions from any vehicle whose primary use is noncommercial personal transportation. GHGs are defined by the state as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, but for the purpose of this regulatory program, only the first four of these are subject to control. The reductions are to apply to motor vehicles manufactured in the 2009 model year and thereafter.

Under this authority, CARB adopted regulations September 24, 2004, requiring gradual reductions in fleet average GHG emissions until they are about 30% below the emissions of the 2002 fleet in 2016.[4] As illustrated in **Figure 1**, the regulations set separate standards for two classes of vehicles. The first class consists of all passenger cars, plus light duty trucks and SUVs weighing 3,750 lbs. or less; these vehicles must reduce emissions by an average of 36.5% between 2009 and 2016. The second group consists of light trucks and passenger vehicles over 3,750 lbs., which must reduce emissions 24.4% over the same time period.

The regulations require reductions in fleet averages, rather than compliance by individual vehicles. They provide substantial flexibility, including credit generation from alternative fuel vehicles and averaging, banking, and trading of credits within and among manufacturers. Credits — and debits for any year in which a manufacturer exceeds the standards — must be equalized within five years of their

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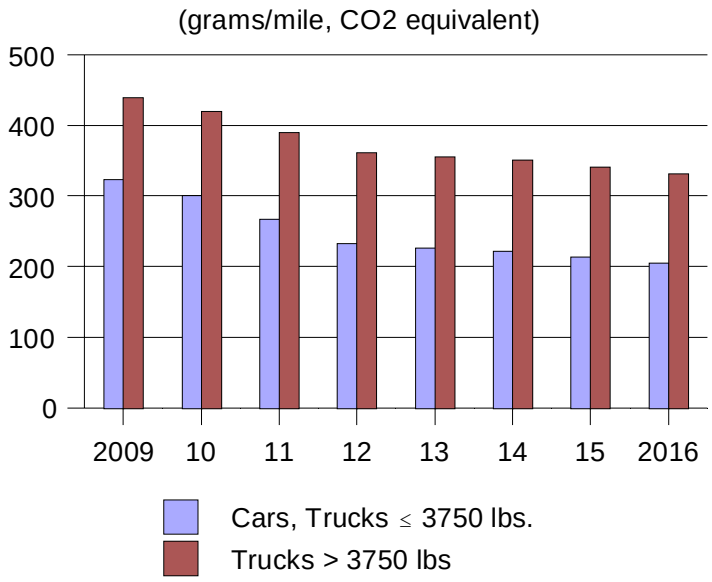
[3] Personal communication, U.S. EPA Office of Transportation and Air Quality, July 20, 2007.

[4] A table showing the mandated reductions year-by-year can be found in CARB's *Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, Final Statement of Reasons,* August 4, 2005, p. 8 at [http://www.arb.ca.gov/regact/grnhsgas/fsor.pdf].

generation, with the first equalization required in 2014. Thus, manufacturers would not be subject to penalties for failure to meet the standards until 2014 at the earliest.[5]

Figure 1. California GHG Emission Requirements



Source: California Air Resources Board

Following adoption of these regulations by CARB, they were subjected to public comment and legislative review, following which CARB submitted a request to U.S. EPA, December 21, 2005, for a waiver under Section 209(b).

EPA's Response to the Waiver Request

EPA has not yet responded to California's waiver request, in part because it was waiting for the U.S. Supreme Court to decide whether greenhouse gases could be considered air pollutants under the Clean Air Act, and thus subject to EPA's regulatory authority. The court case challenged EPA's denial, in 2003, of a petition from 19 private organizations that asked the agency to regulate GHG emissions from new motor vehicles. The agency concluded that it lacked authority under the Clean Air Act to regulate motor vehicle emissions based on their climate effects. The petition denial was challenged by Massachusetts and twelve other states (CA, CT, IL, MA, ME, NJ, NM, NY, OR, RI, VT, WA); three cities (New York, Baltimore, and Washington, DC); two U.S. territories (American Samoa and Northern Mariana

[5] California Air Resources Board, *Regulations to Control Greenhouse Gas Emissions from Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b)*, December 21, 2005, Attachment 2, Support Document, p. 2. Hereafter referred to as "Support Document."

Islands); and several environmental groups. In an April 2, 2007 decision,[6] the Supreme Court resolved this issue, finding:

> The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air...." ... Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical ... substance[s] which [are] emitted into ... the ambient air." The statute is unambiguous.[7]

Thus, the Court found no doubt that the Clean Air Act gives EPA the authority to regulate greenhouse gases from new motor vehicles, although the specifics of such regulation might be subject to agency discretion. (For further discussion of the Court's decision, see CRS Report RS22665, *The Supreme Court's Climate Change Decision: Massachusetts v. EPA*, by Robert Meltz.)

Following this decision, EPA announced that it would consider the California waiver request. The agency held public hearings on May 22, 2007, in Arlington, VA, and on May 30 in Sacramento, CA. Under pressure from California's Senator Boxer, who chairs the Environment and Public Works Committee, and other California leaders, including Governor Schwarzenegger and Attorney General Brown, EPA Administrator Johnson announced that he would decide whether to grant the waiver request by the end of 2007.

EPA is under pressure regarding both the content and timing of its decision. With regard to content, the agency has received more than 60,000 comments, the vast majority of them urging it to grant the waiver. Support comes from environmental groups, the Manufacturers of Emission Controls Association, the National Association of Clean Air Agencies (which represents state and local air pollution control departments), and a number of governors. As will be discussed further below, 14 other states have adopted regulations identical to California's, but their ability to implement the regulations depends on California first being granted a waiver.[8] Thus, they have weighed in in support of the waiver request.

The auto industry and the U.S. Department of Transportation (DOT), among others, are opposed to the granting of a waiver. The auto industry maintains that there is effectively no difference between California and federal emission standards in their impact on criteria air pollutants (ozone, in particular), that the benefits of the

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[6] Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

[7] Id. at 1460.

[8] The 14 states are Arizona, Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Under Section 177 of the Act, states that have nonattainment or "maintenance" areas can adopt California's emission standards for mobile sources in lieu of federal standards. Every state except Hawaii, North Dakota, and South Dakota would be eligible to adopt California's standards under this so-called "piggyback' provision. Thus, there is broad interest in the California waiver decision and more at stake than would be the case if only California had adopted the regulations.

GHG regulations are "zero", and that emissions from California's auto fleet will actually increase as a result of the regulations as consumers keep older, higher-emitting cars longer.[9]

With regard to timing, the House Appropriations Committee, in its report to accompany H.R. 2643, the Department of the Interior, Environment, and Related Agencies Appropriation bill for 2008, "strongly encourage[d]" EPA to promptly issue a decision.[10] California's governor and attorney general have threatened to sue EPA if a decision is not announced by October, and Florida's Senator Nelson and Washington's Representative Inslee have introduced legislation (S. 1785/H.R. 3083) to require a decision no later than September 30. By a vote of 10-9, Senator Nelson's bill was ordered reported, amended, by the Environment and Public Works Committee, July 31, 2007.[11]

In early June, on the other hand, officials in the Department of Transportation's Office of Governmental Affairs called Members of Congress, urging them to contact EPA to urge the Administrator to extend its public comment period, thus delaying a decision — a step that EPA did not take. DOT's talking points (subsequently obtained by Representative Waxman) stated: "If asked our position, we say we are in opposition of the waiver."[12]

Actions by Other States

As noted above, California is the only state permitted to adopt more stringent emission standards under the waiver provision of Section 209(b); but elsewhere (in Section 177, 42 U.S.C. 7507), the Clean Air Act provides that any state with an EPA-approved State Implementation Plan — every state except Hawaii, North Dakota, and South Dakota — "may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines" provided: 1) that the standards are identical to standards for which California has been granted a waiver; and 2) that California and such state have adopted the standards at least two years before the commencement of the model year to which the standards apply. Relying on this authority, and presuming that California will be granted a waiver, 14 other states (Arizona, Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) have adopted or announced their intention[13] to

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[9] Alliance of Automobile Manufacturers, "California Waiver Request," presentation materials from U.S. EPA public hearing, Sacramento, CA, May 30, 2007.

[10] H.Rept. 110-187, June 11, 2007, p. 100.

[11] The House companion bill, Rep. Inslee's H.R. 3083, had not seen action as of the August recess.

[12] See p. 11 of internal e-mail from the U.S. DOT, Office of Governmental Affairs, available on the website of the House Oversight and Government Reform Committee, at [http://oversight.house.gov/documents/20070702164117.pdf].

[13] In some cases, only one branch of government (e.g., the Governor, through Executive (continued...)

adopt California's greenhouse gas emission controls. Including California, these states account for 44% of the total U.S. population (**Table 1**). Thus, the stakes involved (both the environmental consequences and the potential impact on the auto industry) go well beyond California.

Table 1. States Adopting California's Mobile Source GHG Standards

State	2006 Population	Legislation/Regulation
Arizona	6,166,318	Executive Order 2006-13, September 8, 2006
California	36,457,549	AB 1493, July 22, 2002
Connecticut	3,504,809	Public Act 04-84, May 4, 2004
Florida	18,089,888	Executive Order 07-127, July 13, 2007
Maine	1,321,574	Amendments to Chapter 127, December 19, 2005
Maryland	5,615,727	Senate Bill 103, April 24, 2007
Massachusetts	6,437,193	Amendments to the state's LEV regulations, December 30, 2005
New Jersey	8,724,560	P.L. 2003, Chapter 266, January 14, 2004
New Mexico	1,954,599	Executive Order 2006-69, December 28, 2006
New York	19,306,183	Chapter III, Subpart 218-8, November 9, 2005
Oregon	3,700,758	Regulations (Division 257; OAR 340-256-0220; and Division 12), June 22, 2006
Pennsylvania	12,440,621	Amendments to Title 25, Chapters 121 and 126, December 9, 2006
Rhode Island	1,067,610	Air Pollution Control Regulation No. 37, December 22, 2005
Vermont	623,908	Amendments to Subchapter XI, November 7, 2005
Washington	6,395,798	House Bill 1397, May 6, 2005
Total	131,807,095	

Source: Pew Center on Global Climate Change for information and links to state regulations, at [http://www.pewclimate.org/what_s_being_done/in_the_states/vehicle_ghg_standard.cfm], U.S. Census Bureau for population data.

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[13] (...continued)
Order) has ordered the adoption of the California GHG standards. Without reviewing each state's regulatory process, it is unclear to CRS whether, in such cases, the state can be considered to have adopted the standards.

Waiver Criteria

As noted earlier, Section 209(b) says that the EPA Administrator "shall ... waive" the prohibition on state emission standards "if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." Since California did so determine, this language would seem to give EPA little room to turn down the waiver request. But the section adds:

> No such waiver shall be granted if the Administrator finds that-
> (A) the determination of the State is arbitrary and capricious,
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
> (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.

There are two ways in which this language can be interpreted. One is that it refers to the specifics of the new standards under consideration — in this case, the GHG standards. The other is that it refers to the state's program as a whole — i.e., whether, in the aggregate, all the state's requirements for auto emission controls are as protective of public health and welfare as federal standards, are needed to meet compelling and extraordinary conditions, etc. We look at each of these interpretations in turn in the following sections.

Evaluating the GHG Standards in Isolation

If the Administrator's determination is to be made on whether California's GHG standards by themselves meet the waiver criteria, he must first find whether the state's determination that its standards are at least as protective as applicable federal standards is arbitrary and capricious. There are no federal standards for GHG emissions. Thus, it is difficult to see how the Administrator could find California's determination that its standards are at least as protective to be arbitrary and capricious.

The other two criteria, (B) and (C), pose higher hurdles.

Compelling and Extraordinary Conditions. In the record accompanying the adopted regulations, California identifies numerous conditions that climate change presents to the state that are arguably compelling and extraordinary, including the potential of rising sea levels that would bring increased salt water intrusion to its limited supplies of water, diminishing snow pack that would also threaten its limited water supply, and higher temperatures that would exacerbate the state's ozone nonattainment problem, which is already the worst in the nation.[14]

Whether the state's mobile source GHG emission standards are "need[ed]" to meet these conditions poses a more difficult question, however. Climate change is a global issue, and will pose nearly identical challenges to California whether or not

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[14] CARB, Support Document, p. 18.

the state is permitted to implement the adopted regulations. The reductions in GHG emissions that the regulations will bring about are estimated at 155,200 tons of CO_2 equivalent per day in 2030[15] (i.e., when the fleet consists of vehicles that meet the 2016 standard) — 56.6 million tons a year compared to a business-as-usual scenario. If all 15 states that have adopted or announced plans to implement the regulations do so, the reductions might be as much as 175 million or 200 million tons annually. Compared to total current U.S. emissions from all sources of about 7 billion tons, California's action alone would reduce emissions less than 1%, and all 15 states would eliminate 2.5% to 3%. Compared to world emissions from all sources (34 billion tons), all 15 states would reduce the total only about 0.6%. Thus, it might be argued that the standards do not go far enough to be said to "meet" the compelling and extraordinary conditions that the state has described.

On the other hand, a more persuasive case can perhaps be made that the GHG regulations are no different in this regard than the 53 previous sets of regulations for which EPA has granted California waivers. Like the GHG standards, each of the previous sets of regulations were incremental steps that reduced emissions, but in themselves were insufficient to solve the pollution problem they addressed: large portions of the state are still in nonattainment of the ozone air quality standard nearly 40 years after the first of these waivers, despite these incremental steps to reduce emissions.

Furthermore, auto and light truck emissions are major contributors to the total pool of greenhouse gas emissions (about 20% of the total of U.S. emissions), and are growing more quickly than emissions from other sources.[16] In California, according to CARB, the affected vehicles produce about 30% of the state's total GHG emissions.[17] Stabilizing and reducing total GHG emissions would be difficult or impossible without addressing this sector. Thus, a strong case can be made that reducing GHG emissions from mobile sources is necessary if the state is to meet the compelling and extraordinary conditions posed by the increasing concentration of GHGs in the atmosphere.

In *Massachusetts v. EPA*, the Supreme Court was concerned about a similar issue. There, in determining whether petitioners had standing, the Court discussed the question of "redressability" — whether a favorable decision in the case would

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[15] CARB, *Regulations to Control Greenhouse Gas Emissions from Motor Vehicles, Final Statement of Reasons*, August 4, 2005, at [http://www.arb.ca.gov/regact/grnhsgas/fsor.pdf], p. 13.

[16] From 1990 to 2005, U.S. passenger car and light duty truck CO_2 emissions increased 25.4%, while total U.S. CO_2 emissions increased 21.7%. Source: U.S. EPA, Office of Atmospheric Programs. 2007. *The U.S. Inventory of Greenhouse Gas Emissions and Sinks*. Table 3-7.

[17] California Environmental Protection Agency, Air Resources Board, *Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles*, August 6, 2004, p. viii, available at [http://www.arb.ca.gov/regact/grnhsgas/isor.pdf].

redress the injury caused by global warming.[18] The Court concluded both that "the harms associated with climate change are serious and well recognized,"[19] and that a state need not show that the government actions it is seeking would completely remedy the injury:

> ... accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.... They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.[20]

This Supreme Court language may prove useful to California in its quest for an EPA preemption waiver, notwithstanding that it arose in a standing, rather than Section 209(b), context.

Consistency with Section 202(a). The Administrator could also reject the request if he finds that the state's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Clean Air Act. Much of Section 202(a) is not applicable to this waiver request: it addresses standards specific to heavy duty trucks, rebuilt heavy-duty engines, motorcycles, and gasoline vapor recovery. But the section also provides general authority for motor vehicle and motor vehicle engine emission standards. It allows the Administrator to determine whether there are any unreasonable risks to public health, welfare, or safety associated with specific emission control devices or systems, and to determine the amount of lead time necessary to permit the development and application of technology requisite to meet emission standards. The Administrator has used the latter authority in the past, and could do so again, to delay the effective date of California standards.

In its *Initial Statement of Reasons* and in other documents supporting the GHG standards, the state emphasized that it had based the standards on the use of already demonstrated technologies: "The technologies explored are currently available on vehicles in various forms, or have been demonstrated by auto companies and/or vehicle component suppliers in at least prototype form," CARB stated in its *Initial Statement of Reasons*.[21] The Support Document accompanying its December 2005 formal request for a waiver contains 21 pages describing the technologies available to meet the standards, and states: "... unlike most previous CARB requests setting standards years into the future, each of the technology packages projected for

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[18] To establish standing to sue in most federal courts, a plaintiff must demonstrate (1) that he/she has suffered actual or imminent "injury in fact," (2) that the injury is caused by actions of the defendant, and (3) that the relief requested from the court will redress the injury.

[19] Massachusetts v. EPA, 127 S. Ct. 1438, 1455 (2007).

[20] Id., at 1457.

[21] CARB, *Initial Statement of Reasons*, previously cited, p. iii. A more detailed discussion is found on pp. 42-102 of the document.

compliance contains many technologies that are currently available and in vehicles today."[22]

The state concluded that inconsistency with Section 202(a) can only be shown if there is inadequate lead time to permit the development of technology to meet the requirements, giving appropriate consideration to the cost of doing so, or if the federal and California test procedures impose inconsistent certification requirements. Because there are no federal test procedures that measure greenhouse gases for climate change purposes, test procedures cannot be an issue. CARB concludes:

> The only relevant question, then, is whether manufacturers can apply these technologies in sufficient quantities to meet the standards in time for the regulatory compliance deadlines following model years 2012 and 2016, a lead time of eight to 11 years respectively. The Greenhouse Gas Rulemaking record shows that they can.[23]

In making past determinations on waiver requests, EPA has granted waivers despite industry statements and its own findings that doing so would greatly increase cost, result in substantial fuel economy penalties, cause the marketing of a more restricted model line in California, result in poorer driveability, and cause California auto dealers' business to suffer substantially. Despite making all of these findings in a 1975 waiver determination, then-EPA Administrator Russell Train granted a waiver because he concluded that the statutory language required that he give deference to California's judgment.[24]

Evaluating the State's Program in the Aggregate

The other interpretation of Section 209(b) is that the Administrator is to determine whether California's auto and light truck emission requirements in the aggregate — not just the GHG controls — meet the criteria for a waiver. According to numerous informed sources — including both California and EPA — this has always been how the statute has been interpreted. California's waiver submission, for example, states: "The relevant inquiry under section 209(b)(1)(B) is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions."[25]

EPA has agreed with this position in past determinations. For example, in a 1984 waiver determination, Administrator William Ruckelshaus stated:

> CARB argues that ... EPA's inquiry is restricted to whether California needs its own motor vehicle pollution control *program* to meet compelling and extraordinary conditions, and not whether any given standard, (e.g., the instant

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[22] Support Document, p. 21.

[23] Ibid.

[24] 40 *Federal Register* 23103-23105, May 28, 1975.

[25] Support Document, p. 15.

> particulate standards) is necessary to meet such conditions.... For the reasons elaborated below, I agree with California...."[26]

The "reasons elaborated below" included Congress's use of the term "State standards ... in the aggregate."

Relying on this interpretation of the statute, EPA has repeatedly found, as recently as December 2006, that California faces compelling and extraordinary conditions and needs its own standards to meet them.[27] EPA has also generally deferred to the state's judgment regarding consistency with Section 202(a).[28] In general, as EPA stated in a 1975 waiver determination:

> These provisions must be read in the light of their unusually detailed and explicit legislative history.... Congress meant to ensure by the language it adopted that the Federal government would not second-guess the wisdom of state policy here.... Sponsors of the language eventually adopted referred repeatedly to their intent to make sure that no "Federal bureaucrat" would be able to tell the people of California what auto emission standards were good for them, as long as they were stricter than Federal standards.... (Senate language says "You may go beyond the Federal statutes unless we find that there is no justification for your progress").[29]

The Value of Precedent: Has EPA Ever Turned Down a Waiver Request?

As noted earlier, California has previously requested waivers under Section 209(b) on many occasions. A precise count of the number of such requests is difficult to determine, according to EPA's Office of Transportation and Air Quality (OTAQ), in large part because the nature of such requests varies. The state has requested waivers for new or amended standards on at least 53 occasions; on another 42 occasions, the state has requested "within the scope" determinations (i.e., a request that EPA rule on whether a new regulation is within the scope of a waiver that the agency has already issued). Adding all of these together, one might say that

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[26] 49 *Federal Register* 18889-18890, May 3, 1984.

[27] 71 *Federal Register* 78192, December 28, 2006.

[28] As noted by Administrator Ruckelshaus in the same 1984 waiver determination, "EPA has long held that consistency with section 202(a) does not require that all manufacturers be permitted to sell all motor vehicle models in California." As of 1984, he concluded, "Only once has the Agency found a ... standard inconsistent with section 202(a) in a California waiver proceeding. In that case, imposition of the standard would have forced manufacturers out of the California market for an entire class of vehicles , i.e., light duty trucks." [49 *Federal Register* 18892, May 3, 1984.]

[29] 40 *Federal Register* 23103, May 28, 1975.

there have been at least 95 waiver requests, but nearly half of these were relatively minor actions that may not deserve to be counted as formal requests.[30]

Of these, all were granted in whole or in part. "I don't think we've ever outright denied a request," according to an OTAQ official; "but there were some grants in which we denied part or delayed the effective date of part on feasibility grounds," he added.[31] On at least six occasions prior to the 1977 Clean Air Act amendments, the agency granted a waiver in part, while denying other parts of the request.[32] In 1975, it denied a waiver for the 1977 model year, but granted it for 1978.[33] Since the 1977 amendments, there was at least one instance in which EPA made a determination that California's requirements were feasible in part, granting a waiver for the 2007 through 2011 model years, but making no decision for model years after that.[34]

Related Litigation[35]

Besides the expected EPA decision on California's waiver request, there is also litigation seeking to prevent California and other states from implementing the California mobile source GHG standards. Preemption suits are pending in three federal judicial circuits containing a state that has adopted GHG controls on vehicles. The first suit, *Central Valley Chrysler Jeep, Inc. v. Witherspoon*, in the Ninth Circuit, challenges the regulations under California's Assembly Bill 1493. The plaintiffs are 13 California car dealers plus the Alliance of Automobile Manufacturers. In 2006, the district court in a preliminary ruling[36] refused to dismiss the plaintiffs' preemption arguments — holding that (1) the plaintiffs had stated a claim that the regulations are preempted by the fuel economy standards set under the Energy Policy and Conservation Act, which instructs that states not enforce any rule related to fuel

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[30] Personal communication, U.S. EPA, Office of Transportation and Air Quality, July 20, 2007. California has also submitted about 10 waiver requests for non-road vehicles and engines under Section 209(e). These form a third category.

[31] Ibid.

[32] According to EPA, the dates were May 6, 1969 (34 FR 7348), April 30, 1971 (36 FR 8172), April 25, 1972 (37 FR 8128), April 26, 1973 (38 FR 10317), November 1, 1973 (38 FR 30136), and July 18, 1975 (40 FR 30311).

[33] 40 FR 30311, July 18, 1975.

[34] 71 FR 78190, December 28, 2006.

[35] This section was authored by Robert Meltz, Legislative Attorney, American Law Division.

[36] 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

economy standards;[37] (2) the regulations are preempted by the Clean Air Act,[38] absent a waiver approved by EPA;[39] and (3) the plaintiffs had stated a claim that the regulations were preempted as conflicting with federal policy to address climate change through multilateral international agreements. In contrast, two other arguments made by the plaintiffs — that the CARB regulations violate the dormant commerce clause of the Constitution by imposing economic burdens far outweighing any benefits, and offend an antitrust statute by requiring cooperation among otherwise competitive automobile manufacturers in the California new-vehicle market — were rejected on the merits.

On January 16, 2007, the district court stayed further proceedings in the case pending the Supreme Court's decision in *Massachusetts v. EPA*.[40] In the meantime, California is enjoined from enforcing the CARB regulations due to the court's holding as to CAA preemption, unless EPA grants a waiver.

Similar preemption claims to those in California, also made by car dealers and trade associations, are pending in suits challenging the adoption of the California standards by Vermont (Second Circuit) and Rhode Island (First Circuit). In Vermont, in *Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse*,[41] plaintiffs assert the same five legal theories as in the California suit, but limit themselves to challenging the state's CO_2 standards. In a companion suit filed the same day, *Association of International Automobile Manufacturers v. Dalmasse*,[42] only the EPCA and CAA preemption theories are advanced, but the suit encompasses all four GHG emissions covered by the regulations (CO_2, methane, nitrous oxide, and hydrofluorocarbons), not just CO_2. These two suits have been consolidated, and the State of New York (which would be bound by any Second Circuit decision on appeal) has intervened on the side of Vermont. Recently, the state's motion to dismiss on ripeness grounds was rejected.[43]

The legal theories presented and the types of emissions covered in the *Dalmasse* litigation are the same, respectively, in two Rhode Island suits — *Lincoln Dodge, Inc.*

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[37] EPCA states: "When an average fuel economy standard prescribed under this act is in effect, a State ... may not adopt ... a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this act." 49 U.S.C. § 32919(a).

[38] CAA § 209(a), 42 U.S.C. § 7543(a). This prohibition on state regulation appears to apply even in the absence of a federal emission standard. Thus, despite EPA's having no vehicle emission standards for CO_2, methane, and hydrofluorocarbons, a state would still be preempted from setting its own emission standard, absent a waiver.

[39] CAA § 209(b), 42 U.S.C. § 7543(b).

[40] 127 S. Ct. 1438 (2007). As of this writing, the stay is still in effect, despite the Supreme Court's having ruled.

[41] No.2:05-CV-302 (D. Vt. filed November 18, 2005).

[42] No. 2:05-CV-304 (D. Vt. filed November 18, 2005).

[43] 2006 Westlaw 3469622 (D. Vt. November 30,2006).

v. Sullivan[44] and *Association of International Automobile Manufacturers v. Sullivan*.[45]

Conclusion

California's request for a greenhouse gas waiver under Section 209(b) of the Clean Air Act marks the second time that EPA has been asked to regulate or to allow regulation of GHG emissions from mobile sources. The first time, a petition from 19 private organizations asking EPA to set federal GHG emission standards, was denied by the agency in 2003; but it led to the Supreme Court's decision (*Massachusetts v. EPA*), April 2, 2007, in which the Court overturned EPA's decision, finding that GHGs are air pollutants within the meaning of the Clean Air Act, and rejecting EPA's arguments against their regulation as being insufficient.[46]

In light of the Court's decision, the California waiver request would seem to be on firmer ground. The Court found that the harms associated with climate change are serious and well-recognized, and that a state need not show that the standards it seeks to impose would completely remedy the problem. For such state standards to be granted a waiver from Clean Air Act preemption, the state needs only to meet Section 209(b)'s tests, which are basically four in number.[47] First, the state must determine that the standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards. The state has made this determination, and since there are no comparable federal standards, the state has clearly met this requirement.

Second, EPA may deny the waiver if the Administrator finds that the determination of the state (that its standards are at least as protective as comparable federal standards) is arbitrary and capricious. Again, it is difficult to see how the Administrator could reject a waiver on these grounds, since there are no federal standards.

Third, the Administrator could reject the petition by finding that California does not need the standards to meet compelling and extraordinary conditions. The state has described the compelling and extraordinary conditions that the standards are meant to address, including threats to its coast line and its water supply from rising sea levels, threats to its water supply from a diminished snow pack, and threats to human health and environment from higher temperatures and higher ozone concentrations, among other factors. Without concerted action by California, the rest of the United States, and other countries, these conditions are more likely to occur, and to occur sooner, according to the state. Thus, there is a plausible argument that

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[44] No. 1:06-CV-00070 (D.R.I. filed February 13, 2006).

[45] No. 1:06-CV-00069 (D.R.I. filed February 13, 2006).

[46] The decision does not command EPA to regulate GHGs from motor vehicles, but it finds that if it does not do so, it must ground its reasons for inaction in the statute.

[47] The state's action might be pre-empted under the Energy Policy and Conservation Act, as the auto industry maintains, but that is a separate issue that the courts will decide.

the state's action (together with many other actions) are necessary to meet compelling and extraordinary conditions. Furthermore, EPA has repeatedly held that it is the state's entire program, not the specific standards, that must satisfy this criterion. As recently as December 2006, the agency reaffirmed its conclusion that the state's program has met this test.

Fourth, EPA must deny a waiver if the Administrator finds the standards inconsistent with Section 202(a) of the Act. Here, the issue appears to be whether the state has allowed manufacturers sufficient lead time. California argues that, since many of the requisite technologies were available and in vehicles in 2005, manufacturers clearly have sufficient time to comply. Furthermore, the standards do not require that each vehicle or each model reduce emissions below the standards. By relying on fleet averages, the regulations allow manufacturers to exceed the limits on some models, provided that others reduce emissions enough to make up for the excess. EPA has delayed the effective date of a waiver on some other occasions, but more often it has found that a waiver should be granted even if it meant that some models offered for sale elsewhere in the United States would be unavailable in California.[48]

Whether EPA will reach similar conclusions regarding the law and California's arguments supporting its GHG waiver request is, of course, not certain. The Supreme Court's decision in *Massachusetts v. EPA*, however, does make it harder for the agency to reject the waiver request. Though not interpreting section 209, the Court plainly took the prospect of climate change quite seriously — noting, for example, that "respected scientists" endorse the GHG-climate change relationship, and that "[t]he risk of catastrophic harm, though remote, is nevertheless real."[49] Moreover, implied the Court, the fact that reduction in GHGs from California vehicles can be but a small part of the solution is not a reason to discount it: "[a]gencies ... do not generally resolve massive problems in one fell regulatory swoop."[50] Thus, *Massachusetts v. EPA* arguably adds support to a Section 209(b)(1)(B) finding that California needs a GHG emission reduction to meet compelling and extraordinary conditions.

This report concludes that California would appear to have a strong case that it has met the criteria for the grant of a Section 209(b) waiver. A related issue is not addressed here: whether California is prohibited from regulating greenhouse gases by the Corporate Average Fuel Economy (CAFE) requirements of the Energy Policy

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[48] See, for example, the discussion in 49 *Federal Register* 18892, May 3, 1984, which found that for the 1983 model year, 73 models of small gasoline-powered pick-up trucks were available federally, while only 55 models were available in California. The Administrator there quoted the D.C. Circuit Court of Appeals (International Harvester v. Ruckelshaus, 478 F.2d at 640): "We are inclined to agree with the Administrator that as long as feasible technology permits the demand for new passenger automobiles to be generally met, the basic requirements of the [Clean Air] Act would be satisfied, even though this might occasion fewer models and a more limited choice of engine types. The driving preferences of hot rodders are not to outweigh the goal of a clean environment."

[49] Massachusetts v. EPA, 127 S. Ct. 1438, 1458 (2007).

[50] Id. at 1457.

and Conservation Act of 1975 (EPCA). Under EPCA, the authority to set fuel economy standards is reserved for the federal government, and specifically, the National Highway Traffic Safety Administration. In several court cases (as yet undecided), and in other venues, the auto industry has maintained that the regulation of greenhouse gases is simply another method of regulating fuel economy, and, therefore, that California's GHG standards are preempted by EPCA. These arguments will remain to be addressed even if EPA grants California a waiver under Section 209(b) of the Clean Air Act.