Order Code RL34099

CRS Report for Congress

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

Updated March 4, 2008

James E. McCarthy
Specialist in Environmental Policy
Resources, Science, and Industry Division

Robert Meltz
Legislative Attorney
American Law Division

Prepared for Members and
Committees of Congress

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

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 (CAA) generally preempts states from adopting their own emission standards for mobile sources. However, the act allows such standards in California, if the state obtains a waiver of CAA preemption from EPA.

California requested this waiver in 2005, but EPA took until December 19, 2007, to decide that it would deny the request. On that day, EPA Administrator Stephen Johnson wrote California Governor Schwarzenegger to say, "I have decided that EPA will be denying the waiver and have instructed my staff to draft appropriate documents setting forth the rationale for this denial in further detail...." According to press reports, the decision was taken against the unanimous advice of the agency's technical and legal staffs. On February 29, 2008, the Administrator issued a decision document denying the waiver that will be published in the *Federal Register*.

Following EPA's December 19 letter, California and environmental groups petitioned for review in the Ninth Circuit, with multiple states intervening on California's side. The interest of the intervening states derives from the fact that under the CAA, states other than California may adopt motor vehicle emission standards identical to California's and avoid CAA preemption if California is granted a waiver. At least 14 states have adopted such regulations.

This report reviews the nature of EPA's, California's, and other states' authority to regulate emissions from mobile sources, the applicability of that authority to GHGs, and issues related to the California waiver request. The conditions for granting or denying a waiver request under CAA are four: whether the state has determined that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards; whether this determination was 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 CAA Section 202(a). California appears to have a sound argument that it has met these tests; EPA, however, has decided that climate change is simply beyond the scope of its preemption waiver authority.

This report does not analyze whether California is preempted from regulating mobile-source GHGs by the Corporate Average Fuel Economy (CAFE) requirements of the Energy Policy and Conservation Act of 1975, or the newly enacted provisions of the Energy Independence and Security Act of 2007 (P.L. 110-140). Under these laws, authority to set fuel economy standards is reserved to the federal government — specifically, the National Highway Traffic Safety Administration (NHTSA). In several court cases and in other venues, the auto industry is maintaining that the regulation of mobile-source GHG emissions is simply another method of regulating fuel economy, so California's GHG standards (and identical standards adopted by other states) are preempted. Two federal district courts have rejected this argument, but one decision has been appealed and the other likely will be.

Contents

List of Figures

List of Tables

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, Congress's usual approach is to allow stricter state standards; for example, the Clean Air Act (CAA) 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 CAA (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 CAA Section 209(b)[2] —

> 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.[3]

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

---

[1] CAA § 209(a), 42 U.S.C. § 7543(a). See also S.Rept. 91-1196 (1970), p. 32.

[2] 42 U.S.C. § 7543(b).

[3] 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.[4] (Although only California may be granted a waiver under this section, elsewhere in the Act, as discussed later in this report, there is a waiver of preemption for other states that have adopted 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.[5] 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 generation, with the first equalization required in 2014. Thus, manufacturers would

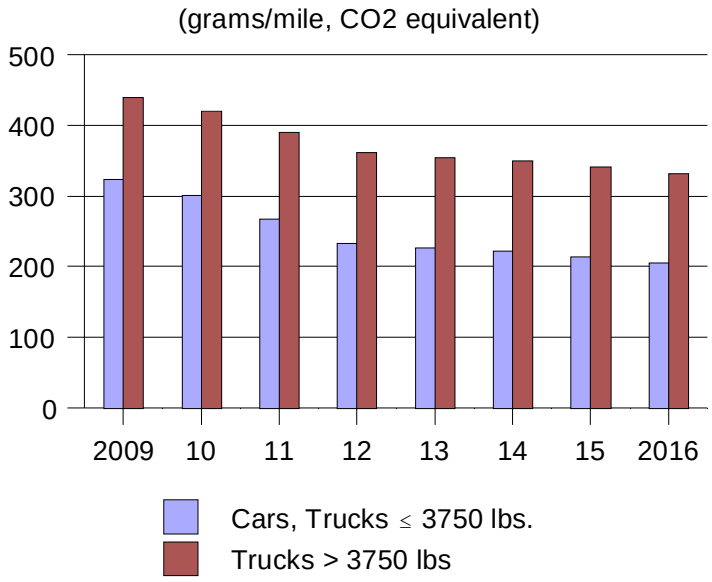
---

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

[5] 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].

not be subject to penalties for failure to meet the standards until 2014 at the earliest.[6] Following adoption of these regulations by CARB, they were subjected to public comment and legislative review, and CARB submitted a request to U.S. EPA, December 21, 2005, for a waiver under Section 209(b).

Figure 1. California GHG Emission Requirements



Source: California Air Resources Board

EPA's Response to the Waiver Request and Resulting Litigation

On December 19, 2007, EPA Administrator Stephen Johnson wrote California Governor Schwarzenegger to say, "I have decided that EPA will be denying the waiver and have instructed my staff to draft appropriate documents setting forth the rationale for this denial in further detail...." According to press reports, the decision was taken against the unanimous advice of the agency's technical and legal staffs.[7] His staff did subsequently draft a decision document, which the Administrator signed

---

[6] 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."

[7] "EPA Chief Denies Calif. Limit on Auto Emissions," *Washington Post*, December 20, 2007, p. A1. Documents shown to, and transcribed by, congressional staff have included numerous statements by senior EPA staff recommending that the Administrator grant the waiver; and the Administrator has not identified any staff recommendation suggesting denial. See U.S. Senate, Committee on Environment and Public Works, Hearings, January 24, 2008, and February 27, 2008.

on February 29, 2008.[8] (The decision document's rationale is set out at the end of the "Compelling and Extraordinary Conditions" section, below.)

The agency's long response time, two years, has been the result of several factors. First, the agency was waiting for the U.S. Supreme Court to decide whether GHGs are "air pollutants" under the CAA, and thus subject to EPA's regulatory authority. The court case posing this question challenged EPA's denial, in 2003, of a petition asking the agency to regulate GHG emissions from new motor vehicles under CAA section 202(a).[9] The agency concluded it lacked authority under the CAA to regulate motor vehicle emissions based on their climate effects. In its April 2, 2007 decision in *Massachusetts v. EPA*,[10] the Supreme Court resolved this issue, finding 5-4 that —

> 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.[11]

Thus, the Court's majority had no doubt that the CAA gives EPA authority to regulate GHGs from new motor vehicles, although the specifics of such regulation are subject to agency discretion. (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,[12] and other California leaders, including Governor Schwarzenegger and Attorney General Brown,[13] EPA

---

[8] [http://www.epa.gov/otaq/url-fr/fr-waiver.pdf]. Related materials can be found at [http://www.epa.gov/otaq/ca-waiver.htm].

[9] 42 U.S.C. § 7521(a).

[10] 127 S. Ct. 1438 (2007).

[11] Id. at 1460 (emphasis in original).

[12] At a May 22, 2007 hearing, for example, Senator Boxer stated, "EPA already has all the authority it needs to begin regulating greenhouse gas emissions from motor vehicles now. The Supreme Court's landmark decision has now cleared the way. The time to act is now. The clearest example of this point is the case for the California waiver. ... Further delay in this matter is simply unacceptable." See Opening Statement of Senator Barbara Boxer, U.S. Senate, Committee on Environment and Public Works, Hearing on "Examining the Case for the California Waiver," May 22, 2007, at [http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=39508511-fd9e-469b-80af-faaf843f6696].

[13] See "California Attorney General to File Lawsuit if EPA Fails to Act on Waiver Past October 25," *Daily Environment Report*, May 23, 2007, p. A-13.

Administrator Johnson announced that he would decide whether to grant the waiver request by the end of 2007.[14]

During the public comment period, the agency received more than 60,000 comments, the vast majority of them urging it to grant the waiver. Support came 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, and 2 others have announced their intention to do so, but their ability to implement the regulations depends on California first being granted a waiver.[15] Thus, they have weighed in in support of the waiver request.

The auto industry and the U.S. Department of Transportation (DOT), among others, opposed a waiver grant. 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 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.[16]

On January 3, 2008, two petitions for review were filed in the U.S. Court of Appeals for the Ninth Circuit challenging EPA's December 19 letter to Governor Schwarzenegger. One suit was filed by the State of California;[17] 15 other states that have adopted or are considering adopting the California standards have intervened on California's side.[18] The other suit was filed by environmental groups, and was consolidated by the Ninth Circuit with California's suit. With EPA's issuance of a decision document on February 29, 2008, it is unclear what will happen to these suits, which argue that the December letter, rather than the later decision document, was the final decision subject to judicial review. A new petition for review may be filed by the same or similar parties in connection with the February 29 decision

---

[14] Testimony of Stephen L. Johnson, Administrator, U.S. EPA, before the Senate Committee on Environment and Public Works, July 26, 2007, at [http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1a49cc26-6d6b-4f55-9eb4-759b7e0e039c].

[15] 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.

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

[17] State of California v. U.S. EPA, No. 08-70011 (9th Cir. Filed January 3, 2008).

[18] The 15 states are New York, Massachusetts, Arizona, Connecticut, Delaware, Illinois, Maine, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the Pennsylvania Department of Environmental Protection.

document. (To avoid prejudging this issue, this report refers to neither the letter nor the decision document as EPA's "final decision" on the waiver request.)

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. As of February 28, 2008, the Pew Center also listed Colorado and Utah as having announced their intention to adopt California's standards, although neither state had formally adopted legislation or regulations as of that date.

The existing suits, and any future suit filed in the Ninth Circuit challenging the February 29 decision document, face a threshold issue: does the Ninth Circuit have jurisdiction over a petition for review of a preemption waiver denial? EPA has generally taken the position that its decisions on waiver requests are final actions "of national applicability," and therefore petitions for review must be filed in the D.C. Circuit, not the Ninth Circuit.[19] This threshold issue is unlikely to prevent a judicial resolution of the petitions on the merits, however; it may delay it. A later section of this report, titled "Waiver Criteria," sets out some points that a court might consider once it does reach the merits.

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, the CAA 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[20] to adopt California's greenhouse gas emission controls. Including California, these states account for 44% of the total U.S. population (**Table 1**).[21] Thus, the stakes involved (both the environmental consequences and the potential impact on the auto industry) go well beyond California.

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

---

[19] CAA § 307(b), 42 U.S.C. § 7607(b). See, e.g., 71 Fed. Reg. 78190, 78192 (December 28, 2006).

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

[21] Colorado and Utah can perhaps be added to this list: in Utah's case, the state has joined a regional group that has pledged to adopt the California standards; in Colorado, the Governor has released a Climate Action Plan that includes the California standards. Neither state has issued regulations as of this writing, however.

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. This interpretation has historically been rejected by EPA and by California, as will be discussed at greater length (see "Evaluating the State's Program in the Aggregate," below). The other interpretation is that the language 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. This has historically been EPA's interpretation of the statute, relying on both its wording and the accompanying legislative history. We look at each of these interpretations in turn in the following sections. Since EPA has now broken with its previous interpretation and based its decision on the GHG standards in isolation from the rest of California's program (under the compelling and extraordinary conditions criterion), we begin by examining this approach.

Evaluating the GHG Standards in Isolation

Applicable Federal Standards. If the Administrator's final 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 CO_2 (the principal greenhouse gas), nor are there standards for the other GHGs (methane, NOx, etc.) based on their greenhouse gas effects. Thus, it is difficult to see how the Administrator could have found California's determination that its standards are at least as protective to be arbitrary and capricious.

Without addressing that point directly, the Administrator (in his letter to Governor Schwarzenegger) and other EPA spokespersons, and the President himself, in a December 20 news conference, have mentioned federal standards established by the Energy Independence and Security Act (EISA, P.L. 110-140), which the President signed December 19, 2007, as requiring greater fuel economy than the California approach or being national in scope, as opposed to a "patchwork" of state standards.[22]

---

[22] At the President's news conference, he stated:

> The question is how to have an effective strategy. Is it more effective to let each state make a decision as to how to proceed in curbing greenhouse gases? Or is
> (continued...)

These statements would seem to imply that the Administrator considered the argument that California's GHG standards are not as protective as applicable federal ones, although ultimately, his February 29 decision document is not based on it.

Such an argument was tenuous for at least three reasons. First, the new energy law does not establish emission standards; it sets fuel economy standards. As will be discussed at greater length in the "Related Litigation" section below, two courts have now found that energy legislation does not preempt EPA or California actions to regulate auto emissions, even if the emissions in question (GHGs) are closely related to fuel economy. The overlap between GHGs and fuel economy is not precise: for example, California regulates GHG emissions from auto air conditioners, which are not covered by fuel economy standards. Furthermore, Congress has twice visited the issue of fuel economy without preempting EPA or state authority to set emission standards. Second, even if one were to hold that GHG standards and fuel economy standards serve identical purposes, there still is no federal standard to which one might compare California's for the years 2009-2019: the energy law does not establish any new standard for fuel economy before 2020, 11 years after California's GHG standards would take effect. Thus, for the years 2009-2019, there is no overlap.[23] Third, far from establishing a "patchwork" of state standards, granting a California waiver would establish only two sets of standards: California's standards in the 15 states that have adopted them, and federal standards (currently nonexistent) in the other states. This two-standard approach is the system that Congress intended when it authorized California standards in 1967,[24] and amended it in the Clean Air Act Amendments of 1977.[25]

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

---

[22] (...continued)

> it more effective to have a national strategy? Director Johnson made a decision based upon the fact that we passed a piece of legislation that enables us to have a national strategy, which is the — increasing CAFE standards to 35 miles an hour [sic] by 2020, and a substantial increase of alternative fuels, 36 billion gallons by 2022.
>
> And so the Director, in assessing this law, and assessing what would be more — more effective for the country, says, we now have a national plan. It's one of the benefits of Congress passing this piece of legislation. [http://www.whitehouse.gov/news/releases/2007/12/20071220-1.html]

[23] P.L. 110-140 (in Section 102(b)) does give authority to the Secretary of Transportation to set such standards beginning in 2011, but it is not clear how stringent such standards will be.

[24] H.Rept. 90-728, as reprinted in 1967 U.S.C.A.A.N. 1938, 1956-57.

[25] H.Rept. 95-294, as reprinted in 1977 U.S.C.A.A.N. 1077, 1380-81.

water supply, and higher temperatures that would exacerbate the state's ozone nonattainment problem, which is already the worst in the nation.[26]

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 the state is permitted to implement the adopted regulations. The reductions in GHG emissions that the regulations would bring about are estimated at 155,200 tons of CO_2 equivalent per day in 2030[27] (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 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.

This had seemed to be the position that Administrator Johnson intended to take. In his December 19 letter to Governor Schwarzenegger, he stated —

> Unlike other air pollutants covered by previous waivers, greenhouse gases are fundamentally global in nature. Greenhouse gases contribute to the problem of global climate change, a problem that poses challenges for the entire nation and indeed the world. Unlike pollutants covered by the other waivers, greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur. In other words, this challenge is not exclusive or unique to California and differs in a basic way from the previous local and regional air pollution problems addressed in prior waivers.[28]

He concluded, "In light of the global nature of the problem of climate change, I have found that California does not have a 'need to meet compelling and extraordinary conditions.'"[29]

On the other hand, while the nature of the pollution problem (global vs. local or regional) is clearly different, a case can still be made that the GHG regulations are similar in fundamental respects to 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

---

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

[27] 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.

[28] Letter of EPA Administrator Stephen L. Johnson to Governor Arnold Schwarzenegger, December 19, 2007, p. 1.

[29] Ibid., p. 2.

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.[30] In California, according to CARB, the affected vehicles produce about 30% of the state's total GHG emissions.[31] 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.[32]

Ultimately, EPA's decision document of February 29, 2008, denying the waiver, was not based on the factual adequacy of California's showing that its standards were needed to meet compelling and extraordinary conditions. Rather, it was based on the breadth of the legal concept of compelling and extraordinary conditions. Relying largely on the legislative history accompanying the original enactment of section 209 in 1967, EPA concluded in the decision document that climate change impacts on California cannot constitute compelling and extraordinary conditions, as that phrase is used in section 209(b), for two reasons. First, it argues, compelling and extraordinary conditions must be of a local or regional nature; climate change, by contrast, is a global phenomenon. Second, contends the document, climate change impacts in California will not be different enough from those in the nation as a whole to justify calling California's situation "compelling and extraordinary."

As noted, EPA's February 29 decision document takes the approach of evaluating California's GHG standards in isolation, not in combination with its whole air pollution control program. EPA argues that the global nature of climate change makes inapplicable the in-the-aggregate approach used with previous waiver requests, which all shared a characteristic — that they addressed local or regional problems — justifying a common approach.

Consistency with Section 202(a). Although he did not raise this issue in his letter to the Governor or his February 29 decision notice, the Administrator could also have rejected the request if he found that the state's standards and accompanying

---

[30] 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.

[31] 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].

[32] Taken literally, the Administrator's letter appears to be making a slightly different argument: it says that California *does not have a need to meet* these conditions. This is not the actual criterion stated in Section 209(b), which would require him to find that the state *does not need such State standards* to meet the conditions.

enforcement procedures are not consistent with section 202(a) of the CAA. 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*.[33] 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 compliance contains many technologies that are currently available and in vehicles today."[34]

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 GHGs for climate change purposes, test procedures cannot be an issue. CARB concluded —

> 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.[35]

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

---

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

[34] Support Document, p. 21.

[35] Ibid.

waiver because he concluded that the statutory language required that he give deference to California's judgment.[36]

Evaluating the State's Program in the Aggregate

The other possible 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."[37]

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 particulate standards) is necessary to meet such conditions.... For the reasons elaborated below, I agree with California...."[38]

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 (as to pollution, not climate change) and needs its own standards to meet these conditions.[39] EPA has also generally deferred to the state's judgment regarding consistency with Section 202(a).[40] 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

---

[36] 40 *Federal Register* 23103-23105, May 28, 1975.

[37] Support Document, p. 15.

[38] 49 *Federal Register* 18889-18890, May 3, 1984.

[39] 71 *Federal Register* 78192, December 28, 2006.

[40] 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.]

> 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").[41]

In arguing thus, the Administrator foreshadowed the House Interstate and Foreign Commerce committee report on the 1977 Clean Air Act Amendments, which revisited and strengthened California's position in seeking a waiver. The report, accompanying amendments to Section 209(b) that gave the subsection its current form, states:

> The Committee amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e. to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.... The Administrator, thus, is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State. There must be clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State, before EPA may deny a waiver.[42]

Has EPA Ever Previously Turned Down a Waiver Request?

As noted earlier, California has 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 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.[43]

Of these, all were granted in whole or in part. "I don't think we've ever outright denied a request," said an OTAQ official before the current decision, "but there were some grants in which we denied part or delayed the effective date of part on

---

[41] 40 *Federal Register* 23103, May 28, 1975.

[42] U.S. House of Representatives, Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1977, H.Rept. 95-294, May 12, 1977, pp. 301-302.

[43] 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.

feasibility grounds."[44] On at least six occasions prior to the 1977 CAA amendments, the agency granted a waiver in part, while denying other parts of the request.[45] In 1975, it denied a waiver for the 1977 model year, but granted it for 1978.[46] 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.[47]

The EPA Administrator's letter to Governor Schwarzenegger and his February 29 decision document attempt to undercut whatever precedent value this history of consistent waiver grants may have. Both argue that GHGs are unlike other air pollutants covered by previous waivers, since they are fundamentally global in nature. GHGs harm the environment in California and elsewhere regardless of where emissions occur. Thus, the challenge they pose, as the letter says, "differs in a basic way from the previous local and regional air pollution problems addressed in prior waivers."[48]

Related Litigation

Aside from litigation over EPA's denial of California's request for a CAA preemption waiver, there is active litigation over state regulation of mobile source GHG emissions raising non-CAA preemption and other legal theories. This litigation, filed by auto dealers, trade associations, and manufacturers, seeks to prevent California and other states from implementing the California mobile source GHG standards *even if the EPA waiver denial is overturned by the courts.* Suits are pending in four federal judicial circuits — not coincidentally, the circuits containing most of the states that have adopted the California GHG controls. Courts addressing this litigation have not doubted that without a California waiver, state regulation of GHG emissions from motor vehicles is preempted by the CAA, and the non-CAA litigation is moot.

Two decisions have been handed down so far, both rejecting the non-CAA preemption theories presented. In the first, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*,[49] the district court ruled that the relationship between Vermont's California-identical GHG standards and the Energy Policy and Conservation Act (EPCA) was better analyzed as an interplay between two federal

---

[44] Ibid.

[45] 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).

[46] 40 FR 30311, July 18, 1975.

[47] 71 FR 78190, December 28, 2006.

[48] Letter of EPA Administrator Stephen L. Johnson to Governor Arnold Schwarzenegger, December 19, 2007, p. 1.

[49] 508 F. Supp. 2d 295 (D. Vt. 2007)

statutes, rather than as a federal-state preemption question. So viewing the matter, the court pointed out that the National Highway Traffic Safety Administration (NHTSA) has consistently treated EPA-approved California emissions standards as constituting "other motor vehicle standards of the Government," which EPCA says NHTSA must consider when setting CAFE standards.[50] Moreover, in a related context the *Massachusetts v. EPA* decision saw the CAA and EPCA CAFE provisions as harmonious.[51] Thus, the court found the CAA section 209/EPCA relationship to be one of overlap, not conflict. Despite its conclusion that preemption doctrine did not apply, the court also did a preemption analysis, finding that Vermont's GHG standards were preempted neither by EPCA nor as an intrusion upon the foreign policy authority of the United States. An appeal is pending.

In the second decision, *Central Valley Chrysler Jeep, Inc. v. Goldstone*,[52] a district court similarly rejected claims that California's regulation of GHG emissions from cars and trucks was precluded by EPCA, preempted by EPCA, and preempted as an intrusion on federal authority over foreign policy.[53] An appeal is likely.

The legal theories presented in the *Crombie* and *Goldstone* decisions are similar to those in two duplicative Rhode Island suits — *Lincoln Dodge, Inc. v. Sullivan*[54] and *Association of International Automobile Manufacturers v. Sullivan*[55] — challenging that state's adoption of the California standards. Most recently, New Mexico's adoption of the California GHG standards has been challenged as preempted under EPCA in *Zangara Dodge, Inc. v. Curry*.[56]

Conclusion

California's request for a greenhouse gas waiver under CAA Section 209(b) marks the second time 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 for mobile sources, was denied by the agency in 2003. That led to the Supreme Court's decision in *Massachusetts v. EPA*, April 2, 2007, which rejected EPA's rationale for denial, finding that GHGs are air pollutants within the meaning of the CAA and spurning EPA's arguments against their regulation as being insufficient.[57] The Court's

---

[50] 49 U.S.C. § 32902(f).

[51] 127 S. Ct. at 1462.

[52] No. 04-6663, 2007 Westlaw 4372878 (E.D. Cal. December 11, 2007).

[53] In 2006, the district court dismissed claims under the Dormant Commerce Clause and Sherman Antitrust Act.

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

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

[56] No. 1:07-CV-01305 (D.N.M. filed December 27, 2007).

[57] The decision does not command EPA to regulate GHGs from motor vehicles, but it finds
(continued...)

decision caused a remand of the petition to EPA, which has not yet addressed it, and drew new attention to California's December 2005 request for a waiver of preemption to regulate the same pollutants.

For California standards to be granted a waiver from CAA preemption, the state needed only to meet Section 209(b)'s tests, which are basically four in number.[58] EPA cannot interpose policy considerations.

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's determination would appear to be correct. Administrator Johnson's December 19 letter to Governor Schwarzenegger does reference the President's signing that same day the Energy Independence and Security Act, which includes new fuel economy standards for cars and trucks to be phased in by 2020. The letter states that these standards will require greater fuel economy than California's approach, and be national in scope. But the new energy law, while giving authority to the Secretary of Transportation to do so, does not itself establish any standard for fuel economy before 2020, 11 years after California's standards would take effect. Nor does it regulate auto *emissions* in any way. California's standards are designed to address emissions, even if their major impact might be on fuel economy. For example, the California standards address emissions from auto air conditioners; the new CAFE standards will not.

Second, EPA may deny the waiver if the Administrator finds that the determination of the state (that its standards are at least as protective, in the aggregate, as comparable federal standards) is arbitrary and capricious. Again, it is difficult to see how the Administrator could have rejected 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. This is the sole basis for the waiver denial cited in the Administrator's decision document; reliance on the other criteria is expressly disclaimed. The state had described what it regarded as the compelling and extraordinary conditions that its standards were 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 the state's action (together with many other actions) is necessary to meet compelling

---

[57] (...continued)
that if it does not do so, it must ground its reasons for inaction in the statute. Following the Supreme Court decision, the D.C. Circuit vacated the agency's denial and remanded the matter to EPA.

[58] The state's action might be preempted under the Energy Policy and Conservation Act, as the auto industry maintains, but that is a separate issue for the courts to decide.

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.

In the February 29 decision document, however, the Administrator articulated as his basis for denying the waiver that California's GHG standards were *not* needed to meet compelling and extraordinary conditions. First, he argued, Section 209(b) was intended to allow California to address mobile source-caused pollution problems that are local or regional, not global like climate change. Second, in the alternative, he asserted that the effects of climate change in California are not compelling and extraordinary when compared to the rest of the country. Noting that the global nature of climate change makes it qualitatively different from conventional air pollution, the Administrator also determined that whether the compelling and extraordinary conditions criterion was satisfied must be assessed by looking solely at California's GHG standards — not, as with past waiver requests, its air pollution program as a whole.

Fourth, EPA must deny a waiver if the Administrator finds the standards inconsistent with Section 202(a) of the Act. Here the issue would have been whether the state allowed manufacturers sufficient lead time. California argued 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.[59]

According to press reports and review of relevant documents by congressional staff, EPA technical and legal staff reviewed the law and California's arguments supporting its request and recommended that the Administrator grant the requested waiver.[60] But the Administrator overruled the staff and, in his December 19 letter to Governor Schwarzenegger, said that he has "instructed" his staff "to draft appropriate

---

[59] 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."

[60] "EPA Chief Denies Calif. Limit on Auto Emissions," *Washington Post*, December 20, 2007, p. A1.

documents setting forth the rationale ... in further detail" for his decision. This led to the decision document signed by the Administrator February 29.

The December 19 letter is being challenged in court — by California, 15 other states, and environmental groups; almost certainly, the decision document will be as well. Should the challengers win on the merits, further delay could still ensue; a court holding thus would likely remand EPA's decision to the agency for further consideration, enumerating the flaws in the agency's reasoning rather than ordering EPA to grant the waiver outright. All things considered, it is unlikely that EPA will be forced to grant a waiver through judicial means before the swearing in of a new Administration in 2009.

Congress could, of course, grant EPA a waiver, obviating the need for judicial action. It could do so in a number of ways:

- Stand-alone legislation could waive the Clean Air Act's preemption of California's GHG standards, or order EPA to grant such a waiver by a date certain.

- The CAA could be amended to clarify that Section 209(b) can be used to authorize California standards for GHGs, or to establish new criteria for determining whether to waive preemption in the case of GHG standards.

- An EPA appropriation bill could order the agency to grant a waiver, perhaps as a step toward national GHG standards for cars and trucks.

Such congressional action, in whatever form, might pose the best shortcut for those opposed to the waiver's denial, but it too would face obstacles. An appropriation rider, for example, might be the easiest way to get a provision through Congress: there *will* be an appropriation for EPA this year, and the bill might be less likely to face a veto than either an amendment to the Clean Air Act or a stand-alone bill. In general, though, there is a prohibition in House rules on legislating through appropriations bills, so amendments to the Clean Air Act or other legislative language attached to EPA's appropriation would be subject to a point of order on the House floor. In practice, too, directives placed in appropriations bills tend to be more successful at prohibiting an agency from taking a particular action than at initiating or compelling an action. Thus, the challenge might be to find an activity that the agency could be required to do through appropriations and to tie implementation of California's GHG program to implementation of that EPA activity.

Bills not tied to appropriations — whether stand-alone or amending the Clean Air Act — might be more difficult to enact. Congress as a whole has not shown itself to be united on climate change issues. Should legislation clear Congress and be vetoed by the President, two-thirds majorities of the House and Senate would be required for enactment, an extraordinarily high hurdle in the current political climate.

Meanwhile, the three most likely candidates for President (Senators McCain, Clinton, and Obama) are all supporters of national climate change legislation. The latter two are also cosponsors of S. 2555, Senator Boxer's bill to approve the

California waiver request. Thus, California's GHG regulations for cars and trucks, rejected by the EPA Administrator this year, may not be dead yet. Instead, the regulations join a growing list of issues that may see new life in 2009.