



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

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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 (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. The Administrator published a decision document denying the waiver in the March 6, 2008 *Federal Register*.

Following EPA's denial of the waiver request, California and environmental groups petitioned for review in the D.C. Circuit, with 18 other states intervening on California's side. The interest of the intervening states derives from the fact that under the CAA, other states may adopt motor vehicle emission standards identical to California's and avoid CAA preemption if California is granted a waiver. Fourteen states and the District of Columbia have already 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. To obtain a waiver, California must meet conditions laid out in CAA Section 209(b): the state must first determine that its standards will in the aggregate be at least as protective of public health and welfare as applicable federal standards. The EPA Administrator must then find whether the state's determination is arbitrary and capricious; whether the state needs the standards to meet compelling and extraordinary conditions; and whether the standards and accompanying enforcement procedures are consistent with CAA Section 202(a).

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 amended CAFE standards 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 both decisions have been appealed.

On January 21, 2009, California submitted a formal request to President Obama and EPA Administrator-designate Lisa Jackson for reconsideration of the waiver denial. In response to this request, EPA will hold a hearing March 5, 2009, and will accept written comments until April 6.

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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 “preempts” states from adopting 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 of federal preemption, however, in CAA Section 209(b)²—

The [EPA] Administrator shall, after notice and opportunity for public hearing, waive application of this section [the preemption 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 “prior to March 30, 1966,” so only California can qualify for such a preemption waiver. (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.)

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 its standards, the state has requested and been granted Section 209(b) waivers at least 54 times since 1967.⁴ 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.

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.

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

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 were to apply to motor vehicles manufactured in the 2009 model year and thereafter.

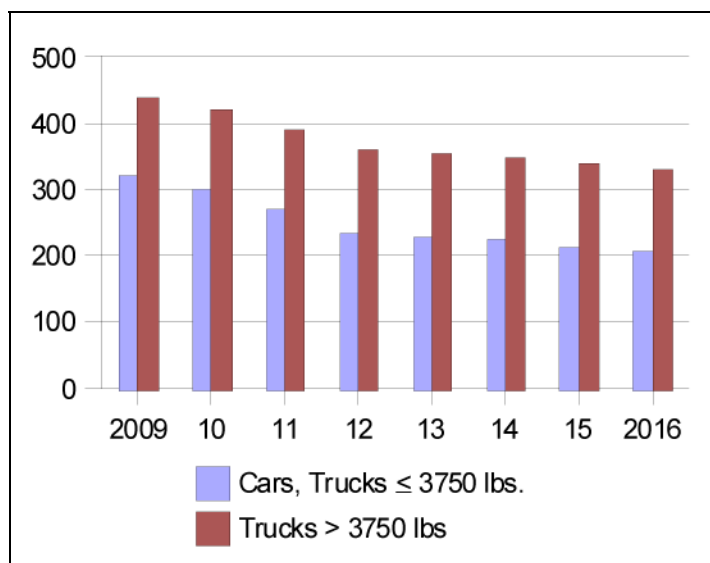
Under this authority, CARB adopted regulations September 24, 2004, requiring gradual reductions in fleet average GHG emissions until they are about 30% below the emissions of the 2002 fleet in 2016.⁵ As illustrated in **Figure 1**, the regulations set separate standards for two classes of vehicles. The 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 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 preemption waiver under Section 209(b).

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>.

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, available at http://www.arb.ca.gov/cc/docs/att2_support.pdf. Hereafter referred to as “Support Document.”

Figure 1. California GHG Emission Requirements
(grams/mile, CO₂ equivalent)



Source: California Air Resources Board

EPA's Response to the Waiver Request and Resulting Litigation

EPA took two years, from late 2005 to late 2007, to respond to California's waiver request for its motor vehicle GHG emission standards. The agency's long response time was doubtless the result of intense debate over the waiver request within the Bush Administration, which from its arrival in Washington had opposed regulatory approaches to reducing GHG emissions. In addition, the agency was waiting for the U.S. Supreme Court to decide a case it had accepted that squarely presented the issue of whether GHGs are "air pollutants" under the CAA, and thus subject to EPA's regulatory authority. This case began when EPA, in 2003, denied a petition asking it to regulate GHG emissions from new motor vehicles under CAA section 202(a).⁷ The agency concluded it lacked authority under the CAA to regulate motor vehicle emissions based on their climate change effects. In its April 2, 2007 decision in *Massachusetts v. EPA*,⁸ the Supreme Court resolved this authority 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.⁹

⁷ 42 U.S.C. § 7521(a).

⁸ 549 U.S. 497 (2007).

⁹ Id. at 528-529 (emphasis in original).

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, 2007, in Sacramento, CA. Under pressure from California's Senator Boxer, who chairs the Environment and Public Works Committee,¹⁰ and other California leaders, including Governor Schwarzenegger and Attorney General Brown,¹¹ EPA Administrator Johnson announced that he would decide whether to grant the waiver request by the end of 2007.¹²

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 and the District of Columbia 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.¹³ Thus, many of them 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.¹⁴

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ Alliance of Automobile Manufacturers, "California Waiver Request," presentation materials from U.S. EPA public hearing, Sacramento, CA, May 30, 2007.

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
District of Columbia	581,530	Law 17-0151, March 19, 2008
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	132,388,625	

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.

On December 19, 2007, EPA announced its decision. EPA Administrator Stephen Johnson wrote California Governor Arnold 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.¹⁵ His staff did subsequently draft a

¹⁵ "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 did not identify any staff recommendation suggesting denial. See U.S. Senate, Committee on Environment and Public Works, Hearings, January 24, 2008, and February 27, 2008. Additional detail confirming the above was provided as the result of an investigation by the House Oversight and Government Reform Committee. See "White House Involved in California Waiver (continued...)"

decision document, which the Administrator signed on February 29, 2008.¹⁶ It was published in the March 6, 2008 *Federal Register*,¹⁷ and will be referred to herein as the March 6 decision.

It came as no surprise that the Administrator's denial of California's waiver petition was challenged in court. The first petitions for review were filed soon after the December 19 letter by California, 15 other states, and environmental groups, arguing that the letter itself constituted final agency action and was thus ripe for review. With the issuance of the March 6 decision document, these suits based on the EPA letter were dismissed (by the court or by stipulation) and replaced, on May 5, 2008, by a suit in the D.C. Circuit challenging that document.¹⁸ Petitioners in *California v. EPA* are California, 18 other states, and numerous environmental groups. Most of the California congressional delegation, including Speaker of the House Nancy Pelosi and Senators Boxer and Feinstein, are participating in the case as amici on behalf of the petitioners. The legal arguments of petitioners and respondent EPA are summarized in the "Waiver Criteria" section of this report, under the subsection discussing the "Compelling and Extraordinary Conditions" waiver criterion that is the focus of these arguments. Briefing in the case is now underway; a decision is likely in spring, 2009 (unless mooted by the Obama Administration EPA's possible reversal of the denial).

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). CAA Section 177, however, 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) and the District of Columbia have adopted or announced their intention¹⁹ to adopt California's greenhouse gas emission controls. Including California, these states account for 44% of the total U.S. population (**Table 1**).²⁰ Thus, the stakes involved (both the environmental consequences and the potential impact on the auto industry) go well beyond California.

(...continued)

Denial," May 19, 2008, at [<http://oversight.house.gov/investigations.asp?start=25&id=121>].

¹⁶ Related materials can be found at <http://www.epa.gov/otaq/ca-waiver.htm>.

¹⁷ 73 *Federal Register* 12013.

¹⁸ *State of California v. U.S. EPA*, No. 08-1178 (D.C. Cir. filed May 5, 2008).

¹⁹ 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.

²⁰ 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.

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.” 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.

As originally enacted in 1967, Section 209(b) was worded differently. The waiver process did not involve, as it does today, an initial determination of protectiveness by California that EPA can reject only on an “arbitrary and capricious” standard that is deferential to the state. This bow to California was added by the 1977 amendments, the legislative history of which stresses that the changes made in Section 209(b) were “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 discretion possible in selecting the best means to protect the health of its citizens and the public welfare.”²¹

California's Justification of Its Waiver Request

In requesting a waiver, California argued that its standards met each of the CAA criteria: that they were at least as protective as applicable federal standards, because there are no federal GHG standards; that air pollution generally, and climate change in particular, present numerous conditions to the state that are compelling and extraordinary; and that the standards and enforcement procedures are consistent with Section 202(a), based on previous EPA interpretation of the consistency requirement.²²

Of particular importance (see following section) is the state's case that it faces compelling and extraordinary conditions. These include 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

²¹U.S. Congress, House Interstate and Foreign Commerce Committee, *Clean Air Act Amendments of 1977*, May 12, 1977, H.Rept. 95-294, pp. 301-302.

²² The state concluded that, since there are no federal test procedures that measure GHGs for climate change purposes, inconsistency with Section 202(a) can only be shown if there is inadequate lead time to permit the development of technology to meet the regulatory requirements. The state based the standards on technologies already available on vehicles or demonstrated by auto companies and component suppliers, so it concluded that the standards were consistent with the need for adequate lead time. See CARB, Support Document accompanying the December 21, 2005 Waiver Request, previously cited, pp. 19-43.

ozone nonattainment problem, which is already the worst in the nation.²³ But the state argues that it need not demonstrate that it faces unique threats from GHG emissions, since EPA must consider not just the GHG controls, but the state's entire motor vehicle emissions program in evaluating the waiver request. According to the state: "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."²⁴

The Decision Document's Argument for Waiver Denial

In its March 6 decision document denying California's waiver request, EPA explained that its denial was based solely on CAA Section 209(b)(1)(B), the "compelling and extraordinary conditions" criterion. It did not address the other two criteria above.

EPA concluded that California did *not* need its GHG emission standards to meet compelling and extraordinary conditions. At the outset, this argument required EPA to reverse its historical position that the "State standards" mentioned in Section 209(b)(1)(B) embrace California's *entire* motor vehicle emissions control program, not merely the standards that are the subject of the waiver request. This longstanding agency position was based partly on statutory text: the phrase "such State standards" in 209(b)(1)(B) seems to refer back to "State standards ... in the aggregate." Lending further support is 1977 legislative history, which speaks to a situation where EPA might want to approach an air pollution problem by cranking down on the allowable emissions for one pollutant, but California might prefer to address the problem by cutting down on another. "To deal with such a situation," says the 1977 House report, "the Committee amendment requires the Administrator of EPA to grant a waiver for the *entire* set of California standards."²⁵

For California's GHG regulations, however, EPA found the opposite – that it was "appropriate" to consider the need to meet compelling and extraordinary conditions with reference to the GHG regulations *alone*. The reason for the switch, EPA said, was that GHG standards address a *global* problem, whereas in the past California's motor vehicle program, and its waiver requests, had only addressed *local and regional* problems. Local and regional air pollution problems are rooted in local causes, such as thermal inversions and the large number of vehicles in California. In contrast, GHG concentrations are essentially uniform across the globe, and are not uniquely connected with causal factors in California. Based on this lack of nexus between local conditions and global GHG concentrations, California does not, EPA concluded, "need" its GHG emission standards to meet the compelling and extraordinary condition of climate change.

Alternatively, EPA argued, the impacts of climate change in California are simply not the kind of impacts that Congress had in mind by the phrase "compelling and extraordinary conditions." The 1967 legislative history of Section 209(b), the agency points out, refers to California's "peculiar local conditions" and "unique problems," suggesting to EPA that to be compelling and extraordinary, the impacts of climate change in California must be significantly different from those in other states. To prove such uniqueness, California had noted in its petition that it faced

²³ CARB, Support Document, p. 18.

²⁴ Support Document, p. 15.

²⁵ H.Rept. 95-294, p. 302 (emphasis added).

greater temperature increases from climate change than the rest of the nation, that it has the largest agriculture-based economy of any state, the largest coastal population, and so on. EPA was not persuaded, concluding that global climate change will affect the nation and the world in ways very similar to California.

Positions of the Parties in the Waiver Denial Litigation

As noted, the active suit against the waiver denial is *California v. EPA*, filed May 5, 2008, by California, other states, and environmental groups. In their joint brief, these petitioners argue first that EPA erred in not applying Section 209(b)(1)(B) to California's motor vehicle emissions program as a whole. Petitioners reassert the textual argument – that “such State standards” in Section 209(b)(1)(B) refers back to the phrase “State standards ... in the aggregate.” They also stress the longevity of EPA's historical position that the entire California motor vehicle emissions program must be assessed.²⁶

Petitioners then make a typical *Chevron* step one / *Chevron* step two argument. By way of background, the Supreme Court in *Chevron U.S.A. Inc. v. NRDC* set out what has become the canonical framework for judicial review of federal agency action.²⁷ Under *Chevron*, the reviewing court first asks whether “Congress has directly spoken to the precise question at issue.”²⁸ If so, the court is to “give effect to the unambiguously expressed intent of Congress.”²⁹ On the other hand, if the statute is found to be “silent or ambiguous” on the question, the court must proceed to *Chevron* step two and ask whether the agency's interpretation was “permissible.”³⁰ A petitioner challenging agency action will, if possible, argue that the agency interpretation fails under step one, since under step two the court generally must accord the agency interpretation a considerable degree of deference.

Petitioners' “*Chevron* step one” argument is that EPA's exclusion of climate change impacts in California from “compelling and extraordinary conditions” because they are not local/regional and not unique to the state violates the plain meaning of Section 209(b)(1)(B). Petitioners argue that the fact that smog reduction was the dominant concern in 1967, when the section was enacted, does not mean that the broad language of Section 209(b) should be confined to that situation today. To buttress this view, petitioners argue that construing “compelling and extraordinary” to require that conditions in California be unique is contradicted by CAA Section 177, discussed above. How, they ask, can it make sense to allow other states to adopt California's standards if California's authority is limited to addressing problems unique to that state?

Petitioner's “*Chevron* step two” argument is that even assuming EPA's interpretation of compelling and extraordinary conditions survives *Chevron* step one, it is not a “permissible” interpretation. It is not permissible, they contend, because it conflicts with the Supreme Court's view in *Massachusetts v. EPA* that climate change is within the CAA's scope notwithstanding that Congress did not have it in mind when the CAA was enacted. Moreover, the deference normally accorded an agency's interpretation under *Chevron* step two should be at a minimum here,

²⁶ See, e.g., 49 *Federal Register* 18,887, 18,889-90 (May 3, 1984).

²⁷ 467 U.S. 837 (1984).

²⁸ *Id.* at 842.

²⁹ *Id.* at 843.

³⁰ *Id.*

petitioners argue, because EPA's waiver denial infringes on state sovereignty and reverses its longstanding practice of assessing California's vehicle emissions control program in the aggregate.

In response to petitioners' arguments, the Bush Administration EPA argued, in one of its last legal briefs filed January 9, 2009, that its waiver rejection should be upheld. Its positions and supporting arguments in the brief track those in its decision document – and are all positioned under the usually deferential *Chevron* step two. As for the threshold issue, EPA argues that its decision to review California's GHG regulations separately was a reasonable interpretation of an ambiguous statute. EPA then argues that it reasonably interpreted the reference to compelling and extraordinary conditions in Section 209(b)(1)(B) to focus on local conditions, and on whether those conditions are sufficiently different from the rest of the country. Under that interpretation, it contended, California had not demonstrated that its standards were “needed” to meet such conditions.

The fate of the *California v. EPA* litigation hinges on what action, if any, the newly arrived Obama Administration officials take at the EPA. EPA could reverse the Bush Administration EPA's waiver denial, making the present suit moot but inviting a judicial challenge to the reversal in a new suit by the auto manufacturers. Alternatively, the Obama Administration EPA could wait until the D.C. Circuit rules (putting it in the probably unacceptable position of defending the waiver denial at oral argument), or until Congress mandates that the waiver be granted (mooting any litigation). The complexities of each of these courses of action are explored in the final section of this report.

Previous Waiver Requests

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 55 occasions; on at least 42 other 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 nearly 100 waiver requests.³¹

Of these, all were granted in whole or in part. EPA has repeatedly found, as recently as September 2008, that California faces compelling and extraordinary conditions (as to conventional pollutants, not climate change) and needs its own standards to meet these conditions.³² In general, as the Administrator 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

³¹ 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.

³² 73 *Federal Register* 52042, September 8, 2008.

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.³³

In arguing thus, the Administrator foreshadowed the House Interstate and Foreign Commerce committee report on the 1977 CAA 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 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.³⁴

Although EPA had never denied a request outright before the GHG waiver, on at least six occasions prior to the 1977 CAA amendments, the agency granted a waiver in part, while denying or delaying the effective date of other parts of the request on feasibility grounds.³⁵ In 1975, the Administrator denied a waiver for the 1977 model year, but granted it for 1978.³⁶ 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.³⁷

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 auto 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 or reversed by EPA*. 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.

The chief non-CAA preemption theory in this litigation is based on the Energy Policy and Conservation Act (EPCA), the authority under which the National Highway Traffic Safety Administration (NHTSA) establishes corporate average fuel economy standards (“CAFE

³³ 40 *Federal Register* 23103, May 28, 1975.

³⁴ 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.

³⁵ According to EPA, the dates were May 6, 1969 (34 *Federal Register* 7348), April 30, 1971 (36 *Federal Register* 8172), April 25, 1972 (37 *Federal Register* 8128), April 26, 1973 (38 *Federal Register* 10317), November 1, 1973 (38 *Federal Register* 30136), and July 18, 1975 (40 *Federal Register* 30311).

³⁶ 40 *Federal Register* 30311, July 18, 1975.

³⁷ 71 *Federal Register* 78190, December 28, 2006.

standards”).³⁸ Enacted in 1972, EPCA today requires NHTSA to prescribe separate fuel economy standards for passenger and non-passenger automobiles beginning with model year 2011, to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon.³⁹ More pertinent here, EPCA preempts states from adopting laws “related to” the federal fuel economy standards.⁴⁰ The auto industry argues that this preemption is fatal to state regulation of GHG emissions from cars. The argument runs that the only known way to reduce GHG emissions is to improve gas mileage, so that a state regulation of auto GHG emissions is a law “related to” the federal emission standard, hence invalid.

Two decisions on the merits have been handed down so far, both rejecting the non-CAA preemption theories, including under EPCA. In the first, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*,⁴¹ the district court ruled that the relationship between Vermont’s California-identical GHG standards and EPCA was better analyzed as an interplay between two federal statutes (EPCA and the CAA), rather than as a federal-state preemption question. So viewing the matter, the court pointed out that 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.⁴² This suggests that EPCA was meant to coexist with the CAA, rather than supersede it. Moreover, noted the court, in a related context the *Massachusetts v. EPA* decision saw the CAA and EPCA CAFE provisions as harmonious.⁴³ 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. Goldstene*,⁴⁴ 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.⁴⁵ An appeal is pending in this case as well.

The legal theories pressed in the *Crombie* and *Goldstene* cases are similar to those in two Rhode Island suits, consolidated as *Lincoln Dodge, Inc. v. Sullivan*,⁴⁶ challenging that state’s adoption of the California standards. Recently, the district court held that the claims of the auto manufacturers and trade associations in this case were barred by collateral estoppel, a legal doctrine that prohibits parties from relitigating issues they have already adjudicated (as these plaintiffs had done in *Crombie* and *Goldstene*).⁴⁷ The Rhode Island auto dealers, by contrast, had themselves never raised the issues in the case, and thus were held to be viable plaintiffs, allowing the case to

³⁸ The fuel economy provisions of EPCA are codified at 49 U.S.C. §§ 32901-32919.

³⁹ 49 U.S.C. § 32902(b)(2)(A).

⁴⁰ 49 U.S.C. § 32919.

⁴¹ 508 F. Supp. 2d 295 (D. Vt. 2007).

⁴² 49 U.S.C. § 32902(f).

⁴³ 549 U.S. at 532.

⁴⁴ 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

⁴⁵ In 2006, the district court dismissed claims under the Dormant Commerce Clause and Sherman Antitrust Act.

⁴⁶ No. 1:06-CV-00070 (D.R.I. filed February 13, 2006).

⁴⁷ November 24, 2008.

proceed. In a fourth preemption case, New Mexico's adoption of the California GHG standards has been challenged as preempted under EPCA in *Zangara Dodge, Inc. v. Curry*.⁴⁸

Comments and Conclusions

In considering whether to reverse the Bush Administration's stance on the California waiver, the incoming Administration faces several important decisions regarding the potential for greenhouse gas regulations. EPA has now received at least eight petitions asking the agency to regulate GHGs from different sources, including cars and trucks, aircraft, ocean-going ships, nonroad engines and equipment (such as locomotives, construction equipment, farm equipment, forklifts, harbor craft, and lawn and garden equipment), and fuels—in addition to the California waiver request. The agency also faces lawsuits seeking to force it to regulate GHGs from stationary sources, including power plants, petroleum refineries, and the Portland cement industry. A decision on any of the petitions is likely to be seen as a precedent for the others, and would have implications for the agency's position in the pending waiver-denial litigation.

The incoming Obama Administration is sympathetic to greenhouse gas controls. At the same time, both Congressional leaders and President Obama have stated their intention to make the passage of economy-wide GHG controls a priority. A decision on the California waiver and the other pending petitions needs to be viewed, therefore, in the context of its potential impact on such legislation as well as the precedent it might set for GHG regulations under existing CAA authority.

From statements made during the election campaign, President Obama appears poised to reverse EPA's denial of the waiver request,⁴⁹ and since his inauguration, the President has ordered EPA to review the decision. In general, a regulation (or "rule") can be reversed by following the same procedural steps that were taken to promulgate it. The waiver decision is not a regulation—it was never formally proposed in the *Federal Register*, and CAA Section 307 does not treat decisions under Section 209(b) as being subject to the administrative procedures that it sets out for regulatory decisions – but the same general principal (i.e., following the same procedural steps the agency took to make the original decision in order to reverse it) presumably applies. A waiver decision, states Section 209(b), requires only "notice and opportunity for a public hearing" before it is made. In reaching the March 6, 2008 decision, the EPA Administrator requested public comment on whether he should grant the waiver, held two public hearings, and six months later announced that he had decided not to grant a waiver, stating his reasons.

Thus, reversing the decision could be relatively simple – less complicated than reversing a formal regulation. It would not require a formal proposal, since the original decision was not proposed. Instead, the Administrator can take action following notice and opportunity for a public hearing. The final step would be to set forth a rationale for the decision's reversal. This could be relatively straightforward, as well: the justification for granting a waiver was prepared by EPA staff, before

⁴⁸ No. 1:07-CV-01305 (D.N.M. filed December 27, 2007).

⁴⁹ "Obama Likely to Take Action on Regulating Emissions, Clearing California Waiver Request," *Daily Environment Report*, November 13, 2008, p. A-1. Of course, the decision is made by the EPA Administrator, not by the President. Since the Bush Administration was criticized for having – at least to outward appearances – pressured the EPA Administrator to deny the waiver, President Obama and his Office of Management and Budget may be hesitant to become too overtly involved in EPA's reconsideration of its waiver denial.

Administrator Johnson discarded it and changed course in December 2007.⁵⁰ Thus, a reversal by the new EPA Administrator might be the quickest way to address the issue.

California and EPA are already pursuing this tack: a January 21, 2009 letter to EPA from the California Air Resources Board formally requests EPA to reconsider its denial, and based on the Board's arguments (similar to those pressed by California in the litigation), grant the waiver.⁵¹ In her confirmation hearing, Administrator Jackson stated that she would reconsider the waiver request, and President Obama requested the agency to do so January 26. On February 6, the agency announced that it would hold a hearing on California's request March 5, 2009, in Arlington, VA, and that it would take public comment through April 6.

Given the determination to proceed administratively, there may be little need for Congress to involve itself in the decision; nevertheless, interest in the issue is expected to remain high until it is resolved.

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⁵⁰ The history of the decision is known in some detail as the result of an investigation by the House Oversight and Government Reform Committee. See "White House Involved in California Waiver Denial," May 19, 2008, at <http://oversight.house.gov/investigations.asp?start=25&id=121>.

⁵¹ Letter from Mary Nichols, Director, California Air Resources Board, to EPA Administrator-Designate Lisa P. Jackson, dated January 21, 2009, available at <http://www.arb.ca.gov/newsrel/arbwaiverrequest.pdf>.