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Subject Fw: Updated CA waiver briefing

----- Forwarded by Karl Simon/DC/USEPA/US on 09/11/2007 08:18 AM -----

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Subject Updated CA waiver briefing

Here are the updated slides. Please note slide 32 - I modified the options discussion a bit to better reflect the current state of analysis and OGC's views. thanks



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EPA 3897

# Briefing for the Administrator: California's Waiver Request to EPA Re: Motor Vehicle GHG Regulations

September 12, 2007

# Overview

- Background Summary
- General Overview
  - Congressional History and Court Decisions Reflect Limited Review, Deference, and Burden on those Opposing Waiver
  - Statutory Criteria and Additional 3 FR Notice Questions
- Key Issues Based on Comments Related to Clean Air Act Waiver Criteria
- Options

# Background Summary

- In 2004, CA adopted standards limiting total GHGs from cars and light trucks. December 21, 2005, California requested that EPA grant a waiver of preemption under Clean Air Act § 209(b).
- On April 30, 2007, EPA published a notice for public hearing and comment period – closed June 15, 2007. Nearly 100,000 comments received.
- Litigation –
  - CA notice of intent to sue on October 23, 2007
  - Vermont, US District Ct – Decision could be any day, could include EPCA considerations
  - CA, US (Fresno) District Ct – October 22, 2007 oral argument on summary judgment motions and effect of *Mass v EPA*, could include EPCA considerations
  - US Court of Appeals, 9<sup>th</sup> Circuit – NHTSA CAFÉ issues

## Background Summary of CARB GHG Rule

- “CO2 equivalent” standards include emissions of all four GHG pollutants from vehicles.
- GHG fleet average standards incorporated into preexisting LEV II vehicle standards
- Standards phased in from 2009 to 2016

# General Overview – History of Waivers

- Congress set forth preemption concept in 1967 and California's unique ability to get waiver and reinforced this ability in 1977 and 1990 CAA amendments
- Nearly 40 years of EPA waiver practice; approximately 95 waiver actions – No complete denials (2 partial denials – test procedure issues; 1 partial - grant of one pollutant and delay of 1 model year for other 2 pollutants; 1 partial - held over evaporative emission standard for 1 model year; 1 partial - excluded CNG/LPG due to CARB miscue; 1 granted waiver through 2011 (but not later) model years (ZEV)
- No waiver requests were ever affected by anything over than lead time or technological feasibility
- Affirmation of EPA waiver process:
  - 1977 and 1990 CAA amendments
  - Case Law – MEMA I
  - 2006 NAS Study; Endorsed current general EPA practice –
    - “California should continue its pioneering role in setting mobile-source emission standards. The role will aid the state's efforts to achieve air quality goals and will allow it to continue to be a proving ground for new emission-control technologies that benefit California and the rest of the nation.”



# General Overview – EPA legal and regulatory waiver review practice

- Scope of Review
  - Waiver Request cannot be denied unless one of the specific findings in section 209(b) can properly be made
- Substantial Deference
  - Leave decisions on ambiguous and controversial matters or public policy/regulatory approaches to California's judgment – including approaches that EPA may itself not adopt
- Burden of Proof
  - CAA starts with presumption that CA receives a waiver if it makes the protectiveness finding
  - Burden is on those opposing the waiver; EPA does not need to make affirmative findings and must grant waiver unless if makes one of the specified findings
  - Protectiveness Finding – Evidence must demonstrate that CA was arbitrary and capricious



## Waiver of Preemption – Statutory Criteria

EPA shall waive the preemption unless:

- **1. Protectiveness** - California was “arbitrary and capricious” in determining that its standards will be, in the aggregate, at least as protective of public health or welfare as applicable federal standards;
- **2. Compelling and Extraordinary Conditions** - California does not need such state standards to meet compelling and extraordinary conditions; or
- **3. Consistency with 202(a)** - Such standards...are not consistent with section 202(a) of the Act.





## Waiver of Preemption - Additional Questions for Public Comment

- Given that CA's regulations relate to global climate change should that affect EPA's evaluation of the 3 statutory criteria?
- Whether the Mass v. EPA Supreme Court decision is relevant to EPA's evaluation of the 3 statutory criteria?
- Whether the Energy Policy and Conservation Act (EPCA) fuel economy provisions are relevant to EPA's consideration of CA's petition or to CARB's authority to implement its vehicle GHG regulations?

# Overview of Key Issues from Commenters

## ■ Protectiveness

- Timing of CARB's determination and new information and of federal rulemaking
- Numerical standard comparison or lifetime effect
- Significance of NERA/Sierra Research Report
  - *Staff Evaluation:* CARB made the appropriate protectiveness determination at the time of the rulemaking. Opponents have not met the burden of demonstrating that new protectiveness information undermines CARB's on-going findings.

## ■ Compelling and Extraordinary Conditions

- Evaluate based on "need" for motor vehicle program or based on GHG program need?
- How much does CA's GHG program need to mitigate climate change in order to satisfy a potential "meet" test?
- Level of the seriousness of the conditions necessary in order to be compelling and extraordinary
  - *Staff Evaluation:* California continues to have compelling and extraordinary conditions which allow them to implement a motor vehicle emission program both for the purposes of addressing climate change and ozone conditions within the State.

## ■ Consistency with section 202(a)

- Should EPA evaluate this criteria based on prior practice of narrow review of technological feasibility and lead time?
- Has CARB adequately addressed any technological feasibility concerns?
- Is an affirmative or negative endangerment finding necessary for a grant or denial of the waiver?
  - *Staff Evaluation:* Opponents of waiver have not met their burden of demonstrating a lack of technological feasibility, giving consideration to lead time and cost. Waiver denial must be based on an affirmative finding of inconsistency – a finding of non-endangerment would be necessary

## Key Issues - Protectiveness

- Whether California's determination that its "standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards .... is arbitrary and capricious.
  
- EPA's Waiver Practice
  - Protectiveness finding made by comparing numerical stringency of EPA regulations to California's regulations
  - Where EPA has no "comparable" regulations, California's regulations have been deemed more protective
  - EPA previously accepted CA's protectiveness finding for its light-duty vehicle standards known as LEV II. CA has added its GHG standards to the LEV II standards and no changes have been made on the federal level.

# Protectiveness - Timing of "California's Determination"

- Timing
  - Can determination be made before federal standards exist?
  - Should CARB's determination be evaluated from the time of its rulemaking or be based on any new information (NERA/Sierra Report)?
- Proponents –
  - Determination is simple since no comparable federal standards (EPA has previously issued waivers in such circumstances and reflects California as the laboratory, pioneer)
  - Evaluation should only be on addition of GHG since EPA already waived LEV II and ZEV and associated protectiveness determinations
  - Determination reasonable at time of CARB rulemaking - also reasonable based on review of new NERA/Sierra Report.
- Opponents –
  - until federal process plays out impossible for EPA to evaluate how CARB's standards will compare, federal process will take into consideration CAFE/EPCA
  - Determination based on new information and requires analysis of entire CARB program including effects on stringency from CARB's ZEV program
- *Staff Evaluation:* EPA has issued past waivers before federal standards have existed. CARB made a timely protectiveness determination at time of its GHG rulemaking and has appropriated considered information included in a new study.




## Protectiveness - “At Least as Protective”

- Numerical vs Lifetime In-use Effects (takes into account consumer and driver behavior, etc)
- Numerical Approach - Section 209(b)(2) “If each [California] standard is as least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).”
- Proponents - Would be first time EPA looked at lifetime effects in the context of a waiver review; EPA already waived LEV II and ZEV so should only examine incremental effects (if any) of GHG
- Opponents - Inappropriate to rely upon 209(b)(2) for how to define protectiveness as 209(b)(1) requires an analysis of “net emissions” or effects associated with the standards
- *Staff Evaluation:* Under either approach (numerical comparison of standards or lifetime effects analysis) opponents have not met burden of demonstrating why CARB’s analysis and conclusions are not reasonable.

# Protectiveness - "Arbitrary and Capricious"

- Burden of Proof – CARB must make initial protectiveness determination and submit to EPA
- Standard of Review - Challengers to the waiver must meet the burden of proof with clear and convincing evidence (MEMA I and Legislative history)
- Proponents -
  - Statute language and history indicated that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements
  - The burden of proving determination is arbitrary and capricious is on whoever attacks them." (MEMA);
  - Proponents attempting to remake the legal burden of proof standard into a burden on California to provide something more than it provided in its request (including an analysis of in-use effects, not required to look at a new report based on old information)
  - CARB made a full determination and submitted it in the waiver request and CARB's update (even if necessary) shows that the vehicle program remains more protective
- Opponents –
  - CARB has not carried its initial burden of proof of making a well-informed determination that the GHG regulations will "do no harm"
  - CARB did not compare the two programs at the time of its rulemaking and CA offered only a conclusory statement that questioned how anyone could challenge the fact that no federal standards exist
  - CARB nowhere demonstrates that it made a direct and complete comparison of the federal and California programs
- *Staff Evaluation:* The arbitrary and capricious standard of review imposes a high burden of proof on the opponents of the waiver which has not been met. CARB's protectiveness findings is based on reasonable analysis which has not been undermined by opponents.



# Protectiveness: In-Use Effects: NERA/Sierra Research Report 2007 - Overview

- NERA (an economic consulting company) and Sierra Research (a vehicle technology research company) analyzed the impacts of CARB's GHG standards for the Alliance of Automobile Manufacturers
- NERA/Sierra's assessment concluded the CARB GHG tailpipe standards, in combination with the ZEV Standards, are not as "protective" as Federal regulations
- This finding was based on increased criteria air pollution emissions from three different effects:
  - Fleet Turnover
  - Rebound Effect
  - Upstream Emissions

# Protectiveness: Fleet Turnover – NERA/Sierra Research Perspective

- California GHG tailpipe standards will cause delayed fleet turnover and, thus, increase criteria air pollution
- Logic:
  - GHG Rule causes price increases for new vehicles, which results in a decline in new vehicles sales
  - As the prices of new vehicles increase, the prices of existing vehicles increase as well
  - Decision to scrap an existing vehicle depends upon trade-off between value of existing vehicle in its working condition and its scrappage value
  - Rising prices of existing vehicles leads to decisions by some consumers to delay scrappage of vehicles
  - Older vehicle stock (i.e., fewer new vehicles/more existing vehicles) on the road results in criteria air pollution increase
- Delayed fleet turnover single largest factor (accounts for ~3/4's) of criteria air pollution increases in NERA/Sierra Research study





# Protectiveness: Fleet Turnover – CARB Perspective

- ERA/Sierra Research sales/delayed scrappage estimates are too high
- Why?
  - NERA/Sierra Research vehicle cost estimates too high
    - Sierra Research: \$3000-\$4000 per vehicle (California GHG/ZEV Rule)
    - CARB: \$1000-\$1300 per vehicle (GHG Rule)
  - NERA doesn't accurately account for "fuel economy benefits" of new vehicles
    - With GHG Rule, fuel economy improvements are "synchronized" with higher priced new car purchases
- CARB Conclusion: Combined sales/scrappage impacts likely to be close to zero since fuel economy improvements lower fuel costs roughly in line with increase in monthly payments from higher priced new vehicles



## Protectiveness: Rebound Effect

- **Definition:** The rebound effect for vehicle fuel economy is defined as the increase in vehicle travel resulting from a decrease in the fuel cost per vehicle miles as a consequence of an increase in fuel economy
- CARB used economic and travel demand modeling and peer-reviewed methodology to come up with a California-specific value of 4%
- NERA re-estimated the CARB study with different values and came up with a 13% value

## Protectiveness: Upstream Emissions Impacts

- Large differences between CARB and NERA/Sierra estimates:
  - CARB: upstream emissions reductions outweigh emission increase from rebound etc.
  - NERA: there are small upstream emission reductions, not large enough to offset rebound etc.
- CARB estimates may be conservative
  - only accounted for reductions in the transportation and distribution of fuel
- GREET national numbers more in line with CARB

| In 2020      | CARB<br>Tons/Day<br>Reduction | NERA<br>Tons/Day<br>Reduction |
|--------------|-------------------------------|-------------------------------|
| NMOG<br>+NOx | 6.0                           | 1.1-1.5                       |
| PM10         | 0.8                           | 0.0016-<br>0.005              |



## Protectiveness: NERA/Sierra Report– Summary of Staff Evaluation

- Costs estimates are not clear – GHG v ZEV technology costs are commingled, inclusion of ZEV after 2011 is inappropriate, high technology costs are not supported and do not demonstrate that CARB costs estimates are unreasonable
- Fleet Turnover - CARB makes reasonable estimates based on synchronized price increases and vehicle fuel economy and performance improvements
- Rebound – CARB estimates are reasonable and NERA/Sierra study does not refute CARB's analysis
- Upstream/Net Benefits – CARB estimates are reasonable/conservative; NERA/Sierra estimates do not clearly demonstrate arbitrariness of CARB's calculations

## Key Issues - Compelling and Extraordinary Conditions

- Section 209(b)(1)(B) ...whether “such State [California] does not need such State standards [California] to meet compelling and extraordinary conditions.”
- EPA’s Waiver Practice:
  - Broadly examine whether CA has conditions such that it still needs its own motor vehicle emission program. We have not examined the need and conditions for specific standards or specific air pollution problem.
  - Congress wanted CA to be afforded “the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”
  - This allowed CA’s CO standards to be less stringent than EPA standards, to facilitate NOx standards that were more stringent than the federal.
  - “Conditions” has included climatic, topographic, population and vehicle density

## Key Issues – Compelling and Extraordinary Conditions

- Need = whether CA needs to demonstrate that a State program is necessary given that GHGs are not localized pollutants?
- Meet = whether CA's GHG standards are needed to redress/mitigate climate change effects on compelling conditions?
- Extraordinary = whether CA's conditions are occurring and are extraordinary, and whether this requires CA conditions to be sufficiently unique from other states?

## Compelling and Extraordinary Conditions – “Need”

### ■ Proponents

- Relevant inquiry is whether CA needs its own emission control program, not whether any given std is necessary. Need does not refer to levels of pollution directly but to the factors/conditions that tend to produce them; EPA's past practice
- CARB's regulations will minimizing ozone problems, thus fills the expanded definition of “need”
- Congressional history and EPA practice is to afford CA broad discretion on need

### ■ Against

- “Need” and “Meet” should be distinguished:
  - need = whether a state program is necessary to address air quality issues
  - meet = whether the stds help mitigate the conditions
- When CA has an especially severe local air quality program (ozone) then a case for separate stds can be made, focuses on “such State standards” to suggest a standard by standard analysis rather than need for whole emission program
- The preemption in 209(a) is broad and implies “field preemption,” and only exception is where CA has unique conditions and this cannot be met with a global problem that does not affect CA in a qualitatively or sufficiently quantitatively unique way. Minimal direction on GHG impact does not amount to a “need.”

- *Staff Evaluation* California has reasonably identified general factors and conditions within the state which are not different from historical basis for the need for its own motor vehicle emission program. The GHG standards are reasonably viewed as necessary to address both climate change and ozone conditions within the state.

## Compelling and Extraordinary Conditions – “Meet”

- Proponents:
  - Alliance suggestion of a test of redressability is answered by: “A reduction in domestic emissions would slow the pace of global emissions increases,” and the risk of catastrophic harm “would be reduced to some extent....” *Mass v. EPA*
  - The sole relevant criterion regarding the “effectiveness” of the GHG stds is whether the protectiveness criteria is met. CA need only show a rational connection between its regulatory action and the problem being addressed. Alliance’s own modeling finds a very small reduction in temperature as a result of CARB’s regulation.
  - EPA is not to micromanage each CA standard and pollutant
  - Alliance’s argument re field preemption in 209(a) fails due to 1. In environmental matters preemption provisions are to be narrowly construed, and 2. It reads out the historically recognized role of CA as a pioneer and laboratory.
  - Ozone and Science
    - Dr. Schneider and Dr. Kleeman testified that global warming is projected to increase the number of days conducive to ozone formation in South Coast and San Joaquin Valley
    - Relatively small reduction in CO2 emissions is scientifically important because of the nonlinear nature of the climate system
    - The IPCC 2007 4<sup>th</sup> Assessment Report, Dr. Schneider, Hansen, and others state the GHG emissions are on trajectory that would likely increase temperatures by at least 2 degrees Celsius



## Compelling and Extraordinary Conditions – “Meet”

- Opponents:
  - CA has not and can't show that GHG stds will provide any discernable benefit to meet CARB's identified downstream C and E conditions or impact climate change overall
  - Alliance has provided extensive evidence that CA does not dispute re the GHG standards adopted even nationally or worldwide would not have measurable effect on temperature
  - CARB's response that any action by the State in the name of climate change should be afforded policy deference is misplaced; CARB is not acting in context of expansive state police power and is not free to take tiny steps that may do nothing to alleviate climate change
  
- *Staff Evaluation* - Past waivers have not questioned CARB's policy choices and the stringency or effectiveness of its standards (this is done within the “protectiveness” evaluation). Opponents have not met their burden of demonstrating that CARB's GHG program will not have an incremental benefit for both climate change and ozone conditions.



## Compelling and Extraordinary Conditions – “Extraordinary”

### Proponents

- No indication in the language of section 209 or legislative history that suggests that CA’s pollution problem must be worst in the country (citing 1984 particulate matter waiver)
- In the alternative, strong evidence of extraordinary conditions re coastal resources, Bay-Delta saltwater intrusion, agricultural impacts, levee collapse and flooding, wildfires, snow packs and melts
- Serious ozone levels will be exacerbated – ozone long recognized as an “extraordinary” condition. CA regulations will have direct reduction of ozone precursors and will also mitigate radiative effect of GHG

## Compelling and Extraordinary Conditions – “Extraordinary”

### Opponents

- “Extraordinary” embodies a concept of uniqueness
  - Global warming to not a unique condition specific to CA
  - “unique” effectuates the underlying purpose of the waiver provision which was to provide CA leeway to address the issue of localized urban air pollution
- CA’s “laundry list” of potential impacts is the same as many or most states
  - Impacts must be qualitatively or quantitatively extreme
- *Staff Evaluation:* CA continues to exhibit extraordinary ozone conditions. CA conditions, such as population and density, coastline, salt-water intrusion, wildfires, agricultural economy, snow pack and melt, etc, when aggregated, represent serious conditions on their own and when compared with other states.

## Key Issues - Consistency with 202(a)


Section 209(b)(1)(C) – The Administrator shall ... (grant the waiver unless he finds)... “such State standards and accompanying enforcement procedures are not consistent with section 202(a) of (the Act).”

- Whether “consistency” with 202(a) also limits CARB’s regulatory authority to EPA’s regulatory authority, and if so, to what extent?
- EPA waiver practice
  - EPA has stated that California’s standards and accompanying test procedures are **inconsistent** with section 202 of the Act if:
    - 1) there is **inadequate lead time** to permit the **development** of technology to meet those requirements, giving appropriate consideration to the **cost of compliance** within that time frame; and
    - 2) the Federal and California test procedures impose **inconsistent certification certification** requirements so as to make manufacturers unable to meet both sets of requirements with the same vehicle.



## Consistency with 202(a) – EPA Waiver Practice for How to Examine Technological Feasibility, Cost and Lead Time

- EPA, in making consistency determinations under 209(b), is guided by concepts from various Federal Court decisions:
- Lead Time (*NRDC & Intl Harvester*) -
  - CA can set shorter lead times for compliance when near term technologies are identified, and longer lead times when projected technologies identified
- Technological Feasibility (*NRDC*) -
  - Future standards can be technologically feasible if CA identifies the steps needed for their refinement, and offers plausible reasons for believing that each of those steps can be completed in the time available.
- Cost (*MEMA I*) -
  - CA has discretion to choose standards that will increase costs, but to be “inconsistent with 202”, costs must be a very high level, and excessive (e.g., costs that double or triple the cost of a car). before EPA would find CARB standards to be inconsistent with section 202(a).



## Consistency with 202(a) - Issues Raised by Opponents

### ■ Lead Time

- EPA precedent declares lead time begins when CA adopts standards; here, opponents banked on idea that CA GHG standards are preempted by EPCA – no Lead Time for invalid standards

### ■ Technological Feasibility and Cost

- Opponents submitted qualitative statements about general costs and impacts, and additional time needed

# Consistency with 202(a) - Proponent Responses to Industry

- **Lead Time**
  - CARB believes that classic lead time benchmark is still valid. Even if Industry view accepted, evidence shows that almost all companies confirm that they will meet near-term standards, and more than adequate lead time exists for compliance with longer-term standards – meeting NRDC test
- **Technological Feasibility**
  - CARB identified numerous “off the shelf” near term technologies in models from MY 2004 through present, and submitted more specific information on the progress of numerous technologies for mid-term to full-term
- **Cost**
  - CARB submitted cost information showing reductions in expected costs through innovative design in recent and current examples of technological development.
- **Staff Evaluation:** Opponents have not met burden of demonstrating that existing technologies are available for near-term standards, and that CARB identified technologies for longer-term standards are not feasible giving consideration to lead time and cost. CARB provide 5 years of lead time from the date of the adoption of its GHG regulations, and even if lead time is measured today CARB has reasonably identified available technologies and evidence that manufacturers can and will meet the standards.

# Consistency with 202(a) – “Endangerment” Argument

- Opponents
  - “Consistency with 202(a)” means ALL of 202(a) – Until EPA makes its own endangerment finding that any substance warrants regulation under 202, EPA cannot find that regulation of the substance is consistent with 202 (a)
  - As part of EPA’s follow up to *Mass v EPA* the Agency must still decide the appropriate regulatory standards and thus EPA can’t compare consistency of CARB standards until EPA issues own GHG standards and takes into consideration technology, costs and lead time
  - GHG is a new pollutant and is distinguishable from other CA regulations where EPA has at least made an endangerment finding on the pollutant (versus OBD)
  - Methods of control/prospect for effectiveness in CA could not form basis for federal control under 202(a)
- Proponents
  - EPA would need to find that GHG are NOT an endangerment in order to find inconsistency with 202(a)
  - Consideration of factors other than feasibility and lead time is not permissible
  - That *Mass v EPA* includes subsequent activity at federal level is irrelevant to waiver and pace in CA. GHG emissions are air pollutants. *EMA v EPA* – EPA had proposed to waive EPA nonroad standards before making finding re those engines’ emissions
  - EPA has granted waivers/authorizations BEFORE corresponding Federal activity (highway PM standards and nonroad CI and SI standards)
  - This is consistent with intent of Congress that California be the pioneer/trailblazer for vehicle/engine emission standards
- **Staff Evaluation:** The burden is on those opposing the waiver to demonstrate why the endangerment finding is relevant for an evaluation of consistency. If relevant, an affirmative finding that GHGs are not an endangerment is then necessary in order to find that CARB’s GHG regulations are not consistent with section 202(a).



# Options

OTAQ and OGC are reviewing these options from a legal, technical, and waiver precedent perspective and other options may fall in or out of our review. The clearest and most defensible option is to grant the waiver. The other options have high to very high vulnerability to legal challenge.

- **Option 1. Grant** – Opponents of waiver have not met their burden; **CARB enforces 2009 and later model years (MYs)**
- **2 Partial Grant Options - Delay Model Year Implementation**
  - **Option 2. Condition Waiver on Endangerment Finding;** EPA determination that opponents of waiver have not met their burden, however “consistency with 202(a)” requires EPA endangerment finding for authority to exist; waiver enforceable after EPA final endangerment finding; **CARB enforces 2010 and later MYs**
  - **Option 3. Condition Waiver on CARB providing adequate lead time;** EPA determination that opponents of waiver have not met their burden, however “consistency with 202(a)” requires more certainty about 202(a) regulatory authority; **Lead time does not run from CARB adoption but from *Mass v EPA*; CARB enforces 2012 and later MYs**
- **Option 4. Abeyance/Reopen Waiver at Later Date** – “Consistency with 202(a)” requires EPA both make endangerment finding and issue final GHG rule for point-by-point comparison with CARB rule; EPA reopens waiver comment period after final federal rule; CARB not enforce presently

## Next Steps/Schedule

- Options Briefing – End of September
- Completion of Draft Decision – End of October
- Update Briefing - Late October
- Management Review – November
- Final Decision - December