California GHG Waiver

Options

Overview

- Background
- 3 Options Presented
  - Grant Waiver
  - Deny Waiver Partially or Completely Based on Leadtime Concerns
  - Deny Waiver Based on Lack of Need to Meet Compelling and Extraordinary Conditions
- Likely Effect of Options on EPA GHG Rule
- Other Options Considered and Rejected
- Conclusions and Next Steps

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BACKGROUND

- Under section 209(b), EPA must, after notice and comment, waive preemption for California (CA) standards unless EPA makes any of the following three findings:
  - CA was arbitrary and capricious in determining that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards;
  - CA does not need such state standards to meet compelling and extraordinary conditions; or
  - CA standards are not consistent with CAA section 202(a)
- Past Practice
  - 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 denial for 1 model year for other 2 pollutants [pre-1977]; 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 partial denials based on anything other than lead time or technological feasibility

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BACKGROUND (cont)

- Deference: Traditional interpretation is statute provides CA the broadest possible discretion in developing its program. EPA has only narrow and circumscribed discretion to deny a waiver to California.
  - Consistent EPA interpretation since beginning of waiver program
  - Legislative history – Statute intended to give CA broadest possible discretion
  - Court decisions affirm this approach
- Burden of Proof – Those opposing waiver must affirmatively demonstrate that CA was arbitrary and capricious in its protectiveness determination with clear and compelling evidence. Burden also on those opposing for other two waiver criteria
  - MEMA I "…California regulations,…, when presented to the Administrator are presumed to satisfy the waiver requirements and … the burden of proving otherwise is on whoever attacks them."

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Legislative History

- Initial Enactment of Preemption Section (1967)
  - CA was ahead of the federal gov't in regulating motor vehicles, made "pioneering efforts" in auto pollution control. CA also had "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards … which might need to be more stringent than federal."
  - Congress preserved CA's regulatory role and protected industry from "patchwork quilt" of state regulations.
  - Benefits to nation were:
    - CA able to continue its program and provide benefits to that state
    - Nation would benefit from CA experience as a laboratory that may help with later federal standards
    - Industry faced with only one potential variation from the federal program.
- 1977 Revisions
  - California standards need only be "in the aggregate" as protective as federal standards.
  - Affirmed 1967 reasoning. Affirmed EPA's prior "liberal construction" of 209(b) to permit CA to proceed with its own program.
  - Purpose of 1977 amdts. was to "ratify and strengthen the CA 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."

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Option 1: Grant Waiver

- Option is consistent with past interpretation of statute, EPA practice, case law, and the record. We would have the option to revisit the waiver decision after EPA promulgates its regulations.
- "Protectiveness"
  - We can only deny waiver under section 209(b)(1)(A) if we find CA was arbitrary and capricious in making its "in the aggregate" protectiveness finding.
  - Traditional review is direct comparison to federal standards
    - CA standards more stringent than non-existent (or likely contemplated) EPA standards
  - Modified review suggested by manufacturers is to look more broadly at effects of standards on pollution
    - CA has provided an analysis indicating that its standards will decrease ozone precursors
      - Manufacturers rely on NERA/Sierra Research study to show that CA standards will increase ozone precursors
      - EPA has found several significant problems with the assumptions in the Sierra Research study
      - Under this option, EPA would argue that CA's assumptions are reasonable in general, and not arbitrary or capricious
      - EPA will likely be relying on assumptions similar to CA's in its GHG rule

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Option 1: Grant Waiver (cont)

- "Compelling and Extraordinary Conditions"
  - Traditional Interpretation
    - EPA looks at need for CA program as a whole, not pollutant by pollutant or individual standards
    - Need for CA motor vehicle program as a whole not questioned
  - Alternative Interpretation from Manufacturers
    - Look at need for individual standards, at least for GHGs
    - GHG Conditions
      - CA provides broad range of climate change concerns that CA contends are extraordinary when taken in their totality
    - Ozone – CA identified benefits as part of GHG rule
      - CA provided data indicating GHG standards directly reduce ozone precursors and argues that reduction in GHG will be beneficial for ozone problem
      - EPA will likely make similar statements in federal rule
      - CA ozone problem has always been considered compelling and extraordinary
      - EPA and courts have previously found that we should not second-guess CA policy choices – Supreme Court Mass v EPA opinion echoes idea that even small reductions are helpful

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Option 1: Grant waiver (cont)

- "Consistency with section 202(a)"
  - Traditional Review: technological feasibility considering leadtime
    - Auto manufacturers did not support arguments with factual evidence that standards were infeasible or would make vehicles less safe
    - CA provided factual evidence that near-term and long-term standards can be met with technology already in field without reducing vehicle size
    - CA factual evidence indicates that standards are feasible given leadtime provided
    - Vermont court decision – favors states' estimates of technology and costs
  - Modified Review Suggested by Manufacturers: CA GHG standards is inconsistent with section 202(a) until EPA makes a finding of endangerment
    - Burden on those opposing waiver to provide evidence that CA regs are inconsistent with 202(a). Under this option, we would argue that those opposing the waiver would have to show that GHG do not endanger public health or welfare
    - No evidence that GHG do not endanger public health or welfare; indeed, we are likely to find that they do
    - Failure of EPA to make endangerment finding is not an affirmative finding that GHGs don't endanger

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Option 2: Partial/Full Denial Based on Inadequate Leadtime

- Four possible suboptions for granting a partial waiver or full denial based on leadtime concerns
  - Deny for first 2-3 years, then grant
  - Grant for first 2-3 years, then deny
  - Full Denial
  - Conditional approval if CA revises regulations to push back its program by three model years. Full or partial denial for current program
- Basic Argument
  - EPA's traditional interpretation and public statements are that leadtime runs from date of regulatory adoption, including from date of CA enacted regulations. This is reasonable normally given traditional assumptions regarding waiver and that manufacturers are on notice regarding CA standards.
  - However, the unique circumstances regarding first regulation of GHG requires different approach. EPA had stated its view that section 202 did not allow EPA regulation of GHGs, which raised a clear question regarding whether EPA could grant a waiver for CA GHG standards.
  - Manufacturers were reasonably not expecting CA GHG regulations to be enforceable and were only on notice of possibly having to meet the regulations since April 2007 Supreme Court decision.
  - We would find that CA has justified its regulations based on a greater amount of leadtime than circumstances reasonably provided and that manufacturers have provided enough of a showing that actual leadtime was insufficient.

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (cont)

- Issues Common to all Sub-options
  - EPA's long time view is that leadtime should run from date California enacts standards. We would need to justify a change in practices here.
    - EPA's previous opinion regarding ability to regulate GHG under section 202 provides an arguably uncertain basis for assuming EPA would deny the waiver, ~~given~~ traditional analysis under section 209(b)(1)(C).
    - Arguably, manufacturers were still on notice regarding substance of CA standards.
    - EPA has said in the past that CA can't base lead time on uncertain timing of EPA waiver
  - Record support still an issue using alternative leadtime
    - Burden is on those opposing waiver to come forward with evidence of infeasibility based on leadtime – automakers' arguments on this issue are unsupported by data
    - CA provided significant discussion of available near-term technologies and identified long-term technologies
  - Vermont court found manufacturers did not meet burden to show standards were infeasible

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (cont)

- Option 2A: Deny for first 2-3 model years based on leadtime concerns
  - Pros: that manufacturers would only have 9 months to a few years leadtime to meet the standards, which would not be considered enough time to change their manufacturing to meet the standards
  - Cons:
    - While argument is theoretically plausible, specific evidence in docket indicates manufacturers can meet the standards for first 2-3 model years
    - Manufacturers provided no data supporting their arguments that standards are not feasible
    - Finding of feasibility is arguably closer fit to federal GHG rulemaking data
    - CA standards in later years may end up being more stringent under this option because manufacturers will not be able to bank credits in first three years

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (cont)

- Option 2B: Deny for years after the first 2-3 model years
  - Pros: CA factual evidence of feasibility of more difficult later standards is based on lead time starting in 2004-5, not 2007 and we would find that manufacturers provided enough of a showing that they cannot meet standards with lesser lead time
  - Cons:
    - CA provided factual evidence that standards are feasible given lead time from enactment, and manufacturers provided no factual evidence supporting their arguments that they were not feasible, either from date of enactment or from date of Supreme Court decision
    - Manufacturers argue that CA feasibility determination was based on lead time starting in 2004-5, but CA disputes this characterization and argues standards are feasible in the appropriate model years
    - Finding of feasibility may be closer fit to federal GHG rulemaking data

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (cont)

- Option 2C: Full denial
  - Pros: combination of reasons for options 2A or 2B and that the GHG program is a single non-segregable program where denying for any year (particularly early years) has effect on other years (e.g., denial of early years would affect ability to bank credits for use in later years). EPA does not believe it is appropriate to break up CA program.
  - Cons:
    - Same as for Options 2A and 2B
    - Even if standards are infeasible in later model years, this arguably would not require denial for earlier model years

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (cont)

- Option 2D: Conditional Grant with Full/Partial Denial
  - Pros: We would deny the program as written, either fully or partially, based on leadtime issue. However, we would find that CA standards meet the other two criteria of section 209(b) and that if CA revises its standards (or the portion of its standards we deny) to take effect three years later, then there is no basis to deny on grounds of inadequate leadtime. EPA would not need further review to grant a waiver if standards are so revised.
  - Cons:
    - This is still a full or partial denial of the waiver request for existing CA standards, so all of the issues with previous sub-options remain
    - Those who oppose waiver may argue that we have no authority to waive standards that do not yet exist and that we need to go through proper procedures before granting waiver for future standards
    - This would be the first time we have granted a conditional waiver

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Option 3: Denial: CA Doesn't Need GHG Standards to Meet Compelling and Extraordinary Conditions

- Pros:
  - We would argue that climate change is sufficiently different from traditional pollution to merit a different approach than the traditional approach looking at CA's need for its vehicle program as a whole.
    - Climate change is a worldwide condition caused by worldwide pollution.
  - We would argue that CA conditions (causes of air pollution such as emissions/geography; levels of air pollution; effects of air pollution) are generally not compelling and extraordinary with respect to GHG and climate.
  - With regard to ozone, we would argue that change in climate and reductions in ozone precursors caused by standard are so miniscule as to not have any discernible effect on ozone.
  - Thus, we would argue that CA does not need these standards to meet any compelling & extraordinary conditions.

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Option 3: CA Doesn't Need GHG Standards to Meet Compelling and Extraordinary Conditions (cont)

- Cons:
  - Ozone
    - Climate change directionally exacerbates CA ozone problems, which are the foundation of section 209(b)
    - Direct reduction in ozone precursors identified in GHG rulemaking
    - Data indicate standards will lead to reduction in temperatures (calculated by manufacturers), which directionally may reduce number and degree of high ozone days
    - EPA and courts have found that EPA should not second-guess CA policy choices and that every little bit of reduction helps – Supreme Court opinion on standing echoes this
  - General
    - EPA will likely make arguments similar to CA to justify our own GHG rule
    - CA lists broad range of climate change concerns that CA claims are compelling and extraordinary when taken in their totality
    - Inconsistent with previous actions that looked at vehicle program as a whole, not individual standards

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Options Considered and Rejected

- We have reviewed and rejected several other options. They include:
  - Denial based on infeasibility of CA regulations counting leadtime from date of CA enactment
  - Denial based on finding that CA was arbitrary and capricious in finding that its standards are not at least as protective of human health and welfare
  - Denial based on preemption under EPCA
  - Conditional approval or denial based on lack of EPA finding of endangerment

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Next Steps

- Make decision taking into account legal and policy implications of various options (9/21)
- Preparation of decision document
- Senior management review of decision document (10/26)

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