



CARB Rebuttal of Industry (7/24/07) - Technological Feasibility Information

- Industry offered only minimal discussion refuting CARB evidence presented on state of technology and technology development.
- Near term Compliance Picture
 - CARB presented info from Vermont case (company officials' depositions) showing numerous mfgs admit that their current business plans will result in compliance in early years:
 - Honda – can comply thru MY 2010 and possibly in 2011 w/ credits
 - Nissan – can comply with LDT2/MDV std through 2011 and with PC/LDT1 with model mix shift
 - VWoA – can comply for 2009, and for 2010 w/ incremental changes
 - Toyota – can comply through 2011
 - GM – conceded no compliance issues through 2010
 - DCC – conceded no compliance issues through 2011

CARB Rebuttal of Industry (7/24/07) -
Technological Feasibility Information – Cont'd

- Industry also misrepresented the Lead Time evidence:
 - S. Albu of CARB noted that most technologies are already developed and not require 6-7 years of lead time
- Because substantial lead time remains to continue refining these technologies, CARB clearly meets the *NRDC* lead time test

Alternative “Endangerment” Argument

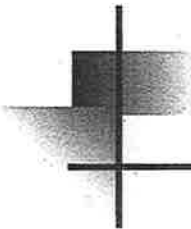
- Industry
 - “Consistency with 202(a)” means ALL of 202(a) – Until EPA makes its own endangerment finding that any substance warrants regulation under 202, EPA cannot find that regulation of the substance is consistent with 202 [AIAM uses “substance” rather than “air pollutant”]
 - As part of EPA’s 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)
- California
 - 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
 - EPA would need to find that GHG are NOT an endangerment in order to find inconsistency with 202(a)



The Three Additional Questions

Within the context of these statutory criteria [209(b) - protectiveness, compelling and extraordinary conditions, consistency with section 202(a)] we also request comment on the following:

- 1) Given that the regulations referenced in the December 21, 2005, request letter relate to global climate change, should that have any effect on EPA's evaluation of the criteria, and if so, in what manner?
- 2) Whether the United States Supreme Court's decision, issued on April 2, 2007 [*Mass v EPA*], regarding the regulation of emissions of greenhouse gases from new motor vehicles under Title II of the Clean Air Act, is relevant to EPA's evaluation of the three criteria, and if so, in what manner?
- 3) Whether the Energy Policy and Conservation Act (EPCA) fuel economy provisions are relevant to EPA's consideration of this petition or to CARB's authority to implement its vehicle GHG regulations?



Alliance's General Perspective on EPA Waiver Precedence

- Prior waivers pertained to smog-forming pollutants and other pollutants in ambient air and harmful to breathe – EPA used highly deferential standard that would be inadequate for federal stds under 202(a).
- Tech Feasibility – Constrained to approve a CA approach that EPA might feel unable to adopt at Federal level as a regulator. EPA determined it lacked authority to consider potential long-term burdens as long as adequate lead time for compliance is provided.
- Waiver Denials – denials or actions requiring CA to agree to modify its standards as a condition of approval involved situations in which delays in the regulatory process in CA or in EPA's review made it logistically impossible for auto manufs to meet stds of a new model year
- EPA's waiver approach approved by DC Circuit in *MEMA* (1979) – review is “modest” and EPA “has no broad and impressive authority to modify California's regulations.” 627 F.2d at 1119. Since this decision EPA has granted every waiver even if CA or EPA is late in relation to the model year. Since *MEMA* EPA has taken position that the Agency is neither required nor permitted to consider California's regulations with federal laws other than CAA.



Opponents - Regulations Relate to GHG/Global Climate Change

- **Unconventional Nature of CA's GHG Regulations**
 - Nothing in 209(b) requires EPA to give deference to CA's judgment that it needs the GHG regulations to meet "compelling and extraordinary conditions."
 - Legis. History supports CA acting as a pioneer in localized air pollutants but no evidence of CA taking leadership role on GHG – CA had longstanding expertise in smog pollutants, unique air pollution problems in CA, CA has no expertise in climate change.
 - CA's claimed need for regulations are not unique or "extraordinary" – EPA must make its own independent judgment, with no deference to CA, on the perceived need for the GHG emission regulations




Proponents - Regulations Relate to GHG/Global Climate Change – page 1

- CA regulations relate to Greenhouse Gas emission should have no effect on EPA's evaluation; GHGs are subject to regulation in the same manner as other pollutants currently regulated under Title II
- Because the Court held that GHGs are pollutants that EPA is authorized to regulate, GHGs should be treated like any other pollutant, and the provisions of CAA sections 209, 202 and 177 remain applicable after this decision, without revision. If EPA has the authority to regulate GHGs, so does California.
- Fact that CA's regs relate to GHG should not affect EPA's evaluation – Alliance's assertion that CA's leadership on GHG is somehow different than other pollutants (warranting less deference) is wrong. CA has demonstrated it has met the relevant criteria.



Proponents - Regulations Relate to GHG/Global Climate Change – page 2

- The SC stated in *Mass v. EPA* that “a reduction in domestic emissions would slow the pace of global emission increases, no matter what happens elsewhere.” So, here, California need not show that the climate will in fact respond to its regulatory action, but rather its obligation is to show that there is a rational connection between these standards and the problem being addressed.
- “Compelling and extraordinary conditions does not refer to levels of pollutions directly, but primarily to the factors that tend to produce them: geographical and climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.”
- EPA has always broadly included the factors that contribute to local air pollution problems in its examination of this criterion as well as localized pollutants. EPA has recognized that California’s regulations can address pollutants that broadly contribute to local air pollution conditions and that may go beyond California’s local air pollution concerns.
- CA should continue to act as a trailblazer



Opponents - Significance of *Massachusetts v EPA* – page 1

- 3-step analytical process of 202(a)(1)
 - (1) determine if substance is an “air pollutant”
 - (2) determine whether air pollutant can be anticipated to endanger public health and welfare
 - (3) adopt standards that apply “requisite technology” giving consideration to various factors, including time need to deploy controls
- *Mass v EPA* only established GHG as “air pollutants” and creates the trigger for the next 2 steps
- EPA should not give CA a presumption of consistency with 202(a)
 - EPA should either find CA is inconsistent since EPA has not made an endangerment judgment, or
 - Hold the request in abeyance until EPA has completed its 202(a) work – this will THEN provide the necessary point of reference

Opponents - Significance of Massachusetts v

EPA - page 2

- Although CARB noted two instances where EPA did grant a waiver for emissions that did not have EPA endangerment findings (the diesel PM waiver and the LEV waiver where CARB covered Formaldehyde) these are distinguishable. For diesel PM, there was Legislative history that endorsed California regulating PM. For Formaldehyde, Congress had directed EPA in the 1990 CAA amendments to regulate Formaldehyde in new motor vehicles irrespective of whether EPA had made an endangerment finding.
- Court made clear that any EPA regulation would not be permitted to conflict with EPCA – “both administer their obligations and yet avoid inconsistency”. This guidance does not support a California initiative that doesn’t balance EPCA factors.

*Proponents - Significance of Massachusetts v
EPA - page 1*

- The SC decision affirms that EPA and CARB have authority under the CAA to regulate GHGs. The decision puts the burden on EPA to show why it should NOT regulate GHGs; there is no reason to delay enforcement of the CA regulation until EPA completes its process in response to the decision.
- There is no legal basis for delaying waiver action as 209(b) clearly envisions the potential for CA taking action before EPA
- The Court confirmed that the CAA by its terms authorized regulation of “any pollutant” and charged EPA to come up with reasons why it should not, so enforcement of CA’s regulations should not have to await the completion of EPA’s process. Decision eliminated any consistency argument that California cannot regulate if EPA cannot.



Opponents – Significance of EPCA

- NHTSA’s LDT CAFE rule – April, 2006 – NHTSA’s analysis reconciles CAA waiver authority with specific prohibition against state fuel economy stds
- Appropriate for NHTSA to state this since CA insists EPA can’t look outside 209(b) criteria – unless EPA changes historic (*MEMA*) approach then precluded from considering EPCA preemption
- EPA can’t intrude upon EPCA and should deny waiver for 209(b) reasons
- Argument that EPA cannot consider whether GHG regulations are preempted by EPCA cannot be reconciled with arguments that a waiver renders the regulations immune of the same preemption – waived standards would not receive “federal status” – issue should best be left to the courts.

Proponents - Significance of *Massachusetts v*

EPA - page 2

- The SC had “little trouble” concluding that the CAA authorizes EPA to regulate GHGs. There are no textual or structural differences between EPA’s authority under section 202 and California’s under 209. Congress had anticipated that CA’s standards would be “more stringent than, or applicable to emissions or substances not covered by, the national standards. (Emphasis added)” (HR Rep. No. 90-278 (1967))
- This decision should be considered when granting the request, because it clearly indicated that EPA can act to reduce GHGs in furtherance of the CAA without taking away the authority of the DOT.
- Court found that EPA must reconsider its failure to regulate GHGs emissions from motor vehicles. The EPA should show good faith by allowing California to regulate its GHG emissions. EPA’s failed policy arguments at issue in *Mass v EPA* – that GHG is “too different” a pollutant does not prevent EPA from moving forward



Proponents – Significance of EPCA – page 1

- In *Mass v. EPA*, the Court spoke directly to the EPA argument it could not regulate CO₂ because this would require it to tighten mileage standards (which is the province of NHTSA) – “But that DOT sets mileage standards in no way licensed EPA to shirk its environmental responsibilities. The two obligations may overlap, but there is no reason to think that the two agencies cannot both administer their obligations and yet avoid inconsistency.” So, EPA can harmonize its obligation to protect the public health and welfare with the NHTSA obligations to improve fuel economy.
- This decision should be considered when granting the request, because it clearly indicated that EPA can act to reduce GHGs in furtherance of the CAA without taking away the authority of the DOT. EPA can’t shirk its responsibilities and it follows that EPA should permit California to enact its own limits.
- NHTSA’s view on preemption are entitled to no deference as preamble discussion in CAFE rule is not final agency action. When EPA issues the waiver, the foundation of NHTSA’s analysis (i.e., that EPA lacks the authority to regulate GHG) disappears under the weight of *Mass v EPA*.

Proponents – Significance of EPCA –page 2

- EPA must make decision solely on criteria of CAA. When EPA issues a waiver, it then deems the CA standards as “Federal standards.” As such, they are not within the set of state standards subject to express or implied preemption of EPCA
- EO 13432 requires EPA to coordinate with NHTSA on GHG regulations within statutory limits, EPCA/CAFE and NHTSA continue to have no bearing on EPA’s waiver review criteria. CAA text and purpose is clearly distinguished from EPCA.

Comments on Scope of EPA's Waiver Decision Flexibility

- Judge in Vermont case asked if EPA had authority under 209(b) to require modifications in the lead time allowed for the CA regulations OR in the content of the regulations
- Alliance:
 - NY and VT wrongfully rely on 2 waivers issued prior to *MEMA* claiming that EPA can change content or timing of CA's standards.
 - *MEMA* states that 209(b) does not give EPA authority to modify CA's standards – EPA can only grant or deny and can't modify in order to reduce long term costs [an issue in VT case]
- CARB:
 - Contrary to Alliance, nothing in 209(b) precludes a waiver through only certain model years or for granting for only certain tiers of standards

Options Going Forward – page 1

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES

- **A. 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**
 - **B. 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**
 - **C. 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**
- **D. Partial Grant**; EPA determination that opponents of waiver have not met their burden except EPA’s “protectiveness” review of CARB’s entire light-duty motor vehicle program requires re-analysis of ZEV, etc after 2011; **CARB enforces 2009-2011 MYs only**

Options Going Forward - page 2

- **E. Deny – any of the three 209(b) waiver criteria, or combination**
 - Protectiveness
 - Compelling and Extraordinary Conditions
 - Consistency with section 202(a) – endangerment finding
- **F. Abeyance – “Consistency with 202(a)” requires EPA make endangerment finding and EPA must issue final GHG rule for point of comparison with CARB rule; EPA reopens waiver comment period after final federal rule; CARB not enforce presently**