

vehicle emission standards under the CAA nor is it relevant to EPA's consideration of its waiver request. CARB points to litigation in the 9th Circuit action (*Center for Biological Diversity v. NHTSA*) wherein NHTSA's admits that its statements in the preamble discussion of the challenged light-truck CAFÉ rulemaking is not ripe until EPA decides the waiver issue. CARB states that NHTSA thus recognizes the point CARB made in its initial waiver request – that EPA acts independently to make decisions about the waiver under the CAA, separate and apart from EPCA.

Several commenters opposed to the waiver note that the starting point for discussion on this issue is the Federal Register Notice published by NHTSA that set forth a detailed analysis of state greenhouse gas regulations and concluded that such regulations are inconsistent with EPCA.³⁵ The Alliance states that it was proper for NHTSA to address the legality of state greenhouse gas regulations under EPCA – including NHTSA's finding that:

EPCA does not include any exception to its preemption provision that would cover State GHG and CO₂ standards. Nevertheless, some commenters opposing preemption suggested that Section 32902(f), which lists the factors that NHTSA must consider in determining the level at which to set fuel economy standards, prevents preemption by requiring consideration, by NHTSA, of the effect of other Government standards, including emissions standards, on fuel economy. EPCA's decisionmaking factor provision is neither a saving clause nor a waiver provision. Nor does NHTSA interpret it as saving state emissions standards that effectively regulate fuel economy from preemption.³⁶

The Alliance notes that it was appropriate for NHTSA to address the legality of state GHG regulations under EPCA since the legislative history (i.e., *MEMA v. EPA*, 627 F.2d 1095, D.C. Circuit 1979) and EPA's approach to date, appears to preclude EPA from considering the

³⁵ Alliance June 5 at 10, AIAM Oct 1 at 5 (late comment, so note first AIAM comment)

³⁶ Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 FR 17566, 17669 (Apr. 6,