

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

David
Dickinson/DC/USEPA/US
08/31/2007 04:17 PM

To Karl Simon, Robert Doyle, Michael Horowitz, Michael Shelby,
John Koupal, Ben DeAngelo, Dina Kruger

cc

bcc

Subject Draft Slides for GHG waiver briefing with Myers on 9/4

Total pages is 35, also attached is an appendix that I might clean up over the weekend - suggestions are welcome on any of this.

Karl - pay particular attention to pages 3 and 19

Mike S and John - have a look at page 19 for our impressions of the NERA/Sierra report

Please send comments to ME, KARL and Bob Doyle



BobMyersBriefSept4V4DD8-31.ppt AppendixtoMyersDD8-31.ppt

David Dickinson

202 [REDACTED]

fax - [REDACTED]

[REDACTED]@EPA.GOV


EPA 3915

**GHG Waiver Update –
Briefing for OAR Principal Deputy**

Administrator

September 4, 2007





Comments on Waiver Criteria & Additional Questions; Next Steps

- **Introductory Remarks**
- **Protectiveness**
- **Compelling and Extraordinary Conditions**
- **Consistency with Section 202**
- **Options**

Introductory Remarks

- Staff Assessment – From a legal, technical and policy perspective (and waiver precedence) CA has made the requisite protectiveness determination and those opposing the waiver have not clearly demonstrated that any of the section 209(b) criteria have been met. A waiver should be granted
- Burden of Proof/Deference
 - CAA starts with the presumption that CA receives a waiver if it makes the protectiveness finding. Burden of proof is on parties opposing a waiver, not on CA or EPA. EPA does not need to make an affirmative finding on (1) - (3) to grant waiver; EPA must grant a waiver unless it makes one of the specified negative findings. MEMA
 - Traditional view is CAA provides CA the broadest possible discretion in developing its program and in policy choices (legislative history and case law support this)
- Relevance to EPA's waiver evaluation of 3 additional FR Notice questions (global climate change, Massachusetts v. EPA decision, EPCA)
 - *For*: GHG a pollutant like all others, treat the same way in waiver context, EPCA irrelevant
 - *Against*: GHG is a unique pollutant, deference should not be given as CA not intended to be pioneer, CA rule does not take EPCA factors into consideration but EPCA preemption alone not basis to deny CAA waiver

Options Going Forward – page 1

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. Not all of these options are defensible and clearest option is to grant the waiver.

- **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**

Options Going Forward - page 2

- **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