

David  
Dickinson/DC/USEPA/US  
12/20/2007 06:53 AM

To Michael Horowitz, Karl Simon, Robert Doyle  
cc Carl Wick, Justin Cohen  
bcc  
Subject Good Morning - GHG

Attached is my most recent INTERNAL DRAFT of the decision document -



Decisiondocument12-6-07dd.doc

I assume the GHG webpage may get updated today with the "letter" from Johnson to GOvS. BD - can you please leave me a phone message (at my work #) reading me what the letter says?

David Dickinson  
202/ [REDACTED]  
fax - [REDACTED]  
[REDACTED]@EPA.GOV

EPA 4062

## **Environmental Protection Agency**

### California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, Decision of the Administrator (2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles)

#### **I. INTRODUCTION**

By this decision, issued under section 209(b) of the Clean Air Act, as amended (Act), 42 U.S.C. § 7543(b), the Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) request for a waiver of federal preemption to enforce its greenhouse gas (GHG) standards as they affect 2009 and later model year (MY) vehicles. As further explained below, CARB has adopted amendments to title 13, California Code of Regulations (CCR), sections 1900 and 1961, and established a new section 1961.1 for its Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles.<sup>1</sup>

Section 209(a) of the Act provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(b)(1) of the Act requires the Administrator, after an opportunity for public

---

<sup>1</sup> CARB's GHG regulations were approved by California's Office of Administrative Law (OAL) on September 15, 2005.

-2-

<sup>3</sup> See, e.g., 43 Fed. Reg. 32,182 (July 25, 1978).

<sup>2</sup> California is the only State which meets section 209(b)(1) eligibility criteria for obtaining waivers. See e.g., S. Rep. No. 90-403, at 632 (1967).

Once California has received a waiver for its standards and enforcement procedures for a certain group or class of vehicles, it may adopt other conditions precedent to the initial retail sale,

inconsistent certification requirements.<sup>3</sup>

given the cost of compliance within that time, or if the Federal and State test procedures impose

202(a) if there is inadequate lead time to permit the development of the necessary technology,

Previous waiver decisions have stated that State standards are inconsistent with section

of the Act.

State standards and accompanying enforcement procedures are not consistent with section 202(a)

does not need the State standards to meet compelling and extraordinary conditions; or (C) the

that: (A) the protectiveness determination of the State is arbitrary and capricious; (B) the State

and would certainly preclude BPCA on its face as opposed to by MEMA case law] if he finds

the Administrator must grant a waiver unless he finds - which technically isn't what 209(b) says

standards. However, no such waiver shall be granted by the Administrator [as opposed to stating

will be, in the aggregate, at least as protective of public health and welfare as applicable Federal

vehicles or new motor engines prior to March 30, 1966,<sup>2</sup> if the State determines that standards

standards (other than crankcase emission standards) for the control of emissions from new motor

hearing, to waive application of the prohibitions of section 209(a) for any State that has adopted

titling or registration of these vehicles without the necessity of receiving an additional waiver.

## II. BACKGROUND

California's GHG program is included as part of its second generation low-emission vehicle program known as LEV II. EPA previously issued a waiver for the LEV II program and also issued a waiver for CARB's zero-emission vehicle program (known as ZEV) through the 2011 MY. [If we issue a partial GHG waiver we may want to include a sentence on the rationale behind ZEV only through 2011, this may also be helpful when we set up the "flaw" reasoning for NERA/Sierra under protectiveness]

By letter dated December 21, 2005, CARB submitted a request seeking a waiver of preemption for its GHG motor vehicle program. CARB's regulations and incorporated test procedures are directed primarily to controlling greenhouse gas emissions from two categories of new motor vehicles – passenger cars and the lightest trucks (PC and LDT1) and heavier light-duty trucks and medium-duty passenger vehicles (LDT2 and MDPV). The regulations add four new greenhouse gas air contaminants (carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), and hydrofluorocarbons (HFCs)) to California's existing regulations for criteria and criteria-precursor pollutants, along with air toxic contaminants.<sup>4</sup> The regulations establish a manufacturer declining fleet average emission standard for these gases, with separate standards for each of the two categories of passenger vehicles noted above. [note CO<sub>2</sub> equivalent standard] CARB places the declining standards into two phases: near-term standards phased in

---

<sup>4</sup> [note AC credits – both CO<sub>2</sub> and HCFCs?]

from 2009 through 2012, and mid-term emission standards, phased in from 2013 through 2016.  
[Consider placing table from p.7 of 12/21 request of the stds] [alternative fueled vehicles, early credits, other credits, trading – 5 years, etc]

On February 21, 2007 EPA notified the Executive Officer of CARB that the timing of EPA's consideration of the GHG waiver request was related to the then-pending *Massachusetts v. EPA* case before the United States Supreme Court. EPA believed that the decision and opinion in that case would be potentially relevant to issues EPA must address in the context of the GHG waiver proceeding. As noted in the February 21, 2007 letter EPA would (and subsequently did) proceed with the waiver request after the Supreme Court decision was issued.<sup>5</sup> In addition, EPA notified the Governor of California on two separate occasions in June, 2007 that because of the necessity of affording public hearings on CARB's GHG waiver request and the volume and scope of oral and written comments received by the Agency that EPA would make its decision on the waiver request by the end of 2007.<sup>6</sup> [DD note: I am looking for a Congressional response, etc where EPA said that a waiver by the end of the year would still cover the 2009 MY if waived]

On November 5, 2007 the State of California filed a complaint against EPA in the United States District Court, District of Columbia for declaratory and injunctive relief to compel EPA to either grant or deny the waiver request, and on November 8, 2007 the State of California filed a petition for review of EPA in the United States Court of Appeals, District of Columbia Circuit seeking to "review and compel action unlawfully withheld and unreasonably delayed" in "failing to either grant or deny California's request" for a waiver. On November XX, 2007 [get letter from

---

<sup>5</sup> Docket cite XX

Tanya] Administrator Johnson once again stated to the Governor of California that EPA would be making a waiver decision by the end of 2007 – today’s decision fulfills that intention.

On April 30, 2007, a Federal Register notice was published announcing an opportunity for hearing and comment on CARB’s request, including a public hearing scheduled for May 22, 2007 in Washington, DC and a written comment period with a deadline of June 15, 2007.<sup>7</sup> On May 10, 2007 an additional Federal Register notice was published announcing an additional public hearing for May 30, 2007 in Sacramento, CA with no change in the comment period deadline of June 15, 2007.<sup>8</sup> EPA subsequently conducted the two public hearings on May 22, 2007 and May 30, 2007 and heard from over XX witnesses.<sup>9</sup> The written comment period expired on June 15, 2007. Both during and after the comment period EPA received nearly 100,000 submissions to the docket - [sentence from BD about mass mailings, number supporting the waiver, etc].<sup>10</sup>

On several occasions EPA received requests to extend or re-open the comment period; however, the Agency did not extend the June 15, 2007 deadline.<sup>11</sup> In addition to EPA clearly and consistently stating that the public comment period would not be reopened or extended, the Agency also indicated that, consistent with past waiver practice, we would continue, as necessary, to communicate with any stakeholders to the waiver process after the comment period

---

6 Insert June 13, and and June 21, EPA letter citations.

7 72 FR 21260 (April 30, 2007)

8 72 FR 26626 (May 10, 2007)

9 List the witnesses

10 Insert general list of primary commenters

11 Insert letters and responses both before and after the comment period

ended.<sup>12</sup> As clearly noted, the public comment period for this waiver proceeding closed on June 15, 2007 and EPA has evaluated and made its decision on CARB's GHG waiver request based on all comments and information submitted to the Agency by that date. EPA does not believe that any significantly new and relevant information has been submitted since the June 15<sup>th</sup> deadline. The purpose in maintaining the ability to communicate with parties to the waiver proceeding after the close of the comment period was not to continue to receive comments which should have been submitted by the deadline or to receive the same comments in a reformatted fashion, but rather to insure that if any inherent misunderstandings developed during the comment process the parties could bring them to EPA's attention and to insure that no reopening of the comment period was necessary in light of any such misunderstandings, potential court decisions affecting California's ability to regulate GHGs from motor vehicles, etc. Including the decision in [Vermont} and all other comments received after the close of the comment period, EPA does not believe such information affects or should affect the Agency's analysis (based on all information submitted by the June 15, 2007 comment period deadline) of whether those opposing the granting of waiver have met their burden of demonstrating whether the criteria under section 209(b) have not been met. To the extent any such late comments or submissions, including the *Vermont xx* decision are discussed, they are merely noted for purposes of clarifying the issue at hand or to clarify how EPA evaluates the criteria found in section 209(b). After the close of the written comment period EPA received additional comment from CARB on July 24, 2007 concerning xx, the Alliance on August 9, 2007 seeking a 45 day extension of the comment

---

<sup>12</sup> Insert June 8 letters to Alliance and other parties. EPA also indicated in August, 2007 that we would continue to

period, the Conservation Law Foundation on September 12, 2007 – submitting the United States District Court Decision in Vermont of September xx, 2007, in [insert case name], comment from AIAM of October 1, 2007 addressing the CARB comments from June 15, 2007 and July 24, 2007 along with *Vermont*; an additional submission from the Alliance dated October 9, 2007 along with comment dated October 12, 2007 from the National Automobile Dealers and comment dated October 15, 2007 from the Automotive Trade Policy Council regarding *Vermont*, and additional comment the Conservation Law Foundation (state the others?) of October 12, 2007 which also addresses the potential relevance of *Vermont*. The Agency also received joint-comment from Sierra Research and NERA Economic Consulting dated October 29, 2007.

### III. WAIVER CRITERIA, LEVEL OF DEFERENCE, AND BURDEN OF PROOF IN WAIVER PROCEEDINGS

#### A. Waiver Criteria

As noted above, section 209(a) of the CAA provides that no state shall adopt or enforce any emission standard for new motor vehicles, and section 209(b) states that the Administrator shall grant California a waiver of section 209(a) if California “determines that [its standards] will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. Section 209(b) further states that no such waiver shall be granted if the Administrator finds that “ – (A) the determination of [California] is arbitrary and capricious, (B) [California] does not need such State standards to meet compelling and extraordinary conditions, or (C) such [California] standards and accompanying enforcement procedures are not consistent with section \_\_\_\_\_ evaluate and comments to the extent practicable.



202(a) of this part. In previous waivers EPA has stated that Congress intended EPA's review of California's decision-making be narrow. This has led EPA in the past to reject arguments that are not specified as grounds for denying a waiver:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.<sup>13</sup>

Thus, historically, my consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that I may consider under section 209. As noted below, in addition to seeking comment on the three waiver criteria noted under section 209(b) of the CAA, EPA also sought comment on three additional questions in the April 30, 2007 Federal Register notice. The question "whether the Energy Policy and Conservation Act (EPCA) fuel economy provisions are relevant to EPA's consideration of this petition or CARB's authority to implement its vehicle GHG regulations" is of particular importance to the question of whether EPA should take into consideration other laws or requirements that may affect the legality of CARB's GHG regulation. Further discussion of the "three additional

---

13 36 Fed. Reg. 17,458 (Aug. 31, 1971). Note that the "more stringent" standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that the California standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

questions" is located below in section IV. A. As discussed in that section, by today's decision EPA continues to evaluate CARB's waiver requests by the criteria prescribed in section 209. However, because of what opponents of the waiver view as unique pollutants that CARB seeks to regulate and because of their suggestions that the waiver criteria be evaluated in a fuller context or expanded manner, EPA believes it reasonable (although EPA is not making a finding that it is required) to evaluate whether the opponents of the waiver have demonstrated that CARB's GHG regulation does not meet the waiver criteria under the suggested expanded scope. Within the specific waiver criteria found in section IV below this will be further discussed. EPA received limited comment as to whether EPA should continue its practice of confining its review of California's regulations to the specific terms of section 209(b). One commenter noted that such confinement (that EPA is neither required to nor permitted to consider the consistency of a given California regulations with federal laws other than the Clean Air Act) was approved within the context of traditional California regulations (for criteria and precursor pollutants) in *Motor and Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (*MEMA I*).<sup>14</sup> This same commenter notes that since the *MEMA I* decision the Agency has taken an even more restrictive view of the issue of consistency with other provisions of law, citing EPA's 1996 review of California's onboard diagnostic regulations and the finding that potential anti-competitive concerns expressed in section 207 of the CAA would be "beyond the scope of my review in the context of a section 209(b) waiver decision.<sup>15</sup> This commenter is among the opponents of the waiver noted above which argue that EPA's review of the waiver

criteria in the context of the GHG regulation not be as narrowly construed as in past waivers based on the pollutants at issue. [check if AIAM made any non-EPCA arguments for broader scope]

CARB and other proponents of the waiver maintain that EPA is only to deny a waiver if he finds that one of the specified criteria in section 209(b) exists. “The express terms of section 209(b) combined with this and other waiver implementation history thus establish that U.S. EPA cannot apply any additional criteria – such as the potential conflicts with other law – in evaluating California’s waiver requests. U.S. EPA’s review thus begins and ends with section 209(b).”<sup>16</sup>

As stated above, EPA will evaluate the GHG waiver request based on the narrow criteria found in section 209(b); however, the separate question of whether EPA will continue to narrowly construe the application is further discussed below.

#### **b. Deference**

In previous waiver decisions EPA has recognized that the intent of Congress in creating a limited review (based on the section 209(b) criteria) of California’s determinations that California need its own separate standards was to ensure that the federal government not second-guess the wisdom of state policy. This has led EPA to state:

It is worth noting ... I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to “catch up” to some degree with newly promulgated standards. Such an approach ... may be attended with costs, in the shaped of reduced

---

<sup>15</sup> Alliance at 5, citing 61 FR 53371 (Oct. 11, 1996) waiver decision

<sup>16</sup> CARB 12/21 request at 10.

product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.<sup>17</sup>

This has also led EPA to state that the structure and history of the California waiver provision clearly indicate both a Congressional intent and an US EPA practice of leaving the decision on ambiguous and controversial matters of public policy to California's judgment.

CARB maintains that this deference applies equally if not more so to policy considerations over the treatment of GHG emissions. It notes nothing in section 209(b) has changed the express Congressional intent for California to lead and experiment with cutting edge emission-reduction technologies and just as California paved the way for advances in reducing criteria air pollutants so is California's GHG regulation advancing the reduction in climate-changing GHG emissions.

The Alliance, in the context of responding to the three additional questions noted in EPA's April 30, 2007 Federal Register Notice, discusses EPA's historical practice and its "highly deferential standard of review."<sup>18</sup> The Alliance identifies past procedures or waiver decisions that while suited to the purposes of limited review (EPA has received no comments suggesting that such past limited review was inappropriate), would be inadequate for other purposes, such as the setting of federal emission standards under section 202(a) of the CAA, or for a comprehensive review of the full economic and environmental impacts of a given set of state regulations on the nation as a whole.[DD: what do we do with the fact that Alliance wants to exclude EPCA and the broader economic review (impacts on economy, jobs, etc) but meanwhile suggests that review within the

---

<sup>17</sup> 40 FR 23103-23104; see also LEV I Decision Doc at p.64

waiver criteria (more in A above) should not be narrow.] Although the Alliance's comments on the "limited scope of EPA's review" might suggest that EPA's review ought to be limited to just the waiver criteria in section 209(b) (which is a position that the Alliance apparently supports), or that such criteria be interpreted narrowly (as discussed above, the Alliance and other opponents of the waiver claim that EPA should interpret the criteria broadly – for example, rather than EPA only examining whether California continues to have "compelling and extraordinary conditions" the Agency should also examine whether California has a "need" for its standards and whether the standards will help "meet" or mitigate the conditions that may otherwise be compelling and extraordinary) in the context of its June 5, 2007 comments the Alliance instead set out examples of EPA's deference toward California's regulations as demonstration of EPA's limited scope of review. For example, in addition to the decision cited in footnote 17 above, the Alliance noted an early EPA waiver decision where the Agency determined it lacked authority to consider the potential long-term burdens imposed by a set of California standards.<sup>19</sup> The Alliance also notes the LEV I Decision Document for the proposition that the issue of long-term compliance costs was a matter of policy that Congress intended to consign to CARB:

"Although neither the industry nor CARB has expressly acknowledged it, manufacturers can recover the costs of this program by passing the costs on to the vehicle purchasers. The fact that CARB has made a judgment that the emission reduction (and consequent public health) benefits resulting from the LEV program will eventually be borne by California citizens in the form of higher vehicle prices is precisely the type of 'controversial' public policy decision that Congress believed should be made by California."<sup>20</sup>

---

<sup>18</sup> Alliance June 5, at 3.

<sup>19</sup> Alliance at p4 citing 36 FR 17458 (8/31/71)

<sup>20</sup> Alliance at p. 5 citing unpublished Decision Document supporting 58 FR 4166 (Jan. 13, 1993) at p. 170 (LEV I Decision).

The Agency has not received any comment suggesting that EPA's deference to California on policy choices inherent in the first and third waiver criteria of section 209(b), therefore EPA will continue its past practice. However, the Alliance believes, based on its claim that CARB's GHG regulation has a qualitatively new objective of addressing global climate change, that EPA must make its own independent judgment [DD – need to fit in burden of proof, standard of review – CA needs to have been reasonable in its findings not that EPA make its own judgment?], with no deference to California, on two questions arising under section 209(b)(1)(B) – specifically whether California *needs* its own state-specific regulations and whether California's particular regulations will actually address (or “meet”) the perceived need. As discussed in the section above regarding the scope of EPA's analysis under the waiver criteria, today's decision does examine these two particular questions since they have been raised by opponents of the waiver. However, EPA's role in reviewing any CARB waiver request is to determine whether the opponents of the waiver have met their burden of proof [expand on this, reference section below, etc]. Therefore EPA [summarize that EPA not make independent judgements, maintain deference on some questions but will still look to see whether CA has at least reasonable analyzed them.e tc]

**c. Burden of Proof**

In Motor and Equip. Mfrs Assoc. v. EPA, 627 F.2d 1095 (D.C. Cir. 1979) (MEMA I), the U.S. Court of Appeals stated that the Administrator's role in a section 209 proceeding is to:

consider all evidence that passes the threshold test of materiality and . . . thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which

Congress intended a denial of the waiver.<sup>21</sup>

The court in MEMA I considered the standards of proof under section 209 for the two findings necessary to grant a waiver for an “accompanying enforcement procedure (as opposed to the standards themselves): (1) the “protectiveness in the aggregate and (2) “consistency with section 202(a) findings. The court instructed that, “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.<sup>22</sup>

The court upheld the Administrator’s position that, to deny a waiver, “there must be ‘clear and compelling evidence’ to show that proposed procedures undermine the protectiveness of California’s standards.<sup>23</sup> The court noted that this standard of proof “also accords with the Congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare . . . .<sup>24</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although MEMA I did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards, there is nothing in the opinion that suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have

---

<sup>21</sup> MEMA I, 627 F.2d at 1122.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

consistently made clear that:

[E]ven in the two areas concededly reserved for Federal judgment by this legislation - the existence of compelling and extraordinary conditions and whether the standards are technologically feasible - Congress intended that the standards of EPA review of the State decision to be a narrow one.<sup>25</sup>

---

<sup>25</sup> See, e.g., 40 Fed. Reg. 23,102-103 (May 28, 1975).



Finally, opponents of the waiver bear the burden of showing whether California's waiver request is inconsistent with section 202(a). As found in MEMA I, this obligation rests firmly with opponents of the waiver in a 209 proceeding, holding that: [t]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>26</sup>

The Administrator's burden, on the other hand, is to demonstrate that he has made a reasonable and fair evaluation of the information in the record in coming to the waiver request decision. As the court in MEMA I stated, "here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'<sup>27</sup> Therefore, the Administrator's burden is to act "reasonably.<sup>28</sup>

[Alliance – protectiveness, etc see p. 5 of June 15 comment]]

[Do we want to get into this burden questions a bit and lay out the it is presumed CA gets that waiver, EPA has made a reasonable and fair evaltion (we haven't ignored the evidence but can not make conclusions at this time – why can't we make conclusions that opponenets have not

---

<sup>26</sup> MEMA I, 627 F.2d at 1121.

<sup>27</sup> Id. at 1126.

submitted enough evidence – protectiveness (we don't wait for federal waiver before comparing but can't definitely find w/o standards (or flawed data)

#### IV. DISCUSSION

##### A. Three Additional Questions Posed in the Federal Register Notice

In addition to the three statutory criteria, found in section 209(b) of the CAA and which are discussed further below, in EPA's April 30, 2007 Federal Register notice announcing the opportunity for hearing and comment on CARB's waiver request, because of the unusual circumstances of this waiver proceeding (e.g., first time a CABR request had been submitted for greenhouse gases, a recent United Supreme Court decision on a fundamental question of authority to regulate greenhouse gases under Title II of the CAA, etc) the Agency asked an additional three questions in order to determine their relevance and significance to EPA's final waiver decision.

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?

Many commenters noted that the fact that the California regulations target primarily greenhouse gas emission reductions, as opposed to previously targeted pollutants, was and remains largely irrelevant in the context of waiver law and history. Commenters also note generally that there is no legal basis for EPA to treat this request differently from previous waiver requests. Some commenters add that the *Massachusetts v. EPA* opinion vindicates California's

---

28 Id. at 1126.

approach to greenhouse gases as simply additional pollutants to be regulated under the CAA, for which California should receive a waiver and for which EPCA/CAFE neither affects CARB's authority nor informs EPA's review.<sup>29</sup>

One commenter requested that EPA pay particular attention to the ZEV waiver decision summarized in the document "Waiver of Federal Preemption for California Low Emission Vehicle Standards" dated January 8, 1993. This decision addressed a set of standards that were fundamentally different from EPA actions at the time since it was a specific mandate related to the type of technology used rather than numerical air emission standards. The commenter provides additional discussion noting that in that waiver decision, the EPA Administrator found that where there was not a specific regulation by EPA that would preempt this regulation; even if there might be a conflict with other federal statutes (in this case NEPAC), there was no issue of federal preemption.<sup>30</sup> [find this comment and clarify]

---

29 California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 1-2.  
California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-0422-6) p. 54-55.  
California Attorney General's Office (EPA-HQ-OAR-2006-0173-0421-2) p. 10-12.  
Environmental Defense (EPA-HQ-OAR-2006-0173-0421-38) p. 189-199.  
National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-1604) p. 11.  
Nichols, Mary; UCLA Institute of the Environment (EPA-HQ-OAR-2006-0173-1421-17)  
p. 92-96  
Nunez, Fabian; California Assembly Speaker (EPA-HQ-OAR-2006-0173-0421-3) p. 16.  
Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-1352)  
p. 2.  
Pavley, Fran; Former California Assemblywoman (EPA-HQ-OAR-2006-0173-0422-3),  
p.26.  
Pavley, Fran; Former California Assemblywoman (EPA-HQ-OAR-2006-0173-0421-4),  
p.18.

30 Mary Nichols, UCLA Institute of the Environments, 2006-0173-1421-17, p. 92-96. [doesn't appear to be the correct cite]

-19-

standards for pollutants that EPA had not addressed. The technological feasibility and lead time California to set standards more stringent and sooner than EPA might, and to continue setting Congress saw California as a trailblazer and laboratory for innovation and provided for implemented sooner than federal standards.

as a laboratory for new technology by setting standards that are more stringent and Consistent with Congressional intent, California should be able to continue serving

Letters: Conservation Law Foundation (EPA-HQ-OAR-2006-0173-1502) p. 3.

*continues to play leading role*

*3 separate ideas of - pollutant - CA; need not be related to smog or be unique; CARB*

additional discussion in support of their position on this issue.

standards that are more stringent than the national standards). The commenter provides intended it to play (i.e., to pioneer solutions to the nation's air quality problems by developing 209(b)(1)(B) of the Act. California's waiver request is aligned with the national role Congress be "unique" to California to qualify as "compelling and extraordinary conditions" pursuant to § Moreover, as EPA itself has long recognized, pollution problems need not be related to smog or dioxide and other pollutants that contribute to climate change (*Massachusetts v. EPA*).

nothing. The Clean Air Act is "unambiguous" with respect to the authority to regulate carbon The fact that this waiver request concerns standards to control GHG emissions changes

issues occur in a world increasingly focused on global warming, which will ultimately force manufacturers to accelerate the implementation of technologies. One commenter (California Attorney General's Office) cites case law at 627 F.2d 1095, 1979 in support of its opinion on this issue.

Letters:

Attorneys General of Rhode Island, Washington, Arizona, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey (EPA-HQ-OAR-2006-0173-1462) p. 6.  
California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-3601) p. 2.  
California Attorney General's Office (EPA-HQ-OAR-2006-0173-0422-1) p. 14-15.  
May, Karen; Illinois Representative (EPA-HQ-OAR-2006-0173-0422-13) p. 141-148.

CA as a leader/laboratory

Congress clearly intended for section 209(b) to allow California to set standards before EPA takes action or decides what it will do with the federal program. There is no legal basis for delaying action on California's waiver request. EPA's past, present and ongoing failure to grant California's waiver request is Agency action unreasonably delayed and unlawfully withheld.<sup>31</sup>

The system set up by the CAA, whereby states can choose between adopting federal air quality standards or the stricter California standards, has been successful. This approach should work equally well for GHG emission standards, and is crucial in the absence of federal standards.

---

<sup>31</sup> Environmental Defense (EPA-HQ-OAR-2006-0173-1459) p. 22-23.

Letters:

Sierra Club (EPA-HQ-OAR-2006-0173-1690) p. 2.

Opponents' arguments on these questions essentially boil down to a desperate attempt, in the face of a resounding defeat of the same failed EPA policy arguments at issue in *Massachusetts et al. v. EPA*, to show that greenhouse gases are just "too different" from previously regulated pollutants to allow California to proceed. That court's holding - combined with the text, structure, cases interpreting, and agency practice concerning Section 209(b) - confirm that despite manufacturers' discomfort in having California and EPA regulate greenhouse gases as one of many motor vehicle emissions, that is precisely what the Act authorizes and what a proper application of Section 209(b) requires.

Letters:

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-3601) p. 31-32.

On the other hand, opponents of the waiver request state that Congress did not intend to permit California to take a leadership role in addressing the issue of GHG emissions regulations. The reasoned foundation upon which Section 209(b) was based and which continues to exist today simply does not apply to GHG emissions. Nothing in the text of Section 209(b) requires EPA to give any deference to California's judgment or claim that the State needs to enforce climate change regulations in order to "meet compelling and extraordinary conditions" in California or elsewhere. Legislative history shows that Congress intended to permit California to act as a pioneer in the

control of localized air pollutants, but there is no evidence that Congress intended to allow California to take a leadership role in addressing GHG emissions. Unlike criteria pollutants or toxic emissions, CARB has no particular insight or problem-solving expertise in the area of GHG emissions. Commenters provide significant additional discussion on this issue. The Alliance includes a detailed account of the legislative history with respect to EPA's long experience in reviewing requests from California, noting that California has no particular expertise in the field of climate change regulation. The Alliance asserts that the absence of such expertise should be sufficient on its own to require EPA to reconsider its traditional deference to California's judgment of "need" under Section 209(b)(1)(C) and that California's claimed need for regulations to address the issue of climate change through motor vehicle regulations cannot be considered unique or "extraordinary."

Letters:

Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1519) p. 2-7.  
National Automobile Dealers Association (EPA-HQ-OAR-2006-0173-1671) p. 4-5.  
Utility Air Regulatory Group (UARG) (EPA-HQ-OAR-2006-0173-1497) p. 2-3.

-23-

(1) GHG emissions are pollutants under the Act, and California is regulating these emissions from new motor vehicles as it has for other pollutants. See also CAA Section 209(e) authorizing California to regulate nonroad emissions before EPA completed its endangerment study or issued regulations under Section 213(a). The

(A) The fact that California's waiver request relates to global climate change should not affect EPA's evaluation of the criteria.

### 3.2 Effect on Scope of Review by EPA

(C)

Letters: Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1297) p. 4.

The issue of global climate change is not an appropriate subject for a state-specific waiver of preemption under section 209. California's waiver application is both premature and factually deficient. Before EPA takes any further action on the waiver request, California should: 1) withdraw the current waiver request, for further proceedings at CARB to address the issues raised in the hearings and public comment letters, and 2) withdraw its written threat to sue EPA if a decision on the current waiver request is not made by October 2007. If not, then EPA should deny the waiver request and leave the matter to the D.C. Circuit for the further litigation that California appears intent upon pursuing.



Alliance's assertion that California's leadership position on GHG emissions is somehow different from its historical leadership role, warranting less EPA deference, is misguided and wrong.

Letters:

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 22.

National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-1604) p. 11.

- (1) The scope of the waiver inquiry is limited to the Section 209(b) requirements of the CAA. Policy concerns outside of this section have never been used in the determination of California's right to a preemption waiver.

Letters:

Connecticut Department of Environmental Protection (EPA-HQ-OAR-2006-0173-2173)

p. 2.

Pacific Gas and Electric Company (EPA-HQ-OAR-2006-0173-2280) p. 3.

Pacific Gas and Electric Company (EPA-HQ-OAR-2006-0173-0421-14) p. 86.

**(A) Commenters support the Request for Waiver of Federal Preemption for California Motor Vehicle Greenhouse Gas Standards as submitted by CARB to EPA on December 21, 2005.**

- Comments provide additional legal analyses and discussion in support of the California waiver. Some of these commenters also provide a historical summary of case law and waivers granted to date in support of their position that EPA should defer to California on this issue and grant the waiver. A number of commenters provide additional discussion regarding the three conditions that influence whether EPA will grant the waiver, noting that 1) California's determination is not arbitrary and capricious, 2) California needs the GHG standards to meet compelling and extraordinary conditions, and/or 3) California's GHG standards and accompanying enforcement procedures are consistent with Section 202(a) of the CAA. Many commenters also note that the California standards, including the GHG standards, are as protective as federally administered standards (and thus, meet the Section 209(b) requirement) and that the California standards do not conflict with the Energy Policy and Conservation Act (EPCA). Some commenters note that EPA's decision will affect not only California but many other states as well (e.g., New York) that have decided to follow California's lead, but cannot move forward until California is granted its waiver by EPA. In all cases where commenters address these or other specific legal issues in support of their position, the comment is summarized in greater detail in subsequent sections of this report.
- Letters:
- Adirondack Council (EPA-HQ-OAR-2006-0173-1457) p. 1-2.
  - Attorneys General of Rhode Island, Washington, Arizona, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey (EPA-HQ-OAR-2006-0173-1462) p. 1.
  - Blumenthal, Richard; Connecticut Attorney General (EPA-HQ-OAR-2006-0173-0246) p. 1-2.
  - California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-3601) p. 1-2.
  - California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 1-2.
  - California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-0422-6) p. 47-71.
  - California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-0421-5) p. 23-41.
  - California Assembly Speaker Fabian Nunez (EPA-HQ-OAR-2006-0173-0421-3) p. 15.
  - California Assembly Member Ira Rusklin (EPA-HQ-OAR-2006-0173-0421-7) p. 44-45.
  - California Attorney General's Office (EPA-HQ-OAR-2006-0173-1433) p. 1.
  - California Attorney General's Office (EPA-HQ-OAR-2006-0173-0422-1) p. 14-21.
  - California Attorney General's Office (EPA-HQ-OAR-2006-0173-0421-2) p. 8-14.
  - California Senator Christine Kehoe (EPA-HQ-OAR-2006-0173-0421-6) p. 41-43.
  - Center for Biological Diversity (EPA-HQ-OAR-2006-0173-1485) p. 1-12.
  - Commonwealth of Massachusetts (EPA-HQ-OAR-2006-0173-2246) p. 1.
  - Connecticut Department of Environmental Protection (EPA-HQ-OAR-2006-0173-2173) p. 1-3.
  - Conservation Law Foundation (EPA-HQ-OAR-2006-0173-1502) p. 1-3.

Conservation Law Foundation (EPA-HQ-OAR-2006-0173-0422-24) p. 224-233.  
Crist, Charlie; Governor of Florida (EPA-HQ-OAR-2006-0173-3600) p. 1.  
Environmental Defense (EPA-HQ-OAR-2006-0173-1459) p. 2-3.  
Environmental Defense (EPA-HQ-OAR-2006-0173-0421-38) p. 189-199.  
Illinois Environmental Protection Agency (EPA-HQ-OAR-2006-0173-1677) p. 1-2.  
Fitz-Gerald, Joan; Colorado State Senator (EPA-HQ-OAR-2006-0173-0423) p. 1-3.  
Kennedy, Susan; Chief of Staff, California Office of the Governor (EPA-HQ-OAR-2006-0173-0421-1) p. 5.  
Kucinich, Dennis; House of Representatives, 10th District, Ohio (EPA-HQ-OAR-2006-0173-1460) p. 1.  
Kulongoski, Theodore R.; Governor - Oregon (EPA-HQ-OAR-2006-0173-1277) p. 1.  
Manufacturers of Emission Controls Association (EPA-HQ-OAR-2006-0173-1294) p.1.  
Manufacturers of Emission Controls Association (EPA-HQ-OAR-2006-0173-0422-9) p.104.  
National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-1604) p. 2.  
National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-0422-18) p.178.  
National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-0421-27) p. 132-137.  
Natural Resources Defense Council (NRDC) (EPA-HQ-OAR-2006-0173-1672) p. 1-3.  
Natural Resources Defense Council (NRDC) (EPA-HQ-OAR-2006-0173-0421-37) p. 182-189.  
New Mexico Environment Department (EPA-HQ-OAR-2006-0173-1270) p. 1.  
Oregon Department of Environmental Quality (EPA-HQ-OAR-2006-0173-2174) p. 1.  
Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-1352) p. 1.  
Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-0005) p. 1.  
Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-0422-15) p. 153-162.  
Puget Sound Clean Air Agency (EPA-HQ-OAR-2006-0173-1295) p. 2-4.  
Paul, Ron; House of Representatives, 14th District, Texas (EPA-HQ-OAR-2006-0173-1235) p. 1.  
Richardson, Bill; Governor of New Mexico (EPA-HQ-OAR-2006-0173-0857) p. 1.  
Romanoff, Andrew; Colorado House of Representatives (EPA-HQ-OAR-2006-0173-0537) p. 1-2.  
San Joaquin Valley Air Pollution Control District (EPA-HQ-OAR-2006-0173-1256) p. 1.  
South Coast Air Quality Management District (EPA-HQ-OAR-2006-0173-1353) p. 1.  
Southwest Clean Air Agency (EPA-HQ-OAR-2006-0173-1673) p. 1-2.  
State of Vermont (EPA-HQ-OAR-2006-0173-1301) p. 1-2.  
UCLA Institute of the Environment - Mary Nichols (EPA-HQ-OAR-2006-0173-1421-17) p. 92-96

Ventura County, California (EPA-HQ-OAR-2006-0173-2431) p. 1.

Woman's National Democratic Club (EPA-HQ-OAR-2006-0173-0522) p. 1.

### **Oppose –**

- (1) Commenters provide some additional legal analyses and discussion in opposition to the California waiver. Many of these commenters provide additional discussion regarding the three conditions under which EPA must deny the waiver, noting that: 1) California's determination is arbitrary and capricious, 2) California does not need the GHG standards to meet compelling and extraordinary conditions, and/or 3) California's GHG standards and accompanying enforcement procedures are inconsistent with Section 202(a) of the CAA. Some commenters also provided additional discussion regarding the technological challenges associated with the California GHG regulations, the overall effectiveness of these regulations for achieving GHG emission reductions, and other potential impacts of the regulation that would affect the ambient concentrations of other criteria pollutants. In all cases where the commenter addresses these or other specific legal issues in support of their position that the waiver should not be granted, the comment is summarized in greater detail in subsequent sections of this report.

#### Letters:

Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1297) p. 2.

Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1519) p. 1-14.

Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-0422-8) p. 101-103.

Association of International Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1455) p. 21.

General Motors Corporation (EPA-HQ-OAR-2006-0173-1595) p. 1.

Knollenberg, Joseph K.; House of Representatives, 9th District, Michigan (EPA-HQ-OAR-2006-0173-1292) p. 1-2. (also includes the following members of Congress as additional signatories: Timothy Walberg, Dave Camp, Fred Upton, Mike Rogers, Thaddeus McCotter, and Candice Miller)

Mullen, Williams; (EPA-HQ-OAR-2006-0173-1528) p. 1-3.

National Automobile Dealers Association (EPA-HQ-OAR-2006-0173-1671) p. 1-3.

Utility Air Regulatory Group (UARG) (EPA-HQ-OAR-2006-0173-1497) p. 1-8.

### **3 general Questions**

2. Whether the United States Supreme Court decision (*Massachusetts v EPA*), issued on April 2, 2007 (549 US --) (2007), 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?

The *Massachusetts v. EPA* decision is relevant to the California waiver request since it allows for the regulation of GHG emissions as a pollutant under the CAA and nothing in this decision supports delaying EPA action on CARB's request. The *Massachusetts v. EPA* decision eliminates a potential consistency argument that California cannot regulate GHG emissions if EPA cannot. The court's reversal of EPA's reliance on factors not identified in the statute reinforces the prohibition against EPA denying California's waiver request for reasons other than issues related to protectiveness, necessity for meeting extraordinary and compelling conditions, and/or consistency with section 202(a). In its decision, the Supreme Court declined the opportunity to distinguish between global warming and other deleterious effects of air pollution. Because the Court found that carbon dioxide fit within the Clean Air Act's "capacious" definition of "pollutant," it could be regulated under §202(a) and other sections of the Clean Air Act like any other air pollutant. This position suggests that when the mitigation of global warming is the purpose of new motor vehicle regulations, the Administrator should consider California's request for waiver with the same deference it has accorded such proceedings in the past. The decision also reinforces the need for EPA to consider only statutory factors in exercising its regulatory authority, and by extension, to consider only 209(b) factors in reviewing this request.

Letters:

Attorneys General of Rhode Island, Washington, Arizona, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey (EPA-HQ-OAR-2006-0173-1462) p. 6.  
California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 21.  
California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-0422-6) p. 53-54.  
Center for Biological Diversity (EPA-HQ-OAR-2006-0173-1485) p. 10.  
National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-1604) p. 2, 11.  
Natural Resources Defense Council (NRDC) (EPA-HQ-OAR-2006-0173-0422-19) p.

189-190.

Northeast States for Coordinated Air Use Management (NESCAUM) (EPA-HQ-OAR-2006-0173-0421-26) p. 131.

Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-1352) p. 1, 2.

Puget Sound Clean Air Agency (EPA-HQ-OAR-2006-0173-1295) p. 4.

The *Massachusetts v. EPA* decision dispels the notion that other government agency action, or other countries' actions, must come first; it leaves no doubt that it is incumbent upon EPA to take this and its own incremental steps to reduce greenhouse gas emissions.

Letters:

Attorneys General of Rhode Island, Washington, Arizona, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey (EPA-HQ-OAR-2006-0173-1462) p. 3.

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 21.

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-0421-5) p. 30.

National Association of Clean Air Agencies (EPA-HQ-OAR-2006-0173-1604) p. 11.

Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-1352) p. 1.

Puget Sound Clean Air Agency (EPA-HQ-OAR-2006-0173-1295) p. 4.

**xx. Endangerment Finding**

Nothing in the *Massachusetts v. EPA* decision supports delaying action on this request.

EPA need not first make an endangerment finding to grant this request, and even if EPA believes it must, the overwhelming, voluminous, well-developed, and readily available scientific evidence requires a finding concurrent with action on this request. CARB notes that EPA action must occur before the end of October 2007 (the 180 day expiration of California's notice of intent to sue for unreasonable delay) and provides a copy of its notice in this regard as attachment 131 to their letter. CARB also cites the June 13, 2007 letter from Governor Schwarzenegger on this subject.

Letters:

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 21.

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-0422-6) p. 54.

CARB notes that the opponents' June 5, 2007 letter presents EPA with two false choices that the *Massachusetts v. EPA* opinion does not present or allow. First, EPA cannot now find the subject GHG regulations inconsistent with Section 202(a), both because 202(a) consistency concerns only technological feasibility and lead time with consideration of costs, and because there is no question that California can and does regulate emissions or substances before they are identified as pollutants under the Act or before EPA chooses to regulate such pollutants. For the same reason, EPA cannot hold California's request in abeyance for a later "considered judgment" on consistency. Even if EPA ultimately chooses not to regulate vehicular greenhouse gases for whatever reason, California's standards are unaffected because they would not be inconsistent with technological and lead time considerations, which must be liberally construed in California's favor as the manufacturers point out in I.A of their letter.

Letters:

California Air Resources Board (CARB) (EPA-HQ-OAR-2006-0173-1686) p. 21-22.

Some have argued that EPA lacked authority to control GHG emissions and that as a result so did California. However, the Supreme Court concluded that Section 202(a)(1) of the Act "unambiguous[ly]" authorizes EPA to regulate vehicle emissions that contribute to climate change (127 S.Ct. at 1460). There is no textual or structural difference between EPA's authority under Section 202 and California's under Section 209. Congress did not require California to



wait for EPA to regulate a pollutant. To the contrary, from the start Congress anticipated that California's standards would be "more stringent than, or applicable to emissions or substances not covered by, the national standards."

Letters:

Natural Resources Defense Council (NRDC) (EPA-HQ-OAR-2006-0173-1672) p. 8.

The Supreme Court's decision rests upon the contention that the effects of global warming can be particular enough to a single state to constitute a concrete injury in fact, rather than a general grievance about the global effects of climate change. California, like Massachusetts, is particularly vulnerable to shifts in climate brought on by greenhouse gases. The holding that a single state can have a unique stake in mitigating the effects of climate change gives weight to the contention that California has a particularly "compelling and extraordinary" condition requiring action to reduce greenhouse gas emissions.

Letters:

Center for Biological Diversity (EPA-HQ-OAR-2006-0173-1485) p. 9.

The Court ruled that EPA does have the authority to regulate GHG emissions under the CAA, that determinations by EPA not to regulate must be confined to the language of the CAA and not other policy considerations. The Court directed EPA to revise their endangerment findings regarding GHG emissions. The California GHG standards provide a reasonable and workable regulatory framework to begin to address motor vehicle GHG emissions.

Letters:

Connecticut Department of Environmental Protection (EPA-HQ-OAR-2006-0173-2173)

p. 3.

The *Massachusetts v. EPA* case resolves that incremental remedies to climate change [dd note -- remember DOJ seeds increment damage as standing test not as a meet test] can have legally substantial effects. In its discussion of standing, the Court's decision answers EPA's arguments that the global nature of climate change precludes the remedial effects of unilateral action to fight global warming. The Supreme Court decision recognizes the dangers of global climate change and the ways in which mobile source emissions contribute to climate change. Consequently, it is logical and necessary to regulate GHG emissions from vehicles. Reductions in the U.S. would be beneficial on their own and the California GHG emission standards should be implemented even if, on its own, it wouldn't reverse global warming. According to *Massachusetts v. EPA*, the "reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." Such a holding defeats any argument that decision-makers should delay action on climate change until a comprehensive or multilateral strategy is developed. In addition, the court held that although "regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it." This same position should be taken in the context of EPA's review of the California GHG standards.

Letters:

Attorneys General of Rhode Island, Washington, Arizona, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey (EPA-HQ-OAR-2006-0173-1462) p. 3.

Center for Biological Diversity (EPA-HQ-OAR-2006-0173-1485) p. 10.  
Natural Resources Defense Council (NRDC) (EPA-HQ-OAR-2006-0173-1672) p. 3.

The Supreme Court determined in the Massachusetts decision that, even if the enacting Congress did not anticipate that burning fossil fuels could lead to global warming, the broad language of the Clean Air Act "reflects an intentional effort to confer the flexibility necessary to forestall . . . obsolescence. The fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (127 S.Ct. at 1462) The Court recognized that federal automotive emission controls would aid the long term effort to reduce anthropogenic climate change, and the same is true here. It makes no difference that California's regulations will affect only a fraction of the national vehicle fleet; its standards nevertheless will "slow the pace of global emissions increases."

Letters:

Conservation Law Foundation (EPA-HQ-OAR-2006-0173-1502) p. 3.

(10) Commenters do not provide any additional discussion or supporting documentation.

Letters:

Calvert Asset Management Company (EPA-HQ-OAR-2006-0173-1482) p. 2.

Pacific Gas and Electric Company (EPA-HQ-OAR-2006-0173-2280) p. 3.

Pacific Gas and Electric Company (EPA-HQ-OAR-2006-0173-0421-14) p. 86.

Pennsylvania Department of Environmental Protection (EPA-HQ-OAR-2006-0173-0005)  
p. 1.

New York Department of Environmental Conservation (EPA-HQ-OAR-2006-0173-0422-17) p. 176.

Northern Sonoma County Air Pollution Control District (EPA-HQ-OAR-2006-0173-0421-20) p. 107-109.

**opponents**

The *Massachusetts v. EPA* decision only resolved that GHG emissions should be considered "air pollutants" and thus, questions regarding whether and how to regulate GHG emissions from vehicles remain unresolved. As a result, it cannot be used to help justify approval of the California waiver request.

An "endangerment finding" must precede any potential EPA regulation of GHG emissions. Under the CAA, EPA must first determine if an airborne substance is an "air pollutant" and then determine whether that substance can be anticipated to endanger public health or welfare, which is achieved through an "endangerment finding" by EPA. If such a finding is made, then EPA's third step under Section 202(a)(2) is to adopt standards that apply the "requisite technology" to control the relevant air pollutant, taking into consideration various factors such as the time needed to implement controls. The decision in *Massachusetts v. EPA* was narrow and only established that GHG emissions should be considered "air pollutants" for potential regulation under Section 202(a). The court remanded the matter for EPA to decide whether to make an endangerment finding or employ policy considerations pursuant to Section 202(a)(2), in deciding what technologies to require and when to require them. The *Massachusetts v. EPA* opinion neither ordered EPA to grant Massachusetts' rulemaking petition nor to issue an "endangerment finding" under Section 202(a)(1). Consequently, questions of whether and how to regulate GHG emissions from vehicles remain unresolved. Commenters provide additional discussion in support of their position on this issue. The Alliance provides significant additional discussion on this issue in both their June 5 and June 15, 2007 letters,

citing to case law and the petitioners' merits brief and concludes that the significance of the Massachusetts decision for the California waiver request depends on: 1) whether EPA can and will offer a new explanation for denying the remanded rulemaking petition; 2) whether current climate science and the available data compel EPA to make an endangerment finding; and 3) if this finding is made, what EPA will determine to be the "requisite technology" to address the conditions of concern.

Letters:

Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1297) p. 26-28.

Alliance of Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1519) p. 7-9.

Association of International Automobile Manufacturers (EPA-HQ-OAR-2006-0173-1455) p. 3-4.

National Automobile Dealers Association (EPA-HQ-OAR-2006-0173-1671) p. 5-6.

As for the recent Supreme Court ruling in *Massachusetts v. EPA*, the ruling states that EPA is required to provide a rationale for not regulating greenhouse gases from automobiles. Because EPA does not possess the statutory authority to regulate CO<sub>2</sub> from motor vehicles, it cannot waive authority that it does not possess and any request for a waiver is on its face arbitrary and capricious. [*See related discussion under Issues 4.1 and 5*].

Letters:

Environmental Consultants of Michigan (EPA-HQ-OAR-2006-0173-0012) p. 1-3.

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?

Previous waivers have consistently made clear that EPA's review of California's regulations is a narrow one. "The law makes it clear that the waiver request cannot be denied unless the specific findings designated in the statute can properly be made."<sup>32</sup> Thus the express terms of section 209(b) along with other waiver implementation history (insert footnote for 1984 decision, LEV I, etc) establishes that EPA cannot apply any additional criteria – including potential conflicts with other case law<sup>33</sup> – in determining whether California's regulations merit a waiver under section 209(b). However, when EPA solicited public comment on the GHG regulations the Agency was aware of the National Highway Transportation Safety Administration's (NHTSA's) stated position of the preemptive effect of EPCA on state motor vehicle regulations which regulate CO<sub>2</sub> (see below) and thus EPA specifically requested that commenters address the relevance of EPCA to EPA's consideration of CARB's GHG waiver request.

In CARB's waiver request they note that despite EPA's waiver review being limited to the criteria in section 209(b) they anticipate that manufacturers will attempt to raise issues in the waiver proceeding concerning preemption under EPCA.<sup>34</sup> CARB noted that such issues are outside the scope of EPA's review. CARB consistently held this position throughout EPA's public comment period. They state that EPCA neither diminishes California's authority to adopt

---

<sup>32</sup> 36 FR 17158 (August 31, 1971)

<sup>33</sup> Cite both MEMA I and MEMA II

<sup>34</sup> Request Letter at p. 10.