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U.S. Environmental Protection Agency
Docket Center (EPA/DC)
EPA-HQ-OAR-2006-0173
EPA West
Room B102
1301 Constitution Avenue, NW
Washington, DC 20004

To Whom It May Concern:

Pursuant to the notice soliciting public comment published in the *Federal Register* by the U.S. Environmental Protection Agency (“EPA”) on April 30, 2007 (72 FR 21260), the National Association of Clean Air Agencies (“NACAA”) is pleased to provide the following comments on the December 21, 2005, request by California for a waiver of federal preemption under Section 209(b) of the Clean Air Act, to permit enforcement of the state’s emission standards and test procedures for motor vehicle greenhouse gas emissions.

SUMMARY

On September 24, 2004, the California Air Resources Board (“CARB”) approved regulations (“the California Greenhouse Gas Regulations”) that require a reduction of 30 percent in the fleet average generation of greenhouse gases per mile in motor vehicles sold in California. These regulations established declining fleet average emission standards for these gases (expressed as CO₂), with separate standards for the lighter and heavier portions of the passenger vehicle fleet, phased in beginning with model year 2009 and extending to model year 2016. Vehicular greenhouse gas emissions that contribute to climate change come from four main areas: (1) CO₂, CH₄ and N₂O emissions resulting directly from operation of the vehicle; (2) HFC emissions resulting from operating the air conditioning (AC) system (indirect AC emissions); (3)

HFC refrigerant emissions from the air conditioning system due to leakage, losses during recharging, or release from scrappage of the vehicle at end of life (direct AC emissions); and (4) upstream emissions associated with the production of fuel used by the vehicle. The California Greenhouse Gas Regulations include requirements that account for each of these elements.

After subsequent California procedural reviews, including review by the California legislature and California's Office of Administrative Law, the rules were adopted under California law and on December 21, 2005, CARB requested that the EPA grant a waiver of federal preemption under Section 209(b) of the Clean Air Act ("CAA") to permit enforcement of California's regulations. Since that time 11 states¹ have employed the "opt-in" provisions of Section 177 of the CAA to adopt the California Greenhouse Gas Regulations. However, California's and those state regulations cannot be enforced unless EPA grants a waiver of the federal preemption of motor vehicle emission regulations as provided by Section 209(b) of the CAA.

Included with CARB's December 21, 2005, waiver request was a comprehensive set of documents and analysis establishing that California had met the requirements of Section 209. By letter dated February 21, 2007, EPA advised CARB that it would not rule on CARB's waiver request until the Supreme Court published its decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), a case seeking to require EPA to adopt standards regulating greenhouse gases from motor vehicles. In response, EPA had asserted that the CAA provided no such authority. In its decision on April 2, 2007, the Supreme Court held that the CAA does, in fact, provide authority to regulate greenhouse gas emissions and that any decision by EPA not to regulate such emissions must be grounded in the language of the CAA, as distinct from other policy considerations. On April 30, 2007, EPA published a *Federal Register* notice soliciting comment on California's waiver request (72 FR 21260). EPA's notice correctly identifies the very narrow role reserved to EPA by Congress when it decided that California, which already had a motor vehicle emissions program prior to the initiation of the federal vehicle emissions program, could maintain that program. As EPA notes in its *Federal Register* notice, under Section 209(b) of the Clean Air Act EPA must grant California's waiver request unless EPA can affirmatively determine that (1) California acted in an arbitrary and capricious manner when it determined that its motor vehicle emissions program standards "will be as protective of the public health and welfare as applicable federal standards," (2) California does not need its motor vehicle emissions program standards to meet compelling and extraordinary conditions or (3) California's motor vehicle emission standards were not "consistent with" the requirements of Section 202(a) of the Act.

NACAA has reviewed the Administrative Record made available by EPA respecting California's pending waiver request for this critical set of greenhouse gas emission requirements and has concluded that the EPA record does not contain sufficient information to rebut the "presumption of regularity" that is to be afforded to the actions of a state acting in its regulatory capacity or to demonstrate that CARB acted arbitrarily.

¹ Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington

Accordingly, in our judgment, EPA does not have the discretion to deny California's request. Under the facts and the applicable law as we understand them, EPA must grant California's request for a waiver.

NACAA'S INVOLVEMENT IN PRIOR CALIFORNIA WAIVER REQUESTS UNDER SECTION 209

When it established the CAA in 1970, Congress determined that air pollution prevention and control "is the primary responsibility of States and local governments." Section 101 of the CAA, 42 U.S.C. 7401. NACAA is a nonpartisan association of those agencies directly responsible for managing and implementing state and local air pollution control programs under the federal CAA. The several hundred individuals who represent NACAA's member agencies have unparalleled experience in evaluating and administering air pollution control programs. Based on the collective experience of these seasoned officials, NACAA is uniquely qualified to address the issues raised in the present matter.

Since at least 1970, state and local governments have been working to preserve clean air where it exists and to bring unhealthy air quality levels into compliance with the National Ambient Air Quality Standards ("NAAQS") through State Implementation Plans ("SIPs") and to ensure that in the future air quality reaches and continues to achieve these health-based standards. However, in many instances, regulation of stationary sources cannot, by itself, achieve the necessary improvements in air quality. Congress attempted to balance the general rule that environmental protection is best addressed by state and local government with the need of the automobile industry to avoid dozens of potentially conflicting requirements for motor vehicles by providing a general prohibition against state regulation of new motor vehicle emissions, except in California. See, Section 209 of the CAA, 42 U.S.C. 7543. However, in Section 177 of the CAA Congress also provided that states may adopt and enforce California's vehicle emission standards. See, Section 177 of the CAA, 42 U.S.C. 7507.

As emissions from mobile sources become a greater percentage of local emissions inventories, many state and local air pollution control agencies have taken a greater interest in regulation of mobile sources to help ensure clean air for their constituents. For this reason, NACAA has, for a number of years, remained closely involved in the development of the mobile source emission rules, both at the federal level and in California. However, Section 177 of the CAA provides that in order for these regulations to be enforceable in the adopting states, EPA must have granted California's request for a waiver of federal preemption.

EPA's grant of the requested waiver will assist NACAA's members in carrying out their charge to provide clean air in their respective states. These rules will lessen the adverse impacts of vehicle emissions on climate in adopting states and elsewhere as well as reduce emissions of toxic air pollutants and of criteria pollutants that lead to violations of NAAQS in those jurisdictions. The impact of these rules is even more significant in many metropolitan areas with serious air pollution problems. Thus, the California

Greenhouse Gas Regulations represent a significant opportunity that will greatly assist state and local authorities in fulfilling their obligations to provide clean air for the public. For this reason, NACAA strongly supports California's request for waiver under Section 209(b) of the CAA.

EPA REVIEW OF CALIFORNIA WAIVER REQUESTS UNDER SECTION 209(b)(1) OF THE CAA

When Congress first considered the question of how to implement a federal program for the regulation of mobile source emissions, it recognized that California had led the national effort to develop such a program and that California had a particular interest in mobile source emissions programs. For this reason, as EPA has correctly noted, Congress included a provision under Section 209(b)(1) of the CAA, 42 U.S.C. 7543(b)(1), that was intended to allow California to continue to lead the nation in developing and implementing motor vehicle emissions programs. Under these provisions, EPA must approve requests from California for a waiver of federal preemption of state regulation provided at Section 209(a) of the CAA, 42 U.S.C. 7543(a), unless EPA can make one of the following determinations:

- (1) California acted in an arbitrary and capricious manner when it determined that its motor vehicle emissions program standards [as a group] “will be as protective of the public health and welfare as applicable federal standards,”
- (2) California does not need its motor vehicle emissions program standards [as a group] to meet compelling and extraordinary conditions, or
- (3) the California standards [as a group] are not “consistent with” the requirements of Section 202(a) of the Act.

PRIOR CALIFORNIA WAIVER REQUESTS

EPA has received more than 40 waiver requests from California since 1975 under the provisions of the CAA that were applicable at the time of the request. EPA granted each of those requests and, in the course of responding to those requests, established a body of precedent to guide the current decision. Under applicable precedent EPA is not to substitute its judgment for that of CARB as to the wisdom of adopting a particular standard², but is to consider California's standards as a group. Thus, the question is not whether a particular standard is as stringent as a federal standard, but whether CARB acted in an arbitrary and capricious manner when it determined that the California motor vehicle emissions program was as protective as the federal program. Similarly, the question is not whether California needs the Greenhouse Gas Emissions Regulations to meet compelling and extraordinary conditions, or whether the California Greenhouse Gas Emissions Regulations comply with the lead time, stability and technological feasibility requirements of Section 202(a) of the CAA. Instead, the issues are more properly framed as whether California needs to maintain its motor vehicle emissions program to meet

² See, e.g. 40 FR 23102, 104

compelling and extraordinary conditions and whether California's motor vehicle emission standards are "consistent with" the requirements of Section 202(a).

Moreover, as California has pointed out in its waiver request, under the applicable law

...[t]he language of the statute and its legislative history indicate that California's regulations, and California's determination that they 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.³

EPA recognized long ago that

[t]he structure and history of the California waiver provision clearly indicate both a Congressional intent and a U.S. EPA practice of leaving the decision on ambiguous and controversial matters of public policy to California's judgment.⁴

EPA has determined, on numerous occasions in the past and as recently as December 28, 2006 (78 FR 78190), that the facts needed to deny a waiver request respecting California's motor vehicle emissions program had not been shown. No facts have been presented in this proceeding to suggest a change in circumstance that would warrant a reversal of those earlier determinations.

CALIFORNIA'S MOTOR VEHICLE EMISSIONS PROGRAM STANDARDS ARE AS PROTECTIVE OF PUBLIC HEALTH AND WELFARE AS THE APPLICABLE FEDERAL STANDARDS

As EPA has acknowledged, the relevant inquiry under this test is not a standard-by-standard evaluation, but a consideration of whether California's program is as protective as the federal program. Based on an extensive record with ample opportunity for public comment, on September 23, 2004, CARB adopted Resolution 04-28 in which it determined that the regulations approved herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.

³See, *Motor and Equipment Manufacturers Association, Inc. v. EPA*, 627 F.2d 1095, 1120-1121 (D.C. Cir. 1979) cited in *Basis and Analysis for California's Request for a Clean Air Act Section 209(b) Determination*, EPA Docket No. OAR-2004-0132, p.18. Here, California's waiver request and record in support of its request have been available for over 17 months.

⁴ 49 FR 23104 at 23104. See also 58 FR 4166.

NACAA's members are very familiar with the California motor vehicle emissions program. NACAA has, for many years, maintained a standing committee on Mobile Sources and Fuels whose members focus on issues relating to control of air pollution in these areas. In NACAA's judgment, California's program continues to lead the effort to reduce emissions from motor vehicles.⁵ This leadership role is demonstrated by, among other things, California's rulemaking in recent years concerning emissions from passenger motor vehicles and heavy-duty diesel engines. We believe CARB's September 24, 2004, determination that the California program (including its Greenhouse Gas Regulations) is not less protective than the federal program is correct.

Here, there is no federal counterpart to the California rules that are the subject of the current waiver request and no area where California's rules are less stringent than the federal rule. Thus, there can be no denying that the California program is at least as stringent as the federal program. Importantly, nothing has been introduced into the record to rebut the presumption of regularity that is to be afforded to California's determination and there can be no issue that CARB acted in an arbitrary and capricious manner when it determined that the California Greenhouse Gas Regulations will not render California's mobile source program less stringent than the federal program.

CALIFORNIA NEEDS ITS MOTOR VEHICLE EMISSIONS PROGRAM TO MEET COMPELLING AND EXTRAORDINARY CONDITIONS

EPA has acknowledged that

“compelling and extraordinary conditions” does not refer to levels of pollution directly, but primarily to the factors that tend to produce them: geographical and climactic conditions that, when combined with large numbers and high concentrations of automobiles create serious air pollution problems. 46 FR 26371, 26373 (May 12, 1981).

The unique geographical and climactic conditions that tend to foster the creation and retention of ozone in the Los Angeles basin are as they were in the 1970s, when Congress and EPA each initially recognized California's need for its own motor vehicle emissions program. Similarly, the very large number and concentration of motor vehicles in parts of California continue to this day. Also unchanged is the fact that a very large portion of the total emissions inventory in parts of California comes from mobile sources. Moreover, California continues to experience serious air pollution problems.

Based on an extensive public record with full opportunity for public comment, CARB adopted Resolution 04-28, in which it once again determined that separate California emission standards and test procedures are necessary to meet compelling and extraordinary conditions. California's need to maintain its motor vehicle emissions program has been confirmed by EPA in each of its prior grants of California waiver requests, including as recently as December 28, 2006, 78 FR 78190. These

⁵ This opinion was specifically endorsed by the United States Court of Appeals for the D.C. Circuit in *Engine Manufacturers Association v. U.S. EPA*, 88 F.3d 1075, 1090 (D.C. Cir. 1996).

determinations are consistent with the intent of Congress when it enacted the original waiver provisions and when it amended those provisions.

Some might argue that California no longer “needs” its mobile source program because emissions of key pollutants – such as ozone and PM_{2.5} – have declined significantly over the past decades. While California has experienced significant emission reductions in most pollutants since 1977, those reductions do not demonstrate that the California mobile source program is no longer needed, since a significant part of those reductions occurred because of the California mobile source program. There is nothing in the administrative record to suggest that this progress could be sustained, or maintained, absent continued aggressive regulation by California of motor vehicle emissions.

Moreover, portions of California remain the most intractable areas of air pollution in the country, and do not attain public health standards. Thus, for example, while PM_{2.5} levels have been reduced by 50 percent in Los Angeles over time, those levels remain significantly higher than other cities in the U.S. and do not meet health-based standards. In addition, while concentrations of pollutants are declining, the science respecting adverse environmental impacts of pollution has advanced to the point where greater emission reductions are now known to be needed. This fact has been recognized by EPA in its adoption of more stringent NAAQS for PM_{2.5}. We have also come to learn that diesel emissions, in particular, have greater adverse health consequences than previously identified. For these reasons, notwithstanding all its improvements in emission levels, California clearly needs an aggressive mobile source program if it is to reach its goal of providing clean air to its residents.

The Administrative Record does not contain sufficient information to rebut the presumption of regularity that is to be afforded to CARB’s determination that its mobile source program is still needed. Nor does the record provide information sufficient to justify a reversal by EPA of its numerous prior determinations concerning California’s need for a motor vehicle emissions program.

CALIFORNIA’S STANDARDS ARE “CONSISTENT WITH” THE REQUIREMENTS OF SECTION 202(a) OF THE CAA

EPA has interpreted Section 209’s “consistency” requirement to mean that California’s standards and accompanying test procedures are inconsistent with Section 202(a) **only** if

(1) there is inadequate lead time to permit the development of technology to meet those requirements, giving appropriate consideration to the cost of compliance within that time frame or

(2) the federal and California test procedures impose inconsistent certification requirements so as to make manufacturers unable to meet both sets of requirements with

the same vehicle⁶. The California Greenhouse Gas Regulations easily meet these requirements because there aren't any federal requirements and hence are fully consistent with Section 202(a) of the CAA.

Given the technology-forcing aspects of the CAA, EPA or CARB will, of necessity, forecast the technology that will be available several years in the future. In this instance, in 2004 CARB identified existing and near-term technologies that would permit manufacturers to meet the Greenhouse Gas Regulations in the 2009 to 2016 time frame. Resolution 04-28 contains CARB's determination:

that the California emission standards and test procedures as approved herein will not cause the California requirements to be inconsistent with Section 202(a) of the Clean Air Act and raise no new issues affecting previous waiver determinations of the Administrator of the Environmental Protection Agency pursuant to Section 209(b) of the Clean Air Act.

Moreover, Section 209(b) does not require that California standards "meet" the requirements of Section 202(a) as EPA would apply those requirements to an EPA rulemaking, merely that California standards be "consistent with" those requirements⁷ in consideration of clear Congressional intent that California be allowed to promulgate more stringent standards than EPA. This view is consistent with the decision in *Motor and Equipment Manufacturers Association v. Nichols* in which the court concluded that

Section 209(b)(1) makes clear that Section 202(a) doesn't require through its cross referencing, consistency with each federal requirement in the act. California's consistency is to be evaluated "in the aggregate," rather than on a one-to-one basis.⁸

We do not believe Section 209(b) requires or authorizes EPA to conduct a *de novo* review of the substance of California's decision respecting an individual rule and certainly not on the basis of after-acquired facts. For EPA to do so would provide two or three "bites at the apple" by stakeholders and greatly expand the rights of litigants to challenge decisions years after they are made by suing, not on the basis of the initial decision, but over EPA's review of a waiver request. Such a result is itself inconsistent with the Clean Air Act. Moreover, principles of federalism disfavor a federal agency reviewing the decisions of an appellate state court. This could occur if a company lost a challenge to a CARB rule in state court, and EPA subsequently denied a waiver request based on its review of the substantive merits of the CARB decision respecting the individual rule at issue.

⁶ "Neither the court nor the agency has ever interpreted compliance with Section 202(a) to require more." *MEMA II*, 142 F.3d at 463 (citations omitted). See also 46 FR 26371 (May 12, 1981).

⁷ Indeed, it would seem to be literally impossible for California to maintain a "more stringent program" if each of EPA's regulations were held in the same way as California's rules to the provision in Section 202 that standards must reflect the "greatest emissions reductions achievable."

⁸142 F. 3d 449, 464 (D.C. Cir. 1998)

CARB staff engaged in a lengthy and thorough evaluation of available technologies, with the support of independent consultants and in discussions with the manufacturers of those technologies, as well as motor vehicle manufacturers subject to the rule. In the course of that extensive and time-consuming process, CARB staff identified a number of existing technologies that could be employed to meet its regulations. As noted repeatedly throughout the rulemaking documents, the Greenhouse Gas Regulations rely less on traditional “technology-forcing” than on repackaging a combination of “off-the-shelf” technologies to meet the adopted standards. Thus, with few exceptions, the issue is largely whether cutting-edge technologies that are or will soon be deployed in the fleet will be broadly utilized. Here, CARB amassed significant documentation concerning technical feasibility, while EPA is only now commencing its inquiry into these issues. Accordingly, EPA is not now in a position to “second guess” CARB’s evaluation and should provide substantial deference to California’s determinations.

It is also important to recognize that, based on the underlying enabling legislation,⁹ CARB identified the reductions in greenhouse gas emissions that are feasible without reducing vehicle miles traveled, vehicle weight or performance from today’s levels. Given the recent and anticipated future increases in the retail cost of gasoline, it has been widely reported that large Sport Utility Vehicles have become, and may remain, less popular than in recent years. It is also reasonable to expect that manufacturers will respond to a public demand for fuel economy by reducing vehicle weight and horsepower to some degree. To the extent that any of these events occur over time, it will be easier for manufacturers to meet California’s rules.

Since the California Greenhouse Gas Regulations were promulgated in 2004¹⁰ and do not impose obligations until 2009 those rules provide ample lead time for manufacturers, as demonstrated by CARB’s extensive record establishing the feasibility of its rules. Moreover, since these rules are the first such rules to regulate greenhouse gas emissions from motor vehicles, there is no issue respecting consistency with federal test procedures. Accordingly, there can be no question as to whether the California Greenhouse Gas Regulations are consistent with Section 202 of the CAA.

Applying the test noted above, we believe there is no basis to deny the requested waiver. California’s underlying statute contains a requirement that motor vehicle emission standards promulgated by CARB be “technically feasible,” see H&S.C., Sections 43101, 43018.5. In promulgating its rule, CARB made specific determinations that the California Greenhouse Gas Regulations met the feasibility requirements of California law and of Section 202(a) of the CAA. Whether CARB met those limitations was open to challenge in a process that was substantively similar to available federal processes. Rather than permitting two avenues of appeal of the substantive decisions by CARB – one to the California courts on the initial decision, the other to EPA and the federal Courts on EPA’s decision on a waiver request – EPA should limit its inquiry to

⁹ See, Attachment 2, “*Support Document*” to CARB’s request for waiver, December 21, 2005.

¹⁰ Indeed, manufacturers will have had 12 years lead time from the publication of California’s initial rulemaking documents until the final implementation date of California’s rule.

whether the California motor vehicle program is “consistent with” the federal requirements found in Section 202(a). Thus, EPA should limit its inquiry to a determination of whether the “feasibility” requirements of California’s underlying statute are consistent with the feasibility requirements of the CAA.

If EPA believes it must review the substance of CARB’s rulemaking decision, it should do so with great deference. It should do so respecting Congressional recognition that in many instances CARB would require technology that might not yet be ready for nationwide introduction or that might cost more than EPA thought was prudent. See, 40 FR 23102, 43104, cited in *Basis and Analysis for California’s Request for a Clean Air Act Section 209(b) Determination*, *infra*, at pp 17-18. Importantly, EPA should not “redecide” the issue, but limit its review to whether CARB was arbitrary and capricious in making its decisions in 2002, based on the information that was available at the time.

Clearly, in reviewing California’s substantive decisions in this rulemaking, EPA cannot impose a standard of review that is higher than established by the CAA for review of EPA’s rulemaking decisions. The courts have determined that EPA’s burden in this context is relatively low. In *Natural Resources Defense Counsel v. U.S. E.P.A.* the court determined that EPA

will have demonstrated the reasonableness of its basis for prediction if it answers any theoretical objection to the [projected control technology], identifies the major necessary refinement of the [technology], and offers *plausible reasons for believing* that each of those steps can be completed in the time available¹¹. (emphasis provided)

Thus, if EPA decides that it must review the substance of California’s decisions with respect to lead time issues in the California Greenhouse Gas Regulations, its review is limited to whether California has offered *plausible reasons for believing* that the technology can be available in the 2009 to 2016 timeframe.

Finally, if EPA concludes that it must review California’s 2004 rulemaking on the basis of current facts, those facts do not support a finding that the California Green House Gas Regulations are “not consistent” with Section 202(a). California’s request for waiver includes a lengthy and detailed updated technology assessment that demonstrates that the initial technical feasibility determinations by CARB were correct. Nothing in the record to date demonstrates that CARB acted arbitrarily when it determined in 2004 that the California Greenhouse Gas Regulations were technically feasible or in December 2005, when it reaffirmed that determination.

NEITHER THE FACT THAT CALIFORNIA’S REGULATIONS RELATE TO GLOBAL CLIMATE CHANGE NOR THE EXISTENCE OF THE ENERGY POLICY AND CONSERVATION ACT PROVIDE A BASIS TO DENY CALIFORNIA’S PETITION

¹¹655 F.2d 318, 331-332 (D.C. Cir 1981)

In its April 30, 2007, notice of public hearing and comment on California's waiver request for its Greenhouse Gas Regulations, EPA specifically solicited comment on three matters:

(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?

The several greenhouse gases identified in California's regulation are subject to regulation in the same manner as other pollutants, such as volatile organic compounds and carbon monoxide, which are currently regulated under Title II of the CAA. The fact that EPA does not now regulate these greenhouse gases provides no basis to deny California's petition. Indeed, granting California's request for a waiver is entirely consistent with Congressional intent that California continue to lead in the development of motor vehicle emission requirements if it so chooses.

(2) Whether the United States Supreme Court's decision, issued on April 2, 2007 regarding the regulation of greenhouse gas emissions from new motor vehicles under Title II, is relevant.

The Supreme Court decision is not only relevant, as suggested by EPA in its letter of February 21, 2007, it is instructive, and perhaps controlling on many of the issues involved in this matter. That decision affirms that EPA and CARB have always had authority under the CAA to regulate greenhouse gas emissions from new motor vehicles. Since the Court confirmed that the CAA, by its terms, authorizes regulation of "any pollutant," and placed the burden on EPA to come up with reasons why it should not regulate greenhouse gases, enforcement of California's regulation need not await completion of EPA's recently announced multi-agency process. The decision also affirms that EPA must ground its decision on California's waiver request on the statutory language of the CAA discussed earlier in this comment and not on other policy considerations or statutes. Finally, the decision rejected a number of EPA arguments as to why it could not or should not regulate mobile source greenhouse gas emissions, including the "global" nature of the problem, the relatively "small" contribution to the problem and ultimate solution posed by subject emissions, a purported desire to identify a comprehensive solution before acting and potential difficulties in negotiating a global resolution of the problem. Given the close relationship of the issues presented, EPA should not attempt to base its decision on California's waiver request on arguments that have been explicitly rejected by the highest court in the land.

(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.

The Supreme Court decision in *Massachusetts v. EPA* specifically rejected EPA's arguments respecting federal fuel economy regulations and instructed EPA that it must ground its decision on whether it will regulate mobile source greenhouse gas emissions

on the specific language of the CAA, not other statutes. While there is an undeniable relationship between greenhouse gas regulation and fuel economy, the issues are not identical. A substantial portion of the reduction in greenhouse gases that is forecast under California's rules, especially in the initial phase of those rules, comes from a reduction in leaks of refrigerant from air conditioning systems that are unrelated to fuel economy.

GRANTING CALIFORNIA'S REQUEST FOR A WAIVER IS IN THE PUBLIC INTEREST

Granting California's request for a waiver is clearly in the public interest. While one can perhaps debate whether other efforts to control greenhouse gas emissions are in the public interest, there can be no substantial debate that this measure is in the public interest. Most importantly, California's Greenhouse Gas Regulations demonstrate that this country can address global warming while maintaining our quality of life and, at the same time, reduce emissions of criteria and toxic pollutants, making the air safer to breathe. The regulations also create jobs, enhance energy security, reduce our dependence on foreign oil and save money for the consumer. California's rules will also encourage the domestic auto industry to make the necessary investments to keep their products competitive in a global economy, thus minimizing further job loss in that sector.

Eleven states¹² – Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington – have recognized these advantages and elected to opt-in to California's Greenhouse Gas Regulations under Section 177 of the CAA. In its recent decision on Greenhouse Gas Regulations, the Supreme Court also reaffirmed the role of the states other than California:

[i]n the Federal system the states are not relegated to the role of mere provinces or political corporations; but retain the dignity, though not the full authority, of sovereignty.

The public interest requires that the decision of these states be respected by EPA.

Having California and the opt-in states lead the way also provides benefits in terms of the development of the federal program. As demonstrated in the recent heavy-duty diesel emission rulemaking, it is also in the interest of the manufacturers to minimize risk by implementing such changes in stages, rather than having to meet such requirements across the entire country at once. Providing prompt approval of California's regulations will provide a necessary incentive to manufacturers to continue essential investment and technology development and provide a greater degree of robustness to the EPA decision-making process, now scheduled for December 2008.

Additionally, CARB's rules provide a number of innovations, such as averaging, banking and trading, alternate compliance programs and "well-to-pump" determinations

¹² These states, together with California, have a combined population in excess of 100 million persons – one third of the total U.S. population.

for alternative fuel vehicles that may help shape the national program in the future. Allowing California and the opt-in states to continue to serve as the laboratory for development of national programs is entirely consistent with the intent of Congress expressed in the CAA and is in the public interest.

Finally, the public interest requires a prompt response to CARB's 2005 waiver request. As a federal agency, EPA must demonstrate respect for the decisions of Congress and the Courts and provide a prompt decision on California's waiver request.

CONCLUSION

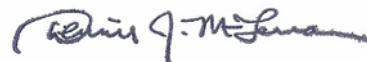
Congress determined (1) that the states have "primary responsibility" for "air pollution prevention and control" and (2) that California should be permitted to adopt and enforce a motor vehicle emissions program that is more stringent than the federal program. As set out above, and in California's waiver request, these principles are reflected in the language and the structure of the CAA and mandate that EPA narrowly limit its role in reviewing waiver requests from California. The record in support of California's waiver request is strong, incorporating key information from the companies that will be called upon to provide the necessary technology. We can not imagine what information could be submitted that would warrant a denial of California's request. Given the nature of the efforts to show technical infeasibility in the California rulemaking and the limited opportunity for others to know and understand the trade secrets of each of the potential manufacturers of the identified technologies, it is difficult to imagine what information could be submitted that would warrant a denial of California's request. Moreover, as we have pointed out, after-acquired information has no relevance to whether EPA should approve California's request for a waiver.

In conclusion, EPA has four reasons to promptly grant California's request for a waiver. These are: (a) a waiver is in the public interest, (b) a waiver will assist California and other states in carrying out their responsibilities under the CAA, (c) respect for the rights of states requires EPA to grant California's request and (d) well-established law requires EPA to do so.

Sincerely,



Nancy Seidman
Massachusetts
Co-Chair
Mobile Sources Committee



Dennis McLerran
Seattle, Washington
Co-Chair
Mobile Sources Committee