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April 6, 2009

U.S. Environmental Protection Agency
EPA West – Air Docket
1200 Pennsylvania Avenue, NW
Room B108, Mail Code 6102T
Washington, DC 20460

Re: **Docket ID No. EPA-HQ-OAR-2006-0173** ("California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption," 74 *Federal Register* 7040, February 12, 2009)

Dear Administrator Jackson:

The National Association of Clean Air Agencies (NACAA) – the association of air pollution control agencies in 53 states and territories and over 165 metropolitan areas across the country – is pleased to submit these comments on the Obama Administration's reconsideration of the previous denial of California's request for a waiver of federal preemption under Section 209(b) of the Clean Air Act, to permit enforcement of the state's motor vehicle emissions standards to control greenhouse gas emissions.

Since California submitted to the U.S. Environmental Protection Agency (EPA) its request for a waiver, NACAA has been strongly supportive of full and prompt approval and believes firmly that there is nothing in the record to support any action but approval. To this day, those who oppose the waiver have been unsuccessful in rebutting the facts provided by California and other supporters of the waiver in their respective testimonies, written comments and other submittals of data and information. There is no question that the information needed to make the right decision on this request has been available all along. NACAA is extremely pleased that in his first week of office, President Obama requested the review of the previous administration's decision, and equally pleased that EPA Administrator Lisa P. Jackson took immediate action in response. NACAA looks to this EPA to complete its review and issue its decision by the June 30, 2009 deadline established in the FY 2009 omnibus appropriations bill signed by the President on March 11, 2009.

California's Greenhouse Gas Regulations

The State of California has traditionally led the national effort to reduce air pollution, dating back to 1963 when California adopted the nation's first motor vehicle emissions standards. Congress has consistently recognized and supported California's leadership role in its design of the federal Clean Air Act, which specifically authorizes enforcement of California-developed motor vehicle emissions standards in California and other states, subject to relatively minor procedural constraints. This provision has provided enormous benefits to California and the entire nation, allowing states to serve as laboratories of innovation.

California's intended role as an innovative leader and "pioneer," and the state's statutory authority to adopt motor vehicle emissions standards with EPA's very limited scope of review and discretion in evaluating waiver applications, have been repeatedly reinforced and reaffirmed over the years, including:

- by Congress in 1977, when it amended the Clean Air Act and strengthened California's authority (as provided in the 1967 Clean Air Act) to adopt vehicle emissions standards;
- by the D.C. Circuit Court of Appeals in 1979, in *Motor and Equipment Manufacturers Association, Inc. v. Environmental Protection Agency*, in which the court stated that California is "tasked with a leadership role in developing technological strategies to address air pollution and acting as a national 'laboratory for innovation'"; and
- by the National Research Council in 2006, which concluded (in a report entitled, *State and Federal Standards for Mobile-Source Emissions*) that "the California program has been beneficial overall for air quality by improving mobile-source emissions control. California should continue its pioneering role when setting mobile-source emissions standards. The role will aid the state's efforts to achieve air quality goals and will allow it to continue to be a proving ground for new emissions-control technologies that benefit California and the rest of the nation."

In September 2004, after extensive research and public comment, the California Air Resources Board (CARB) adopted Greenhouse Gas Regulations. The regulations meet the challenge laid out by Assembly Bill 1493[1] to achieve the maximum feasible and cost-effective reductions in greenhouse gas emissions from motor vehicles in a way that will not harm California's economy, will be cost effective for California's drivers and will preserve the right of any citizen to drive whatever class of vehicle he or she desires. In December 2005, CARB

[1] Now section 43018.5, Division 26 of the California Health & Safety Code.

requested that EPA grant a waiver of federal preemption under Section 209(b) of the Clean Air Act, to permit enforcement of California's regulations. In March 2008, EPA denied that request.

EPA has received more than 40 waiver requests from California since 1975 under the provisions of the Clean Air Act 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 that should guide the decision in this case as well.

Mobile Source Greenhouse Gas Regulation by Other States

In the Clean Air Act, Congress finds that the reduction of air pollution – including that which may have an effect on climate and weather – is the primary responsibility of states and local governments. Although the Act establishes a federal program to set minimum requirements to serve as a "floor" for state regulation, it specifically authorizes more stringent state regulation. While consideration of the potential adverse impact on commerce of many different state emissions standards led Congress to preempt states other than California from adopting motor vehicle emissions standards, Congress does, in Section 177 of the Act, provide that each state can decide whether to enforce the federal emissions standards or the at-least-as-stringent California standards for new motor vehicles sold in-state. The federal government has no permissible role in this decision.

Since CARB's adoption of the Greenhouse Gas Regulations, 14 other states – Arizona, Connecticut, the District of Columbia, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington – have recognized the benefits of these rules and have adopted statutes or regulations that permit enforcement of California's regulations in their own states. However, these state programs cannot be enforced until and unless EPA grants California's request for a waiver. Thus, EPA's denial of California's request vitiates the rights of these states to protect the health and welfare of their citizens.

We note further that the Association of International Automobile Manufacturers has illogically argued that California cannot adopt motor vehicle emissions standards, nor can any other state adopt California's standards, until California receives a waiver of federal preemption from EPA. California requesting a waiver in advance of finalizing a rule within the state would be premature and impractical. Doing so would mean that EPA would be reviewing draft regulations that may never be adopted or may be adopted in an amended form.

Further, delaying other states' regulatory actions until a waiver is granted would ultimately postpone implementation, extending by several years the two-year lead time that Congress clearly sets forth as an adequate amount of time for compliance with the new standards by automobile manufacturers.

The U.S. Court of Appeals for the Second Circuit addressed this issue head on in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State* (1994), finding that "it is sensible for [the New York State Department of Environmental Conservation] DEC to adopt the standards prior to the EPA's having granted a waiver, so long as the DEC makes no attempt to enforce the plan prior to the time when the waiver is actually obtained." NACAA requests that EPA confirm that California may, in fact, adopt regulations prior to the time it receives a waiver from EPA. Likewise, we request that EPA confirm (either in this proceeding or in another forum, if that is more appropriate) that other states may adopt California's standards before EPA grants a waiver.

California's Waiver Request

As established by Congress and interpreted by EPA over the past 30 years, EPA's role in granting a waiver to California on a particular motor vehicle emission rule is narrow and deferential. EPA is not to substitute its judgment for that of CARB as to whether a standard is too technically challenging or too expensive. Moreover, EPA may not base its decision on statutes other than the Clean Air Act, or other policy considerations. Rather, EPA must grant California's request for a waiver unless it can demonstrate that the conditions of Section 209(b) of the Act are not met. Unfortunately, the former EPA chose to ignore the statutory criteria and deny California's waiver, notwithstanding the fact that every bit of evidence pointed clearly to a decision of approval.

EPA must grant the waiver unless it can be shown by clear and convincing evidence that CARB acted in an arbitrary and capricious manner when it determined that the addition of the Greenhouse Gas Regulations did not render California's mobile source program, considered as a whole, less protective than the federal program. Here, it is difficult to imagine how regulating greenhouse gas emissions – where the federal program does not contain any parallel regulations – does anything other than make the California program even more stringent than it was before those regulations were adopted. Given the fullness of the public process employed by California and the strength of the administrative record of support for California's decision, there was no basis for EPA to determine that CARB's decision was arbitrary and capricious.

EPA must grant the waiver unless it determines that California no longer needs to maintain an independent motor vehicle emissions program. Under prior precedent the issue is not whether California needs a particular standard or whether any particular standard will significantly contribute to resolving an identified problem unique to California. EPA determined as recently as December 2006 – one year after California submitted this waiver request – that, with respect to a separate waiver request, there were compelling and extraordinary conditions warranting a continuing California vehicle emissions program. Although EPA chose to reject California's waiver request in 2008, it failed to establish that anything had occurred since December 2006 warranting elimination of the California program. Moreover, evidence of California's continued struggles with air pollution, with pollution from motor vehicles in particular and with global warming continues to mount. As you heard from speakers at the March 5, 2009 public hearing, the results of recent research further substantiate the compelling and extraordinary conditions in California.

For example, based on his peer-reviewed scientific study published in 2008 regarding the causal link between carbon dioxide and air pollution mortality, Stanford University Professor Mark Z. Jacobson told the House Select Committee on Energy Independence and Global Warming that 1) "carbon-dioxide-induced global warming increases air pollution health problems more in California per capita than it does in the U.S. as a whole," 2) "controlling carbon dioxide from California will reduce the air-pollution-related death and illness rate in California at a rate 2.5 times faster than it will reduce the death rate of the U.S. as a whole" and 3) "local carbon dioxide emissions from vehicles in California causally increase local air pollution and health problems in California."[2]

Also by way of example, researchers using a multi-model, multi-scenario climate model ensemble to identify climate change hotspots in the continental U.S. found the highest peak hotspots over California (followed by northern Mexico and western Texas).[3]

Finally, pursuant to the third statutory criterion for evaluating a waiver request, EPA must grant the waiver unless it determines that California's motor vehicle program is not consistent with the requirements of Section 202(a) of the Act. Since California's program contains the same limitations as found in Section 202(a), the required "consistency" is established.

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[2] Testimony of Mark Z. Jacobson before the U.S. House of Representatives Select Committee on Energy Independence and Global Warming, April 9, 2008.

[3] Diffenbaugh, N.S., et al. (2008), Climate change hotspots in the United States, *Geophys. Res. Lett., 35*, L16709, doi:10.1029/2008GL035075.

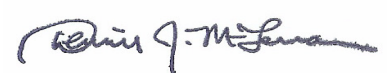
Conclusion

In conclusion, California's Greenhouse Gas Regulations and its request for a waiver were – in 2005, when the state requested the waiver; in 2007, when EPA took public comments on the request; and in 2008, when EPA denied the request – clearly in the public interest. And today, in April 2009, these rules not only remain in the best interest of the public and but also begin the process of demonstrating that this country can address global warming and, at the same time, create jobs, enhance energy security, reduce our dependence on foreign oil and save money for the consumer. The rules further provide a number of innovations that will allow California and the 14 states that have elected to opt into the requirements to continue to serve as the laboratory for development of national programs, consistent with the intent of Congress as expressed in the Clean Air Act.

Once again, NACAA applauds President Obama and EPA Administrator Jackson for their prompt action to review this important issue and urges final action to reverse the previous administration's ill-advised decision.

Sincerely,

Nancy L. Seidman
Co-Chair
Mobile Sources and Fuels Committee



Dennis J. McLerran
Co-Chair
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