ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, ARIZONA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, THE COMMONWEALTH OF MASSACHUSETTS, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, AND VERMONT, ALONG WITH THE NEW YORK CITY CORPORATION COUNSEL, AND THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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EPA/DC, EPA West Room B102
1301 Constitution Ave., NW
Washington, DC 20004

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

Dear Administrator Jackson:

We appreciate the opportunity to present these comments in support of California's request for a waiver of preemption under Section 209(b) of the Clean Air Act. We are pleased that you have decided to reconsider former EPA Administrator Stephen Johnson's denial of California's waiver request. His decision disregards decades of agency practice, incorrectly applies the Clean Air Act, and is at odds with the analysis of EPA's career technical and legal staff. EPA should vacate the denial and grant California's waiver request, in full, without further delay.

In EPA's notice for public hearing and comment on reconsideration, the agency noted that the March 6, 2008 waiver denial significantly, and without legitimate justification, departed from EPA's longstanding interpretation of the Clean Air Act's waiver provisions and from the Agency's history of granting waivers to California for its new motor vehicle emission program. *See* California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7,040 (Feb. 12, 2009). We agree, and urge EPA to return to its traditional, and correct, interpretation of Section 209.

These comments supplement prior comments already in the docket and principally address the first legal question EPA posed in the notice for reconsideration: whether EPA's interpretation and application of section 209(b)(1) in EPA's March 6, 2008 waiver denial was

appropriate. We also briefly address two of the automobile industry's arguments against the California regulation: (1) the "patchwork" argument, and (2) the "adopt or enforce" argument. These arguments are incorrect and EPA should reject them both.

EPA's Interpretation And Application Of Section 209(b)(1) In EPA's March 6, 2008 Waiver Denial Was In Error Because It Contradicts Section 209's Plain Meaning

EPA denied California's waiver based solely on Section 209(b)(1)(B), determining that California does not need its greenhouse gas emissions standard to meet compelling and extraordinary conditions. The decision is based on two premises: (1) that, when analyzing California's waiver request, EPA can apply Section 209(b)(1)(B) to California's GHG standards separately, rather than to California's program as a whole; and (2) that because California's GHG standards are designed to address climate change, they are not "needed" to meet "compelling and extraordinary conditions." Neither premise can withstand examination.

Section 209(b)(1)(B) Must Be Applied To California's Program As A Whole

The Clean Air Act's waiver criteria for new motor vehicles, as amended in 1977, provide the following:

> The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted ***standards*** (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that ***the State standards*** will be, ***in the aggregate***, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need ***such State standards*** to meet compelling and extraordinary conditions, or
>
> (C) ***such state standards*** and accompanying enforcement procedures are not consistent with section 202(a) of this part.

42 U.S.C. § 7543(b)(1) (emphases added).

Despite EPA's longstanding interpretation of the phrase "such state standards" to mean California's motor vehicle emissions program as a whole, the former Administrator construed the phrase to mean only the GHG standards which were the subject of California's waiver request. According to former Administrator Johnson: "The text of section 209(b)(1)(B) does not limit EPA to its previous practice as the language of the statute is ambiguous on this point."

California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,161 (March 6, 2008).[1]

EPA conceded that its longstanding interpretation of the phrase "such state standards" refers to California's program as a whole, but rejected that interpretation for greenhouse gas pollutants. EPA reasoned that a new interpretation is justified because global warming is "fundamentally different" from other kinds of pollution. *See, e.g.*, 73 Fed. Reg. at 12,159. EPA's reasoning is in stark contrast to the United States Supreme Court's ruling in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007), where the Court confirmed that "greenhouse gases fit well within the Act's capacious definition of 'air pollutant.'" The Clean Air Act makes no distinction between greenhouse gases and other pollutants. Nor does the statute's text or legislative history support EPA's new interpretation of Section 209(b)(1)(B) and denial of California's waiver request.

Section 209 Is Not Ambiguous – "Such State Standards" Means "Program As A Whole"

The fundamental problem with EPA's reasoning is that the Clean Air Act provides no support for it. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1461 (2007) ("There is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute.") The term "standards," as used throughout Section 209, refers to California's motor vehicle emissions program. For example, when "standards" first appears in Section 209, it identifies California as the only state that had "adopted standards . . . for the control of emissions from new motor vehicles . . . prior to March 30, 1966." This is a reference to the California program, not to a particular standard within the program. The word "standards" appears three more times in Section 209(b), never in the singular. Thus, the only consistent and coherent reading of the term "standards" in Section 209 is as a reference to California's overall program, rather than to individual standards within the program.

Section 209's Legislative History Further Confirms That It Is Not Ambiguous

The plain meaning of "standards" in Section 209 is reinforced by legislative history. Section 209 first appeared in its present form in 1977. That year, Congress made two important changes to the mobile-source preemption scheme. First, Congress revised the criteria to require that the California standards be at least as protective as the applicable federal standards in the

[1] EPA's new interpretation must also be rejected because it applies only to greenhouse gas pollutants. *See* 73 Fed. Reg. at 12,158. In denying California's waiver request, EPA said that it would retain its existing statutory interpretation for waivers involving so-called "traditional" pollutants, but will apply a different interpretation for greenhouse gas waivers. It is not permissible, however, for EPA to give different meanings to the same statutory language for different factual contexts. *See, e.g.,United States v. Santos*, 128 S. Ct. 2020 (2008) (it is improper to give the same word, in the same statutory provision, different meanings in different factual contexts).

aggregate. In the original version of Section 209 adopted in 1967, Congress had required every California standard to be at least as protective as the equivalent federal standard. By 1977, however, Congress recognized that there were trade-offs in regulating emissions of different pollutants and that more stringent standards for one pollutant could necessitate less stringent standards for another pollutant (H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977)). Requiring the protectiveness of the California standards to be evaluated as a package permitted California "to weigh the degree of health hazards from various pollutants and the degree of emission reduction achievable for various pollutants with various emission control technologies and standards" (H.R. Rep. No. 294, 23 (1977)).

The House Committee on Interstate and Foreign Commerce that drafted this amendment stated that the amendment was "intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare" (H.R. Rep. No. 294, 301-302 (1977)). The House committee also made clear that EPA was to be highly deferential in reviewing California's waiver requests:

> The Administrator . . . is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State. There must be clear and compelling evidence that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in that State, before EPA may deny a waiver (H.R. Rep. No. 294, 302 (1977)).

This legislative history reconfirms that the plain meaning of the term "standards," as Congress wrote it in Section 209, is a reference to all the "standards" that comprise California's motor vehicle emissions program.

California's GHG Standards Are "Needed" To Meet "Compelling And Extraordinary Conditions"

EPA also based its denial on the assertion that California is limited to addressing only "local" pollution problems and on EPA's conclusion that the air pollution *problem* being addressed was "elevated atmospheric concentrations of greenhouse gases" and their "impact on global climate change." 73 Fed. Reg. at 12,160.[2] As such, the agency concluded that California does not "need" its GHG standards to meet "compelling and extraordinary conditions." The former Administrator explained:

> I base this decision on the fact that California's GHG standards are designed to address global climate change problems that are different from the local

[2] EPA, however did not find California lacked compelling and extraordinary conditions, instead it asserted that "the effects of climate change in California are [not] compelling and extraordinary *compared to the effects in the rest of the country*." 73 Fed. Reg. at 12,157 (emphasis added).

> pollution problems that California has addressed previously in its new motor vehicle program.

Id. at 12,159. The "compelling and extraordinary conditions" inquiry, however, is not limited to addressing "local" pollution problems. There are no such limiting words in Section 209. EPA repeatedly has held that whether there are compelling and extraordinary conditions "primarily refers to certain general circumstances, unique to California, primarily responsible for causing its air pollution problem." *See, e.g.*, 49 Fed. Reg. 18,887 at 18890 (May 3, 1984). Considering the statute's legislative history, EPA has also noted that "[i]t is evident . . . 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 climatic conditions that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems." *Id.* at 18,890.

As EPA held in 1993, in its waiver of preemption of California's Low-Emission Vehicle Standards, "the basic inquiry here concerns whether 'compelling and extraordinary conditions' exist that justify California's continued need for its own mobile source program[,]" not whether there is a compelling or extraordinary need for the particular standard under review. Waiver of Federal Preemption, California Low-Emission Vehicle Standards ("1993 LEV Waiver") at 46 (Jan. 7, 1993); *see also* Waiver of Federal Preemption, 2005 and Subsequent Model Year Zero-Emission Vehicles at 32, 34 (Dec. 21, 2006).

More generally, EPA is not permitted under Section 209 to make its own determination concerning the need for a particular standard. This is an area Congress reserved to CARB's judgment. *See, e.g.*, 1993 LEV Waiver at 46-57 (citations omitted).[3] To the extent such a "needs" inquiry were permitted at all, those concerns would fall under Section 209(b)(1)(A)'s "protectiveness" inquiry. But even there, EPA's inquiry is narrow:

> EPA's decision under section 209(b)(1)(A) is directed to the California regulations' ability to protect the environment from the effects of motor vehicle pollution, not on cost-effectiveness, lead time, or any of the other policy considerations that a regulator may weigh in determining the appropriateness of regulations. EPA is not authorized under section 209(b)(1)(A) to provide *de novo* review of all policy decisions made by CARB

[3] The fact that EPA does not second-guess California's policy judgments in the waiver process does not mean that California's actions evade review. All of its motor vehicle emissions regulations are the end result of a state-based administrative process involving extensive public notice and comment. As such, they are subject to judicial review in state court. The automobile industry has challenged California's GHG regulation in state court. *See Fresno Dodge, Inc. et al v. Air Resources Board et al., Nos. O4-CE CG 03498 & 05- CE CG 02787 (Ca. (Fresno) Sup. Ct., filed Dec. 7, 2004).* The industry has also challenged California's regulations (thus far unsuccessfully) in federal court. *See, e.g., Central Valley Chrysler-Jeep, Inc. v. Witherspoon, 563 F. Supp. 2d 1158 (E.D. Cal. 2008); Green Mountain Chrysler v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007) ; Lincoln Dodge, Inc. v. Sullivan, 588 F. Supp. 2d 224 (D.R.I. 2008)* ; *Zangara Dodge v. Curry, No. CIV 07-1305 (D.N.M. filed Dec. 27, 2007).*

> in the course of its regulatory proceedings and to comment on the appropriateness or arbitrariness of those decisions. Congress clearly intended that California be free to make its own decisions regarding what regulations are appropriate, without interference by EPA, except on the narrow grounds provided by section 209(b).

Waiver of Federal Preemption; Determination of the Administrator (OBD II Waiver) at 33-34 (Oct. 3, 1996).

EPA's attempt to re-interpret Section 209(b)(1)(B) to permit such an inquiry is improper. Under Section 209(b)(1)(B), EPA's inquiry is restricted to whether California needs its own motor vehicle pollution control program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions. *Id.* at 34 (citing 49 Fed. Reg. 1887, 1889-1890 (May 3, 1984).) Hence, EPA's determination that California does not "need" its GHG regulation because climate change is "global," is improper.

Thus, EPA's new interpretation conflicts with Section 209(b) generally because EPA must defer to California's policy judgment concerning the need for the regulation under (b)(1)(A). Therefore, it cannot second-guess that same determination under (b)(1)(B). *See, e.g.*, 73 Fed. Reg. at 12,158 ("Applying this interpretation to this waiver application calls for EPA to exercise its own judgment to determine whether the air pollution problem at issue—elevated concentrations of GHGs—is within the confines of state air pollution programs covered by section 209(b)(1)(B).")

California's Motor Vehicle Emissions Program Is Not Restricted To "Local" Pollutants

EPA's interpretation also is at odds with the Clean Air Act's primary reason for preserving California's authority to maintain its own motor vehicle emissions program: for the Nation to benefit from California's leadership. *See, e.g.*, 58 Fed. Reg. 4,166 (Jan. 13, 1993) ("I must also evaluate waiver requests in light of Congressional intent regarding the waiver program generally. An important motivation behind enactment of section 209(b) was to foster California's role as a laboratory for motor vehicle emission control, in order 'to continue the national benefits that might flow from allowing California to continue to act as a pioneer in this field.'") For example, though the problems associated with smog have historically been severe in California, as compared to the rest of the country, other states suffer from similar smog-associated problems caused primarily by motor vehicle emissions. Congress recognized this when it granted California authorization to continue to administer and develop its own motor vehicle emissions program.

If it were true that Congress intended to restrict California to only local or regional pollution problems, then there would be no reason for it to have given other states the ability to adopt California's standards. But that is precisely what the Clean Air Act does. Congress recognizes this obvious fact by allowing other states to "piggyback" California's regulation once

a waiver has been granted. *See* 42 U.S.C. § 7507 (allowing "any State" to adopt and enforce California's standards).

While climate change is certainly a problem of a global scale, the impacts of climate change are also being felt at the local and state level. Many of these impacts are distinct in nature and magnitude across different locations. Thus, addressing climate change requires action at both the global and local levels. The lessons learned from California's greenhouse gas regulations will provide important benefits to the rest of the country, in the manner that Congress intended when it enacted section 209(b). This is a reason to allow California to address GHG emissions from motor vehicles, not to prevent it from taking action.

Industry's Patchwork Argument Is Without Basis And Is Irrelevant To EPA's Waiver Decision

The automobile industry waiver opponents have argued that granting California's waiver request is tantamount to permitting a "patchwork" of state regulatory regimes which will impose undue burden on the industry. These claims are factually and legally incorrect. Clean Air Act Section 177 provides that other states may adopt only emissions standards that are "identical" to California's. Through Sections 177 and 209, Congress allowed for two separate standards for motor vehicle emissions. Thus, "new motor vehicles must either be 'federal cars' designed to meet EPA's standards or 'California cars' designed to meet California's standards." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1080 (D.C. Cir. 1996). Thus, the auto industry's claim that there is a "patchwork" of auto emissions standards is simply incorrect: there are only two – California's and the federal government's, as specifically provided by the Clean Air Act. We note that the auto industry, in its numerous challenges to the 177 states' adoption of California's greenhouse gas standards, has failed to raise a claim of lack of identicality under Section 177.

To the extent that the auto industry is arguing that a "patchwork" is created because of differences between fleet composition in different states, that argument lacks merit and is irrelevant to this waiver proceeding. We will not attempt to address this issue in detail, as we understand that CARB and others are already doing so.

EPA, however, need not address industry's patchwork claims. First, they are incorrect. Second, such claims are not appropriate in a waiver proceeding. In previous waiver proceedings EPA has recognized that Congress intended EPA's review of California's decision-making to be narrow. Thus, EPA's consideration of evidence submitted during a waiver proceeding is limited by its relevance to the three waiver criteria EPA must consider under Section 209. *See, e.g.*, 36 Fed. Reg. 17,458 (Aug. 31, 1971). This has led EPA to reject arguments that are not specified as grounds for denying a waiver, and it should do so with the patchwork arguments as well.

EPA Should Reaffirm That California And Section 177 States May Adopt Motor Vehicle Emissions Regulations Before EPA Grants A Waiver

The automobile industry has argued that section 209(a), which provides that no "political subdivision shall adopt or attempt to enforce any standard," should be read to mean that neither California nor any Section 177 state may "adopt" a motor vehicle emissions regulation before EPA grants a waiver. Because the clock for compliance (lead time) is measured from the date of adoption, delaying the date of adoption until after EPA grants a waiver would effectively delay the date by which industry would have to comply with any standard.

The Clean Air Act does not support industry's argument. Section 209(a) prohibits the states from "adopt[ing] or attempt[ing] to enforce" motor vehicle emissions regulations. 42 U.S.C. § 7543(a). Section 209(b), however, creates an exception to that requirement because it allows California to obtain a waiver to enforce such standards "which it has adopted." *Id*. § 7543(b). Section 177 allows other states to "adopt and enforce" motor vehicle emission standards, as long as their standards and California's are: (1) identical; and (2) adopted "at least two years before commencement" of the affected model year. 42 U.S.C. §§ 7543(b), 7507. Section 209(b) and Section 177 do not prevent California or an opt-in state from adopting its regulation before EPA grants a waiver. In fact, both of those provisions suggest the opposite. As one court recently found:

> Although section 209(a) may prohibit a state from adopting or attempting to enforce "ny standard relating to the control of emissions from new motor vehicles," that prohibition simply does not apply where California adopts regulations under the terms and conditions specified by section 209(b). There is absolutely no rule of statutory construction that does what AIAM invites the court to do; that is, to invalidate the exception because the rule contains the word "or."

Central Valley Chrysler-Jeep v. Goldstene, 563 F. Supp.2d 1158, 1163 (E.D. Cal. 2008). The argument, the court said, "is without support in law, logic, or grammar." *Id.* at 1164.

> It is not necessary to resort to the cannons of statutory interpretation to see the flaw in [industry's] argument. . . . There is absolutely no support for the proposition that, because the word "or" is used to indicate a disjunction between two verbs in subsection 209(a), that the provisions of the entire subsection are somehow disjoined from the provisions of any other subsection, including subsection 209(b). . . . [I]t is indisputable that the plain language of subsection 209(b) provides an exception to subsection 209(a) that allows California to adopt automobile emissions regulations and submit same to EPA for their consideration. [Industry] cannot escape the fact that their interpretation of the interplay between subsections 209(a) and 209(b) would require that courts thwart the clearly stated intent of Congress to allow

> California to adopt regulations under subsection 209(b) that would be granted waiver from the application of subsection 209(a) if the statutory prerequisites are met.

Id.

In fact, EPA has long interpreted the Clean Air Act to authorize pre-waiver adoption of California standards by an opt-in State. *See, e.g.*, Letter from William K. Reilly to Thomas C. Jorling (January 7, 1993) (states are not required to wait for the waiver before adopting the California standards). "[T]he plain language of 177, coupled with common sense," leads to the conclusion that other states "may adopt the [California] standards prior to the EPA's having granted a waiver, so long as [the state] makes no attempt to enforce the plan prior to the time when the waiver is actually granted." *Motor Vehicle Manufacturers Association v. New York Dept. of Environmental Conservation*, 17 F.3d 521, 533-34 (2d Cir. 1994). EPA has, for years, consistently issued waivers to California for state standards that California (and other states) had adopted prior to EPA's issuance of the waiver. *See, e.g*., 46 Fed. Reg. 26,371 (1981), 68 Fed. Reg. 19,811 (2003), 70 Fed. Reg. 50,322 (2005).

Finally, EPA has also specifically rejected the argument that allowing pre-waiver adoption creates uncertainty. As EPA has explained:

> The Manufacturers argue that pre-waiver adoption of California standards by an opt-in State creates uncertainty because manufacturers will not know whether they need to meet the new standards until EPA makes a waiver decision. This concern is greatly overstated because the standard for denying a waiver is extremely high. See *Motor and Equipment Mfrs. Ass'n Inc. v. EPA*, 627 F.2d 1095, 1122 (D.C. Cir. 1979) (California's emission standards "are presumed to satisfy the waiver requirements" and EPA may not disregard California's determination absent "clear and convincing" evidence to the contrary), *cert. denied*, 446 U.S. 952 (1980); *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1297 (D.C. Cir. 1979) ("Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight"). This standard of proof "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." *Id*.; H.R. Rep. 294, 95th Cong., 1st Sess. 301-02 (1977). EPA recognizes that the scope of its review of a waiver request is very narrow. *See* 41 Fed. Reg. 44209, 44210 (Oct. 10, 1976) (EPA defers to California on public policy issues surrounding California emission standards); 40 Fed. Reg. 23102, 23103 (May 28, 1975) (even in the two areas reserved for EPA judgment, the scope of EPA's review is narrow); *id*. at 23104 (EPA gives California "very substantial deference" on central policy issues surrounding California emission standards).

Brief of the United States as *Amicus Curiae* at 29, n.17; in *Motor Vehicle Manufacturers Association, et al. v. New York State Department of Environmental Conservation, et al.* (2d Cir.), Case No. 93-7938 & 93-7974).

EPA should reaffirm its long-held view that California and the Section 177 states may adopt motor vehicle emissions regulations before EPA grants a waiver. EPA's interpretation is consistent with the plain meaning of the Clean Air Act and reasonably reconciles the waiver requirement with the lead time requirement. The plain language of Section 177 makes clear that the two-year lead time clock begins to run upon adoption of the emission standard. The industry is on notice of the time period and of the adoption of the state standard. Industry's reading of the statute would expand the two-year leadtime requirement until after EPA grants a waiver and the additional amount of time needed for subsequent state adoption of the standards. The result could delay enforcement by one or more model years. Should the situation arise where for some unforeseen reason the two-year lead time period is insufficient, EPA has the authority to provide additional lead time during the waiver process. *See* 42 U.S.C. § 7521(a)(2).

Conclusion

EPA should review California's standards under section 209(b)(1)(B) by considering whether California continues to need its own motor vehicle emission program, rather than inappropriately evaluating greenhouse gas standards separately. The automobile industry's "patchwork" argument is both incorrect and misplaced in this waiver proceeding and therefore should be rejected. Finally, industry's "adopt or enforce" argument has no basis in the Clean Air Act. We urge EPA to confirm the invalidity of industry's interpretation of the Clean Air Act, and to vacate the denial and grant California's waiver request, in full, without further delay.

Sincerely,

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