



Linda S. Adams
Secretary for
Environmental Protection

Air Resources Board

Mary D. Nichols, Chairman
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Arnold Schwarzenegger
Governor

January 21, 2009

VIA OVERNIGHT TRACKING NO. 7962-7014-0140

Administrator-Designate Lisa P. Jackson
United States Environmental Protection Agency
Headquarters Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

RE: Request for Reconsideration—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-Years Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed.Reg. 12156 (March 6, 2008)

Dear Administrator-Designate Jackson:

The State of California's Air Resources Board (ARB) is requesting that the United States Environmental Protection Agency (EPA) reconsider its March 6, 2008, decision (73 Fed.Reg. 12156) denying California's request for a waiver of preemption to enforce its adopted new motor vehicle greenhouse gas emission standards. California believes EPA has the inherent authority to reconsider the denial and should do so in order to restore the interpretations and applications of the Clean Air Act to continue California's longstanding leadership role in setting emission standards. Because it is now over three years since our original December 2005 waiver request, during which time the evidence of global warming and the need to reduce greenhouse gas emissions has greatly accelerated, we respectfully request your prompt attention to this matter.

The bases for our request are straightforward. As explained briefly below, the former Administrator's denial decision misinterpreted the Clean Air Act to set new flawed tests and then misapplied facts to these new tests in order to deny the waiver. A noticed reconsideration process is appropriate to reexamine these issues; EPA can solicit input from the public and stakeholders in a speedy timeframe due to the previous, extensive comment input and the limited scope of the issues to be reconsidered.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

EPA's first improper basis for the waiver denial was the former Administrator's reading of the Clean Air Act^[1] to conclude that he "did not believe that section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems" (73 Fed.Reg. at 12157). Decades of EPA waiver decisions had reviewed only whether California continued to have general factors (e.g. topography, meteorology, climate, and a large human and vehicle population) affecting California's air quality and thus impacting Californians. The former Administrator instead improperly evaluated California's need for greenhouse gas standards in isolation rather than as part of California's complete motor vehicle emission control program. This interpretation is contrary to the text and history of the waiver provision and its previous application.

The former Administrator's error led him to invent a "fundamental causal factor" test (73 Fed.Reg. at 12162), improperly requiring only these California's standards to have a more specific – yet undefined – connection between the pollutants regulated and the general factors affecting California's air pollution and resultant public health and resource impacts. He then applied his new test to conclude that Congress intended to limit California's emission standards to those addressing exclusively local or regional factors, ignoring overwhelming case law and Congressional intent to the contrary, and despite no expression of that purported limit in the text of 209(b)(1)(B). To make this new test work the former Administrator also ignored substantial evidence that the greenhouse gas regulations will also reduce traditional smog-related emissions. EPA should jettison this contrived test and return to its longstanding and proper review of California's standards in the context of its motor vehicle program.

The alternative basis for EPA's denial was that the former Administrator did not believe that "the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country" (73 Fed.Reg. at 12157), a conclusion also flouting waiver law and practice. Again, rather than apply its historical and straightforward test, he evaluated the greenhouse gas standards in isolation to conjure a second test – based on a snippet of legislative history and again outside the text of section 209(b)(1)(B) – to require California to have greater air quality and other resource impacts from climate change than elsewhere in the country. The former Administrator then inconsistently compared California's impacts sometimes to national average conditions, sometimes to regions, and sometimes to conditions in individual States. Then he improperly weighed evidence. he specifically relied upon and ignored other abundant evidence in the record, which together show that California does indeed face air quality and other resource

¹ Clean Air Act. All statutory references herein are to that Act.

impacts in California that are worse than in other parts of the country. EPA can and should address the above issues in reconsidering its decision, and should also retract this second new test both because it has no statutory support and because EPA provided no criteria for evaluating how California could show it is "sufficiently different" or "different enough" (73 Fed.Reg. at 12164) from the nation as a whole.

We believe that EPA can reconsider its decision in a manner that fulfills its public notice and comment obligations without undue delay. Because EPA has already noticed and held hearings on our request and would be reconsidering its decision, we do not believe any additional hearings are warranted or required. No part of California's greenhouse gas regulations have changed. Interested parties have had more than ample notice and opportunity to comment on all issues presented by our section 209(b) request and by EPA's original notice, including California's protectiveness determination and technological consistency prongs under sections 209(b)(1)(A) and (b)(1)(C), respectively. Many stakeholders and members of the public did submit extensive comments to the existing Docket on all issues. EPA has more than an ample record upon which to render a reconsidered decision addressing all issues cognizable in the waiver process. At most, all that is needed now is a short supplemental comment period to allow limited updating to responses to the questions EPA originally noticed.

In noticing an additional comment period, EPA may wish to specifically request comment on a sub-issue under the technology and lead-time consistency analysis to consider the status of 2009 model-year vehicles already in production. It is our understanding that because all manufacturers can comply with California's 2009 model-year greenhouse gas fleet average, all manufacturers would obtain credits that would carry forward to future model-years, rendering the 2009 model-year a moot issue in this waiver reconsideration process. We believe that since all overarching lead time, feasibility, and cost issues associated with the consistency analysis were noticed and responded to in comments by ARB and others, seeking comment on California's understanding on this narrow sub-issue may be appropriate, would not transform this reconsideration request into a new waiver request and would allow EPA to grant a waiver for the entire regulation for model-years 2009 through 2016.

California and the many States that have adopted California's passenger vehicle greenhouse gas standards look forward to a reasonable application by EPA of longstanding applicable waiver law in the reconsideration process. We are confident that after doing so EPA will conclude that it should grant California a waiver of preemption to enforce these adopted standards for new passenger vehicles. In turn, this waiver approval will provide much needed greenhouse gas reductions.

Administrator-Designate Lisa P. Jackson
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Please enter this letter into the record, Docket ID #EPA-HQ-OAR2006-0173.

Sincerely,



Mary D. Nichols
Chairman

cc: (Via OVERNIGHT TRACKING NO. 7962-7013-6089)

Attention: Docket ID No. EPA-HQ-OAR-2006-0173
EPA West (Air Docket)
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Room B108
Mail Code 6102T
Washington, D.C. 20460

(Via OVERNIGHT TRACKING NO. : 7972-6656-3260)

Mr. David Dickinson
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(Via E-MAIL)

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