



U.S. ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF INSPECTOR GENERAL

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## Office of Counsel Legal Review

# **EPA's California Waiver Decision on Greenhouse Gas Automobile Emissions Met Statutory Procedural Requirements**

Report No. 09-P-0056

December 9, 2008



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
INSPECTOR GENERAL

December 9, 2008

The Honorable Dianne Feinstein  
Chairman  
Subcommittee on Interior, Environment, and Related Agencies  
Committee on Appropriations  
United States Senate  
Washington, D.C. 20510

Dear Madam Chairman:

This is in response to your January 2, 2008, letter requesting that the Office of Inspector General (OIG) investigate whether the decision by the U.S. Environmental Protection Agency (EPA) to deny California's request for a waiver to implement a law to reduce greenhouse gas (GHG) emissions from automobiles deviated from standard protocols. As I noted in my March 17, 2008, correspondence to you, we have narrowed the focus of our review to address whether the statutory requirements related to the waiver decision were met. I also noted that our anticipated response date would be within a few months. That time frame was necessarily lengthened, however, to enable us to coordinate our efforts with the Government Accountability Office (GAO), given that GAO has been conducting a similar inquiry. The Inspector General Act requires that we coordinate with GAO and avoid duplication of efforts. [See 5 U.S.C. app. 3, § 4(c).] As discussed below, we determined that the statutory requirements were met.

I. Background

Section 209(a) of the Clean Air Act (CAA) preempts States from implementing their own emission control standards for new motor vehicles. According to 42 U.S.C. § 7543(a), "No State or any political subdivisions 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." California alone, however, is granted a special waiver under Section 209(b) to maintain a separate regulatory program that is "in the aggregate, at least as protective of public health and welfare." The applicable provision states:

*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 emissions standards) for the control of emissions from new motor vehicles or new motor 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 7521(a) of this title. [42 U.S.C. § 7543(b)(1).]*

In 2002, California passed a law requiring the California Air Resources Board (CARB), the State's primary air pollution agency, to issue regulations to reduce GHG emissions from new automobiles. In 2004, CARB issued regulations requiring annual reductions in average GHG emissions for new vehicles beginning with the 2009 model year and phased in gradually over 8 years. By the 2016 model year, emissions from new vehicles would be cut by 30 percent. [See Cal. Admin. Code tit. 13, § 1961.1.]

In December 2005, California requested that EPA grant a waiver of preemption under Section 209(b), which would allow California to implement the GHG emissions regulations. [See CARB Letter to Administrator Johnson dated December 21, 2005.] EPA deferred action on the waiver request pending the outcome of the Supreme Court ruling in Massachusetts v. EPA. The Supreme Court issued its decision on April 2, 2007, holding that GHGs are air pollutants under the CAA. [Massachusetts v. EPA, 549 U.S. 497, 127 S.Ct. 1438, 1453, 167 L.Ed.2d 248 (2007).] EPA then published a Federal Register notice on April 30, 2007, announcing a public hearing and a comment period on California's waiver request; a notice on May 10, 2007, announced a second hearing. [See 72 FR 21260 (April 30, 2007) and 72 FR 26626 (May 10, 2007).] Public hearings were held on May 22, 2007 in Washington, DC, and on May 30, 2007 in Sacramento, California. EPA set a written comment deadline of June 15, 2007. [Id.]

Over the next several months, EPA staff from both the Office of Transportation and Air Quality and the Office of General Counsel evaluated the comments and prepared to brief the Administrator. The Administrator was briefed on June 15, September 12, September 20, and October 30, 2007. The June 15 briefing essentially consisted of a general overview. The September 12 presentation essentially summarized the comments and the key issues and arguments raised by the comments. The September 20 presentation focused on the options available to the Administrator. Three basic options were laid out: 1) to grant the waiver; 2) to grant it partially or conditionally; or 3) to deny it. [See September 20, 2007, document entitled, "California GHG Waiver Options Briefing for the Administrator."] The October 30 briefing provided additional information on several issues relating to the waiver. The Administrator made no decision at these meetings.

On December 19, 2007, the Administrator sent a letter to California's Governor informing him that EPA "will be denying" California's waiver request. [See Letter to Governor Arnold Schwarzenegger from EPA Administrator Stephen Johnson Regarding California's Request for a Waiver of Pre-emption for Its Greenhouse-Gas Regulations, dated December 19, 2007 (Administrator Johnson Letter).] On March 6, 2008, EPA issued a notice of decision formally denying California's waiver request. [See 73 FR 12156 (March 6, 2008).]

## II. Analysis

As noted earlier, the statutory requirements governing EPA in making a waiver decision are set out in Section 209(b) of the CAA. The requirements are few and straightforward. First, EPA must provide "notice" and an "opportunity for a public hearing" before it renders a Section 209(b) waiver decision. Second, that section requires that the Administrator deny a waiver if the Administrator "finds" one of three reasons: 1) the State's proposed standards are arbitrary and capricious; 2) the State's proposed standards are not needed to meet compelling and extraordinary conditions; or 3) the State's proposed standards are not consistent with provisions of the CAA.

With regard to the first requirement, EPA published a Federal Register notice announcing an opportunity for hearing and comment on CARB's request for a waiver on April 30, 2007. [See 72 FR 21260 (April 30, 2007).] At that time, EPA scheduled a public hearing in Washington, DC, for May 22, 2007, and established a comment period deadline of June 15, 2007. A second Federal Register notice on May 10, 2007, announced an additional public hearing for May 30, 2007, in Sacramento, California; the June 15, 2007, comment period deadline was retained. [See 72 FR 26626 (May 10, 2007).] The two hearings were held as scheduled, and the comment period closed on June 15, 2007. [See Administrator Johnson Letter.] Administrator Johnson, in his letter to Governor Schwarzenegger, stated that EPA heard from over 80 individuals at the hearings and received "thousands of written comments" from parties representing diverse interests. [Id.] Administrator Johnson also noted that EPA continued to "communicate with stakeholders in the waiver process after the comment period ended . . ." [73 FR 12157 (March 6, 2008).] In short, EPA satisfied the notice and hearing requirements of Section 209(b).

With regard to the second requirement, Administrator Johnson chose to deny the waiver because, in accord with Section 209(b)(1)(B), he determined that California did not establish a need to meet compelling and extraordinary air quality conditions. [See 73 FR 12156 (March 6, 2008).] In both the letter to Governor Schwarzenegger and in the much more lengthy Federal Register decision of March 6, 2008, Administrator Johnson set out a number of arguments to support the "compelling and extraordinary conditions" position. Seemingly, Administrator Johnson's key argument for denying the waiver was that the recent waiver request was distinguishable from earlier requests. [Id.] The Administrator noted that earlier requests for waivers had been designed to allow California to adopt standards to govern pollutants that were directly related to local and regional air quality. [Id.] In this instance, however, California's proposed standards

were focused on the more general problem of GHGs and, according to the Administrator, Section 209(b) was not intended to address a national air quality problem where the direct environmental effect on California is only loosely established. [*Id.* at 12157.]

Administrator Johnson contended that GHGs have national effects in an equal measure regardless of where the emissions occurred. [*Id.* at 12160, 12168.] Hence, the Administrator, in his letter to Governor Schwarzenegger, advocated a national approach to the GHG problem. [*See* Administrator Johnson Letter.] He pointed to a recent Federal energy law, the Energy Independence and Security Act, which set a standard of 35 miles per gallon for all 50 States (as opposed to the 33.8 miles per gallon California standard) as a national approach to addressing global climate change. [*Id.*] Because the GHG problem seemingly affected all States equally, Administrator Johnson determined that California did not have a unique case of compelling and extraordinary air quality conditions due to GHGs, and thus he denied the waiver. [*See* 73 FR at 12162, 12168 (March 6, 2008)]. Administrator Johnson referred to commenters on both sides of the issue in his Federal Register decision. In his letter to Governor Schwarzenegger, Administrator Johnson assured California that this waiver decision would not affect future waiver requests that would not involve GHGs and that would be tied to specific local and regional air quality problems in the State. [*See* Administrator Johnson Letter.]

### III. Conclusion

In this case, Administrator Johnson conducted a notice and hearing phase and based his decision to deny the waiver on one of the three criteria set out in Section 209(b); therefore, he satisfied the procedural statutory requirements. We believe that a number of the other issues raised in your request will be either litigated in the courts or investigated by other agencies, including GAO.

The estimated cost of this report – calculated by multiplying the project’s staff days by the applicable daily full cost billing rates in effect at the time – is \$17,946.

Thank you for your interest in the work of the OIG. If you should have any questions on this or any other matter, please contact Mark Bialek, Associate Deputy Inspector General and Counsel, at (202) 566-0861.

Sincerely,



Bill A. Roderick  
Deputy Inspector General