

The Administrator signed a Federal Register Notice on June 30, 2009 (which contains the following executive summary), and we are submitting it for publication in the *Federal Register*. While we have taken steps to ensure the accuracy of this Internet version of the executive summary, it is not the official version. Please refer to the official version in a forthcoming *Federal Register* publication or on GPO's Web Site. You can access the *Federal Register* at: www.gpoaccess.gov/fr/index.html. When using this site, note that "text" files may be incomplete because they don't include graphics. Instead, select "Adobe Portable Document File" (PDF) files.

I. Executive Summary

Today, I, as Administrator of the Environmental Protection Agency, am granting California's request for a waiver of Clean Air Act preemption for California's greenhouse gas emission standards for 2009 and later model years of new motor vehicles, adopted by the California Air Resources Board on September 24, 2004. This decision withdraws and replaces EPA's previous March 6, 2008 Denial of California's waiver request.

In the March 6, 2008 Denial, EPA determined that one of the three criteria for denial of a waiver had been met, namely, that California did not need its State standards to meet compelling and extraordinary conditions. I have reconsidered that determination, which was based on an interpretation of section 209(b)(1) of the Clean Air Act that I now reject. Based on a review of the statutory language, legislative history, and the comments received, I am returning to EPA's traditional interpretation of this provision. Applying EPA's traditional interpretation I have determined that the waiver should not be denied under this criterion. Since the March 6, 2008 Denial did not evaluate or make any determinations concerning either of the other two waiver criteria, I have evaluated those criteria and determined that the waiver should not be denied under either of them. This includes careful consideration of all of the evidence presented concerning technological feasibility of the model year 2009 and later model year standards, considering lead time and the cost of implementation.

The legal framework for this decision stems from the waiver provision first adopted by

Congress in 1967, and later modified in 1977. Congress established that there would be only two programs for control of emissions from new motor vehicles – EPA emission standards adopted under the Clean Air Act and California emission standards adopted under its state law. Congress accomplished this by preempting all state and local governments from adopting or enforcing emission standards for new motor vehicles, while at the same time providing that California could receive a waiver of preemption for its emission standards and enforcement procedures. This struck an important balance that protected manufacturers from multiple and different state emission standards, and preserved a pivotal role for California in the control of emissions from new motor vehicles. Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards. Congress intentionally structured this waiver provision to restrict and limit EPA’s ability to deny a waiver, and did this to ensure that California had broad discretion in selecting the means it determined best to protect the health and welfare of its citizens. Section 209(b) specifies that EPA must grant California a waiver if California determines that its standards are, in the aggregate, at least as protective of the public health and welfare as applicable Federal standards. EPA may deny a waiver only if it makes at least one of three findings specified under the Clean Air Act (including whether California’s “protectiveness finding” noted above is arbitrary and capricious). Therefore, EPA’s role upon receiving a request for waiver of preemption from California is to determine whether it is appropriate to make any of the three findings specified by the Clean Air Act and if the Agency cannot make at least one of the three findings then the waiver must be granted. The three waiver criteria are properly seen as criteria for a denial – EPA must grant the waiver unless at least one of three criteria for a denial is met. This is different from most waiver situations before the Agency, where EPA typically determines whether it is appropriate to make certain findings

necessary for granting a waiver, and if the findings are not made then a waiver is denied. This reversal of the normal statutory structure embodies and is consistent with the congressional intent of providing deference to California to maintain its own new motor vehicle emissions program.

The three criteria for denial of a waiver are: first, whether California's determination that its standards are, in the aggregate, at least as protective as applicable Federal standards is arbitrary and capricious (Section 209(b)(1)(A)); second, whether California has a need for such standards to meet compelling and extraordinary conditions (Section 209(b)(1)(B)); and third, whether California's standards are consistent with Section 202(a) of the Act (Section 209(b)(1)(C)). EPA has consistently interpreted the waiver provision as placing the burden on the opponents of a waiver to demonstrate that one of the criteria for a denial has been met. In this context, since 1970, EPA has recognized its limited discretion in reviewing California waiver requests. EPA has granted over 50 waivers of preemption and has only fully denied one waiver request, the decision under reconsideration here.

In this case, California first requested that EPA waive preemption for its new motor vehicle greenhouse gas emission standards on December 21, 2005. EPA did not begin its formal consideration of the waiver request until after the *Massachusetts v. EPA* decision in April 2007, in which the Supreme Court determined that greenhouse gases are air pollutants within that term's meaning in the Clean Air Act. On March 6, 2008, after an administrative process that included two public hearings and a written comment period, EPA published its final decision denying California's request. EPA's waiver denial was based on the second waiver criterion, with EPA determining that California did not need its greenhouse gas standards to meet compelling and extraordinary conditions. EPA did not address the other two waiver criteria.

The reconsideration process started early this year. On January 21, 2009, California Governor Schwarzenegger sent a letter to President Obama, and the California Air Resources Board sent a letter to Administrator-designee Jackson, requesting the Agency reconsider the prior denial. After reviewing CARB's reconsideration request and the concerns raised by many different parties, EPA found that there were significant issues regarding the Agency's denial of the waiver. The denial was a substantial departure from EPA's longstanding interpretation of the Clean Air Act's waiver provision and EPA's history of granting waivers to California for its new motor vehicle emissions program. Many different parties, including California, states that have adopted or are interested in adopting California's standards, members of Congress, scientists, and other stakeholders, had expressed similar concerns about the denial of the waiver. Based on this, EPA believed there was merit to reconsidering its decision denying California's waiver request and on February 12, 2009, EPA published a **Federal Register** notice announcing its reconsideration of California's greenhouse gas waiver request. EPA held a public hearing on March 5, 2009, and received written comments through April 6, 2009.

EPA received substantial comment on each of the three waiver criteria. The entire administrative process in consideration of California's request provided the Agency with extensive legal argument and evidence, including oral testimony from three public hearings and nearly 500,000 written comments. This material has been substantive and invaluable in the Agency's review. EPA has received extensive comments from many states; federal, state and local officials; industry; environmental groups; scientists; and other stakeholders. The vast majority of comments EPA received were in support of the waiver.

After a thorough evaluation of the record, I am withdrawing EPA's March 6, 2008 Denial and have determined that the most appropriate action in response to California's greenhouse gas

waiver request is to grant that request. I have determined that the waiver opponents have not met their burden of proof in order for me to deny the waiver under any of the three criteria in section 209(b)(1). The findings I have made concerning each of the criteria are summarized below.

Concerning the criterion with respect to the protectiveness of California's standards in the aggregate, I find that the opponents of the waiver have not met their burden to demonstrate that California's determination was arbitrary and capricious. This evaluation can properly be made in situations where EPA has not issued its own standards, and this finding is appropriate whether or not comparison is made to EPA's current emissions standards or the National Highway Transportation Safety Administration's (NHTSA's) fuel economy standards, and whether or not it includes an evaluation of the real-world in-use effect of California's greenhouse gas standards on its broader motor vehicle program.

With respect to the criterion concerning the need for California's state standards to meet compelling and extraordinary conditions, I have found that the March 6, 2008 Denial was based on an inappropriate interpretation of the waiver provision. The March 6, 2008 Denial determined that Congress intended to allow California to promulgate only those state standards that address pollution problems that are local or regional, and this provision was not intended to allow California to promulgate state standards designed to address global climate change problems. In the alternative, EPA found that the effects of climate change in California are not compelling and extraordinary compared to the effects in the rest of the country.

The text of section 209(b) and the legislative history, when viewed together, lead me to reject the interpretation adopted in the March 6, 2008 Denial, and to apply the traditional interpretation to the evaluation of California's greenhouse gas standards for motor vehicles. If California needs a separate motor vehicle program to address the kinds of compelling and

extraordinary conditions discussed in the traditional interpretation, then Congress intended that California could have such a program. Congress also intentionally provided California the broadest possible discretion in adopting the kind of standards in its motor vehicle program that California determines are appropriate to address air pollution problems and protect the health and welfare of its citizens. The better interpretation of the text and legislative history of this provision is that Congress did not use this criterion to limit California's discretion to a certain category of air pollution problems, to the exclusion of others.

Under that interpretation, I cannot find that opponents of the waiver have demonstrated that California does not need its state standards to meet compelling and extraordinary conditions. The opponents of the waiver have not adequately demonstrated that California no longer has a need for its motor vehicle emissions program. I have also determined that even under the interpretation announced in the March 6, 2008 Denial, opponents of the waiver have not demonstrated that California does not need its greenhouse gas emission standards to meet compelling and extraordinary conditions. In addition, I have interpreted the "compelling and extraordinary conditions" criterion to not properly include a consideration of whether the impacts from climate change are compelling and extraordinary in California. Nevertheless, I have evaluated the comments received and evidence in the record and have determined that the opponents of the waiver have not met their burden in demonstrating why evidence such as the impacts of climate change on existing ozone conditions in California along with the cumulative impacts identified by proponents of the waiver (e.g., impacts on snow melt and water resources and agricultural water supply, wildfires, coastal habitats, ecosystems, etc.) is not compelling and extraordinary.

Concerning the criterion with respect to consistency of the greenhouse gas emission

standards with section 202(a), EPA has reviewed extensive comments and records received from California and from the regulated community concerning the kinds of technology needed to comply with California's standards, including costs and lead time, as well as evidence concerning the current compliance status of manufacturers. In light of the previous waiver denial, EPA specifically asked for comment on how lead time should be evaluated as part of the Agency's reconsideration. Based on all of that information, I cannot find that opponents of the waiver have demonstrated that the greenhouse gas emission standards are inconsistent with section 202(a). While I believe that a grant of the waiver for model year 2009 would not be a retroactive change in the law, to limit any potential concerns that have been raised by the manufacturers over their potential reliance upon EPA's previous waiver denial, my decision provides that CARB may not hold a manufacturer liable or responsible for any noncompliance civil penalty action caused by emission debits generated by a manufacturer for the 2009 model year.

EPA finds that those opposing the waiver request have not met the burden of demonstrating that California's regulations do not satisfy the statutory criteria of section 209(b). For this reason, I am granting California's waiver request to enforce its greenhouse gas motor vehicle emission regulations.