UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

	)	
California State Motor Vehicle	)	
Pollution Control Standards;	)	
Request for Waiver of Federal	)	**Docket No. OAR – 2006-0173**
Preemption; Opportunity for	)	
Public Hearing	)	
	)	

COMMENTS OF THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS (AIAM)

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I. Introduction

The Association of International Automobile Manufacturers ("AIAM") respectfully submits these comments in opposition to the California Air Resources Board's ("CARB") request for a waiver under Section 209(b) of the Clean Air Act for greenhouse gas emission regulations (the "GHG Regulations"). These comments will address two overarching reasons for AIAM's opposition to this waiver request. First, the GHG Regulations do not satisfy the criteria set forth in Section 209(b) of the Clean Air Act. Second, and more fundamentally, by seeking to address global warming through reduction in the amount of fossil fuel consumed by motor vehicles, the State of California is stepping into a field that has been long reserved to the federal government and is addressing an issue that requires a uniform, rational and coordinated federal approach rather than piecemeal state-by-state regulation.

Turning first to the requirements of Section 209(b), there are three independent reasons why these regulations do not qualify for a waiver of federal preemption. First, given the fact that EPA is currently in the process of addressing the regulation of greenhouse gas emissions, it is impossible to determine whether the California GHG Regulations are at least as protective as the federal standards that EPA may promulgate. Second, the State of California does not "need" the GHG Regulations to meet "compelling and extraordinary conditions" because (a) global climate change – the purported basis for these regulations – is not an "extraordinary" condition unique to the State of California, and (b) even if it were, these regulations will do nothing to meaningfully remedy the issue. Third, the GHG Regulations are inconsistent with Section 202(a) of the Clean Air Act in two ways. Initially, because the Administrator of EPA has not made an endangerment finding under Section 202(a)(1) of the Clean Air Act for greenhouse gases, 42 U.S.C. §7521(a)(1), which is a necessary prerequisite to EPA's authority to regulate such emissions under the Act, these regulations are currently inconsistent with EPA's authority to regulate. Moreover, the regulations go into effect in the 2009 model year – which can begin as early as January of 2008 – and become increasingly stringent thereafter, and compliance with the standards will require a substantial amount of lead time. However, the regulations were drafted in such a manner that they required the manufacturers to take steps to comply almost immediately upon their adoption, even though the regulations do not yet have a waiver of federal preemption. Requiring manufacturers to begin taking steps to comply before EPA has even considered the waiver application is contrary to both the letter and the spirit of Section 209(b) and deprives the manufacturers of the adequate lead time required under the Act.

Additional support for an EPA decision to deny the waiver can be found in the specific issues that the Agency asked parties to address in their comments. These consideration are: (1) whether California's characterization of this regulation as relating to global climate change should have an effect on EPA's evaluation of the statutory criteria; (2) the relevance of the Supreme Court's decision in *Massachusetts v. EPA*; and (3) the relevance of the fuel economy provisions of the Energy Policy and Conservation Act, 49 U.S.C. §§ 32901 *et seq.* ("EPCA"), to the consideration of this waiver request. Each of these issues is relevant to EPA's consideration of this petition and to California's authority to implement the regulations. They are therefore discussed within the relevant statutory framework and as factors independent of Section 209(b).

Indeed, the Agency correctly raised these questions because the standards under consideration are fundamentally different from any other standard for which the State of

California has previously sought waivers. For the first time, the State seeks to regulate motor vehicles emissions that do not cause direct and localized air pollution or adverse health impacts, but rather emissions that are believed to cause a worldwide phenomenon – global climate change. As such, the regulations conflict with an emerging coordinated inter-agency approach at the federal level directed by the President and contemplated by the Supreme Court to address climate change issues. Moreover, because the regulation of greenhouse gas emissions is at bottom a matter of reducing the consumption of fossil fuel, the GHG Regulations run head on into EPCA, the federal statute pursuant to which the National Highway Traffic Safety Administration ("NHTSA") administers the federal fuel economy program.

Thus, when standards are established limiting greenhouse gas emissions from motor vehicles, it must be done pursuant to a coordinated inter-agency approach at the federal level that takes into account the goals and purposes of a number of federal statutes as well as the various pertinent national and international initiatives. In contrast, the GHG Regulations currently before EPA are the product of the narrow regulatory action of one State. As such, these regulations both usurp the federal government's prerogatives in this field and threaten to balkanize the long-preserved unified national market for automobiles.

II. Statutory Criteria Under Clean Air Act Section 209(b)

The Clean Air Act contains a broad preemption provision in Section 209(a), 42 U.S.C. § 7543(a), to protect the national market for motor vehicles. Section 209(b) affords a limited exception to that preemption provision:

> (1) 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. § 7521(a)].
>
> (2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1)
>
> (3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this title [42 U.S.C. §§ 7521 et seq.].

Id. § 7543(b). AIAM will address each of these factors in turn.

A. It Is Impossible At This Time To Determine Whether The GHG Regulations Are At Least As Protective Of Public Health And Welfare As The Federal Standards Currently Under Consideration

Section 209(b) requires the State of California to determine that its State standards are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards," 42 U.S.C. § 7543(b)(1), and provides that EPA must deny the waiver application if that determination is arbitrary and capricious, *id.* § 7543(b)(1)(A). CARB argues that because there are no current federal standards for greenhouse gas emissions from motor vehicles, then *a fortiori* the GHG Regulations are more stringent then federal standards.

Even if CARB's formulation of the requirements of the Section 209(b)(1)(A) was correct, these regulations are fundamentally different from California emissions regulations for which EPA has granted waivers in the past, a significant distinguishing aspect of these regulations that will be discussed throughout these comments. These regulations address an issue of undeniable national and international importance and intrude into an area where there is a tremendous level of current federal activity. Pursuant to both *Massachusetts v. EPA* and Executive Order 13432, EPA is at this very moment addressing how greenhouse gas emissions are to be regulated from motor vehicles. That process will involve coordination among several federal agencies and will delicately balance a number of important, competing national goals. Until that process plays out, it is impossible for EPA to evaluate how the GHG Regulations will compare with federal regulation in this field.

The starting point for this discussion is *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). In that case, the Supreme Court held that Section 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions – principally carbon dioxide – from new motor vehicles if the Agency makes a finding that such emissions contribute to climate change and thus "'may reasonably be anticipated to endanger public health or welfare.'" *Id.* at 1460 (quoting 42 U. S. C. §7521(a)(1)). Relying on the broad definition of "air pollutant," the Court held that carbon dioxide is an "air pollutant" within the meaning of the Clean Air Act and that EPA therefore has the authority to regulate emissions of that substance. *Id.* at 1460-62. Significantly, however, the Court's ultimate holding was very narrow and did not "reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." *Id.* at 1463. Rather, the Court simply held that "EPA must ground its reasons for action or inaction in the statute." *Id.*

The *Massachusetts v. EPA* Court clearly contemplated activity at the federal level concerning the regulation of greenhouse gas emissions from motor vehicles. An important aspect of that decision is the recognition that that activity can and should be the product of a coordinated inter-agency effort. In addressing the question of whether the regulation of carbon dioxide emissions may conflict with the Department of Transportation's administration of the federal fuel economy program under EPCA, the Court observed that, although the obligations of EPA and DOT "may overlap," "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.* at 1462. Accordingly, the Court noted that, in the event that EPA makes an endangerment finding, the Agency possesses broad

discretion in determining what standards it should set, including coordination with its sister agencies. "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." *Id.*

In light of this recent directive, EPA is currently considering whether carbon dioxide emissions from motor vehicles "may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), and, determining the appropriate manner to regulate such emissions. The Executive's commitment to this course of action is evidenced by Executive Order 13432. Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines, 72 Fed. Reg. 27717 (May 14, 2007). In that order, the Bush Administration states that "[i]t is the policy of the United States to ensure the coordinated and effective exercise of the authorities of the President and the heads of the Department of Transportation, the Department of Energy, and the Environmental Protection Agency to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth." *Id.*

One significant aspect of whatever approach EPA decides to take is that it will be national in scope and therefore will apply to vehicles sold throughout the country. In contrast, the GHG Regulations only will apply to those vehicles sold in California and the Section 177 states. This, combined with the fact that the regulations are based on a fleet-average approach, is important. As will be discussed in greater detail below, the GHG Regulations essentially set fleet-average fuel economy requirements and require dramatic improvements in the fuel economy of the vehicles fleets sold in California and the Section 177 states. Compliance with these regulations will inevitably result in manufacturers adjusting their fleet mixes in these states so that they are weighted more heavily towards smaller, more fuel efficient vehicles. There is nothing in the regulations, however, that would prevent manufacturers from simultaneously adjusting their fleet mixes in the non-Section 177 states to sell more fuel intensive vehicles, as they are free to do under CAFE, which sets national fleet-average fuel economy levels. In the end, then, there could be no net decrease in carbon dioxide emissions nationwide. Indeed, CARB has recognized this flaw in the regulations in pleadings submitted to the court in the Eastern District of California, where CARB argues that there is no conflict between the GHG Regulations and the federal fuel economy program because:

> Suppose hypothetically that the effect of California's reduction of carbon dioxide emissions is that new light trucks sold in California in 2012 cannot, as a fleet, be less than 25 mpg but that the national CAFE standard is 22 mpg. This would not force NHTSA to set a national fuel economy standard of 25 mpg, as the automakers imply, because California's regulations would affect only California and those States that have adopted California's regulations. If NHTSA determined that complying with California standards would be economically impracticable for auto manufacturers, it might leave the nationwide standard at 22 mpg or even lower it.

Defendant and Defendant-Intervenors' Reply Memorandum of Points And Authorities In Support of Their Motion for Judgment on the Pleadings (ECF 335) at 16 n.3. Accordingly, the

state-by-state approach adopted by CARB will be inherently less protective than the national approach under consideration.

Therefore, while it is true that as of yet, "EPA has no greenhouse gas emission standards against which to compare Californians [sic]," *In the Matter of California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption*, Transcript of Hearing Before the U.S. Environmental Protection Agency at 63 (May 22, 2007) [hereinafter Arlington Hearings], it is also true that federal action with a national scope is under serious consideration. Because Section 209(b) requires California to make a determination that the state standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards, this Agency should deny California's request until it has had an opportunity to make an endangerment finding and set a federal regulatory course.

B. The State Of California Does Not "Need" The GHG Regulations "To Meet Compelling And Extraordinary Conditions"

Section 209(b)(1)(B) sets forth two prerequisites for a State emissions standard. First, the State of California must identify a "compelling and extraordinary condition" that it seeks to remedy by its emissions regulation. Second, the State must "need" the regulation in order to "meet" that condition. The GHG Regulations fail on both scores.

1. Global Warming Is Not A Compelling And Extraordinary Condition Specific To The State Of California

The availability of a waiver of preemption is statutorily bounded by the requirement that California's regulations be necessary "to meet compelling and extraordinary conditions" of the State. In its submissions to EPA concerning this waiver application, CARB has addressed only the "compelling" nature of global climate change and its impacts on the State of California, but none of its evidence demonstrates that *global* climate change in California is an "extraordinary" condition specific to a particular state.

In order to effectuate Section 209(b)(1)(B), both words, "compelling" and "extraordinary," must be given effect. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such a fashion that every word has some operative effect."). Since Congress used both words in the statute to describe the types of circumstances that the State of California was meant to address under Section 209(b), each word must have a meaning independent from the other. "Compelling" is defined as "demanding attention," Merriam Webster's Collegiate Dictionary 234 (10th Ed. 1996), whereas "extraordinary" is defined as "going beyond what is usual" or "exceptional to a very marked degree," *id.* at 413.

The "extraordinary" aspect of Section 209(b)(1)(B) embodies a concept of uniqueness. This reading of the prong effectuates the underlying purpose of the waiver provision, which was to allow California extra leeway in addressing the issue of localized urban air pollution. At the time of the enactment of Section 209(b), California's local air pollution problem was exceptional and different from the rest of the nation – both in kind and in degree. Therefore, Congress granted California authority to regulate automotive air pollutants because of "the unique

problems facing California as a result of its climate and topography," and in particular, the acute smog problem of Southern California. *See* H.R. Rep. No. 90-728; *see also id.* (statement of William B. Macomber, Assistant Secretary of State for Congressional Relations) (noting "the critical concern of California for air pollution control, which is prompted especially by the acute susceptibility of the Los Angeles basin to concentrations of smog"). California's authority was predicated on the finding that "only the State of California has demonstrated ***compelling and extraordinary circumstances sufficiently different from the Nation*** as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards." *Id.* (emphasis added); *see also id.* (statement of Reps. John E. Moss and Lionel van Deerlin) ("A look at the record should convince anyone of California's need for this exemption [from preemption] – and of the State's proven capabilities in the fight against smog"); *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 526 (2d. Cir. 1994) ("Only California, because its unique Los Angeles smog problem caused it to begin regulating auto emissions 'prior to March 30, 1966,' enjoys a statutory exemption allowing it to promulgate its own emission standards.").

This intent was reaffirmed in the Clean Air Act Amendments of 1977. As with the original waiver provision, California's ability to obtain a waiver was affirmed so that the State could address local air pollution issues unique to California. *Ford Motor Co. v. Environmental Protection Agency*, 606 F.2d 1293, 1294 (D.C. Cir. 1979) (observing that the 1977 amendments were to "give California more leeway to tailor its emission control program to its particular problems.").

Indeed, the very Federal Register cite CARB relies upon for its showing on the "compelling and extraordinary" prong demonstrates that Section 209(b)(1)(B) does not countenance state regulation to address a global phenomena to which California has no particular susceptibility. *See* December 21, 2005 Waiver Application, Attachment 2 at 15 (citing California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision, 49 Fed. Reg. 18887 (May 3, 1984)). There, EPA noted that

> a review of the legislative history of section 209 additionally reveals that the phrase "compelling and extraordinary conditions" primarily refers to certain general circumstances, ***unique to California***, … ***primarily responsible for causing its air pollution problem.***

49 Fed. Reg. at 18890. To amplify this point, EPA cited to multiple references in the legislative history showing that Section 209(b) was crafted to allow California to tackle its unique, local air pollution problems caused by the State's climate, topography and population. *See id.* (quoting 113 CONG. REC. 30948 discussing "the unique problems facing California as a result of numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns"); *id.* (quoting "remarks of Rep. Moss referring to 'unique' meteorological problems"); *id* (quoting "remarks of Rep. Corman: 'The uniqueness and the seriousness of California's problem is evident-more than 90 percent of the smog in our urban area is caused by

automobiles, and in the next 15 years the number of automobiles in the state will almost double'").[1]

Pursuant to this fundamental underlying purpose, every emissions standard for which the State of California has heretofore sought waivers has been directed at ameliorating the problem of localized air pollution caused by criteria and other health-related pollutants. *See*, *e.g.*, California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption for Amendments to California's Exhaust Emission Standards and Test Procedures for On-Road Motorcycles and Motorcycle Engines; Notice of Decision, 71 Fed. Reg. 44027 (Aug. 3, 2006) (granting a waiver for CARB's motorcycle emissions standards regulating hydrocarbons and oxides of nitrogen); California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption—Notice of Decision, 68 Fed. Reg. 19811 (Apr. 22, 2003) (granting a waiver of preemption for California's LEV II Amendments that regulate NMOG, carbon monoxide, nitrogen oxide, formaldehyde, and particulate matter); California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption—Notice of Decision, 67 Fed. Reg. 54180 (Aug. 21, 2002) (approving California's Onboard Refueling Vapor Recovery regulations that address hydrocarbon).

The GHG Regulations are fundamentally different. Assembly Bill 1493, the statute pursuant to which these regulations were enacted, was premised on findings by the California Legislature that "control and reduction of emissions of greenhouse gases are critical to slow the effects of global warming." Cal. Health & Safety Code § 43018.5. Yet as CARB's own evidence shows, global warming is not an "extraordinary" condition of one State – California**.** *See, e.g.*,

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[1] CARB cites to this waiver determination for the proposition that the only inquiry under Section 209(b)(1)(B) "is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions." December 21, 2002 Waiver Application, Attachment 2 at 15. AIAM does not agree that this is a correct interpretation of Section 209(b)(1)(B). The "standards" referenced in Section 209(b) are the standards that are before EPA for which a waiver is being sought. This is clear from the provision in Section 209(b) requiring the State to demonstrate that "the State standards ***will be***" in the aggregate, at least as protective of public health and welfare as applicable Federal standards. As part of the waiver inquiry, EPA must deny the waiver if "such State does not need such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(2)(B). The question, then, is whether <u>these</u> "standards" that are currently before EPA meet this criteria. Moreover, CARB's position proves too much, as the GHG Regulations are so separate and distinct from California's existing "program" so as to essentially constitute a separate "program" – in much the same way that the federal CAFE program is separate and distinct from EPA's Tier 2 program. CARB cannot devise an entirely separate emissions regulation program aimed at addressing an entirely different environmental concern from its existing program, and shield it from any scrutiny under Section 209(b)(1)(B) by purporting to place it under the umbrella of an existing program. To do so would effectively write Section 209(b)(1)(B) out of the statute once the State has any program in place.

CARB Slide Presentation at 24 (illustrating the increasing extent of Greenland seasonal ice melt); CARB Slide Presentation at 25 (citing the lost large chunks of ice shelves in the Antarctic Peninsula); CARB Slide Presentation at 26 (showing the alleged effect on Mount Kilimanjaro in Tanzania). In fact, almost all of CARB's presentation discussed alleged impacts of global warming outside of California, s*ee* CARB Slide Presentation at 27- 31 (discussing alleged effects in North America and the United States); *id.* at 33-34 (discussing "worldwide impacts").

Thus, by definition, global climate change is not a "compelling and extraordinary condition" in California. There is no evidence that the alleged environmental impacts of global warming – such as increased ambient temperature, increased sea levels, decreased spring run off, or increased "extreme events" – are any more "compelling" in California than in other states or that California's situation is "extraordinary" compared to other states.

2. The State Of California Does Not "Need" These Regulations To Address Global Warming

Even if global warming were a "compelling and extraordinary condition" under Section 209(b)(1)(B) for California, these regulations do not pass muster under that subsection because the State does not "need" them to "meet" the issue of global warming. The prerequisite that the State "need such State standards to meet" the compelling and extraordinary condition embodies a requirement that the implementation of the standards effectuate a result that will have an impact on the "condition" that is being addressed.

Here, it is undisputed that these regulations will have no measurable impact on either the ambient temperature or any of the downstream effects CARB asserts are impacted by the ambient temperature. This fact was demonstrated through evidence presented in the course of the Vermont and California challenges to the GHG Regulations and that has been presented to EPA during the course of the hearings on this waiver. *See, e.g.,* Deposition of Thomas Cackette (Chief Deputy Executive Officer of CARB) at 258:7-258:17 (testifying that he is not aware of any studies showing any measurable reduction of ambient temperature even if the GHG Regulations were to be adopted worldwide); Deposition of Charles Shulock (CARB's Program Manager for Motor Vehicle Greenhouse Gas Regulation) at 275:12-276:5 (testifying that CARB has not quantified any impacts that these regulations would have on sea level rise, spring run off, or snowpacks in California).

This is not to say, however, that nothing should be done to address global warming issues. As this Agency is aware, there are a number of national and international initiatives underway to address the issue. The point here is that Section 209(b) was crafted to allow California to develop solutions to solve the unique problems of air quality in the State. As any resident of Southern California over the past four decades could attest, CARB's actions in reducing the emissions of harmful and smog-forming pollutants have had a measurable and perceptible impact on improving the quality and healthfulness of the ambient air in the State. Addressing global warming, however, is entirely different. It will require coordinated national and international efforts on multiple fronts. Improving the fuel economy of cars in California – or even in California plus the Section 177 states – will not meaningfully or measurably affect the issue.

C. The GHG Regulations Are Inconsistent With Section 202(a) Of The Clean Air Act

This waiver further should be denied because the GHG Regulations are inconsistent with Section 202(a) of the Clean Air Act in two respects. First, because EPA has not made an endangerment finding with respect to greenhouse gases, the GHG Regulations exceed EPA's present authority to regulate under the Act. Second, because the GHG Regulations, which do not yet have a waiver of federal preemption, go into effect in the 2009 model year and become increasingly stringent thereafter, they do not provide adequate lead time for the manufacturers to implement the necessary technology.

1. The GHG Regulations Are Inconsistent With EPA's Authority To Regulate Greenhouse Gas Emissions

Section 202(a) requires the EPA to establish emission standards for "any air pollutant . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). As discussed in Section II.A *supra*, the Supreme Court in *Massachusetts v. EPA* did not hold that greenhouse gases, such as carbon dioxide, are in fact reasonably anticipated to endanger public health or welfare. That determination is left to the sound discretion of this Agency. Unless and until EPA makes an endangerment finding, carbon dioxide and other greenhouse gases are not subject to regulation under Section 202(a) of the Clean Air Act. And because these emissions are not subject to regulation under Section 202(a) of the Clean Air Act, then California's efforts to regulate these emissions at this time are not consistent with that provision.

2. The GHG Regulations Do Not Provide Adequate Lead Time To Permit Compliance

Further, the GHG Regulations also are inconsistent with Section 202(a) because they provide "'inadequate lead time to permit the development of the technology necessary to implement the new procedures, giving appropriate consideration to the cost of compliance within the time frame.'" *Motor & Equip. Mfs. Ass'n v. Nichols*, 142 F.3d 449, 463 n.13 (D.C. Cir. 1998) ("*MEMA II*") (quoting *Waiver of Federal Preemption*, 46 Fed. Reg. 26371, 26372 (May 12, 1981)).

The fatal problem with the lead time provided by the regulations is that, in drafting the regulations, CARB expected manufacturers to begin taking steps to comply as soon as the regulations were adopted – which was on September 23, 2004 – despite the fact that CARB did not submit this waiver application until December 21, 2005 and despite the fact that no waiver has yet been granted. Requiring manufacturers to begin complying with a state regulation that has not received a Section 209(b) waiver – and therefore is technically preempted under Section 209(a) – violates both the plain language of the Act as well as basic notions of fundamental fairness.

Section 209(a) provides "No State or any political subdivision 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." 42 U.S.C. § 7543(a) (emphasis added). Under the plain meaning of the statute, California is precluded from *adopting* a regulation concerning

motor vehicle emissions absent a waiver. Section 209(b), in turn, allows EPA to "waive application of this section" for California if the preconditions set forth in Subsection (b) are satisfied. However, until a waiver is granted, Section 209(a) prevents California from adopting its proposed standards. Based on this plain language, there can be only one proper procedure for the State of California to adopt and enforce a motor vehicle emissions standard: the State must draft its emissions regulation and submit it to EPA for a waiver *before it formally adopts the regulation*.[2] If EPA grants the waiver, California then can adopt the regulation and enforce the standards after allowing for sufficient lead time thereafter for the manufacturers to implement the necessary technologies.[3]

Any other reading of Section 209 would not only violate the statute's plain language but would be patently unfair to manufacturers. The rule espoused by California would put manufacturers to an impossible Hobson's Choice: either commit the resources necessary to comply with a California regulation before a waiver is granted – knowing full well that if the waiver is denied those resources never could be recovered – or take no action until the waiver is granted and be assured of being out of compliance when the regulation is ultimately enforced. It is true (as CARB will likely point out) that California has in the past enacted regulations that have gone into effect before the granting of a waiver. *See, e.g.,* California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption--Notice of Decision, 67 Fed. Reg. 54180 (Aug. 21, 2002) (waiver decision made in 2002 for onboard refueling vapor recovery regulations that were phased in beginning in 1998). However, those past waivers were for California regulations that fell squarely within the State's authority to regulate under Section 209(b) and where the granting of the waiver was largely a foregone conclusion. Here, in stark contrast, CARB has enacted a regulation that every manufacturer that would be bound by them firmly considers to be beyond the State's authority to regulate.

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[2] AIAM does not suggest that EPA should be reviewing draft California regulations. Rather, the State must submit final regulations that have gone through the regulatory process. What California cannot do, however, is formally adopt the regulations – and thereby start the lead time click ticking – before a waiver has been granted. Nor may California enforce its standards before a waiver is granted.

[3] CARB will likely rely on *Motor Vehicle Manufacturers Association v. New York State Department of Environmental Conservation*, 17 F.3d 521 (2d Cir. 1994) for the proposition that lead time starts when the regulation is adopted. That case, however, pertained to Section 177 of the Clean Air Act and not Section 209(b). Unlike Section 209(a), Section 177 provides that "any State which has plan provisions approved under this part ***may adopt and enforce*** for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines . . . " 42 U.S.C. § 7507. Section 209, in contrast, provides that "no State or any political subdivision 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." *Id.* § 7543(a). By using the disjunctive, Congress intended that California be preempted from adopting a motor vehicle regulation until it has a waiver for such regulation.

What, then, are manufacturers supposed to do when faced with a regulation such as this one, which would require an unprecedented level of resources and investment to comply and which would require a substantial amount of lead time? As will be discussed in greater detail below, compliance with the GHG Regulations requires steep reductions in carbon dioxide emissions. Expressed in a different metric, they will require dramatic improvements in the fuel economy of the manufacturers' fleets. Undisputed evidence presented in trial in Vermont established that the emissions limits set forth in these regulations will effectively require the following fleet average fuel economy levels for the Passenger Car/Light Duty Truck 1 category:

Model Year	Cars plus LDT1s
2009[4]	27.6 mpg[5]
2010	29.6 mpg
2011	33.5 mpg
2012	38.4 mpg
2013	39.4 mpg
2014	40.3 mpg
2015	42.0 mpg
2016	43.7 mpg

Analyses by CARB in the rulemaking record show that, in order to meet these new standards, automobile manufacturers must redesign the cars and trucks they sell to incorporate a number of advanced fuel savings technologies. CARB has determined in its Staff Report and Initial Statement of Reasons (the "ISOR") that automobile manufacturers will need to incorporate a "near-term technology package" into their cars and trucks. The "near-term technology package" includes a number of automotive technologies that when used in various combinations lead to increased fuel economy and reductions in carbon dioxide emissions. The extent to which a particular manufacturer will be compelled to include a "near-term technology package" on its cars and trucks depends on the baseline fuel economy of that manufacturer's fleet. ISOR at 116-17. CARB's most recent analysis of this issue is contained in its Addendum Presenting and Describing Revisions to the Initial Statement of Reasons on September 10, 2004 (the "Revisions to ISOR") at 12, Revised Table 6.2-3. According to this analysis, CARB has determined that Honda will have to incorporate a "near-term technology package" on 24% of its PC/LDT1 fleet in order to meet the 2011 model year standard, while Nissan and Toyota will need to incorporate "near-term technology package[s]" on 49% and 50% of their PC/LDT1

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4 A model year can commence as early as January of the previous calendar year. Thus, for example, the 2009 model year actually can begin in January 2008.

5 By comparison, the current federal fuel economy standard for passenger cars is 27.5 mpg.

fleets, respectively. *Id.* By the following year, CARB's analyses suggest that these three manufacturers will need to incorporate a "near-term technology package" on 81%, 93%, and 99% of their respective PC/LDT1 fleets. *Id.*

The amount of time required by manufacturers to make these necessary changes is substantial. EPA does not need to resolve the disputed issue[6] of the amount of lead time required because California has already admitted that it will be significantly longer than CARB maintained at the time of its GHG rulemaking. Although CARB based the GHG Regulations on an assumed four-year lead time, *see* ISOR at 2 ("The phase-in period for both the near term and mid term standards has been extended to four years"), the testimony of CARB staff presented in the *Green Mountain Chrysler-Plymouth-Dodge-Jeep* matter establishes that these regulations are so stringent, the required lead time will actually prove much longer. For example, CARB's designated representative on lead-time issues, Steve Albu, testified that it will actually take some manufacturers ***up to six years*** in order to bring their fleets into compliance with the 2011 model year standards and ***up to seven years*** to comply with the 2012 model year standard. Deposition of Steve Albu at 258:20-259:10; 272:15-273:19.

A recent analysis conducted by NHTSA concerning the lead time necessary to integrate fuel savings technologies into motor vehicle fleets agrees with these more realistic estimates of Mr. Albu. See Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566 (Apr. 6, 2006) (the "Light Truck Standards"). In setting these recent fuel economy standards for light trucks, NHTSA assumed a six-year phase-in period to "reduce the economic impact of applying technology by providing greater flexibility as to when fuel economy improvements are expected." *Id.* at 17590. Indeed, the aggressiveness of the phase-in period was the subject of numerous comments and received very careful consideration by NHTSA, as demonstrated by the following discussion in the Federal Register notice:

> The agency recognizes that vehicle manufacturers must have sufficient lead time to incorporate changes and new features into their vehicles. In making its lead time determinations, the agency considered the fact that vehicle manufacturers follow design cycles when introducing or significantly modifying a product. For the final rule, the agency based our lead time assumptions more closely on the findings of the NAS report, typically relying on the mid-point of the NAS range for full market penetration, i.e., 6 years or approximately a 17 percent phase-in rate. As illustrated in Appendix B of this document, and as discussed further

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[6] For instance, evidence presented by AIAM members during the course of the *Green Mountain Chrysler-Plymouth-Dodge-Jeep* matter also demonstrates that complying with the strict fuel economy requirements set by the regulations presents such enormous challenges and requires such substantial lead times that it would not be feasible to comply without severely restricting the sale of larger, more fuel intensive vehicles. Deposition of Glenn Choe (Nissan) at 242:5-243:1; Deposition of Robert Bienenfeld (Honda) at 188:2-16; 190:12-24; and Deposition of Michael Love (Toyota) at 223:22-224:24; 230:5-231:16.

> below, the agency made numerous adjustments to timing when applying technologies in order to address lead time concerns.

Id. at 17626.

Therefore, given (a) the fact that the regulations go into effect in the 2009 model year – which can commence as early as January 2008 – and become progressively more stringent in the following model years, and (b) the fact that the regulations require substantial lead times to comply, it is clear that CARB intended for manufacturers to start taking the necessary steps to comply with the regulations as soon as they were adopted in September 2004. And, they were expected to do so despite their firm convictions that these regulations are preempted under EPCA[7] and also are ineligible for a waiver under the Clean Air Act. Nothing in Section 209(b) can be read to require manufacturers to comply with a regulation that has not received a waiver of Clean Air Act preemption.

III. Specific Questions Raised By EPA

EPA also has requested comments on three issues: (1) whether California's characterization of this regulation as relating to global climate change should have an effect on EPA's evaluation of the Section 209(b) criteria; (2) the relevance of the Supreme Court's decision in *Massachusetts v. EPA* in evaluating these criteria; and (3) whether the fuel economy provisions of EPCA are relevant to the EPA's consideration of this petition or to California's authority to enact the GHG Regulations.

EPA has asked commentators to address these issues "[w]ithin the context of these statutory criteria." California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007). AIAM has discussed above how the Section 209(b) criteria are impacted by the fact that the GHG Regulations seek to address global climate change rather than local air quality and *Massachusetts v. EPA*'s mandate for a coordinated approach to addressing the regulation of greenhouse gas emissions from motor vehicles at the federal level.

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[7] Indeed, it is entirely reasonable that manufacturers would be reluctant to immediately expend resources to comply with these regulations given the undeniable fact that they are preempted under EPCA and are therefore invalid. After all, manufacturers obtained a preliminary injunction against a prior attempt by CARB to regulate fuel economy through limiting emissions of carbon dioxide after arguing that the standards were preempted by EPCA. *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 at *9 (E.D. Cal. June 11, 2002) (amendments to ZEV mandate were enjoined because they "clearly have the purpose of regulating the fuel economy performance of" motor vehicles and "will have the practical effect of regulating fuel economy."). Moreover, NHTSA has determined that state greenhouse gas regulations are both expressly and impliedly preempted under EPCA, as will be discussed in greater detail below.

However, the Agency's request for comments on these issues also raises broader concerns, since the full consideration of these matters would arguably require EPA to look beyond the narrow parameters of Section 209(b) in deciding the waiver request. For example, considerations such as whether EPA should consult with NHTSA in deciding to grant or deny the waiver or whether the GHG Regulations are expressly preempted by EPCA fall outside of a narrow construction of the Section 209(b) criteria. Consideration of these issues, therefore, raises two questions. First, should EPA consider questions beyond those explicitly set forth in Section 209(b) in evaluating a California waiver request? Second, if EPA decides to address such issues, then how do they impact EPA's decision of whether to grant or deny the waiver application?

A. EPA Should Consider These Broader Factors In Deciding The Waiver Request

In light of the sweeping and far-reaching effect that the proponents of the regulations attribute to an EPA decision to grant a waiver, EPA may conclude that it is appropriate for the Agency to consider these broader factors. As this Agency is aware, litigation is currently pending in the Eastern District of California, the District of Vermont, and the District of Rhode Island challenging these regulations on the grounds that they are expressly preempted under EPCA's preemption provision, 49 U.S.C. § 32919(a), and are also impliedly preempted because they conflict with NHTSA's administration of the federal fuel economy program. To avoid application of well-established preemption principles in these proceedings, California and the other proponents of the GHG Regulations have advanced a "federalization" theory. In essence, the proponents argue that if EPA grants a waiver, then that signifies express EPA approval of the regulations. And once a waiver is granted, they argue, the regulations then receive "federal status" because "the California standard is a federal standard under the Clean Air Act," thus taking "them out of the realm of preemption."[8] They have further argued that waived California regulations "attain a federal status under the Clean Air Act . . .[and] standards which are waived under 209(b) by EPA are federal standards for the purposes of EPCA. They are not state standards anymore."[9] This argument also has been raised by at least one proponent of the waiver during the public hearings. *See* Arlington Hearing, *supra*, at 189 ("[W]hen EPA approves California emission standards by giving them a 209(b) waiver, the fuel economy law deems them to be Federal standards. . . . they are not State standards subject to preemption under EPCA.") (testimony of David Donniger, National Resources Defense Council).

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[8] Transcript of Mar. 2, 2007 Motions Hearing & Pretrial Conference in *Green Mountain Chrysler-Plymouth-Dodge et al. v. Crombie*, United States District Court for the District of Vermont Case No. 2:05-cv-302 at 13:7-9; 15:23-25.

[9] Transcript from Apr. 4, 2007 Hearing to Discuss U.S. Supreme Court Decision In Massachusetts v. EPA & Testimony of Mr. Duleep in *Green Mountain Chrysler-Plymouth-Dodge et al. v. Crombie*, United States District Court for the District of Vermont Case No. 2:05-cv-302 at 25:18-23.

However, at the same time the proponents of the GHG Regulations are arguing for this sweeping effect of an EPA waiver, they are also arguing to this Agency that its authority to decide the waiver request is very "limited in scope." For example, in its December 21, 2005 submissions on the waiver request, CARB argues that EPA's review is narrowly confined to the criteria specifically enumerated in Section 209(b) and that EPA may not consider extra-statutory factors such as preemption under another statute. *See* Attachment 2 to Waiver Request at 10 ("U.S. EPA cannot apply any additional criteria – such as potential conflicts with other law – in evaluating California's waiver requests."). CARB further states that

> CARB anticipates that manufacturers will nevertheless attempt to raise issues in this proceeding concerning preemption under the federal Energy Policy Conservation Act (EPCA). . . . The CARB notes, however, that such issues are both outside the scope of the Administrator's review here as discussed in the text, and are irrelevant for the consistency analysis . . . .

Id. at 10 n.11. This position was articulated a number of times at the public hearings. *See* Arlington Hearing, *supra*, at 49 ("EPA's review is limited in scope to these three issues: protectiveness, California conditions justifying our motor vehicle program, and consistency with technical feasibility and lead-time concerns.") (testimony of Robert Sawyer, Chair of the Air Resources Board); *id* at 51 ("The three issues [in Section 209(b)] . . . are the only issues upon which the EPA can base its waiver decision. . . . EPA may not inject policy considerations or its assessments of the constitutionality of a California standard, or the effect of other statutes.").

The proponents' argument that EPA cannot consider whether the GHG Regulations are preempted by EPCA cannot be reconciled with their argument that a waiver renders the regulations immune to preemption under that statute. It therefore is clear that the proponents are trying to effectively foreclose <u>any</u> court or agency from determining whether the GHG Regulations are preempted by EPCA. According to them, EPA cannot consider the question in deciding the waiver, and if the waiver is granted, then no court could decide the preemption issue because as a matter of law there is no preemption.

It is true, as CARB points out, that in past waiver decisions "the [EPA] Administrator has consistently held since first vested with the waiver authority [that] his inquiry under section 209 is modest in scope." *Motor & Equip. Mfrs. Ass'n v. Environmental Protection Agency*, 627 F.2d 1095, 1119 (D.C. Cir. 1979) ("*MEMA I*"). It is also true, however, that the scope of *MEMA I* is open to interpretation. On the one hand, CARB argues that *MEMA I* stands for the proposition that "U.S. EPA's review thus begins and ends with section 209(b)." *See* December 21, 2005 Waiver Request, Attachment 2 at 10. On the other hand, the text of *MEMA I* would suggest that while EPA is not ***required*** to look beyond the Section 209(b) criteria to consider whether the proposed California regulation violates the Constitution, "nothing in section 209 categorically forbids the Administrator from listening to constitutionally-based challenges." *MEMA I*, 627

F.2d at 1115.[10] Indeed, the *MEMA I* court specifically left this question open: "[w]e need not decide here whether the Administrator is authorized to deny a waiver on the ground that the proposed California regulations are on their face violative of the Constitution." *Id.* at 1114 n.41.

In light of the proponents' position concerning the far-reaching impact of a waiver, it is incumbent upon EPA to determine whether its review of this waiver application will be narrowly confined to the strict statutory criteria of Section 209(b) – as the waiver proponents claim it should be – or whether the Agency also will consider whether the regulations are preempted under EPCA or otherwise interfere with NHTSA's implementation of the federal CAFE program.[11] If the Agency chooses the former course, then it should explicitly state in its waiver decision that it is not addressing express preemption or conflict with EPCA, and that those question are best left to the courts where the issue has been raised. EPA also needs to reject categorically CARB's "federalization" claim and make it clear that a waiver does not magically transform a state regulation into federal law. If, on the other hand, EPA were to consider preemption under EPCA, EPA should deny the waiver for the reasons set forth below.[12]

EPA could also conclude that consideration of these other factors is also appropriate here because of the unique circumstances surrounding this waiver request. As discussed above, California is not seeking to alleviate localized concerns of ambient air pollution (as it has over the past half century of its regulatory program), but rather is trying to address global climate

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[10] Whether the GHG Regulations are preempted by EPCA is at bottom a question under the Supremacy Clause of the U.S. Constitution. U.S. Const. art. VI, cl. 2*; see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (a "fundamental principle of the Constitution is that Congress has the power to preempt state law.").

[11] AIAM does not suggest that EPA should conduct an independent assessment of whether the GHG Regulations conflict with NHTSA's implementation of EPCA. Those policy considerations have been delegated to the Department of Transportation.

[12] CARB's citation to *Massachusetts v. EPA* for the proposition that this Agency cannot consider factors outside the statutory text is misguided. *See* CARB Slide Presentation at 12 (arguing that *Massachusetts v. EPA* "reaffirms [the] principle that EPA's review [in the waiver determination] is limited to the three issues in Clean Air Act §209(b)."). At most, that decision stands for the proposition that EPA cannot ignore the criteria Congress laid out in Section 209(b). It does not, however, support the notion that those enumerated criteria set forth the outer bounds of what EPA may consider. Indeed, other portions of that opinion make it clear that EPA has the flexibility to consider its consultation with other agencies in the context of Section 202. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007) ("Congress authorized the State Department – not EPA – to formulated United States foreign policy with reference to environmental matters relating to climate. EPA has made no showing that it issued the ruling in question here after consultation with the State Department."); *see also id.* at 1462 ("EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.").

change. Consequently, in contrast to the regulation of traditional pollutants, such as hydrocarbons and oxides of nitrogen, which have direct and local impacts on ambient air, regulation seeking to reduce emissions of carbon dioxide will have no direct impact on air quality in California. Unlike traditional pollutants, carbon dioxide does not remain localized and close to the earth's surface. Rather, it disperses evenly throughout the atmosphere, such that emissions of carbon dioxide in California have no greater impact in that State than elsewhere in the United States or indeed the world. Conversely, emissions of carbon dioxide in Asia have as much of an impact in California as do carbon dioxide emissions from sources within the state.

The regulation of greenhouse gas emissions therefore requires a coordinated national approach rather than a patchwork of state approaches. This is especially true for the automobile industry where Congress – through the preemption provisions of EPCA and the Clean Air Act – has recognized the need for a uniform, nationwide approach for standards that impact the design and manufacture of automobiles.

B. Considerations Of Preemption Under EPCA And Inter-Agency Coordination Compel A Denial Of This Waiver

1. NHTSA Has Already Determined That The Regulation Is Preempted Under EPCA

Under well-settled principles of express and implied conflict preemption, the GHG Regulations cannot stand. First, the GHG Regulations are expressly preempted under Section 32919(a) of EPCA. That provision states:

> When an average fuel economy standard prescribed under this chapter [49 U.S.C. §§ 32901 et seq.] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation ***related to*** fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter [49 U.S.C. §§ 32901 *et seq.*].

49 U.S.C. § 32919(a). The broad nature of the term "related to" as it is used in this express preemption clause is well established by Supreme Court jurisprudence. *See Morales v. Trans Word Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("the words thus express a broad pre-emptive purpose.").

Here, the federal agency that is responsible for the implementation of the federal fuel economy program under EPCA has determined that state greenhouse gas regulations are expressly preempted under that statute. Light Truck Standards, 71 Fed. Reg. at 17654. In the preamble to the Light Truck Standards, NHTSA concluded that "[f]uel consumption and CO2 emissions from a vehicle are two 'indissociable' parameters" such that "fuel economy is directly related to emissions of greenhouse gases such as CO2." *Id.* at 17659.

Carbon dioxide is a natural and unavoidable byproduct of combustion of carbon-containing fuels such as gasoline, coal, and natural gas. The relationship between fuel consumption and carbon dioxide emissions for a given fuel is fixed and depends only on the carbon composition of the fuel that is burned. Each gallon of gasoline contains approximately 5.5 pounds (or 2,495 grams) of carbon. *Id.* at 17659. When that carbon is combusted, the 2,495 grams of carbon combines with approximately 6,653 grams of oxygen from the atmosphere and

becomes approximately 9,148 grams of carbon dioxide. *Id.* Thus, "[b]ased on its content (carbon and hydrogen), as a matter of basic chemistry, the burning of a gallon of gasoline produces about 20 pounds [9,148 grams] of CO2." *Id.* at 17659. Fuel economy, therefore, is determined pursuant to EPA guidelines by measuring the exhaust emissions of carbon dioxide per mile traveled, along with the other carbon-containing compounds in the vehicle's exhaust, carbon monoxide and hydrocarbons. 40 C.F.R. § 86.144-94. However, "CO and HC play an increasingly and extremely minor role in the measurement of fuel economy, such that fuel economy has become virtually synonymous with CO2 emission rates." Light Truck Standards, 71 Fed. Reg. at 17660.

Moreover, carbon dioxide is fundamentally different from other automotive emissions that are commonly regulated by EPA and the State of California in that there is no "bolt on" aftertreatment device that can reduce emission. The only way for a manufacturer of gasoline-powered automobiles to reduce tailpipe emissions of carbon dioxide is to improve the fuel economy of the vehicle so that it burns less gasoline per mile driven. *Id*. at 17656 ("the only technologically feasible, practicable way for vehicle manufacturers to reduce CO2 emissions is to improve fuel economy.").

Because of this direct and inextricable relationship between carbon dioxide emissions and fuel economy, NHTSA has concluded that state greenhouse gas regulations are expressly preempted because they are "related to fuel economy standards." That agency concluded:

> In mandating federal fuel economy standards under EPCA, Congress has expressly preempted any state laws or regulations relating to fuel economy standards. A State requirement limiting CO2 emissions is such a law or regulation because it has the direct effect of regulating fuel consumption. CO2 emissions are directly linked to fuel consumption because CO2 is the ultimate end product of burning gasoline. Moreover, because there is but one pool of technologies for reducing tailpipe CO2 emissions and increasing fuel economy available now and for the foreseeable future, regulation of CO2 emissions and fuel consumption are inextricably linked. It is therefore NHTSA's conclusion that such regulation is expressly preempted.

Id. at 17654.[13]

NHTSA also has concluded that allowing states to regulate fuel economy separately through the guise of limiting carbon dioxide emissions would frustrate its implementation of the CAFE program. In setting fuel economy standards, NHTSA strives to balance a number of competing criteria, such as conserving energy, ensuring consumer choice, avoiding adverse

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[13] To the extent that EPA disagrees with this legal conclusion, then the matter should be referred to the Office of Legal Counsel at the Office of Management and Budget. Executive Order No. 12146, 44 Fed. Reg. 42657 (July 18, 1979); Executive Order No. 12608 § 15, 52 Fed. Reg. 34617 (Sept. 9, 1987); Executive Order No. 13286, 68 Fed. Reg. 10628 (Feb. 28, 2003).

economic impacts to the automobile industry, protecting employment in the automobile industry, and ensuring vehicle safety. NHTSA has therefore determined:

> A State requirement limiting CO2 emissions is also impliedly preempted under EPCA. It would be inconsistent with the statutory scheme, as implemented by NHTSA, to allow another governmental entity to make inconsistent judgments made about how quickly and how much of that single pool of technology can and should be required to be installed, consistent with the need to conserve energy, technological feasibility, economic practicability, employment, vehicle safety and other relevant concerns.

Id. As NHTSA has concluded, "the State GHG standard, to the extent that it regulates tailpipe CO2 emissions, would frustrate the objectives of Congress in establishing the CAFE program and conflict with the efforts of NHTSA to implement the program in a manner consistent with the commands of EPCA." *Id.* at 17667.

Although there are a number of specific ways in which the GHG Regulations conflict with EPCA,[14] perhaps the most direct conflict – and most significant burden upon the manufacturers – is that it will lead to a balkanization of fuel economy regulation and thus upset the nationwide fleet averaging approach established by Congress in EPCA. The nationwide fleet averaging approach was adopted precisely to "ensure wide consumer choice" by leaving "maximum flexibility to the manufacturer" to produce a "diverse product mix" while meeting the applicable CAFE standards. S. Rep. No. 94-179, at 6 (1975). Thus, under EPCA a manufacturer may balance its sales of larger, more fuel intensive fleets in one part of the country with the sales of smaller and more fuel economical vehicles in another part. The ability to do so provides manufacturers with valuable flexibility and ensures that a wide choice of vehicles will be available to consumers no matter where they live. These regulations, however, would establish separate and independent fuel economy regimes in every state that adopts them, requiring manufacturers to balance their fleets separately in each one. This problem is particularly acute in the small states that have adopted the GHG Regulations, such as Vermont and Rhode Island,

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[14] For example, in the recent Light Truck Standards, NHTSA adopted a "footprint" approach whereby a vehicle's fuel economy "target" is a function of its size. NHTSA embraced this approach to promote EPCA's competing goals, such as maintaining consumer choice and ensuring vehicle safety. *See, e.g.*, Light Truck Standards, 71 Fed. Reg. at 17570 ("Reformed CAFE. . .more fully respects economic conditions and consumer choice" because it "does not force vehicle manufacturers to adjust fleet mix toward smaller vehicles unless that is what consumers are demanding"); *id.* at 17568 ("In addition to the improved energy savings, this CAFE program enhances safety by eliminating the previous regulatory incentive to downsize vehicles and by raising the light truck standards so that there is no regulatory incentive from the CAFE program to design small vehicles as light trucks instead of passenger cars."). By setting a single uniform average for each fleet, the GHG Regulations pose an inherent conflict with NHTSA's implementation of the goals of EPCA.

where subtle shifts in the fleet mix within the state could have dramatic impacts on fleet-wide fuel economy.

Pursuant to these well-settled principles of express and conflict preemption, the GHG Regulations are unquestionably preempted under EPCA. Accordingly, if EPA were base its waiver determination upon a consideration of federal preemption, then it would be compelled to deny the waiver.

2. Massachusetts v. EPA *And Executive Order 13432 Envision Inter-Agency Coordination*

The issue of the inherent conflict between NHTSA's administration of the federal fuel economy program and the regulation of motor vehicle greenhouse gas emissions by another body was addressed by the Supreme Court in *Massachusetts v. EPA*. Two aspects of that opinion bear noting here.

First, the Supreme Court's decision in *Massachusetts v. EPA* did not address the issue of federal preemption of state authority to regulate greenhouse gas emissions. Rather, the Supreme Court determined that EPA has concurrent <u>federal</u> authority with the Department of Transportation to regulate carbon dioxide emissions from motor vehicles. The Supreme Court did not address the entirely different question of <u>state</u> authority to regulate greenhouse gas emissions, or whether such efforts are preempted by EPCA under 49 U.S.C. § 32919(a). Nor did the Court consider whether a state has free reign to enact a regulation that conflicts with EPCA's multifaceted goals or is flatly contrary to that statute's express preemption provision.

Second, although the Court held that EPA's authority to regulate carbon dioxide emissions "may overlap," with the Department of Transportation's regulation of fuel economy, the Court further observed that "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." 127 S. Ct. 1438, 1462 (2007). In the event that EPA determines that emissions of greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), the Court noted that the Agency possesses broad discretion in determining what standards it should set, including coordination with its sister agencies. "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." 127 S. Ct. at 1462.

In an apparent response to these observations by the Supreme Court, the Bush Administration issued Executive Order 13432 on May 14, 2007. That Executive Order states that "[i]t is the policy of the United States to ensure the coordinated and effective exercise of the authorities of the President and the heads of the Department of Transportation, the Department of Energy, and the Environmental Protection Agency to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth." Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines, 72 Fed. Reg. 27717 (May 14, 2007).

Both *Massachusetts v EPA* and the Executive Order envision a coordinated inter-agency approach to addressing the manner in which the federal government should enact motor vehicle emissions standards to address climate change. This approach is necessary to ensure that the goals and purposes of other federal statutes such as EPCA do not become abrogated by whatever regulatory approach is selected.

Although neither *Massachusetts v EPA* nor the Executive Order expressly direct EPA's decision on the pending waiver request, these two authorities do inform EPA's decision on the waiver request because, if they are to be given any effect, the waiver must be denied. In crafting its own GHG Regulations, the State of California neither consulted nor coordinated with NHTSA or any other federal agency as the Supreme Court and the Executive Order clearly contemplated would occur before GHG standards went into effect governing automobiles. The fact that these regulations would frustrate the coordinated national approach that is currently being developed at the federal level is beyond doubt. These regulations have been currently adopted by 12 states,[15] which together represent close to half the new vehicle market. By granting California's waiver request, EPA would be effectively ceding to California the responsibility for balancing all of the national concerns that are implicated by enhanced fuel economy standards – a task the State admittedly did not perform in enacting these regulations. This conclusion is reinforced by NHTSA's stated opinion that the GHG Regulations would frustrate its efforts to implement the federal fuel economy program in a manner consistent with the commands of EPCA.

IV. Conclusion

The issues of global climate change and the environmental impacts of greenhouse gas emissions are matters of broad national concern. They are not issues which Congress intended for the State of California to address on its own under Section 209(b) of the Clean Air Act. Rather, these matters rightfully belong at the federal level so that the government can coordinate a national approach to the issue of climate change that takes into account all of the relevant considerations. In enacting the GHG Regulations, CARB did not take into account the extent to which the regulations would conflict with the federal government's prerogative in setting national fuel economy standards, and did not give due consideration to Congress's goals in enacting EPCA. Furthermore, these regulations usurp EPA's authority to chart a national course in addressing the climate change issue, as it is currently in the process of doing pursuant to the directives in *Massachusetts v. EPA* and Executive Order 13432. Therefore, AIAM respectfully requests that the application of the State of California for a waiver of section 209(b) preemption be denied.

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[15] The states other than California are Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.