

EPA Releases Final Decision Denying California's Waiver Request

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On February 29, 2008, the U.S. Environmental Protection Agency (EPA) released its final decision denying California's request for a waiver of preemption for its motor vehicle greenhouse gas (GHG) emissions standards. EPA, *Federal Register Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles* (February 29, 2008) (Waiver Denial). Although EPA had already alerted California to its decision to deny the request, this document represents the Agency's "final action" and "reflects EPA's entire decision to deny the waiver." *Id.* at 6, n. 8. EPA based its decision on a finding that there are no "compelling and extraordinary conditions" in California to warrant a state-specific GHG emission standard.

California submitted its waiver request pursuant to Section 209(b) of the Clean Air Act ("CAA"), which prohibits states from adopting emission standards for new motor vehicles or motor vehicle engines but provides a mechanism for a state to adopt such standards if it obtains a waiver from EPA. California was seeking such a waiver to implement its 2002 motor vehicle emissions law, which requires automakers to cut GHG emissions starting with the 2009 model year by 25 per cent from cars and light trucks and by 18 per cent from sport utility vehicles. Under CAA Section 209(b)(1), EPA may not grant a waiver if it finds that: (A) a state's determination that its emissions standard would be at least as protective of public health and welfare as applicable federal standards was arbitrary and capricious; (B) the state does not need its GHG standards to meet "compelling and extraordinary conditions"; or (C) the state's standards are inconsistent with CAA Section 202(a), the federal motor vehicle emission standards. EPA denied the waiver for California's GHG emissions standards on the basis of the "compelling and extraordinary conditions" criteria. *See Waiver Denial* at 7.¹

EPA first rejected California's argument that, because EPA previously determined that California needs its own motor vehicle emission standards program to address compelling circumstances, EPA need not consider whether California needs the particular standards at issue in this waiver request. Instead, EPA reasoned that California's GHG program was designed to address a wholly different problem than California's previous motor vehicle emission programs, which targeted local air pollution problems. Therefore, EPA concluded that it must review the purpose of

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Section 209(b)(1)(B) as applied to the “new circumstance of California’s intent to regulate greenhouse gases.” *Id.* at 13.

Acknowledging that EPA’s Section 209(b)(1)(B) review has been fairly cursory in the past, EPA asserted that this was largely because “the fundamental factors leading to air pollution problems ... have not changed over time and over different local and regional air pollutants” and that these “fundamental factors” (namely topography, climate, and number of cars) have not changed for California’s local and regional air pollution problems. *Id.* at 16. By contrast, EPA concluded that the “fundamental factors” perform a different “causal function” with respect to the issue of elevated concentrations of GHG. *Id.* at 17. Therefore, EPA would not apply its historical approach to considering waiver requests for local or regional air pollution problems to California’s GHG emissions program. *Id.* at 18. EPA also reviewed the legislative history of the CAA and determined that it further supported considering the GHG emissions program separately from California’s current motor vehicle emissions program, which is designed to address local and regional problems. *Id.* at 20.

In examining California’s GHG program under Section 209(b)(1)(B), EPA looked at whether GHG emissions from California motor vehicles and the local climate and topography of California are the fundamental factors for elevated concentrations of GHG. *Id.* at 21. EPA interpreted CAA Section 209(b)(1)(B) to be limited to situations where California’s “air pollution problems have their basic cause, and therefore their solution, locally in California.” *Id.* at 26. Applying this standard, EPA found that, even if elevated GHG concentrations and climate change would lead to increased ozone pollution in California, this would not be due to factors local to California. *Id.* at 27. Rather, EPA concluded, GHG emissions from California cars are no more responsible for local ozone levels than “GHG emissions from any other source of GHG emissions in the world.” *Id.* EPA also examined the predicted impacts from climate change and determined that, although California may experience substantial impacts from climate change, these impacts would “not [be] sufficiently different from conditions in the nation as a whole to justify separate state standards.” *Id.* at 38-45.

California has already petitioned the Ninth Circuit Court of Appeals for review of EPA’s initial notice of its intent to deny the waiver request. *Id.* at 6, n. 8. California likely also will challenge this final agency action, either

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by amending its current petition or re-filing a petition to review this final denial. The EPA Waiver Decision and additional documents are available at <http://www.epa.gov/otaq/ca-waiver.htm>.

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¹ EPA also explicitly noted that nothing in its waiver decision should be deemed a decision by EPA as to whether it will promulgate a federal GHG emission standard for motor vehicles. Waiver Denial at 2, n. 1.