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CALIFORNIA SUES EPA AFTER ‘UNCONSCIONABLE’ WAIVER DENIAL

by Addie Haughey*

On January 2, 2008 the state of California filed a complaint in the 9th Circuit against the Environmental Protection Agency (“EPA”) for its December 2007 denial of a Clean Air Act waiver request made by California nearly two years before.¹

Under the Clean Air Act, California has the ability to enact its own air pollution laws due to unique and extreme impacts of pollution in the state.² In order to implement stricter regulations, California must acquire a waiver from EPA and the state has done this nearly fifty times over the last three decades.³ Previous waivers allowed California to create laws requiring catalytic converters, unleaded gasoline, and other major advancements in air pollution reduction, which are often implemented on the national level.⁴

A waiver seeking to impose stricter tail-pipe emission standards was originally requested by California on December 21, 2005.⁵ The waiver was based on policy developed by the California Air Resources Board (“CARB”) that was intended to phase in and ramp up greenhouse gas auto emission standards starting with the 2009 model year.⁶ According to CARB, global warming emissions would be cut by thirty percent by model year 2016, which is the equivalent to taking 6.5 million cars off California roads by 2020.⁷ The waiver request cited global warming impacts on California’s expansive coastline and the Sierra Mountain snowpack to justify the need to regulate greenhouse gasses.⁸

The Clean Air Act also allows other states to adopt California’s standards if they prefer them over the federal alternative.⁹ To date, sixteen states comprising forty-five percent of the US auto market have adopted or are in the process of adopting California standards, which increases the impact of the proposed standards, creating the effect of taking twenty-two million cars off America’s roads by 2020.¹⁰

After California’s waiver request in 2005, Governor Arnold Schwarzenegger made multiple efforts to force EPA to grant a decision on the waiver, including filing suit in 2007.¹¹ The EPA denied the waiver¹² on December 19, 2007 the same day that the U.S. Congress passed the Energy Independence and Security Act of 2007.¹³ The final Act was a stripped down version of what many environmentalists had hoped would be the largest advancement in energy policy in decades.¹⁴ Provisions that would have allowed tax incentives for renewable energy were left out, but the bill does create the first increase in corporate average fuel economy (“CAFE”) standards since the 1970s.¹⁵ According to the White House, new standards will reach thirty-five miles per gallon (“mpg”) by 2020.¹⁶

Some question whether the waiver denial coming the same day as the passage of the energy bill is a coincidence or an engineered political compromise. EPA staffers anonymously

revealed that Johnson made his decision against their unanimous recommendations to grant the waiver.¹⁷ One staffer went so far as to say “California met every criteria . . . on the merits. The same criteria we have used for the last 40 years on all the other waivers.”¹⁸ Johnson, on the other hand, said that his staff “presented [him] with a range of options with a lot of pros and cons” which he considered before deciding to deny the waiver.¹⁹

The Alliance of Automobile Manufacturers (“AAM”) adamantly denies a compromise, saying there are absolutely no linkages between the group’s decision to support the final version of the energy bill and EPA’s denial of the California waiver.²⁰ Critics point out the sudden reversal of AAM’s position after decades of vigorous opposition to the increase of emission standards.²¹

Regardless of whether the political conspiracy theories are correct, a bitter battle is brewing between the Schwarzenegger and Bush administrations. California began an immediate volley of sharp words, attacking the EPA assertion that California’s plan would not be as effective as the federal strategy. In his letter to Schwarzenegger, Johnson claimed that California’s plan would only reach a 33.5 mpg standard as opposed to the federal standard of 35 mpg.

Mary Nichols of CARB, who oversaw air regulations under the Clinton administration, said that Johnson’s decision shows “that this administration ignores the science and ignores the law to reach the politically convenient conclusion.”²² Governor Schwarzenegger called EPA’s decision “unconscionable” and said the EPA was “ignoring the will of millions of people who want their government to take action in the fight against global warming.”²³ California Attorney General Edmund G. Brown, Jr. said Johnson “must have consulted a Ouija board, I don’t know what else can explain his bizarre decision.”²⁴

The *Los Angeles Times* reported that EPA technical and legal staff predicted that if the waiver was denied, EPA would likely lose a legal challenge to its decision, but that if the waiver was granted and the EPA was sued by representatives of the auto industry, that EPA is almost certain to win.²⁵

In the last year several pro-state decisions have been handed down in support of regulation of greenhouse gasses, including *Massachusetts v. EPA* and *Green Mountain Chrysler v. Crombie*. These cases and others involving environmental organizations are likely to give support to California in the upcoming litigation. Despite any predictions, both sides appear ready for a fight.



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ENDNOTES: CALIFORNIA SUES EPA *continued from page 14*

¹ Press Release, California Office of the Governor, Governor Schwarzenegger Announces EPA Suit Filed to Reverse Waiver Denial (Jan. 2, 2008), *available at* <http://gov.ca.gov/press-release/8400/> (last visited Jan. 19, 2007).

² Press Release, California Office of the Attorney General, Brown Sues EPA for Illegally Blocking California's Plan to Curb Tailpipe Emissions (Jan. 2, 2008), *available at* <http://www.ag.ca.gov/newsalerts/release.php?id=1514&> (last visited Jan. 19, 2007).

³ California Office of the Attorney General, *id.*

⁴ California Office of the Attorney General, *id.*

⁵ California Office of the Governor, *supra* note 1.

⁶ California Office of the Governor, *supra* note 1.

⁷ California Office of the Governor, *supra* note 1.

⁸ California Office of the Attorney General, *supra* note 2.

⁹ California Office of the Governor, *supra* note 1.

¹⁰ California Office of the Governor, *supra* note 1.

¹¹ California Office of the Governor, *supra* note 1.

¹² EPA Administrator Stephen Johnson released a Federal Register notice detailing reasons denying the waiver on February 29, 2008, including, that Section 209 (b)(1) of the Clean Air Act did not intend for California to set state standards for new motor vehicles designed to address global problems and in the alternative, that the effects of climate change in California are not compelling and extraordinary compared to the rest of the country. *See* 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 of Feb. 29, 2008, *available at* <http://www.epa.gov/otaq/url-fr/fr-waiver.pdf> (last visited Mar. 1, 2008).

¹³ Letter from Stephen Johnson, administrator, USEPA, to Arnold Schwarzenegger, Governor, California (Dec. 19, 2007), *available at* <http://www.epa.gov/otaq/climate/20071219-slj.pdf> (last visited Jan. 19, 2007).

¹⁴ John M. Broder, Bush Signs Broad Energy Bill, N.Y. TIMES, Dec. 19, 2007, *available at* <http://www.nytimes.com/2007/12/19/washington/19cnd-energy.html?hp> (last visited Jan. 19, 2007).

¹⁵ Broder, *id.*

¹⁶ Broder, *id.*

¹⁷ Janet Wilson, EPA chief is said to have ignored Staff, L.A. TIMES, Dec. 21, 2007, *available at* http://www.latimes.com/news/print/edition/asection/la-me-epa21dec21,1,1021228.story?coll=la-news-a_section (last visited Jan. 19, 2007).

¹⁸ Wilson, *id.*

¹⁹ Wilson, *id.*

²⁰ Wilson, *supra* note 17.

²¹ Wilson, *supra* note 17.

²² Wilson, *supra* note 17.

²³ Margot Roosevelt, California sues government for rejecting bid to curb emissions, L.A. TIMES, Jan. 3, 2008, *available at* <http://www.latimes.com/business/la-me-epa3jan03,1,6968553.story> (last visited Jan. 19, 2007).

²⁴ Roosevelt, *id.*

²⁵ Wilson, *supra* note 17.