

**Testimony of David Doniger
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**Reconsideration of California's Request for a Waiver
Under Clean Air Act Section 209(b) for
Motor Vehicle Emission Standards for Greenhouse Gases**

**U.S. Environmental Protection Agency
Docket No. EPA-HQ-OAR-2006-0173
March 5, 2009**

Thank you for the opportunity to testify again today in favor of California's request for a waiver of preemption under Section 209(b) of the Clean Air Act for the state's landmark standards for vehicle emissions of greenhouse gases for model years 2009-2016. I am policy director and senior attorney at the Natural Resources Defense Council's Climate Center. I represent NRDC and its 1.2 million members and activists, who have supported California's leadership since 2002 in the effort to curb global warming pollution from new cars and light trucks.

We were dismayed last year when former Administrator Johnson, disregarding decades of Environmental Protection Agency waiver precedents and the unanimous analysis and advice received from EPA's career legal and technical staff, issued this first-time denial of a California's waiver. We joined the states and other environmental organizations to challenge that decision in the courts.

Conversely, we were enormously pleased when President Obama, on January 26th, directed EPA to reconsider the waiver denial. And we were equally pleased when EPA Administrator Lisa Jackson moved quickly to initiate the reconsideration and schedule this hearing today.

My testimony today will address primarily the legal questions that EPA has posed in the notice for this hearing, 73 Fed. Reg. 7040. My colleague Roland Hwang, NRDC's vehicle policy director, is also here today to testify on technical issues. NRDC also may supplement today's testimony with further written comments by April 6th.¹

Our message today is as simple and direct as it was during the first waiver hearings two years ago: EPA must grant California's waiver request for all of the requested model years, and without any further delay.

A. Burden of Proof

First, I want to reiterate that the burden of proof lies on parties that oppose the waiver. As the D.C. Circuit put it, California's standards "are presumed to satisfy the

¹ I request that NRDC's testimony and comments from the 2007-08 waiver proceeding be included in the record for this reconsideration and they are hereby incorporated by reference.

waiver requirements” and “the burden of proving otherwise is on whoever attacks them” during the waiver hearing. *Motor and Equipment Mfrs. Ass’n, Inc. v. E.P.A.*, 627 F.2d at 1121. Congress, the court found, intended “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.” *Id.* at 1110 (quoting the House report on the 1977 Clean Air Act Amendments, H.R. Rep. 95-294 at 301-02). As even Administrator Johnson acknowledged last year, “EPA’s role in applying [Section 209(b)(1)(B)] is not to substitute its judgment for California’s on the importance, value, or benefit for California that might be derived from a specific set of GHG standards.” 73 Fed. Reg. at 12,158.

B. Protectiveness

Turning to the first waiver criterion, there is no basis for denying a waiver under Section 209(b)(1)(A). California’s standards clearly are more stringent than EPA’s, since EPA’s standards have no GHG gas component. While EPA may soon begin a rulemaking process to establish federal GHG standards, they will not exist by the time the waiver decision is made. Even if there were federal GHG standards, it would be up to California to determine whether the State’s standards are at least as protective in the aggregate as the federal standards. EPA’s role would be limited to determining whether the state’s conclusion was arbitrary and capricious.

C. Compelling and Extraordinary Conditions

In this section I will address the grounds on which the Bush administration denied the waiver last year. EPA should now reverse that denial, because none of those grounds withstands scrutiny.

1. Need for California’s separate program.

Section 209(b)(1)(B) allows EPA to deny the waiver “if the Administrator finds that . . . [California] does not need such State standards to meet compelling and extraordinary conditions.” The first question under this provision is the point of reference for EPA’s consideration of California’s “need.” As the waiver reconsideration notice states (73 Fed. Reg. at 7042), California has requested

that EPA return to its traditional review of California’s standards under section 209(b)(1)(B) by considering whether California continues to need its own motor vehicle emission program, rather than evaluating greenhouse gas standards separately.

In last year’s waiver denial, Administrator Johnson erred in making his determination regarding California’s “need” not with reference to the State’s overall motor vehicle standards program but with reference to the State’s GHG standards considered separately. Johnson’s position conflicts with both the plain meaning of the statute and the position held by his predecessors over a two-decade period.

The statutory text is unambiguous. Section 209(b)(1)(B) allows a waiver denial if the Administrator finds that California does not need “*such State standards*” to meet compelling and extraordinary conditions. The phrase “such State standards” refers back to the preceding, opening sentence of Section 209(b)(1), which requires California, when it submits a waiver request, to determine that “*the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.*” The phrase “the State standards . . . in the aggregate” means all of the state’s standards considered together. “[S]uch State standards” means the same thing.

EPA has held this view at least since 1984. As Administrator William Ruckelshaus explained in 1984, that the inquiry under Section 209(b)(1)(B) –

is restricted to whether California needs its own motor vehicle pollution control *program* to meet compelling and extraordinary conditions, and not whether any given standard, (e.g., the instant particulate standards) is necessary to meet such conditions.

49 Fed. Reg. at 18,889 (May 3, 1984) (emphasis in original, footnote omitted). Ruckelshaus continued (*id.* at 18,890):

The interpretation that my inquiry under (b)(1)(B) goes to California’s need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statute as well. Specifically, if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase “* * * does not need *such* state standards” (emphasis supplied), which apparently refers back to the phrase “State standards * * * in the aggregate,” as used in the first sentence of section 209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e., “standards,” further confirms that Congress did not intend EPA to review the need for each individual standard in isolation.

This construction was followed in many subsequent waiver decisions.² Indeed, just three years ago, Administrator Johnson re-articulated the same construction:

² See 58 Fed. Reg. 4166 (Jan. 13, 1993) (“CARB has continually demonstrated the existence of compelling and extraordinary conditions justifying the need for its own motor vehicle population control program, which includes the subject standards and procedures. No information has been submitted to demonstrate that California no longer has a compelling and extraordinary need for its own program.”); 57 Fed. Reg. 38503, 38503-04 (Aug. 25, 1992) (“No information has been submitted to demonstrate that California no longer has a compelling and extraordinary need for its own program. Therefore, I agree that California continues to have compelling and extraordinary conditions which require its own program, and, thus, I cannot deny the waiver on the basis of the lack of compelling and extraordinary conditions.”)

EPA has long held that the question under section 209(b)(1)(B) is not whether every element in CARB's regulatory program is needed to address compelling and extraordinary conditions, but whether conditions in California continue to justify separate emissions standards for new motor vehicles. EPA has previously recognized the intent of Congress in creating a limited review of California's determinations that California needs its own separate standards was to ensure that the federal government not second-guess the wisdom of state policy.

California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption, Decision of the Administrator, 2005 and Subsequent Model Year Zero Emission Vehicles (ZEV) at 34 (Dec. 21, 2006).

In last year's waiver denial, however, Administrator Johnson asserted for the first time that he had authority to assess the need for these California standards separately from the rest of the State's motor vehicle program, and that it was "appropriate" to do so. To support this new statutory construction, the Administrator offered no statutory analysis – only the policy-based assertion that

global climate change problems . . . are different from the local pollution problems that California has addressed previously in its new motor vehicle program. The climate change problems are different in terms of the distribution of the pollutants and the effect of local factors, including the local effect of motor vehicle emissions as differentiated from other GHG emissions worldwide on the GHG concentrations in California.

73 Fed. Reg. at 12,159.

Administrator Johnson has no recourse to policy considerations, however, without a statutory ambiguity. And there is none. As demonstrated above, the plain language of the statute shows that "such State standards" is tied to the previous sentence's "State standards . . . in the aggregate."

In reconsidering last year's decision, EPA now needs to return to the statute's plain meaning and to its prior long-standing and correct position. When the question is properly framed – does California lack a need for *its motor vehicle standards in the aggregate* to meet compelling and extraordinary conditions? – there can be only one answer. No one has asserted, much less met the burden of proving, that California no longer needs its own vehicle emissions program to combat its air pollution problems.

2. *California is authorized to reduce GHGs in order to curb global warming and ozone smog.*

Even if EPA had authority to examine the need for California's GHG regulations in isolation, neither of the two alternative theories that Administrator Johnson offered for denying the waiver stands up to legal or factual scrutiny.

First, Johnson asserted that California simply lacks authority under Section 209 to regulate motor vehicle emissions that contribute to global warming. California's authority, he contended, is limited to "situations where the air pollution problems have their basic cause, and therefore their solution, locally in California." 73 Fed. Reg. at 12,163.

Both California's Legislature and the California Air Resources Board (CARB) have found that the State faces "compelling and extraordinary conditions" due to the magnitude and wide range of global warming impacts on the health and well being of California's citizens and on the state's natural resources – including sea level rise, impacts on fresh water supplies, greater risks of wildfires, impacts on agriculture, and other consequences. Both the Legislature and CARB have found that vehicles are the single largest source of global warming pollution within the state, accounting for 40 percent of California's greenhouse gas emissions, and that reducing these emissions will contribute to reducing global warming impacts within the state.

Johnson, however, dismissed these findings, saying:

the issue is not whether such reductions are needed but whether Congress intended them to be effectuated on a state basis by California through its new motor vehicle program. This type of pollution seems ill-fitted to Congress's intent to provide California with a method of handling its local air pollution concentrations and related problems with local emission control measures. I believe that standards regulating emissions of global pollutants like greenhouse gases were not part of the compromise envisioned by Congress in passing section 209(b).

There is nothing in the statutory language, however, that limits California's authority in this way. Climate change is easily described as a "compelling and extraordinary condition." Congress could readily have written the statute to say "compelling and extraordinary *smog* conditions" or "compelling and extraordinary *local or regional* conditions." Instead, Congress used words of more general scope, leaving room for the statute to be used to new pollution problems that affect California in a "compelling and extraordinary" manner as they evolve.

Johnson posited that the pollution problems California addressed with prior standards were purely local and self-contained. He contrasted those problems with global warming, where emission reduction from California's standards will reduce GHG

concentrations outside California as well as inside, and where emission reductions made elsewhere will reduce GHG concentrations in California. By dividing pollution problems into those that are strictly “local” and those that “global,” former Administrator Johnson sought to deny California authority to address pollution problems that are not fully curable with exclusively local emission reductions. On the misplaced assumption that the ozone smog problem in California is entirely self-contained, Johnson asserted that there is not the “same causal link” to California’s air quality for its GHG standards as for the State’s prior smog standards. 73 Fed. Reg. at 12,162-63 (emphasis added).

A self-contained local problem has never been a requirement for a California waiver. The only requirement that could be imposed under Section 209(b)(1) is the minimal one that California’s standards will *contribute* to reducing the State’s pollution problems.

Furthermore, the strict distinction between “local” and “global” does not hold. Even air pollution problems that Administrator Johnson sought to pigeon-hole as “local” are not strictly local. As EPA knows, California’s smog-forming emissions contribute to ozone air pollution both inside and outside the State, and some of California’s ozone smog originates in pollution released as far away as China. California nonetheless has authority to reduce smog-forming emissions from vehicles within the State because those reductions help reduce the ozone levels experienced in California. Neither fact – that that some of California’s smog originates outside the state, and that some of the smog-reduction benefit from California’s standards occurs outside the state – diminishes the need and authority for California to curb its own smog-forming emissions.

Likewise, by reducing greenhouse gas emissions from California vehicles, the State will contribute to reducing global warming impacts felt locally in California. As both the Legislature and CARB have found, vehicles account for 40 percent of California’s GHG emissions and reducing these emissions will contribute to reducing global warming impacts within the state.

Far from finding that California’s regulations do not contribute to reducing global warming impacts in the State, Administrator Johnson acknowledged that they *do* contribute:

Greenhouse gas emissions from vehicles or other pollution sources in other parts of the country and the world will have *as much effect on California’s environment as emissions from California vehicles*. As a result, reducing emissions of GHGs from motor vehicles in California *has the same impact or effect on atmospheric concentrations of GHGs as reducing emissions of GHGs from motor vehicles or other sources elsewhere in the US*, or reducing emissions of GHGs from other sources anywhere in the world.

73 Fed. Reg. 12,162 (emphasis added).

It is telling that the most Administrator Johnson claimed is that there is not “the *same* causal link” between California’s GHG emissions and its global warming problem as between California’s smog-forming emissions and its ozone problem. *Id.* at 12,163. Johnson could not, and did not, assert that there is *no* causal link. And as he himself acknowledged, “EPA’s role in applying [Section 209(b)(1)(B)] is not to substitute its judgment for California’s on the importance, value, or benefit for California that might be derived from a specific set of GHG standards.” 73 Fed. Reg. at 12,158.

Finally, California has demonstrated a direct link between reducing GHG emissions and the original ozone smog problem that EPA concedes is in California’s legitimate domain. California has demonstrated that reducing vehicle greenhouse gas emissions will help reduce ozone smog formation in the State in two ways.

First, global warming worsens smog-formation by raising ambient atmospheric temperatures, because more ozone is formed from any given quantity of the traditional pollutants when the air temperature is raised. California’s GHG reductions will contribute to reducing the extent of these temperature increases.

Second, California has found that its standards will also directly reduce smog-formation within the State by reducing the overall use of gasoline, and thus the amount of smog-forming pollution emitted “upstream” of the vehicles during the refining and distribution of gasoline.

Administrator Johnson did not deny that curbing ozone is a valid reason for California to adopt its own standards. But instead of “giv[ing] deference to California’s policy judgments, as [EPA] has in past waiver decisions, on the mechanisms used to address local and regional air pollution problems” (73 Fed. Reg. at 12,158), in this decision Johnson just dismissed the ozone reduction benefits associated with California’s greenhouse gas reductions.

For all these reasons, EPA cannot sustain a conclusion that California lacks authority to address emissions that contribute to global warming and ozone smog impacts within the State.

3. *California does not have to show impacts “sufficiently different” from the rest of the United States.*

As the reconsideration notice states, California “requests that EPA reconsider (and reject) the alternative grounds for the denial, namely, EPA’s determination that the impacts from climate change in California were not sufficiently different from the nation as a whole.” 73 Fed. Reg. at 7042.

As an alternative justification, Administrator Johnson argued that even if California *does* have authority to regulate GHG pollution, the State still must show “that the effects of climate change in California are compelling and extraordinary *compared to the effects in the rest of the country.*” 73 Fed. Reg. at 12,157 (emphasis added). After extended

discussion of whether California has or has not demonstrated “unique” conditions, the Administrator stated: “While I find that the conditions related to global climate change in California are substantial, they are not *sufficiently different* from conditions in the nation as a whole to justify separate state standards.” *Id.* at 12,168 (col.2) (emphasis added).

There is no statutory foundation for a “sufficiently different” test. First, there is nothing in the terms “compelling and extraordinary conditions” that requires a comparison with the rest of the country. Rather, what is needed is a judgment by California that the problems the State is facing are serious in kind and magnitude. Both California’s Legislature and CARB have found that the State faces “compelling and extraordinary conditions” due to the magnitude and wide range of global warming impacts on the health and well-being of California’s citizens and on the state’s natural resources – including sea level rise, impacts on fresh water supplies, greater risks of wildfires, impacts on agriculture, and other consequences. It is then EPA’s burden to prove that California lacks conditions of that seriousness or magnitude.

A “sufficiently different” test is also plainly inconsistent with Section 177 of the Act, which allows other States to adopt motor vehicle emission standards identical to California’s. That provision would make no sense if California’s authority were limited to addressing problems “sufficiently different” from those in other States. The core premise of Section 177 is that States that share California’s pollution problems, whether in the same or lesser degree, may share in California’s pioneering solutions to those same problems.

Johnson’s interpretation also conflicts with the agency’s long-standing prior position. In 1984, for example, Administrator Ruckelshaus found that “there is no indication in the language of section 209 or the legislative history that California’s pollution problem must be the worst in the country, for a waiver to be granted.” 49 Fed. Reg. 18,887 at 18,891 (May 3, 1984).

Even if EPA had authority to apply a “sufficiently different” test, California has amply demonstrated that the climate change impacts within the State exhibit a wider range and greater severity than those suffered in any other state. California’s determinations – including the determination of need to meet compelling and extraordinary conditions – “are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them.” *Motor and Equipment Mfrs Assn v. EPA*, 627 F.2d 1095, 1120-21 (D.C. Cir. 1979). The burden is on the waiver opponent because Congress intended “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.” *Id.* at 1110.

There is no way that EPA can meet that burden on the current record. No other state experiences the impacts of global warming in combination as does California. Administrator Johnson himself found that California “has a number of physical and economic characteristics to consider when evaluating climate change impacts within the state, and how those impacts may compare to those in the rest of the country.” 73 Fed.

Reg. at 12,167. The list of such characteristics acknowledged by Administrator Johnson is astounding, and worth quoting at length:

First, as a state, California has the largest agricultural based economy (based on 13% of U.S. market value of agricultural products sold). Second, California has the largest state coastal population, representing 25% of the U.S. oceanic coastal population. California's agricultural sector is heavily dependent on irrigation, has the nation's highest crop value and is the nation's leading dairy producer. Though most scientific literature has focused on how elevated CO₂ concentrations and climate change may affect crop yields, there is improved information on how livestock productivity may be affected by thermal stress and through nutritional changes in forage caused by elevated CO₂ concentrations. Wine is California's highest value agricultural product; the wine grapes are very sensitive to temperature changes.

The conditions which create California's tropospheric ozone problems remain (e.g., topography, regional meteorology, number of vehicles). Climate change is expected to exacerbate tropospheric ozone levels. A number of studies in the U.S. have shown that summer daytime ozone concentrations correlate strongly with temperature, i.e., ozone is shown to increase with increasing temperature. Atmospheric circulation can be expected to change in a warming climate and, thus, modify pollutant transport and removal. The more frequent occurrence of stagnant air events in urban or industrial areas could enhance the intensity of air pollution events, although the importance of these effects is not yet well quantified.

Wildfires, which are already increasing in duration and intensity, may be exacerbated. Wildfires can also contribute to health problems through increased generation of particulate matter.

California's water resources are already stressed due to competing demands from agricultural, industrial and municipal uses. Climate change is expected to introduce an additional stress to an already over-allocated system by increasing temperatures (increasing evaporation), and by decreasing snowpack, which is an important water source in the spring and summer.

California has the greatest variety of ecosystems in the U.S., and the second most threatened and endangered species (of plants and animals combined) and the most threatened and endangered animal species, representing about 21% of the U.S. total. As noted above, climate change is expected to have a range of impacts on U.S. ecosystems.

73 Fed. Reg. at 12,164-65 (footnotes omitted).

Johnson further noted comments listing “a number of other compelling and extraordinary circumstances in California that justify the passage of GHG emission standards, including: declining snowpack and early snowmelt and resultant impacts on water storage and release, sea level rise, salt water intrusion, and adverse impacts to agriculture (e.g., declining yields, increased pests, etc.), forests, and wildlife.” Other commenters “specifically point to a direct threat to public health (e.g., asthma) since increased temperatures due to increased GHG emissions will lead to increased levels of ozone and other pollutants.” *Id.* at 12,165.

Finally, Administrator Johnson acknowledged expert testimony that California is subject to a greater range and magnitude of global warming effects than other states:

CARB points to the testimony of Dr. Stephen Schneider of Stanford University and others to demonstrate that not only are California’s conditions “unique and arguably more severe” (e.g. temperature impacts from global warming are more certain for Western states like California) but also that no other state faces the combination of ozone exacerbation, wildfire emission’s contribution, water system and coastal system impacts and other impacts faced by California.

Id. at 12,164.

In the face of all these impacts, Administrator Johnson conceded that “conditions related to global climate change in California are substantial.” 73 Fed. Reg. at 12,168 (col.2). But instead of affirming that California is more severely affected than other individual states, Johnson chose to compare conditions concentrated in California to those found somewhere else in the nation as a whole:

While I find that the conditions related to global climate change in California are substantial, they are not sufficiently different from conditions *in the nation as a whole* to justify separate state standards. . . . While proponents of the waiver claim that no other state experiences the impacts in combination as does California, *the more appropriate comparison in this case is California compared to the nation as a whole, focusing on averages and extremes, and not a comparison of California to the other states individually.* These identified impacts are found to affect other parts of the United States and therefore these effects are not sufficiently different compared to the nation as a whole.

73 Fed. Reg. at 12,168 (emphasis added).

Johnson gave no reason why conditions in California should be compared to those in all 49 other States *considered as a group*, rather than as individual States. Even if it were true that a comparable effect can be found in some other State for each individual effect found in California (*e.g.*, high temperatures, smog, sea level rise, loss of water storage capacity, drought, flooding, risk of wildfires), the difference is that California alone of all the States will experience *all of these impacts*, and will experience at least some of them more severely than any other State.

D. Technological Feasibility, Lead-time, and Cost

EPA may deny a waiver under Section 209(b)(1)(C) only if the Administrator finds that “such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.” Administrator Johnson made no findings on this question in last year’s denial. But EPA has a long-standing practice under this clause of reviewing whether California’s standards are not consistent with the criteria set forth in Section 202(a)(2), which provides:

Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

As the D.C. Circuit said in *Motor & Equipment Mfrs. Ass’n v. Nichols*, 142 F.3d 449 at 463 (D.C. Cir. 1998):

In the waiver context, section 202(a) “relates in relevant part to technological feasibility and to federal certification requirements.” . . . The “technological feasibility” component of section 202(a) obligates California to allow sufficient lead time to permit manufacturers to develop and apply the necessary technology. . . . Neither the court nor the agency has ever interpreted compliance with section 202(a) to require more.

The criteria in Section 202(a)(2) are “technology-forcing.” As the D.C. Circuit stated in *Natural Resources Defense Council v. EPA*, 655 F.2d 318 (D.C. Cir. 1981):

The legislative history of both the 1970 and the 1977 amendments demonstrates that Congress intended the agency to project future advances in pollution control capability. It was expected to press for the development and application of improved technology rather than be limited by that which exists today.

Id. at 328. These technology-forcing criteria apply to California’s standard-setting through Section 209(b)(1)(C).

In NRDC's judgment, California has made a compelling demonstration that its standards can be met within the lead-time allowed. California has shown – and the federal court in Vermont agreed – that its standards can be met with almost no changes to vehicles in the early years. California has also convincingly shown that technology is available – indeed is on the market and in vehicles today – to meet the standards in the later years, through model year 2016. This can be done without the need to resort to hybrid-electric vehicles (although such vehicles naturally count towards the fleet average requirements), without downsizing, and without any compromise in vehicle safety. California's economic analysis shows that owners of vehicles that meet these standards will *save money* due to reduced fuel and maintenance costs.

For these reasons, there is no basis to deny the waiver under Section 209(b)(1)(C) as inconsistent with Section 202(a). My colleague Roland Hwang will speak further to the standards' technological and economic feasibility.

I am happy to take your questions.