

California GHG Waiver

Options

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Summary

- Background
- 3 Options Presented
 - Grant Waiver
 - Deny Waiver Partially or Completely Based on Leadtime Concerns
 - Deny Waiver Based on Lack of Need to Meet Compelling and Extraordinary Conditions
- Conclusions and Next Steps

BACKGROUND (1)

- Under section 209(b), EPA must, after notice and comment, waive preemption for California (CA) standards unless EPA makes any of the following three findings:
 - CA was arbitrary and capricious in determining that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards;
 - CA does not need such state standards to meet compelling and extraordinary conditions; or
 - CA standards are not consistent with CAA section 202(a)
- Past Practice
 - Nearly 40 years of EPA waiver practice; approximately 95 waiver actions – No complete denials - 2 partial denials – test procedure issues; 1 partial - grant of one pollutant and denial for 1 model year for other 2 pollutants [pre-1977]; 1 partial - held over evaporative emission standard for 1 model year; 1 partial - excluded CNG/LPG due to CARB miscue; 1 granted waiver through 2011 (but not later) model years (ZEV)
 - No waiver requests were partially denied based on anything other than lead time or technological feasibility

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BACKGROUND (2)

- Traditional view regarding deference to CA – statute provides CA the broadest possible discretion in developing its program, and EPA has only narrow and circumscribed discretion to deny a waiver to California.
- Consistent EPA interpretation since beginning of waiver program
- Legislative history stated that EPA should give CA broad discretion
- Court cases affirm this approach

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Legislative History

- Initial Enactment of Preemption Section (1967)
 - Preempted all state and local standards but allowed California to receive waiver of preemption from EPA.
 - CA was ahead of the federal gov't in regulating motor vehicles, made "pioneering efforts" in auto pollution control. CA also had "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards ... which might need to be more stringent than federal."
 - Congress preserved CA's regulatory role and protected industry from many different state regulations.
 - Benefits to nation were 1) CA able to continue its program and provide benefits to that state; 2) nation would benefit from CA experience as a laboratory that may help with later federal standards; 3) while there are differing standards, the general consumer of the nation not paying for CA car costs; 4) industry faced with only one potential variation from the federal program.

Legislative History (cont)

- 1977 Revisions
 - California standards need only be “in the aggregate” as protective as federal standards.
 - Affirmed 1967 reasoning. Affirmed EPA’s prior “liberal construction” of 209(b) to permit CA to proceed with its own program.
 - Purpose of 1977 amdts. was to “ratify and strengthen the CA waiver provision and to affirm the underlying intent of that provision, i.e. to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”

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Option 1: Grant Waiver (1)

- Option most easily defensible based on record and precedent
- “Protectiveness”
 - We can only deny waiver under section 209(b)(1)(A) if we find CA was arbitrary and capricious in making its “in the aggregate” protectiveness finding
 - CA standards clearly more stringent than non-existent (or even contemplated) EPA standards
 - Manufacturers rely on Sierra Research study to show that CA standards will increase ozone precursors
 - EPA has found several significant problems with the assumptions in the Sierra Research study
 - CA has provided its own study that indicates that the standards will decrease ozone precursors
 - OAR believes CA’s assumptions are reasonable in general, and not arbitrary or capricious
 - EPA will be relying on assumptions similar to CA’s in its GHG rule
 - OAR does not believe that we can find CA’s protectiveness finding to be arbitrary and capricious

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Option 1: Grant Waiver (2)

- Compelling and Extraordinary Conditions
 - Ozone
 - CA provided data indicating standards reduce ozone precursors and argues that reduction in GHG will be beneficial for ozone problem – EPA will likely make similar statements in our rule
 - CA ozone problem has always been considered compelling and extraordinary
 - Even though benefits are small, they directionally help ozone control and EPA and courts have found that we should not second-guess CA policy choices – Supreme Court opinion echoes idea that even small reductions are helpful
 - Generally
 - Precedent indicates we should look at need for CA program as a whole, not individual standards – need for CA program not in doubt
 - CA general climate change concerns are fairly compelling and could be considered extraordinary

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Option 1: Grant waiver (3)

- Consistency with section 202(a)
 - Normal criteria: technological feasibility considering leadtime
 - Auto manufacturers did not provide evidence that standards were infeasible
 - CA provided substantial evidence that near-term and long-term standards could be met with technology already in field without reducing vehicle size
 - Evidence indicates that leadtime was sufficient (particularly from date of CA enactment, but even from date of Supreme Court decision)
 - Endangerment
 - Burden on those opposing waiver to provide evidence that CA regs are inconsistent with 202(a)
 - No evidence that GHG do not endanger public health or welfare; indeed, we are likely to find that they do
 - Failure of EPA to make endangerment finding not good enough, because that is not an affirmative finding that GHGs don't endanger

Option 2: Partial/Full Denial Based on Inadequate Leadtime (1)

- Four possible approaches for granting a partial waiver or full denial based on leadtime concerns
 - Deny for first 2-3 years
 - Deny after first 2-3 years
 - Full denial
 - Full denial with conditional approval if CA revises regulations to push back its program by three model years
- Basic Approach
 - Though EPA normally counts leadtime from date CA enacts regulations, this situation is different. EPA had stated its view that section 202 did not allow EPA regulation of GHGs, which could logically mean that EPA could not grant a waiver
 - Thus, manufacturers were not expecting CA GHG regulations to be enforceable and were only on notice of possibly having to meet the regulations since April Supreme Court decision
 - CA has not justified its regulations based on such a short amount of leadtime
- Issues Common to all Sub-options
 - EPA's long time view is that leadtime should run from date California enacts standards
 - Even given EPA's previous opinion regarding section 202, manufacturers were arguably not justified in thinking we would deny the waiver, given traditional analysis under section 209(b)(1)(C)

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (2)

- Option 2A: Deny for first 2-3 years based on leadtime concerns
 - Argument would be that manufacturers would only have 9 months leadtime to meet the standards, which would not be considered enough time to change their manufacturing to meet the standards
 - Issues:
 - Specific evidence in docket indicates manufacturers can meet the standards for first 2-3 years
 - CA provided significant evidence that these standards were feasible and manufacturers provided no evidence that they were not feasible
- Option 2B: Deny for years after the first 2-3 model years
 - Argument would be that there is nothing in the record indicating manufacturers can meet the more difficult later standards within the lead time if it begins in 2007
 - Issues:
 - No specific evidence that manufacturers can meet these standards today
 - CA provided evidence that standards are feasible and manufacturers provided no evidence that they were not feasible
 - Manufacturers claim that CA feasibility determination was based on lead time starting in 2004-5, but CA disputes this characterization and says standards are feasible in the appropriate model years

Option 2: Partial/Full Denial Based on Inadequate Leadtime (3)

- Option 2C: Full denial
 - Argument would be combination of reasons for options 2A and 2B and that the GHG program is a single non-segregable program where denying for any year (particularly early years) has effect on other years (e.g., denial of early years would affect ability to bank credits for use in later years)
 - Issues:
 - Same as for Options 2A and 2B
 - Significant evidence that standards are feasible and no evidence in record that the program is infeasible

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Option 2: Partial/Full Denial Based on Inadequate Leadtime (4)

- Option 2D: Full Denial and Conditional Grant
 - Argument: The evidence in the record indicates that the standards are feasible but that CA calculated appropriate lead time starting three years too early. Therefore, we deny the program as written, but find that if CA revises standards to begin and phase in three years later, then standards are feasible given leadtime and EPA does not need further review to grant a waiver if standards are so revised
 - Issues:
 - This is still a denial of the waiver request for existing CA standards, so all of the issues with previous sub-options remain
 - Those who oppose waiver may argue that we have no authority to waive standards that do not yet exist and that we need to go through proper procedures before granting waiver for future standards

Denial: CA Doesn't Need GHG Standards to Meet Compelling and Extraordinary Conditions (1)

- Argument: Climate change is worldwide condition caused by worldwide pollution. CA conditions (causes of air pollution such as emissions/geography; levels of air pollution; effects of air pollution) are generally not extraordinary with respect to climate. Even with regard to ozone, change in climate caused by standards is so miniscule as to not have any discernible effect on ozone – thus, CA does not need these standards to meet any compelling & extraordinary conditions

CA Doesn't Need GHG Standards to Meet Compelling and Extraordinary Conditions (2)

- Issues:
 - Climate change directionally exacerbates CA ozone problems, which are the foundation of section 209(b);
 - Data indicates standards will lead to reduction in temperatures (actually calculated by Alliance) and also reduction in ozone precursors;
 - EPA and courts have made clear that we are not to second-guess CA policy choices and that every little bit of reduction helps – Supreme Court opinion echoes this;
 - EPA will likely make arguments similar to CA to justify our own GHG rule;
 - Inconsistent with precedent saying we look at vehicle program as a whole, not individual standards

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Conclusions and Next Steps

- Most defensible action is to grant waiver
- Partial/complete denial based on leadtime issues is not supported in the record
- Denial based on lack of need for standards to meet compelling and extraordinary conditions has high legal risk and is contrary with central tenets of prior EPA procedure and likely EPA statements defending its own GHG rule
- Next steps:
 - Option selection
 - Preparation of decision document
 - Review of decision document
 - Signature

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