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Legal & Regulatory Group

April 6, 2009

**By Electronic Mail**

U.S. Environmental Protection Agency (EPA)  
EPA West (Air Docket); Room B108 (MC-6102T)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: California State Motor Vehicle Pollution Control Standards;  
Greenhouse Gas Regulations; Reconsideration of Previous Denial  
of a Waiver of Preemption; Doc. No. EPA-HQ-OAR-2006-0173

Dear Sir or Madam:

The National Automobile Dealers Association (NADA) represents 19,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. Together they employ more than 1,000,000 people nationwide, yet a significant number are small businesses as defined by the Small Business Administration.

Earlier this year, EPA issued a notice indicating the intent to reconsider its March 6, 2008 denial of a California Air Resources Board (CARB) request for waiver of federal preemption for rules adopted in September 2004 governing greenhouse gas (GHG) emissions from passenger cars, light-duty trucks, and medium-duty passenger vehicles (motor vehicles). 74 Fed. Reg. 7040-2 (February 12, 2009). At a March 5, 2009 hearing in Arlington, VA testimony was presented by NADA Chairman John McEleney. See *Attachment A*. In addition to that testimony, NADA offers the following comments and suggestions.

**I. EPA MUST UPHOLD ITS PREVIOUS DENIAL OF THE CARB WAIVER REQUEST**

**A. EPA Properly Denied CARB's Waiver Request in its March 6, 2008 Decision**

Following an exhaustive public comment period and two public hearings, a little over a year ago, EPA issued a thorough and well documented decision to deny CARB's waiver request. 73 Fed. Reg. 12156, *et seq.* (March 6, 2008). That decision was supported by a detailed analysis of the federal preemption established by Section 209(a) of the Clean Air Act (the Act) and the narrow preemption waiver provision found in Section 209(b) of the Act. 42 U.S.C. §7543(a) and (b). Following a full consideration of the record and the applicable law, EPA correctly and reasonably denied the waiver based on a determination that California does not need its own motor vehicle GHG standards to meet compelling and extraordinary conditions, a waiver prerequisite set out in Section 209(b)(1)(B) of the Act. 42 U.S.C. §7543(b)(1)(B).

In its June 15 comments to the record, NADA described at some length why California had failed to show that its GHG standards met the “compelling and extraordinary conditions” threshold. NADA also indicated that California did not (and cannot) justify a waiver because its standards are not at least as protective as applicable Federal standards, and because its standards and accompanying enforcement procedures are not consistent with Section 202(a) of the Act. See *Attachment B*. In supplemental comments submitted to the record on October 12, 2007, NADA demonstrated that the waiver should be denied for the additional reason that CARB’s GHG standards do not contain adequate lead times. See *Attachment C*. EPA should revisit and carefully consider the statements made and conclusions reached by NADA in its 2007 comments as they are as valid today as they were when first presented.

In addition, NADA endorses the reasons articulated in the March 6, 2008 EPA decision denying CARB’s waiver request. Section 209(a) of the Act establishes a baseline presumption that state standards are preempted in favor of national standards; Section 209(b)’s carve out of preemption must be construed against that backdrop. 42 U.S.C. §7543(a)-(b). EPA may defer to California’s policy judgments about its local air pollution problems under certain circumstances. But EPA—as the Agency empowered by Congress to administer the Act—should not defer to California on questions requiring interpretation of the Act, including the question whether Section 209(b) permits a waiver for the regulation of GHGs.

1. EPA properly applied the criteria of Section 209(b)(1)(B) to CARB’s motor vehicle GHG standards *separately* rather than to CARB’s motor vehicle program as a *whole*. 73 Fed. Reg. at 12159-61. EPA has previously applied the criteria to CARB’s motor vehicle program as a whole because, until now, the program addressed only local or regional air quality concerns. *E.g.*, 49 Fed. Reg. 18,887 (May 3, 1984). The “compelling and extraordinary conditions” found to justify past waivers were three “fundamental conditions” that cause air quality unique to California—namely, its geographical and climate conditions, and its large motor vehicle population. *Id.* Because those distinct fundamental conditions had not changed over time, and related similarly to all of California’s local or regional air quality concerns, it made sense for EPA to apply Section 209(b)(1)(B) to the program as whole.

In stark contrast, global GHG pollution is neither unique to California nor caused in any significant part by those three fundamental conditions. GHG concentrations basically are uniform worldwide, and California’s relatively minor motor vehicle GHG emissions mix and spread around the globe. Given those elemental differences between global GHG concentrations and local air pollution, EPA must evaluate Section 209(b)(1)(B) application to CARB’s motor vehicle GHG standards separately. Otherwise, standards addressing global GHG concentrations could be justified by completely unrelated factors. The text of Section 209(b)(1)(B) and the structure of the statute overall require this interpretation. Moreover, Section 209’s legislative history confirms that Congress enacted the waiver provision in recognition of the fundamental local conditions causing California’s local air quality concerns and never intended to waive preemption for state standards aimed at nationwide (let alone global) problems. *E.g.*, *Motor and*

*Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), *cert. denied* 446 U.S. 952 (1980) (reviewing legislative history and noting California's "peculiar local conditions"). There is nothing in Section 209(b)(1)(B) that would require a different reading. Accordingly, EPA's waiver denial decision properly framed the Section 209(b)(1)(B) test as whether California's "compelling and extraordinary conditions"—*i.e.*, its geography, climate, and motor vehicle population—are the primary causes of elevated GHG concentrations. 73 Fed. Reg. at 12161-62.

California's waiver request fails that test. California's local geography and climate have no significant impact on GHG concentrations. Although GHGs from motor vehicles in California may have some theoretical impact on GHG concentrations, they have no more impact than GHGs from any other source around the world. More to the point, since reducing California motor vehicle GHGs has the same impact as reducing motor vehicle GHGs in the rest of the country, the impetus for unique GHG standards in California is absent. As such, there are no "compelling or extraordinary conditions" in California that justify a waiver for CARB's standards.

Nothing in the Supreme Court's decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), suggests the opposite. *Massachusetts* held that EPA had authority to promulgate nationwide motor vehicle GHG standards under CAA Section 202 if EPA made an affirmative endangerment finding under Section 202. 127 S. Ct. at 1462. Unlike Section 209(b)(1)(B)'s waiver criteria, Section 202's endangerment determination considers the potential harm air pollution may cause *regardless* of the local, regional, or national nature of its causes. That fact reflects that Congress anticipated standards under Section 202 to apply nationwide, whereas Congress intended a waiver under Section 209(b) to address air pollution problems caused by uniquely local factors requiring a unique standard. *E.g.*, 113 Cong. Rec. 30946 (statement of Rep. Bell); H.R. Rep. 90-728, at 21 (1967). EPA's authority to regulate GHGs under Section 202 thus has no bearing on whether a waiver is warranted under Section 209(b).

2. In addition to denying a preemption waiver based on the foregoing interpretation and application of Section 209(b)(1)(B), EPA correctly stated in its March 8, 2008 denial an alternative ground focused on the impacts of global climate change. 73 Fed. Reg. at 12163-68. A waiver based on "extraordinary and compelling" impacts of GHG concentrations could only be considered if impacts in California were sufficiently different from impacts to the nation as a whole. The word "extraordinary" in Section 209(b)(1)(B), and the legislative history of Section 209, support EPA's conclusions. *See* S. Rep. No. 90-403, at 32 (1967).

After a thorough review and discussion of the scientific literature, EPA could not conclude that either observed or projected climate changes in California were particularly different than those for the nation as a whole. Because GHGs disperse evenly around the world, it should come as no surprise that the impacts of global climate change are not projected to vary greatly in the United States. As such, any impacts California may experience do not justify the costs and burdens associated with a patchwork of motor vehicle GHG standards. To the

contrary, the global nature of the issue is precisely why any such standards are best set at the national level. In sum, EPA correctly concluded that California does not need its own new motor vehicle GHG standards to meet compelling and extraordinary conditions.

### **B. The Bases for a Waiver Denial Have Only Increased Since March 6, 2008**

Last month, the National Highway Traffic Safety Administration (NHTSA) issued Corporate Average Fuel Economy (CAFE) standards for Model Year 2011 pursuant to the Energy Independence and Security Act of 2007 (EISA). 74 Fed. Reg. 14196, *et seq.* (March 30, 2009). According to NHTSA, raising the industry-wide combined CAFE standard to 27.3 mpg will save at least 887 million gallons of fuel nationwide and will reduce carbon dioxide emissions by some 8.3 million metric tons. Moreover, these new CAFE standards are clearly more protective than CARB's motor vehicle fuel economy/GHG rule. For example, CARB's fleet-wide average for model year 2011 of 26.7 mpg is lower than the CAFE standard for model year 2011 of 27.3 mpg, which was set by the Obama Administration on March 30, 2009. Even if one were to assume an extremely unlikely scenario where CARB's rules somehow took effect as a single national standard (as opposed to the minority of states that have actually adopted them or even as 51 separate standards), they still would not be at "least as protective" given that CARB uses an outdated "flat standard" of regulation that constrains fuel economy/GHG improvements. Congress specifically rejected this method of regulation because:

1. it cannot save as much fuel or reduce GHGs as much as a comparable attribute-based standard;
2. it places most of the regulatory burden on full-line manufacturers;
3. it limits consumer choice by forcing production of small vehicles, irrespective of actual consumer demand; and
4. it decreases passenger safety. According to a 2002 National Academy of Sciences study on CAFE, "if an increase in fuel economy is effected by a system that encourages either downweighting or the production and sale of more small cars, some additional traffic fatalities would be expected." National Research Council, *Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards*, at 77.

Congress mandated that fuel economy be regulated under an attribute-based system in EISA specifically to address the shortcomings of the flat standard. By proposing a method of regulation in conflict with Congress' approach, CARB's regulation would undermine and frustrate the program Congress designed.

Further serious structural shortcomings are inherent in the CARB approach, as several jurisdictions other than California would purport to adopt CARB's rules pursuant to Section 177 of the Act. 42 USC § 7507. These shortcomings, and their pernicious impacts on vehicle

commerce and the dual goals of reducing greenhouse gases and petroleum dependency, are detailed in the NADA report entitled *Patchwork Proven: Why A Single National Fuel Economy Standard Is Better For America Than A Patchwork Of State Regulations*. See Attachment D. Simply put, a “patchwork” of state programs would result, not from multiple standards, but rather from the obligation of each covered vehicle manufacturer to deliver a different fleet mix in each state. Importantly, this untenable situation contrasts starkly with the history of multi-state compliance with CARB standards designed to address criteria pollutants. In those situations, so long as vehicles have stickers under their hoods indicating CARB or 50-state certification, they can be sold in any CARB state. CARB’s fuel economy/GHG rules are violated in any given CARB state if the fleet mix of CARB and 50-state vehicles for a covered manufacturer fails to meet the mandatory fleet average. Ironically, while compliance with this obligation is measured by retroactively looking at the fleet of vehicles delivered by each covered manufacturer to its dealers in each “California” state, retail customers living in a “California” state are free to purchase, register, and title any CARB or 50-state certified vehicle they wish (dubbed the “cross border sales loophole”). Thus, to the extent the application of CARB’s rules constrains the availability of a covered manufacturer’s product in a given state, consumers are likely to:

1. obtain the constrained vehicles they want out-of-state;
2. obtain similar vehicles from manufacturers not covered by the law;
3. turn to used vehicles; and/or
4. hold on to vehicles longer than they otherwise would (the “jalopy effect.”).

Bottom Line: A patchwork of motor vehicle fuel economy/GHG programs would disrupt new vehicle commerce while providing little or no environmental or energy security benefits. As such, a state-by-state patchwork of such regulations never can be “as protective as” applicable Federal standards, such as CAFE, or be deemed necessary to address “compelling and extraordinary” conditions (assuming such conditions ever could be demonstrated).

Since March of 2008, the retail automobile industry has entered into what can only be characterized as dire financial straits. The country has plunged into an economic recession that has severely constrained the four sources of credit so vital to new vehicle transactions: the retail credit and leasing that enable consumers to obtain new vehicles, the wholesale or “floorplan” credit dealers need to purchase new vehicles from manufacturers, the working capital dealers need to run the businesses, and the real estate loans dealers need to finance their land and facilities. In March of 2008, new vehicles were being delivered to consumers at an annualized rate of 15 million units; today that rate has fallen to well below 10 million units. Since March of 2008, over a thousand dealers have gone out of business and many more lost money. Most dealers are in survival mode; when consumers don’t buy, dealers can’t buy, and manufacturers can’t deliver new, cleaner, more fuel efficient vehicles. In addition, the recession has led to a significant decrease in vehicle miles traveled and in the use of petroleum generally. Naturally, this has resulted in a wild swing in fuel prices from a high of \$4.11/gallon last year to around \$2.04/gallon today. Consequently, those consumers who are in the market have shifted away

from the fuel sippers that were all the rage last spring and summer, to less fuel economical vehicles, demonstrating clearly the degree to which fuel prices impact new vehicle sales.

Many dealers struggle daily with large, hard-to-sell inventories languishing on their lots. The last thing dealers need is an unnecessary state-by-state patchwork approach to fuel economy/GHG regulation that would fill their lots with more unsold vehicles. Rules aimed at reducing GHGs or increasing fuel economy must account for customer needs and purchasing behaviors. To achieve policy success, consumer demand must be recognized and leveraged. Policies that attempt to force the manufacture and sale of new vehicles that consumers are reluctant to buy will ultimately fail. We simply cannot afford to allow for CARB's market-resistant, patchwork approach, especially given that it offers little or no benefits.

**C. No Legal or Factual Arguments Have Been Made Which Warrant a Reversal of EPA's Denial of the CARB Waiver Request**

EPA's initial denial of California's waiver request was correct and was based on a detailed and reasoned analysis. Any reconsideration of that decision imposes upon the Agency an obligation to explain such reconsideration. "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis. . . ." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970) (footnote omitted), *cert. denied*, 403 U.S. 923 (1971). *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U. S. 29 (1983).

EPA's terse notice reopening the waiver proceeding does not provide an adequate basis for its reconsideration, let alone a fundamental shift in position. EPA asked commenters to address a few specific issues, but offered no specific reasons why its earlier interpretation might be wrong. As a result, EPA has failed to meet the basic requirements for rulemaking under section 307(d)(3) of the Clean Air Act, namely to state a "basis and purpose" for its proposed course of action, which "shall include a summary of . . . (C) the major legal interpretations and policy considerations underlying the proposed rule." *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (D.C. Cir. 1983) (striking portion of rule that was based on inadequate statement of basis and purpose).

Several parties who testified at last month's hearing urged EPA to reverse its preemption waiver denial decision. None of those parties presented adequate justification for reversing the denial, let alone excusing EPA's obligation to justify in its notice why its March 2008 views might have been wrong.

The following commentary addresses a number of issues raised at the hearing.

1. Ms. Linda Adams, Secretary, California Environmental Protection Agency, stated that "California's standard is the equivalent of taking 6.5 million cars off the road..." The reality is,

it is unknown how much reductions in GHGs, if any, CARB's program will achieve because (1) the mix-shifting compliance strategy is the easiest, cheapest and surest way to comply, but distorts the new vehicle marketplace and does little or nothing to reduce GHGs; and (2) motor vehicle GHGs will be reduced under the new Obama CAFE standard regardless. Please see page 14-15 of Attachment D ("*Patchwork Proven*") for more information on mix-shifting.

2. Mr. Tom Cackette, Deputy Director, CARB, asserted that "*...manufacturers are already in compliance or, with minor changes, can demonstrate compliance in the early model years, namely the period 2009-2010.*" No data has been offered supporting the proposition that the fleets delivered by covered automakers in each "California" state would comply with CARB's rules. That no such data exist is understandable given that CARB's rules are preempted by the Act, and that such data would have to address at least 308 separate fleet mandates ((11 states) x (two fleet standards) x (7 covered automakers) x (2 years)).

Mr. Cackette also asserted "*...manufacturers with the greatest compliance challenge admitted in court that they could meet the early year standards.*" Even if it were true, this statement is misleading as it omits the fact that several manufacturers (i.e., Ford, Nissan, GM and VW) have indicated that compliance with CARB's standards would involve mix-shifting, which greatly distorts the new vehicle marketplace with little or no environmental benefit. In fact, any automaker theoretically can comply with CARB's standards as long as it delivers for sale a model above such standards in sufficient quantities to offset its models which fall below. Of course, such a compliance strategy is undesirable as it ignores consumer demand.

3. Mr. Mark Rupp, Director, Washington State's Washington, D.C. Office, claimed that "*CARB's standards will reduce fleet average GHG emissions in Washington by nearly 30 percent by 2016.*" This claim, however, ignores (1) the fact that motor vehicle GHG emissions will be reduced under the CAFE standard set by Congress and implemented by the Obama Administration; and (2) that the CARB approach will necessarily be undermined by its built-in cross border sales loophole, SUV loophole, and exempt manufacturer loophole.

4. Mr. David Cash, Assistant Secretary for Policy, Massachusetts Executive Office of Energy and Environmental Affairs, suggested (as others have) that *because of the identity requirement set out in Section 177 of the Act, there can be no patchwork of regulation.* This is incorrect. Even if each state were to adopt CARB's standards word-for-word, they would still impose upon covered manufacturers a different set of fleet mandate obligations. It is this state-by-state variation in fleet delivery compliance obligations that creates a "patchwork," not the wording of each state's regulations.

Mr. Cash also suggested that since "*35 percent of the total U.S. car market*" would be governed under a CARB rule if a preemption waiver were granted, there would be no "*patchwork market.*" Again, this is not true. The size of the auto market potentially governed by

a CARB GHG rule is irrelevant to the existence of a regulatory patchwork. In fact, the worst case scenario would be the adoption and implementation of CARB's rules in all 51 jurisdictions, as it would result not in a de facto national standard, but in a patchwork of 51 different fleet mandates.

Mr. Cash introduced a March 5, 2009 letter from Massachusetts Attorney General Martha Coakley to Lisa Jackson, Administrator, EPA, in which Ms. Coakley asserted that the "...automakers are heavily advocating for a single set of national standards..." For the record, automobile dealers are not advocating for a single *set* of national standards, but rather for one single national standard. A *set* of national standards is by definition more than one standard. Similarly, a fuel economy/GHG standard set by California that is only administered and enforced in a minority of states would not be a national standard. It would be a patchwork of regulatory compliance regimes. In fact, if anything, the use of phrases such as a "unitary set of standards" is both misleading and a tacit admission that CARB's GHG rules would create a regulatory patchwork.

On the other hand, NADA agrees with Attorney General Coakley that "...manufacturers can comply with the stricter (sic) set of standards through adjusting their marketing strategies and distribution networks rather than retooling specific models." [emphasis added] As discussed above, the term for this compliance strategy is "mix shifting." Notably, Ms. Coakley omitted to indicate that mix shifting would do little to reduce motor vehicle GHGs nationally, yet would greatly distort the new vehicle auto market in Massachusetts (and in all other "California" states) by restricting the availability of certain vehicles, irrespective of consumer demand. As set forth by Congress in EISA, a much preferred approach would facilitate the deployment of fuel saving technologies across all vehicle categories in the fleet. No doubt, under a CARB regulatory approach, mix shifting will be the compliance path chosen by covered automakers, to the detriment of dealers, of consumers, and of the environment.

5. Mr. Walter McManus, Director, Automotive Analysis Division, University of Michigan Transportation Research Institute alleged that, *because automakers already "mix shift" to meet local and regional demands, mix shifting to comply with CARB's regulation won't interfere with consumer choice.* This argument is fatally flawed, however, because automakers that mix shift to meet local and regional demands are doing so to *fulfill* consumer demand, not an artificial regulatory standard. By definition, fulfilling consumer demand does not interfere with consumer choice; it satisfies it. Mr. McManus curiously ignores the fact that mix shifting to meet a CARB GHG rule has no relation to and will likely frustrate consumer demand.

Mr. McManus described mix shifting as a "...low-cost means of meeting Pavley's requirements..." It is certainly not low-cost for auto dealers, many of whom would lose business due to:

- (i) the jalopy effect;

- (ii) dealers who must compete with other dealers who sell exempt brands;
- (iii) being forced to accept smaller vehicles regardless of local consumer demand;
- (iv) the rationing of larger vehicles; and
- (v) out-of-state dealers unencumbered by CARB's regulation.

Moreover, these very real costs will be incurred with little or no commensurate decrease in motor vehicle GHGs, the purported purpose of CARB's regulation.

6. Mr. Roland Hwang, Director, Vehicle Policy, Natural Resources Defense Council, suggested that "*since the fleet's fuel economy is going up anyway because of the market, or because of CAFE, the actual regulatory cost of CARB's program is little or potentially no additional regulatory cost to these [auto] companies.*" In reality, mix shifting and CARB's market-distorting loopholes and exemptions make CARB's rules anything but a harmless appendage to the national CAFE program. There would be real and severe costs associated with the multi-state adoption of CARB's standards, costs that would be borne largely by dealers. On the other hand, there would indeed be little or no additional benefits gained from CARB's rules.

7. Dr. Mark Cooper, Director of Research, Consumer Federation of America, correctly stated that "*there is a direct relationship between greenhouse gas emissions and increased fuel efficiency.*" In fact, as indicated in the chart below, the relationship is so close that the technologies identified by CARB for potential motor vehicle GHG improvements are nearly identical as those technologies identified by NHTSA in support of its new CAFE standards.

## Is CARB's Regulation "Related to" Fuel Economy?

Automotive Technologies	Identified by NHTSA to Raise Fuel Economy	Identified by CARB to Decrease GHGs
Cylinder deactivation	✓	✓
Six-speed automatic transmission	✓	✓
Automated Shift Manual Transmissions	✓	✓
Variable valve timing and lift	✓	✓
Turbocharging	✓	✓
Stoichiometric Gasoline Direct Injection	✓	✓
Integrated Starter-Generator	✓	✓
Camless valve actuation	✓	✓
Homogeneous Charge Compression Ignition	✓	✓
Low-leak air conditioning		✓
<small>Source: 73 Fed. Reg. 24396 (May 2, 2008).            CARB, Report to the Legislature and the Governor on Regulations to Control GHG Emissions From Motor Vehicles, pages 7-8, December 2004.</small>		

In summary, the legal and factual bases for EPA's March 2008 preemption waiver request denial are, if anything, stronger today than they were a year ago.

### **D. EPA Must Deny California's Waiver Request on the Basis That It Provides Inadequate Lead Time for Compliance.**

EPA is required to deny California's waiver request if, among other grounds, California's standards "are not consistent with section 7521(a) of this title," i.e., CAA § 202(a). Section 202(a) provides the basic authority for EPA's federal vehicle emission standards and requires adequate lead time to demonstrate compliance. EPA must consider a proposed California standard to be *inconsistent* with section 202(a) if it affords "inadequate lead time to permit development of necessary technology giving appropriate consideration to the cost of compliance within that time period." 72 Fed. Reg. 21261 (Apr. 30, 2007) (requesting comment on California's GHG waiver request).

California originally submitted its motor vehicle GHG waiver request on December 21, 2005, more than three years ago. EPA postponed consideration of the request for years. NADA's October 12, 2007 supplemental comments explained that it was *already* too late for affected parties to comply with the State's GHG standards. *Attachment C*. Now, 18 months later, that is beyond dispute.

EPA is fully aware of this issue. In its February 2009 notice, EPA asked for comments on "the effect of the March 6, 2008 denial on whether California's GHG standards are consistent with section 202(a) of the Act, *including lead time*." 74 Fed. Reg. 7042 (Feb. 12, 2009) (emphasis added). On the other hand, California attempted to gloss over the issue in its January 21, 2009, request for reconsideration:

In noticing an additional comment period, EPA may wish to specifically request comment on a sub-issue under the technology and lead-time consistency analysis to consider the status of 2009 model-year vehicles already in production. It is our understanding that because all manufacturers can comply with California's 2009 model-year greenhouse gas fleet average, all manufacturers would obtain credits that would carry forward to future model-years, rendering the 2009 model-year a moot issue in this waiver reconsideration process.

Letter from Mary D. Nichols, Chairman, California Air Resources Board, to Lisa P. Jackson, Administrator-Designate, U.S. Environmental Protection Agency, Jan. 21, 2009 ("Request for Reconsideration"), p. 3.

California's simple assertion does not satisfy the statutory criterion and provides no record basis for EPA to determine that adequate lead time would be provided. CARB's standards were written to take effect beginning with model year 2009, *which began more than half a year ago*. California approves compliance with its standards in an Executive Order which, like a federal certificate of conformity, must be obtained *before* a vehicle can be introduced into commerce. 2009 vehicles are already certified and currently are being sold in California without GHGs having been considered. Since an Executive Order is a permit and a legal license to distribute vehicles, California cannot retroactively impose its GHG rules for model years already underway and EPA must conclude that there is inadequate compliance lead time.

California has not sought to defer the compliance deadlines for its standards. In fact, the State argues that a deferral is not necessary:

We believe that since all overarching lead time, feasibility, and cost issues associated with the consistency analysis were noticed and responded to in comments by ARB and others, seeking comment on California's understanding on this narrow sub-issue may be appropriate, would not transform this reconsideration request into a new waiver request and would allow EPA to grant a waiver for the entire regulation for model-years 2009

through 2016.

Request for Reconsideration, p. 3. Moreover, EPA has no authority to change the deadlines in California's regulations. "As the Administrator has consistently held since first vested with the waiver authority, his inquiry under section 209 is modest in scope. He has no 'broad and impressive' authority to modify California regulations." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1119 (D.C. Cir. 1979) (quoting *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 756 (1973)). Thus, there is plainly inadequate lead time for California's GHG standards, and on that basis alone EPA must deny the waiver request.

## **II. NADA SUPPORTS A SINGLE, NATIONAL FUEL ECONOMY STANDARD**

Based on the foregoing discussion and on conclusions reached in the attached documents, EPA must conclude this proceeding by reaching the same conclusion it did a year ago: that only a single, well-designed, national standard can enhance new vehicle fuel economy, emissions performance, and safety. EISA set a very ambitious fuel economy goal for cars and light trucks, equating to an increase in the standard of at least 40 percent, with commensurate decreases in GHGs. EISA also required an attribute-based approach designed to encourage all vehicle manufacturers to improve the fuel economy for each light-duty model segment they sell, thus enabling them to be more responsive to customer buying preferences. Importantly, under EISA, manufacturers may meet their fuel economy mandates by adjusting the number and types of vehicles they sell across the entire country, further providing flexibility to meet consumer demand. These are critical provisions for any fuel economy/GHG regulatory scheme as benefits can be achieved only if, and only when, new vehicles are sold to end users. A national program that accounts for and leverages consumer preferences will avoid perverse interstate sales distortions, and will ensure that sought-after GHG and fuel economy benefits are fully realized.

## **III. CONCLUSION**

Unless and until new vehicles are sold, fuel economy/GHG benefits cannot be realized. The discussion above and in the attachments to these comments conclusively demonstrate that a well-designed national program can effectively leverage consumer demand to help achieve real-world improvements. A state-by-state patchwork approach to GHG and fuel economy regulation cannot, due to its inherent and insurmountable shortcomings, and is the very type of state law the Act's preemption provision and the Energy Policy and Conservation Act's express preemption provision were designed to prevent. 49 U.S.C. 32919(a).

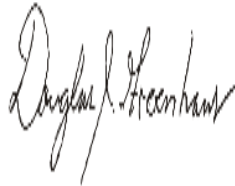
While CARB's approach to regulating motor vehicle GHGs inherently reflects numerous poor policies that undermine its effectiveness, one should not conclude that there is no role for states to play when it comes to reducing motor vehicle GHGs and reducing petroleum dependence. To the contrary, NADA describes at some length in Section III of its June 2007 comments a number of appropriate roles states can play in this area, both regarding existing in-

U.S. Environmental Protection Agency  
April 6, 2009  
Page 13

use fleets and the new vehicles of the future. In fact, dealers across the country look forward to the opportunity to partner with states on many of these potential programs and strategies.

Especially in light of the severe economic challenges faced by the auto sector, EPA's denial of California's waiver request should be reconfirmed in favor of a strong, single, national fuel economy standard. On behalf of NADA, I thank EPA for the opportunity to comment on this important matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Douglas J. Greenhaus". The signature is written in a cursive, flowing style.

Douglas Greenhaus  
Director, Environment, Health and Safety

Attachments