

Legal Lookout: EPA Grants California GHG Waiver Request

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EPA's decision to grant California's request for a waiver, thus allowing the state to set separate air quality standards, should indicate plans for more such movements in the future.

Oh what a difference a new administration makes! On June 30, 2009, EPA reversed its controversial Feb. 29, 2008, denial of California's waiver request for its greenhouse gas (GHG) program for new motor vehicles.[1] The reversal, as its predecessor denial decision, has broad national implications.

Background

Clean Air Act (CAA) Section 209(b) prohibits states from adopting emissions control standards for new motor vehicles or motor vehicle engines. Section 209(b)(1) requires that the EPA Administrator waive the prohibition if the state determines that the standards will protect public health and welfare at least as well as applicable federal standards. No waiver will be granted, however, if the protectiveness determination is "arbitrary and capricious," the state does not need its own standards to meet "compelling and extraordinary" conditions, or the state standards and accompanying enforcement procedures are not consistent with CAA Section 202(a) (federal motor vehicle emission standards).

In 2005, California submitted its request to implement its 2002 motor vehicle emissions law. The rule was aimed at reducing GHG emissions by 25 percent beginning in 2009 model year automobiles and light trucks, and by 18 percent in sport utility vehicles. In 2007, EPA reported that it would consider the request after the Supreme Court ruled on *Massachusetts v. EPA*. The court decided in April 2007, over the agency's objections, that EPA has the authority to regulate GHGs from new motor vehicles.

In a much-anticipated decision, then-EPA Administrator Stephen Johnson advised Gov. Arnold Schwarzenegger on Dec. 19, 2007, that EPA would deny the request. The letter communicating the decision noted that the "current waiver request for greenhouse gases . . . presents numerous issues that are distinguishable from all prior waiver requests. Unlike other air pollutants covered by previous waivers, greenhouse gases are fundamentally global in nature." EPA concluded that California lacks a "need to meet compelling and extraordinary conditions."

The decision set off a firestorm of criticism. In February 2008, the House Oversight and Government Reform Committee issued a subpoena for materials from an EPA staff briefing on the waiver request at which, reportedly, staff urged a different result. The Senate Environment and Public Works Committee asked the Government Accountability Office to investigate the decision. Members of the Senate Appropriations Committee lashed out at Johnson in March 2008, claiming his decision "looks to be plainly contradicted by both the Clean Air Act and by 40 years of agency policy."

On Jan. 26, 2009, President Obama signed a Presidential Memorandum directing the agency to assess whether the denial was appropriate under the CAA, and urging them to “initiate any appropriate action” based on the assessment. Less than six months later, the agency granted California’s waiver request. EPA stated its decision was based on the extensive scientific record favoring approval.

Pollution Engineering readers can expect more stringent state emission control standards similar to those at issue in California in the years ahead. To the extent the Obama Administration has expressed a clear preference for state environmental (or other) regulations more protective than, but consistent with, federal standards, readers can also expect similar expressions of support for states’ rights in the future. PE

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References

1. See 74 Fed. Reg. 32744 (July 8, 2009); see also California Greenhouse Gas Waiver Request, available at <http://www.epa.gov/otaq/climate/ca-waiver.htm>.