
ENVIRONMENTAL LAW & PROPERTY RIGHTS

CAN THE GOLDEN STATE CATCH A GREENHOUSE WAIVER?

By Jonathan H. Adler*

In 2004, the California Air Resources Board (CARB) adopted the nation's first regulations limiting the emission of greenhouse gases from new motor vehicles. The California rules require automakers to reduce greenhouse gas emissions from new motor vehicles sold in the state, beginning with the 2009 model year. By 2016, new vehicle emissions must decline by nearly 30 percent. Several other states have announced their plans to follow California's lead, adopting the regulations as their own. Before these regulations can take effect, however, California must obtain a waiver of preemption under the Clean Air Act (CAA) from the U.S. Environmental Protection Agency (EPA). California politicians demand such a waiver forthwith, and EPA Administrator Stephen Johnson has promised a decision on the request by the end of 2007.

Many assume California is entitled to a waiver, and only Bush Administration intransigence stands in the way. Testifying before the Senate Committee on the Environment and Public Works in May 2007, California Attorney General Edmund G. Brown, Jr. declared "If EPA follows the law, there's no question that it must grant California's waiver."¹ California has sought and obtained numerous waivers of CAA preemption in the past without much trouble. Why should this case be any different? Because this would be the first waiver authorizing state regulation of vehicular emissions of greenhouse gases. EPA approval of California's waiver request is not—and should not be—automatic. A CAA waiver for greenhouse gas emission reductions raises distinct legal and policy issues. In prior cases, California sought permission to adopt more stringent pollution controls to facilitate its efforts to combat urban smog and other localized pollution problems. Now California seeks to reduce emissions that contribute to global warming. The problem California seeks to address with these rules is not localized, or even national; global climate change is a *global* phenomenon. As a consequence, it is not entirely clear that the EPA is required, or even permitted, to grant California the waiver it wants. While the Bush Administration may face tremendous political pressure to grant the Golden State its wish, there are grounds to pause before assuming it is legally obligated to do so.

This article provides an overview of the legal and policy issues raised by California's request for a waiver of federal preemption of its new greenhouse gas emission regulations. After summarizing the legal requirements for obtaining a waiver of preemption under the CAA, this article explains why it may be more difficult for California to obtain a waiver for greenhouse gas emission regulations than it has been for prior state regulations governing traditional air pollutants.

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The article then considers how California's waiver request fits into a broader policy framework dividing responsibility for environmental protection between the federal and state governments. Accepting there are strong arguments for greater state flexibility in environmental law, this article assesses the relative strength of California's demand for greater freedom to set its own greenhouse gas emission control policies.

VEHICLE EMISSION CONTROLS UNDER THE CLEAN AIR ACT

The CAA establishes a baseline of uniform emission controls for new motor vehicles. Section 209(a) of the CAA provides that no state may adopt or enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines" subject to regulation under the Act.² The purpose of this provision is to maintain a national market for motor vehicles by providing for uniformity in vehicle emission standards. Any automobile that rolls off an assembly line meeting federal emission control requirements should be able to be sold anywhere in the United States. A uniform national standard prevents the balkanization of the national automobile market that could result if automakers were required to design and sell different vehicles in different states.³ Indeed, the major automakers supported adoption of federal vehicle emission controls in order to preempt the proliferation of variable state standards.⁴

The CAA contains one exception to this general policy of preemption. Recognizing California's particularly severe air pollution problems, and the Golden State's pioneering efforts to control mobile source air pollution—efforts that predated adoption of vehicle emission controls at the federal level—Congress adopted Section 209(b), authorizing a waiver of preemption for California.⁵ This provision effectively grandfathered California's pre-existing emission controls and authorized a potential exemption for additional emissions controls adopted there in the future.⁶ Once the EPA grants a waiver, other states are permitted to adopt California's regulations as a part of their own air pollution control programs under CAA Section 177, but they are never allowed to adopt vehicle emission standards of their own.⁷ As a consequence, there can never be more than two sets of vehicle emission standards—those set by the EPA, and those set by California.

CALIFORNIA'S GREENHOUSE GAS EMISSION CONTROLS

In 2002, the California state legislature enacted Assembly Bill 1493, directing the CARB to "develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."⁸ In September 2004, CARB approved regulations amending its existing "Low-Emission Vehicle (LEV II)" program to establish declining fleet average greenhouse gas emission standards. The regulations apply to four greenhouse gases: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons, but are enforced by reference to the carbon-dioxide equivalent of a

vehicle's emissions. Under CARB's regulations, the emission standards take effect beginning with the 2009 vehicle model year, and decline in subsequent model years through 2016.

California adopted its greenhouse gas regulations out of a stated concern about the state's contribution and vulnerability to global climate change. California is responsible for a substantial share of U.S. greenhouse gas emissions, and over half of the state's emissions come from transportation. "Climate is a central factor in California life," according to CARB, and "climate change threatens California's public health, water resources, agricultural industry, ecology, and economy."⁹

California policymakers assumed that CARB would apply for, and the EPA would grant, a waiver of preemption under CAA Section 209(b). Accordingly, CARB submitted a waiver request to the EPA in December 2005. Up until now, the EPA has never completely denied a waiver request under Section 209(b).¹⁰ Up until now, however, California had always sought waivers for emission control measures that related to the state's efforts to control its notoriously severe local air pollution problems.

When California adopted its greenhouse gas regulations, there was some legal uncertainty as to whether a waiver request was even possible. At the time, the EPA denied that it had any authority to regulate automotive emissions of greenhouse gases, so there was no basis upon which the EPA could approve a waiver request. The Supreme Court's recent decision in *Massachusetts v. EPA* resolved some of this uncertainty, holding that greenhouse gases were "pollutants" subject to regulation under the CAA.¹¹ The EPA must now reconsider its refusal to adopt federal regulations limiting vehicular greenhouse gas emissions—and such rules are almost certain to be adopted.¹² If the EPA may regulate greenhouse gases, there is no question that California must obtain a waiver from the EPA if it is to maintain and enforce its greenhouse gas emission regulations—but it does not mean that a waiver must be forthcoming. Following the *Massachusetts* decision, however, the EPA announced it would formally consider California's waiver request.¹³

WAIVERS OF PREEMPTION UNDER SECTION 209(b)

The CAA waiver provision is not a blank check. Section 209(b) imposes some limitations on the EPA's authority to approve a waiver of preemption for California's vehicle emission standards.¹⁴ EPA review of a California waiver request is fairly deferential. "California's regulations, and California's determination that they comply with the statute... are presumed to satisfy the waiver requirements and [] the burden of proving otherwise is on whoever attacks them."¹⁵ Nor does the EPA have any authority to consider criteria beyond those enumerated in Section 209(b) when making a waiver determination. Judicial review of the EPA's waiver determination is also deferential, and the EPA is presumed to have acted properly when ruling on a waiver request, particularly if it approves the waiver.¹⁶

Section 209(b)(1) provides that before California can receive a waiver, it must make a threshold determination that its proposed standards "will be in the aggregate, at least as protective of public health and welfare as applicable Federal standards."¹⁷ Once California has made such a determination, and seeks a waiver, Section 209(b) provides that the EPA *must*

deny a waiver if the EPA finds that:

- (A) the determination of the State is arbitrary and capricious,
- (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
- (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.¹⁸

An EPA finding that any one of these three criteria is met is grounds for denying California's waiver request.

The first criterion is unlikely to present much difficulty for California's waiver request. CARB has substantial experience developing and modeling vehicle emission control programs, even if not for greenhouse gases. California maintains an extensive vehicle emission control program and CARB's expertise in this area rivals that of the U.S. EPA.

When adopting its greenhouse gas regulations, CARB analyzed the proposed greenhouse gas emission reductions and concluded that they are no less protective than applicable federal standards. The EPA is obligated to give substantial deference to this determination. It can only reject CARB's conclusions on this point if it concludes that this determination was arbitrary and capricious, and this is unlikely. It is not enough if the EPA disagrees with CARB's conclusion. To reject the waiver request on this basis, the EPA must actually conclude that CARB's conclusion was arbitrary and capricious.

In support of its waiver application, CARB noted that, "since U.S. EPA has declined to set federal standards for greenhouse gases, California's Greenhouse Gas Regulations are unquestionably at least as protective as the applicable federal standards since the latter do not exist."¹⁹ This is true. Some standard is necessarily as, if not more, protective than no standard. After *Massachusetts v. EPA*, the EPA is reconsidering whether to adopt some emission controls, but unless the EPA adopts regulations more stringent than California's—effectively making the Golden State's rules irrelevant—the California standards must be at least as protective as the federal standards.

It is conceivable that the EPA could conclude that CARB underestimated or unreasonably discounted the effect of the greenhouse gas emission standards on fleet turnover, and therefore underestimated the extent to which such emission controls could retard reductions in other air pollutants. It is also possible that further analyses could reveal that the California standards would actually impair other air pollution control efforts if they result in increased driving (due to increased fuel economy) resulting in greater emissions of other pollutants.²⁰

The third criterion is also unlikely to provide a sufficient legal basis for rejecting the California rules. The EPA is unlikely to conclude that the California regulations governing greenhouse gas emissions are inconsistent with CAA Section 202(a).²¹ CARB appears to have given adequate consideration to the technological feasibility of, and required lead time for, its greenhouse gas emission reduction standards. CARB adopted the rules several years before they took effect. Further, CARB maintains that its emission standards may be met with "off-

the-shelf” technologies. This is also a matter with which the Golden State’s regulators have significant experience. Unless opponents of California’s standards can demonstrate with clear and compelling evidence that CARB’s conclusions are inaccurate, the EPA would be unlikely to deny a waiver on these grounds.

THE SECOND CRITERION

If the EPA were to deny California’s waiver request—or if a federal court were to overturn an EPA decision to grant a waiver—it is most likely to be because California’s regulation of greenhouse gas emissions from motor vehicles is not necessary to meet “compelling and extraordinary conditions.” As noted above, Section 209(b) requires EPA to reject California’s waiver request if the Agency determines that California “does not need such State standards to meet compelling and extraordinary conditions.”²² Global climate change, unlike the local and regionalized forms of air pollution that have been the focus of California’s regulatory efforts to date, may not satisfy this standard.²³

In the past, California has been able to argue that more stringent controls on vehicular emissions regulated by the EPA were necessary due to California’s uniquely severe urban air pollution problems, the difficulty some California metropolitan areas would otherwise have meeting applicable National Ambient Air Quality Standards, and the comparatively large contribution mobile source emissions made to California’s air pollution problems. None of these arguments are applicable in the context of global climate change.

CARB submits that the EPA must show as much, if not more, deference to California’s policy determination that greenhouse gas emission reductions are necessary, as it would to other emission control policies.²⁴ There is little basis for this argument. If anything, the EPA is less likely to defer to California’s determination because climate change is not an environmental problem that presents a “compelling or extraordinary” threat to California—as distinct from the nation as a whole.

The argument that climate change cannot satisfy the second criterion of Section 209(b) is not based upon any skepticism or denial of human contributions to climate change. Nor is it dependent upon rejecting that a modest increase in global temperature brought about by anthropogenic emissions of greenhouse gases could have negative ecological and other effects in California. As a coastal state, California may be threatened by sea-level rise in a way that land-locked states cannot be. California’s unique geography and ecological conditions further mean that temperature increases will trigger different types of secondary effects there than elsewhere. But this may not be enough to satisfy Section 209(b)(1)(B).

Section 209(b) almost certainly requires that California do more than show that anthropogenic emissions are causing an increase in atmospheric concentrations of greenhouse gases that, in turn, contribute to a gradual warming of the climate, and that such warming could have negative effects. To read the second criterion in this way is to make it wholly redundant with the CAA standard for setting federal emission standards in the first instance, and thus a dead letter.

CAA Section 202(a)(1) requires the EPA to adopt controls on emissions from new motor vehicles that, in the judgment of the EPA Administrator “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”²⁵ This is the standard for adopting federal controls on vehicular emissions of a given pollutant. Section 209(b) provides for a waiver of preemption for California regulations controlling pollutants that are already subject to regulation under this standard pursuant to Section 202(a). Therefore, to justify a waiver under Section 209(b), California must demonstrate something more than the fact that the accumulation of greenhouse gases in the atmosphere will contribute to global warming that, in turn, may have some deleterious effects in California. If Section 209(b) authorized the EPA to grant a waiver for any pollutant that could have negative effects it would, by definition, apply to every pollutant for which there is a standard under Section 202(a). Assuming the language of Section 209(b) serves some purpose within the Act, it must create a different and more demanding standard than that which triggers federal regulation under Section 202(a).

The most sensible reading of Section 209(b) is that California must be able to show that *California needs* more stringent standards than those provided by the EPA to meet specific conditions or concerns *in California*. This gives the Golden State a problem. Because global climate change is, by definition, a global phenomenon, California cannot claim that it faces a unique problem as distinct from that faced by the nation as a whole. Nor can California claim that it *needs* its greenhouse gas emission controls to address the threat posed by climate change, as adoption of these measures will not have any meaningful (if even measurable) effect on global climate change, let alone the specific effects of climate change about which Californians are concerned.

California cannot maintain that its regulatory program, even if adopted by a dozen other states, will have any meaningful effect on future projections of climate change. Dr. T.M.L. Wigley of the National Center for Atmospheric Research demonstrated that were *all developed nations*—those on “Annex B” of the Kyoto Protocol—to fully comply with the greenhouse gas emission reduction targets established by the Kyoto Protocol, and maintain such controls through 2100, this would only change the predicted future warming by 0.15°C by 2100.²⁶ The reductions modeled in the Wigley study are several times greater than the complete elimination of all greenhouse gas emissions from the U.S. transportation sector, let alone any realistic estimate of emission reductions to be achieved from the imposition of regulatory controls on new motor vehicles nationwide (let alone in a handful of states). Thus, California cannot plausibly maintain that its vehicle emission controls would do much of anything to address any threat posed by climate change to the state.

CARB argues that “California need not demonstrate... that the state faces unique threats from greenhouse gas emissions,” and that it is enough that the state faces “extraordinary and compelling conditions generally.”²⁷ The basis for this argument is that the EPA has traditionally evaluated California waiver requests as applied to emissions control *programs* as opposed to individual *standards*. According to CARB, “the relevant inquiry

under Section 209(b)(1)(B) is whether California needs its own emission control program to meet compelling and extraordinary conditions, not whether any given standard is necessary to meet such conditions.”²⁸ Because it is clear that California does experience the sort of “compelling and extraordinary conditions” that justify a California-specific emissions control program, CARB reasons, the greenhouse gas emission controls must be permitted as well.

There is some merit to CARB’s argument. As interpreted by the EPA, Section 209(b) does not authorize or require the EPA to analyze separately each individual component of each program for which CARB seeks a standard. Rather, the EPA may look at programs as a whole, recognizing that the waiver provision is designed to enable California regulators to tailor a set of standards to California-specific pollution concerns and make different trade-offs than those embodied in relevant federal standards. But this does not mean—indeed cannot mean—that once California had adopted its first vehicular emissions control program, it would be able to adopt any and all emission control standards from that point forward that satisfied the remaining 209(b) criteria. Here California seeks to adopt a new set of standards to address a previously unregulated environmental concern. Surely California’s preexisting emission control program, for which preemption was waived, does not require a waiver for the new standards as well; and the EPA would be wholly justified—if not required—to ensure that California’s greenhouse gas emission controls satisfy Section 209(b)(1)(B), as have those measures adopted before it.

Because California cannot demonstrate that controls on vehicular emissions of greenhouse gases are *necessary* to meet any “compelling and extraordinary conditions” in California, the EPA would have ample justification for denying California’s waiver request. This does not mean that the EPA is necessarily obligated to deny the waiver, however. The CAA gives the EPA some amount of discretion, and federal courts give substantial deference to such agency determinations if they are supported by a reasonable explanation. Insofar as the language of Section 209(b) is at all ambiguous, courts would defer to the EPA’s construction of the standard. Therefore, an EPA decision to grant a waiver would necessarily be vulnerable to court challenge.

POTENTIAL EPCA PREEMPTION

The CAA is not the only federal law that may preempt California’s greenhouse gas emission standards for new motor vehicles. Therefore, even were the EPA to grant California’s request for a waiver, this would not necessarily preclude the federal preemption of California’s greenhouse gas emission controls under other laws, such as the Energy Policy and Conservation Act (EPCA). By its own terms, Section 209(b) only provides for a waiver of preemption under the Clean Air Act, not by other statutes.²⁹

The EPCA establishes federal standards for automotive fuel efficiency, known as Corporate Average Fuel Economy (CAFE) standards.³⁰ The EPCA also explicitly preempts any state or local regulations “related to fuel economy standards.”³¹ This language adopts a fairly broad standard for preemption. It preempts all state rules “related to” fuel economy, and not

simply those that explicitly seek to improve automotive fuel efficiency.

The National Highway Transportation and Safety Administration (NHTSA), the agency charged with implementing the fuel economy standard provisions of the EPCA, has argued with some force that federal fuel economy standards preempt state regulation of greenhouse gas emissions. This is because regulations limiting the vehicular emission carbon dioxide, the primary greenhouse gas emitted from automobiles, are, in effect, regulations of automotive fuel economy. As NHTSA explained:

Congress has explicitly preempted any state laws or regulations relating to fuel economy standards. A State requirement limiting CO₂ emissions is such a law or regulation because it has the direct effect of regulating fuel consumption. CO₂ emissions are directly linked to fuel consumption because CO₂ is the ultimate end product of burning gasoline.³²

Although the California regulations apply to four greenhouse gases, and not just carbon dioxide, compliance is measured by converting emissions of the other three greenhouse gases into “CO₂-equivalent.” On this basis, NHTSA concluded that California’s regulations are “based primarily” on carbon dioxide emissions.³³ Unlike the CAA, the EPCA does not contain a provision authorizing a waiver of preemption for California or any other state.

In *Massachusetts v. EPA* the Supreme Court held that the existence of federal fuel economy program under EPCA did not preclude the conclusion that the EPA had authority to regulate greenhouse gas emissions under the CAA. The Court concluded that these two obligations did not inherently conflict. It does not necessarily follow that *state* efforts to control greenhouse gas emissions are not preempted by federal fuel economy rules, however. In rejecting the EPA’s argument that NHTSA’s authority to set automobile fuel economy standards under EPCA precluded EPA authority to regulate greenhouse gas emission standards, the Court explained that “[t]he two obligations may overlap, but there is no reason to think *the two agencies* cannot both administer their obligations and yet avoid inconsistency.”³⁴ Two federal agencies can be expected to communicate and coordinate overlapping regulatory efforts. The same level of cooperation cannot be assumed between federal and state agencies. Where two federal regulatory programs “overlap,” such coordination may prevent one agency’s regulation from preempting another’s. When federal and state law “overlap,” however, it is common to find that the federal rule preempts potentially conflicting state regulations. Therefore, *Massachusetts* should not be read to preclude EPCA preemption of California’s greenhouse gas regulations.

THE BROADER POLICY CONTEXT

To complement the legal analysis above, it is worth briefly considering the relevant policy considerations raised by California’s waiver request. The CAA may impose some limits on the EPA’s ability to grant California’s waiver request, but this does not mean the balance struck by the CAA is the correct one. There is a strong argument that states should be given greater flexibility in meeting environmental standards than they receive under current law.³⁵

The principle of “subsidiarity”—the principle that problems should be addressed at the lowest level practicable—is particularly appropriate in the context of environmental policy. Because most environmental problems are local or regional in nature, there is a strong case that state and local governments should be given the flexibility to design and implement their preferred approaches to such environmental concerns. This case is particularly powerful in the context of local or regional environmental concerns, such as land-use patterns, local drinking water quality, and the siting of polluting facilities. Decentralizing environmental policy in this way could spur ecological innovation and better “fit” between environmental protections and given environmental concerns. The waiver of applicable federal standards, particularly those that could preempt variable state programs, is one way of providing for such flexibility.³⁶

A preference for decentralization or subsidiarity does not mean there should be no federal environmental regulation, however. It simply creates a rebuttable presumption toward decentralization—a presumption that can be overcome with a demonstration that more centralized action is necessary or likely to produce a more optimal result. For example, the presumption may be overcome where there is an identifiable *federal* interest, or some reason to believe that state and local governments will be systematically incapable or unwilling to adopt publicly desired environmental measures.³⁷

The regulation of greenhouse gas emissions from motor vehicles touches upon two identifiable federal interests that could justify uniform federal regulation. First, global climate change is, by definition, a global concern. It affects the nation, indeed the world, as a whole. Emissions of greenhouse gases, such as carbon dioxide, disperse throughout the atmosphere. Because global climate change requires measures that address global atmospheric concentrations of greenhouse gases, there is little reason to believe that state governments are capable of adopting effective or efficient policies in this area.³⁸ Because climate change is a global concern, the most effective policies must be developed at a “higher” level—through international institutions or the cooperation of national governments, rather than independent actions by states.

State governments are simply incapable of adopting policies that will have a significant impact on climate change trends. This does not mean that state governments should always be precluded from adopting localized climate measures. State climate policies may encourage greater policy innovation, as it has in other contexts.³⁹ But given the relatively minimal benefits that such policies are capable of producing, there should be adequate attention paid to the potential of such policies to externalize costs on to other jurisdictions. If states wish to adopt various measures demonstrating their commitment to reducing greenhouse gases, they should be allowed to do so. States should not necessarily have the freedom to adopt policies that impose disproportionate costs on other jurisdictions.

Another national interest that could justify federal preemption of state standards is the national market for motor vehicles. There are economies of scale in the manufacture of products produced for and distributed to national markets that may make a single federal standard more efficient, and more

beneficial for consumers and producers alike than a multiplicity of state standards.⁴⁰ Specifically, a single set of regulations may make more sense for a single, integrated national economy. This argument is strongest in the case of product regulation. Where a given product is bought and sold in national markets, and will travel throughout interstate commerce, it is less costly to design and produce so as to conform to a single national standard. While it is not clear why siting standards for a pulp mill in Vermont should match those for one in Oregon or Mississippi, if commercial goods are going to be produced on a national scale for national markets, producers may be best served if there is a single product standard that applies nationwide. In addition, consumers may benefit from national product standards, insofar as lower compliance costs result in lower consumer prices.

Allowing states to adopt more stringent product standards of their own poses the risk of one state externalizing the costs of its environmental preferences onto out-of-state market participants. For instance, if California and several northeastern states adopt more stringent emission standards for automobiles, and this produces a *de facto* national standard that increases production costs, consumers in other states may end up bearing a portion of the costs of more polluted states’ preference for cleaner vehicles.

It is likely that the inherent economies of scale from the adoption of a single national standard for products sold in interstate commerce, such as automobiles, are less today than when Congress enacted Section 209. The costs of meeting variable state standards have declined with the development of customized manufacturing processes and just-in-time inventory.⁴¹ Insofar as manufacturers are capable of tailoring production for different markets, state-specific product standards may not necessarily allow one state to externalize the costs of its environmental preferences on another. This does not mean that such concerns are wholly unwarranted, however. Nor does it alter the fundamental policy choice made by Congress that is reflected in CAA Section 209(b).

A NOTE ON TIMING & POLICY ALTERNATIVES

California politicians have complained that the EPA has been particularly sluggish in responding to its waiver request. “If we don’t see quick action from the federal government, we will sue the EPA,” California Governor Arnold Schwarzenegger proclaimed in a recent speech.⁴² In an April letter to the EPA, he warned that California would sue if a waiver were not granted within 180 days. Writing in the *Washington Post* with Connecticut Governor Jodi Rell, Schwarzenegger argued that the EPA’s refusal to grant a waiver to date “borders on malfeasance.”⁴³

California first asked the EPA for a waiver in December 2005, but the federal agency stalled. With litigation concerning the CAA’s applicability to greenhouse gases pending, the EPA was in no hurry to approve California’s request. Indeed, prior to the Supreme Court’s decision in *Massachusetts v. EPA*, the Agency had ample reason to defer action on California’s waiver request. First, the EPA’s legal position in that litigation suggested that the waiver provision was inapplicable. Equally important, it would have been perfectly reasonable for the EPA to decide to defer any action until the resolution of the litigation and a

judicial clarification of the scope of the EPA's authority and the applicability of the waiver provision.

After *Massachusetts v. EPA* was decided, the EPA finally began to review California's request and opened public comment on California's waiver request. If the past is any guide, it could take several months or more for the EPA to review the applicable comments, reach a final determination, and publish a final rule along with a reasoned explanation of its decision. EPA Administrator Stephen Johnson said that he expects an agency decision by the end of the year, but the EPA is hardly known for meeting deadlines.⁴⁴ Even if the EPA granted California's waiver forthwith, the decision could be litigated for years. In any event, a several-month delay is hardly unusual. It is the standard, deliberate (if regrettably slow) pace of federal administrative action—a pace that has not seemed to trouble California before. In the past, California has been more than willing to begin implementing new vehicle emission controls before obtaining an EPA waiver of preemption.

California Governor Arnold Schwarzenegger states that the EPA's failure to grant a waiver immediately will "result in California losing its right as a state to develop forward-thinking environmental policies."⁴⁵ This is not true. The lack of a waiver simply takes one policy option off of the table. Scores of alternatives remain available, and many states are exploring climate policy options that do not conflict with federal law. Nothing stops California from imposing emission controls on industrial and commercial facilities, and other sources of greenhouse gases, other than the political will to impose regulations on producers and consumers within the state. If reducing greenhouse gas emissions from automobiles and encouraging auto efficiency were really so important, California could increase its tax on gasoline. This would be a much more effective way to curb vehicular carbon emissions, particularly as it would reduce consumption by *all* car owners, not just those who purchase new cars. It also could be implemented far more quickly than vehicle emission standards that will not take effect for years. The problem, of course, is that the cost of such a policy would be readily identifiable, and clearly felt, by Californians. Thus it has less appeal to politicians than a vehicle emissions regulation, the costs of which will be buried in new car prices and dispersed to consumers and workers in other states.

CONCLUSION

The debate over California's request for a waiver of CAA preemption highlights the rigidity of federal environmental law. While many federal environmental statutes allegedly embody a "cooperative federalism" approach to environmental policy, in practice most federal environmental programs impose top-down regulatory requirements. The division of responsibility between the federal and state governments cannot be justified by reference to any coherent theory of their proper roles.⁴⁶ Federal environmental statutes are just as likely to impose rigid and uniform regulatory requirements on matters of local environmental concern as they are on those of truly national import. At the same time, states are increasingly likely to try their hand addressing trans-boundary or interstate environmental concerns, such as climate change. This creates a "jurisdictional mismatch" in environmental policy that is inefficient and, at times, even environmentally harmful.

California may well deserve a waiver of preemption, so that it may continue to experiment with potential greenhouse gas emission control policies. Yet, any serious policy argument for granting California a waiver in this instance would also justify authorizing waivers for other states to experiment in other areas in environmental law. The policy arguments for increased flexibility in the development of drinking water protection programs or local waste-site cleanup are far stronger than those for allowing an individual state to regulate products manufactured for national markets in order to address a globally dispersed pollution concern. The problem, however, is that CAA Section 209 authorizes potential waivers for California's air pollution control strategies, but waiver provisions in other environmental laws are few and far between. If policymakers wish to see California, and other states, experiment here, they should be willing to authorize broader experiments throughout much of the rest of environmental law.

Testifying before the Senate Environment Committee in May 2007, California Attorney General Edmund Brown, himself a former governor, suggested that if the EPA refuses to grant a waiver, the Congress should act: "Congress has to allow California to blaze its own trail with a minimum of federal oversight."⁴⁷ As he suggested, perhaps inadvertently, if Californians really want freedom from federal preemption, and a change in federal climate policy, they are better off getting Congress to act than seeking relief from the EPA. Congress may well have been too solicitous of the auto industry's desire for regulatory uniformity when it enacted Section 209, precluding California from taking some steps to address global warming on its own. If so, it is up to Congress, rather than the EPA, to fix it. Should Congress take this course, however, it should not stop with California's authority to regulate motor vehicle emissions. Instead, it should create broader opportunities for state experimentation and innovation across the board.

Endnotes

1 Statement of Edmund G. Brown, Jr., before the Senate Environment and Public Works Committee, Subcommittee on Clean Air and Nuclear Safety, May 22, 2007. Environmental law experts were more circumspect. Speaking to the Associated Press, Sean Hecht of the UCLA environmental law center commented that after *Massachusetts v. EPA*, "It's clear EPA has to consider California's waiver request now," but "that doesn't mean it's a foregone conclusions with respect to the waiver request." Quoted in Samantha Young, *EPA Revives California Emissions Rule*, AP Online Regional, Apr. 4, 2007, abbreviated version available at <http://www.topix.com/sacramento/2007/04/epa-revives-california-emissions-rule>.

2 42 U.S.C. § 7543(a). This provision provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

3 See *Motor & Equipment Mfrs. Ass'n v. EPA (MEMA I)*, 627 F.2d 1095, 1109 (D.C.Cir. 1979), Congress' entry into the field and heightened state activity after 1965 raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers. Acting on this concern, Congress in 1967 expressed its

intent to occupy the regulatory role over emissions control to the exclusion of all the states all, that is, except California.

4 See E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330 (1985) (discussing automakers' role in the adoption of federal vehicle emission standards).

5 42 U.S.C. § 7543(b).

6 Section 209(b)(1) provides, among other things that:

The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards... for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

As California was the only state to have adopted vehicle emission standards prior to March 30, 1966, this provision operates as a special provision for California only.

7 42 U.S.C. § 7507.

8 See 2002 Cal. Legis. Serv. Ch. 200, §3(a).

9 California Environmental Protection Agency, Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document, Dec. 21, 2005 ("CARB Support Document"), at 4; see also Statement of Edmund G. Brown, Jr. (discussing why threat of global warming is "of particular concern to California.").

10 See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 293 (2003). As Prof. Carlson notes, however, the EPA "has sometimes denied part of a waiver or delayed implementation of California emission standards." *Id.*

11 127 S.Ct. 1438 (2007).

12 See Steven Mufson & Michael A. Fletcher, *Bush Calls for Cuts in Vehicle Emissions*, WASH. POST, May 15, 2001, at D1 (reporting President Bush called upon federal agencies to draft regulations controlling greenhouse gas emissions from motor vehicles before the end of his term); see also Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 61, 70-71 (2007) (discussing the legal implications of *Massachusetts v. EPA*), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>.

13 See California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

14 42 U.S.C. § 7543(b).

15 *MEMA I*, 627 F.2d at 1120-21.

16 *Id.* at 1121 (noting "the burden of proof lies with the parties favoring denial of the waiver").

17 42 U.S.C. § 7543(b)(1).

18 42 U.S.C. § 7543(b)(1)(A)-(C). See also *MEMA I*, 627 F.2d, at 1111 ("if the Administrator makes any one of these findings with respect to a waiver request involving California 'standards' he must deny the request").

19 CARB Support Document at 14.

20 Increasing automobile fuel economy reduces the cost-per-mile of driving, which leads, in turn, to an increase in vehicle miles traveled. This "rebound effect" offsets an estimated 10 to 20 percent of the fuel savings from increased fuel economy. See Paul R. Portney, et al., *The Economics of Fuel Economy Standards*, 17 J. ECON. PERSP. 203 (2003); see also David L. Greene, James R. Kahn, & Robert C. Gibson, *Fuel Economy Rebound Effect for U.S. Household Vehicles*, 20 ENERGY J. 1 (1999) (discussing rebound effect from fuel economy standards).

21 42 U.S.C. § 7521(a).

22 42 U.S.C. § 7543(b)(1)(B).

23 See Carlson, *supra* note 10, at 296-97 (noting how greenhouse gas emissions waiver may present different issues than prior waivers).

24 See CARB Support Document at 11.

25 42 U.S.C. § 7521(a). The provision provides that:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

26 T.M. L. Wigley, *The Kyoto Protocol: CO₂, CH₄ and Climate Implications*, 25 GEOPHYSICAL RESEARCH LETTERS 2285 (1998).

27 CARB Support Document at 16.

28 CARB Support Document at 15.

29 Section 209(b) only provides for the waiver of "application of this section." 42 U.S.C. § 7543(b); see also *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160, 1173 (E.D. Cal. 2006) ("Section 209(b) does not provide that the regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from preemption by other federal statutes.").

30 49 U.S.C. § 32902.

31 49 U.S.C. § 32919(a). This provision provides:

When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

32 Average Fuel Economy Standards for Light Trucks Model Years 2008-2011; Final Rule; 71 Fed. Reg. 17654 (Apr. 6, 2006). NHTSA further explained:

Given that the amount of CO₂, CO, and hydrocarbons emitted by a vehicle varies directly with the amount of fuel it consumes, EPA can reliably and accurately convert the amount of those gases emitted by that vehicle into the miles per gallon achieved by that vehicle.

Id. at 17656.

33 *Id.* at 17656.

34 127 S.Ct. at 1462.

35 See generally, Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW 263-64 (Jim Chen ed., 2004).

36 A proposal for ecological waivers is outlined in Adler, *Letting Fifty Flowers Bloom*. A similar proposal is put forth in DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 194-98 (1999).

37 This argument is made in greater detail in Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130 (2005).

38 See Jonathan H. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 101, 102 (2007) ("subnational state-level action is not the best way to combat global climate change"; "local action is not well suited to regulating mobile global conduct yielding a global externality"); see also *id.* at 103 ("state-level efforts could not only be ineffectual, but counterproductive, increasing net emissions and undercutting a wider effort to constrain global emissions.").

39 See Carlson, *supra* note 10, at 313-315 (suggesting that California's ability to obtain waivers of preemption may encourage greater policy experimentation).

40 See PIETRO S. NIVOLA & JON A. SHIELDS, *MANAGING GREEN MANDATES: LOCAL RIGORS OF U.S. ENVIRONMENTAL REGULATION* 17 (2001) ("Business interests, not without justification, often prefer nationwide regulatory standards to a hodgepodge of local rules: broad scope and standardization may lower uncertainty and increase efficiency.").

41 Adler, *supra* note 37, at 149-50.

42 See Bernie Woodall, *Schwarzenegger Warns of Calif. Suit Against EPA*, REUTERS, Apr. 25, 2007, available at <http://www.reuters.com/article/bondsNews/idUSN2531693320070425>.

43 Arnold Schwarzenegger & Jodi Rell, *Lead or Step Aside*, EPA, WASH. POST, May 21, 2007, at A13.

⁴⁴ See Avery Palmer, *Panel Democrats Seek to Prod EPA on California Auto Emissions Rule*, CQ TODAY, July 31, 2007 (reporting “At a July 26 committee hearing, EPA Administrator Stephen L. Johnson testified that the waiver decision is complex, but that the agency has committed to issuing a decision before the end of the year.”).

45 See Letter from Governor Arnold Schwarzenegger to President George W. Bush, Oct. 24, 2006, *available at* <http://gov.ca.gov/index.php?press-release/501/>.

47 Statement of Edmund G. Brown, Jr., before the Senate Environment and Public Works Committee, Subcommittee on Clean Air and Nuclear Safety, May 22, 2007.

