

## Environmental/Energy and Sustainability ADVISORY

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### EPA Reconsideration of Waiver for California Motor Vehicle Regulations Could Have Far Reaching Implications

In a move that signals the new administration's commitment to regulating greenhouse gas emissions, President Obama has requested that the Environmental Protection Agency (EPA) reconsider a Bush-era decision denying California a waiver for motor vehicle regulations that imposed greenhouse gas emission standards. On February 12, 2009, the EPA published notice of its intent to reconsider the previous waiver denial in the Federal Register (70 FR 7040).

Section 209(a) of the Clean Air Act (CAA) generally preempts state standards relating to the control of emissions from new motor vehicles and new motor vehicle engines. However, an exception to this general preemption is contained in section 209(b) of the CAA, which requires EPA to waive preemption where certain criteria are met. The California Air Resources Board (CARB) adopted greenhouse gas emission regulations for passenger cars, light-duty trucks and medium-duty passenger vehicles with a 2009 model year on December 21, 2005. After adopting the emission regulations, CARB submitted a request that EPA grant a Clean Air Act Section 209(b) waiver for the regulations. EPA did not respond to the request for over two years, and when it was ultimately pressed for a decision, it denied the request on March 6, 2008.

Denial of the waiver was a significant departure from past EPA practice. Under the Clean Air Act, California had legally set its own exhaust emissions limits more than 50 times from the early 1970s to 2005, with Section 209(b) waivers routinely granted by EPA. In issuing the denial, EPA determined that climate change impacts in California were not sufficiently different from the nation as a whole and, therefore, did not support adoption of state standards regulating motor vehicle greenhouse gas emissions. California, other states interested in implementing California's standard, members of Congress, scientists and various stakeholders identified numerous concerns with the arguments set forth in the denial, including the conclusion that climate change impacts in California were not sufficiently different from the nation as a whole. Critics argued that a conclusion about whether climate change impacts in California were sufficiently different from the rest of the nation was not necessary under Clean Air Act section 209(b)(1).

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In the wake of repeated concerns about the waiver denial, and in a move that signals a dramatic shift in federal environmental policy, President Obama fulfilled a campaign pledge by requesting that EPA reconsider the Bush-era waiver denial on January 26, 2009. The February 12, 2009, Federal Register notice was issued in response to President Obama's request, and its effects could be far-reaching, impacting greenhouse gas emission regulation across all sectors of the economy—not simply the automobile industry.

Reconsideration of the waiver is important to California insofar as 38 percent of greenhouse gas emission reductions contemplated by the recently adopted Climate Change Scoping Plan are to come from the transportation sector, and the motor vehicle regulations at issue are a large part of California's plan for transportation emission reductions. However, reconsideration of the waiver has much further implications because 17 other states are seeking to adopt California's vehicle emission standards. The 17 states seeking to adopt California's greenhouse gas emission standards are

- New Jersey;
- Connecticut;
- Oregon;
- Washington;
- Rhode Island;
- Vermont;
- New York;
- Maine;
- Massachusetts;
- Arizona;
- Pennsylvania;
- New Mexico;
- New Jersey;
- Utah;
- Florida; and
- Colorado.

If granted, the waiver will require automakers to comply with new, more stringent rules that cut fuel consumption across vehicles sold in California and any other state that adopts California's regulations. Section 102 of the Energy Independence and Security Act of 2007, P.L. 110-140 requires an average of 35 miles per gallon by 2020, but California's regulations would require the rough equivalent of 45 to 50 miles per gallon. Accordingly, automakers, dealers and their allies have staunchly opposed California's request. The argument most often cited by automakers in their opposition to California's request is that issuance of the waiver would result in a "patchwork" of emissions laws that will cause "irreparable harm" and extreme "unintended consequences" to domestic carmakers already struggling to avoid bankruptcy. The counter-argument is that approval of the waiver request would resolve the "patchwork" issue by opening the door to the possibility of establishing California's standards on a 50-state level, without new legislation.

More importantly, however, EPA's action on the waiver will signal where the Obama administration is heading with respect to the regulation of all greenhouse gas emissions, which at a minimum means that regulatory action—or inaction—by the prior administration is being abandoned. The debate about whether the states or the federal government should regulate greenhouse gas emissions is ongoing; there have been unsuccessful attempts at preempting state efforts to regulate greenhouse gas emissions in the past. Representatives John Dingell (D-MI) and Rick Boucher (D-VA), respectively, the chairmen of the House Energy and Commerce Committee and of its Energy and Air Quality Subcommittee, mounted an unsuccessful effort to preempt state efforts at combating global climate change in 2008. In contrast with the Warner-Lieberman cap-and-trade legislation, Dingell and Boucher's white paper, "Appropriate Roles for Different Levels of Government," utilized the EPA justification for denying California's waiver request and deemed climate change a global, not local, problem that states should not have the ability to regulate. EPA's granting the California waiver, though, could tip this ongoing preemption debate in favor of the states, and signal how states will act to regulate other types of greenhouse gas emissions in the absence of federal regulation.

The Federal Register notice initiated EPA's reconsideration of the request. It announced a public hearing concerning the waiver request and the re-opening of the written comment period for the request. The public hearing will be held on March 5, 2009, and the close of the written comment period is April 6, 2009. Regardless of the outcome, EPA's reconsideration of the California waiver will speak volumes about how this administration plans to shape the task of adopting greenhouse gas emission regulations and tackle what has become the most talked about environmental issue of its time: global climate change.

***For further information regarding the Scoping Plan, please contact the authors of this advisory—Sharon Rubalcava, Lee DeHihns and Marisa Blackshire—or your Alston & Bird attorney.***

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