NATIONAL AFFAIRS

USA

California vs. EPA

– Bush Administration's Denial of California's Higher Standards on GHGs –

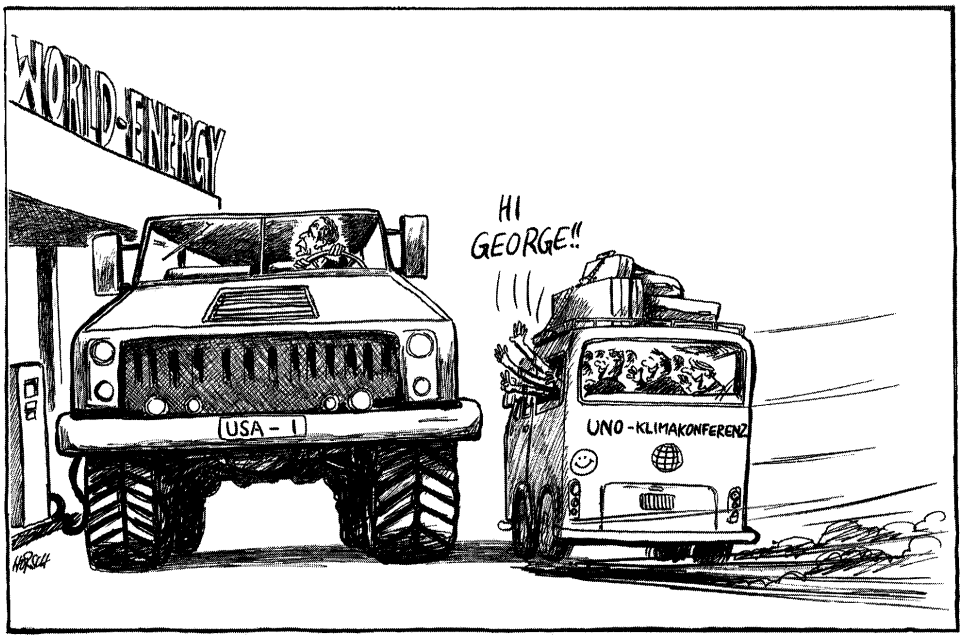
by Nathan Borgford-Parnell and Daniel B. Magraw, Jr*

On December 19, 2007, the Administrator of the U.S. Environmental Protection Agency, Stephen Johnson, denied California's waiver request to allow that state to have vehicle emissions standards regarding CO_2, methane and other pollutants that were stricter than federal standards.[1] The EPA had refused to rule on that issue for two years.

In 2005, California had requested to raise vehicle emissions standards in California above the federal baseline to the level of a 2002 California law that required automobile manufacturers to reduce CO_2, methane and other emissions from cars, trucks and sport utility vehicles by 30% by 2016.[2] This is a much faster and deeper reduction than what would result from the 2007 federal statute (which requires fuel economy standards of 35 miles per gallon by 2020). The denial is the first time in the 44-year history of the US Clean Air Act (CAA) that the EPA has fully denied a waiver request from California. In response to the EPA's denial, California filed a lawsuit[3] joined by 18 other states and five environmental groups[4] to overturn the decision. EPA's denial has also sparked a US congressional inquiry, and US Senator Barbara Boxer (from California) has introduced legislation to effectively repeal the denial.[5]

The CAA provides that there can only be two sets of emissions standards for motor vehicles in the United States: California's and the EPA's. Section 209 of the CAA stipulates that California is the only state allowed to implement its own emissions standards. Section 209 contains two conditions: California's standards must be stricter than EPA standards; and California must have been granted a formal waiver by the EPA Administrator.[6] This right has served to make California an important testing ground for new emissions control technologies and has kept it on the forefront of the battle against air pollution and global warming. Other states do not have the authority to legislate their own standards; but, under CAA Section 117, they may duplicate Californian legislation once it has received a waiver.[7] Prior to Administrator Johnson's denial, twelve other states had adopted California's standards, with four more planning to do so.[8]

In his letter to California Governor Arnold Schwarzenegger explaining the denial, Administrator Johnson stated that California's legislation did not meet the requirement for a "compelling and extraordinary condition" warranting a waiver. Section 209(b) of the CAA directs that the EPA administrator should not deny the application of a waiver except for three reasons, one of which is a lack of "compelling and extraordinary conditions". Administrator



Courtesy: SZ

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Johnson asserted that global warming cannot be an extraordinary condition for California because global warming has a global reach and does not affect only California. He distinguished this waiver denial from the previous 40 years of accepted waivers by stating that the earlier waivers dealt entirely with pollution with only local or regional effects. In making this argument Administrator Johnson effectively equated the meaning of "compelling and extraordinary" with "unique (or limited) to California or its region".

This interpretation, however, appears to contradict earlier interpretations and applications of CAA, Section 209: "extraordinary" has never been taken to mean anything other than that the conditions in California must be "compelling and extraordinary". A better reading of Section 209 is that California does, in fact, meet the requirement for "compelling and extraordinary", as is demonstrated in a report prepared by EPA staff for Administrator Johnson and communicated to the public by Senator Boxer in an unauthorised summary.[9] The EPA staff stated that although global warming from greenhouse gases represents a global issue, the effects from global warming are not uniform and vary from region to region. Some regions are affected much more than others based upon their specific conditions. In this case, these conditions include: the increase in wildfires and health effects in California from smog projected to result from higher temperatures; specific threats to endangered species and fragile ecosystems in California; and coastal inundation and erosion along the more than 1,000 miles of California coastline and levees susceptible to rising sea levels. For these reasons, EPA staff concluded that California does, in fact, represent a compelling and extraordinary condition for a valid waiver under section 209(b); and they advised Administrator Johnson to approve California's request.

While the White House's role in Administrator Johnson's decision is still unclear, his denial and announcement followed almost immediately after President Bush's signing of the new Energy Independence and Security Act of 2007 (as well as coming just after the Bali Conference of the Parties of the UN Framework Convention on Climate Change). Administrator Johnson pointed to this new federal legislation as another reason for the refusal, citing a preference for national legislation over a confusing "patchwork" of state standards. However, the "patchwork" metaphor, which was used initially by the automobile industry and subsequently picked up by Administrator Johnson, misrepresents the situation and confuses the issue. Claiming that there will be a "patchwork" of legislation implies that each state will have its own regulations when in fact there will only be two choices, to wit, the federal baseline and California's higher standard. California and the other states considering or having already passed the same emissions standards contain over 40% of all car owners in the United States. This instead represents a "checkerboard" of legislation with roughly half the country using the federal baseline and the other half using the higher standard. Johnson's preference for the national legislation is also legally irrelevant under Sections 209 and 117 of the CAA, which do not give a preference to a unified system and, in fact, contemplate exactly such a checkerboard.

On February 9, 2008, Administrator Johnson published his final report on the denial of California's waiver request in the Federal Register. The 48-page document provided no new arguments for the denial but did further elucidate Administrator Johnson's reasoning. Simply put, Administrator Johnson argued that while greenhouse gas emissions endanger human health and welfare, they are not more harmful in California than in the rest of the United States. While it doesn't improve his legal argument, this does represent the first time the EPA has acknowledged that greenhouse gases endanger public health and welfare. Some commentators argue Administrator Johnson's statement may have inadvertently obligated the EPA to regulate greenhouse gases under the Clean Air Act.[10]

While the EPA Administrator is ultimately entitled to make his or her own judgment, Administrator Johnson has done so against the reportedly unanimous recommendation of his own staff, 40-plus years of precedent, and the relevant science. In their report to Administrator Johnson, EPA staff also pointed out that EPA would likely lose any legal battle stemming from a denial of the waiver and would likely win any law suit that might arise if EPA granted the waiver. If the states prevail in their lawsuit, or Senator Boxer's legislation becomes law, Administrator Johnson will not succeed in enforcing this denial. However, he will, at a minimum, likely succeed in delaying the acceptance of the waiver long enough to prevent California from enforcing the new standards on 2009 model-year vehicles.

Notes

1 Letter from Stephen Johnson, Administrator of the U.S. Environmental Protection Agency, to Arnold Schwarzenegger, Governor of the State of California (December 19, 2007). Available at: http://www.cleancarscampaign.org/web-content/newsroom/docs/121907_EPALetter.pdf.

2 2002 Cal. Legis. Serv. Ch. 200 (A.B. 1493) (WEST).

3 *State of Cal. v. U.S. Envtl. Prot. Agency*, No. 08-70011 (9th Cir. filed Jan. 2, 2008).

4 On January 2, California's suit was joined by 15 states: Illinois, Vermont, New Mexico, Maine, New York, Rhode Island, Delaware, Connecticut, Maryland, New Jersey, Oregon, Washington, Pennsylvania, Massachusetts and Arizona. The Sierra Club, the Natural Resources Defense Council, the Conservation Law Foundation, the Environmental Defense Fund, and the International Center for Technology Assessment also joined the lawsuit on January 2. Minnesota joined the lawsuit on January 10, Iowa on February 1 and Florida on February 4.

5 Reducing Global Warming Pollution from Vehicles Act of 2008, S. 2555, 110th Cong. (2008). The summary was produced by Senator Boxer's staff who were afforded a short amount of time to study a few EPA documents redacted with white tape under EPA supervision.

6 Clean Air Act § 209, 42 U.S.C. 7543 (1963) (amended 1990).

7 Clean Air Act § 117, 42 U.S.C. 7507 (1963) (amended 1990).

8 Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Oregon, Vermont and Washington have already passed emissions laws in line with California's. Arizona, Colorado, Florida, Iowa and Utah are all considering similar regulations.

9 Press Release, Senate Committee on the Environment and Public Works, Boxer Statement on California Waiver Decision Documents (Jan. 23, 2008).

10 Lisa Heinzerling, *EPA Comes Clean on Climate*, Georgetown Law Faculty Blog, Feb. 29, 2008, *at* http://gulcfac.typepad.com/georgetown_university_law/2008/02/epa-comes-cle-1.html (last visited Mar. 6, 2008).

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