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Dickinson/DC/USEPA/US
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To Robert Doyle, Michael Horowitz, Karl Simon, David Haugen,
William Charmley, Jeff Alson
cc
bcc
Subject GHG Waiver - supplemental comments of NADA (auto
dealers)

Focus primarily on the VT trial and lead time issues - including info on near term model years. If I get a chance I will summarize this later for everyone.



NADA Supplemental Comments on CARB Waiver Request.pdf

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EPA-2411



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Legal & Regulatory Group

October 12, 2007

By E-mail and Messenger

Mr. David Dickinson
Compliance and Innovative Strategies Division (6405J)
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: California State Motor Vehicle Pollutior Control Standards; Request for Waiver of Federal Preemption; Doc. No. EPA-HQ-OAR-2006-1073

Dear Mr. Dickinson:

The National Automobile Dealers Association (NADA) represents nearly 20,000 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 1,300,000 people nationwide yet a significant number are small businesses as defined by the Small Business Administration. These supplemental comments are submitted in further support of NADA's position that the above-referenced request for waiver of preemption should be denied.

I. BACKGROUND

Earlier this year, EPA asked for comment, and set a hearing schedule, on a California Air Resources Board (CARB) request for waiver of federal preemption under the Clean Air Act (CAA) for rules adopted in September 2004 governing greenhouse gas (GHG) emissions from passenger cars, light-duty trucks, and medium-duty passenger vehicles (motor vehicles). 72 Fed. Reg. 21260, *et seq.* (April 30, 2007). EPA held hearings on May 22, and May 30, 2007. NADA requested a 30-day comment period extension on May 24, 2007, in part due to the large and complex volume of hearing material presented. EPA denied that request on June 8, 2007.

NADA filed comments urging EPA to deny CARB's waiver request on June 15, 2007, the due date set by EPA in its April 30 notice. Despite having objected to an extension of the June 15 deadline, in July CARB filed supplemental comments in this waiver proceeding. Those comments included extensive references to testimony and evidence obtained in discovery and at trial in *Green Mountain Chrysler Plymouth Dodge Jeep, Inc., et al v. Crombie*, No. 05-CV-302, 2007 WL 2669444 (D. Vt. Sept. 12, 2007) ("*Green Mountain*"), a case that principally involved the issue of whether the Energy Policy and Conservation Act of 1975 (EPCA) preempts state motor vehicle GHG standards.¹ EPA should recognize that it need not and should not consider

¹ While several franchised dealerships were parties in *Green Mountain*, NADA was not.

CARB's late-filed supplemental comments as it moves forward with this proceeding. However, should EPA nonetheless consider CARB's supplemental comments to any extent, fundamental due process and fairness considerations dictate that EPA also consider supplemental comments from other parties, including NADA.

On September 12, 2007, the court in *Green Mountain* found that the GHG standards adopted by Vermont were not preempted by EPCA.² EPA should recognize, however, that a central premise in *Green Mountain* was that the waiver petition review process now under way permits full consideration of the technological feasibility, costs, and economic practicability of CARB's motor vehicle GHG standards. *Id.* at *49-50. NADA contends that the court's decision reinforces EPA's responsibility to conduct an exhaustive waiver review proceeding and, ultimately, to find that CARB's waiver request must be denied.

II. GIVEN THE INADEQUATE LEAD TIMES IN CARB'S MOTOR VEHICLE GHG STANDARDS, THE REQUEST FOR WAIVER OF FEDERAL PREEMPTION MUST BE DENIED.

NADA's supplemental comments focus on one specific issue -- the lead times needed by vehicle manufacturers to meet CARB's motor vehicle GHG standards. Inadequate compliance lead times necessarily will result in a devastating and wide-spread disruption of the new motor vehicle marketplace, directly impacting the availability, performance, and/or cost of the products consumers buy from NADA's member dealerships. The court in *Vermont* stated that, as a matter of law, "[s]hould EPA find that lead time is insufficient to permit necessary technological development at an appropriate cost, EPA will conclude that the GHG regulation is not consistent with Section 202(a) of the CAA" and must deny the waiver. *Green Mountain, supra*, at *51; 49 U.S.C. § 7543(b)(1)(c). Notably, the Vermont court specifically cited several early CAA Section 209 decisions by EPA in which CARB regulations allowing insufficient lead times for compliance were disapproved. *Id.* at *50 n.55.

CARB's July 2007 supplemental comments proffered citations to the Vermont trial court litigation record suggesting that some manufacturers could, in the near term, comply with its motor vehicle GHG standards. However, no major manufacturer testified that it could comply with CARB's standards after the first few years of implementation. Moreover, overwhelming evidence in the record indicates that, should CARB's standards take effect, major vehicle manufacturers would be unable to deploy full product lines for more than a year or two, in part due to lead time constraints. For example:

- BMW testified that it was already at the stage where, in model year (MY) 2010, the obligation to comply with CARB's standards would "severely impact [BMW's] business." (BMW Test. at 115.³) GM similarly predicted product restrictions beginning in MY 2010, owing

² The decision of the *Green Mountain* trial court has been appealed to the U.S. Court of Appeals for the Second Circuit by all plaintiffs, including the franchised dealership plaintiffs.

³ The *Green Mountain* testimony and other evidence cited in this filing are set out in Appendix A in the same form provided at trial. If and to the extent EPA considers CARB's July 2007 supplemental filing, the material found in Appendix A should likewise be considered.

to inadequate compliance lead time. (GM Test. Tr. 1-B, 25-7.) DaimlerChrysler testified that it would experience shortfalls starting in California in MY 2010. (Chrysler Test. 3-A, 57-62.)

- The evidence was similar for other manufacturers. Honda testified that it saw no feasible means of bringing its entire fleet into compliance with CARB's MY 2013 standards without moving its entire passenger car fleet to the fuel economy levels of the MY 2006 Civic. (Honda Test. at 188-190.) Similarly, Toyota's product plan does not show compliance with CARB's standards in MY 2012. (Toyota Test. at 127.) Nissan testified likewise, predicting model restrictions starting in MY 2012. (Nissan Test. at 208-17.) VW also predicted noncompliance in MY 2012. (VW Test. at 1445.)

It was against this evidentiary backdrop that the Vermont court pointed to EPA as the correct "judge" of the lead time issue. *See Green Mountain, supra*, at *45. While CARB's supplemental filing suggests that statements made in its standards rulemaking documents are somehow "controlling" with respect to lead time (CARB Supplemental Comments at 27), the court in *Green Mountain* in no way suggests that any deference is owed to CARB's judgment on the lead time issue. Simply because CARB alleges something in a filing in this proceeding does not make it true, let alone "controlling," especially given evidence to the contrary. According to *Green Mountain*, EPA properly must consider the standard's lead time and deny the waiver request if it finds such lead time to be inadequate.

Moreover, CARB's suggestion that its standards rulemaking statements on lead time are "controlling" conflict with the specific, credible sworn testimony of Mr. Steven Albu, Chief, Engineering Studies Branch, CARB, in *Central Valley Chrysler-Jeep, Inc., et al. v. Witherspoon*, No. 04-6663 (E.D. Cal.).⁴ That testimony indicated that CARB knew during its rulemaking deliberations that manufacturers likely will need more lead time for compliance, but that for strategic reasons, it kept compliance periods "tight." (CARB Test. at 309-312.) When asked under oath to provide specific estimates for the time each manufacturer would need to comply with CARB's MY 2011 and 2102 standards, Mr. Albu testified as follows:

- DaimlerChrysler, Ford and GM need approximately six years of lead time to make all necessary changes to their vehicle fleet[s] in order to meet CARB's standards for MY 2011. (CARB Test. 257-59.) The same manufacturers would require approximately seven years of lead time to make the necessary changes to their vehicle fleet[s] in order to meet CARB's standards for MY 2012. (*Id.* at 272-73.)

- BMW, Toyota, and Nissan need approximately five years of lead time to make all necessary changes to their vehicle fleet[s] in order to meet CARB's standards for MY 2011. (CARB Test. 259-263.) Toyota and BMW need at least six years of lead time to make necessary changes to their vehicle fleets in order to meet CARB's standards for MY 2012. (*Id.* at 273-74.)

⁴ Similar to the *Green Mountain* preemption challenge, *Central Valley*, in which several dealerships, but not NADA, are parties, involves a preemption challenge to the CARB motor vehicle GHG standards that are the subject of this waiver request proceeding.

- Volkswagen and Nissan would need approximately five to six years of lead time to make necessary changes to their vehicle fleets in order to meet CARB's standards for MY 2012. (*Id.* at 274-76.)

Inadequate compliance lead times would be devastating for dealerships and their employees whose livelihood depends on a timely supply of product necessary to meet expected consumer demand. Since MY 2011 begins in calendar year 2010, and MY 2012 in calendar year 2011, the lead time for compliance with CARB's standards is clearly inadequate and, for that reason alone, the waiver must be denied.

CARB's supplemental comments claim that Mr. Albu's testimony is "unremarkable" because CARB and EPA have "traditionally" measured lead time for compliance from a date "no later than [CARB's] final adoption of the rule, here, August, 2005." (CARB Supplemental Comments at 27.) This assertion is wrong in at least two respects. First, it presumes that any CARB waiver request must be granted without any meaningful scrutiny of the lead times allowed for compliance. However, as the *Green Mountain* court noted, EPA has in the past denied waivers based on inadequate lead times and should do so here if the evidence warrants. Logic and the *Green Mountain* decision suggest that the Clean Air Act does not contemplate vehicle manufacturers incurring huge unrecoverable expenses based merely on the promulgation of a standard for which a waiver may or may not be granted. At least twice in the past, EPA has denied waiver requests for a given model year when insufficient lead times existed between the Agency's waiver decision and the compliance deadline. In neither case did EPA adopt CARB's so-called "traditional" rule. *See, e.g.*, 40 Fed. Reg. 30,311 (July 18, 1975); 38 Fed. Reg. 30,136 (Nov. 1, 1973).

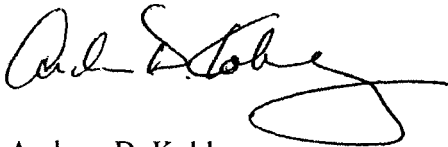
CARB's supplemental comments also conveniently ignore the fact that EPA is by no means engaged in a "traditional" waiver request review proceeding. The CARB motor vehicle GHG standards now before EPA surely are the most costly and technologically challenging in the history of the federal CAA. Recognizing the magnitude of what would be required for vehicle manufacturers to attempt to comply with CARB's GHG standards, the court in *Central Valley* entered an injunction against any enforcement of those standards unless and until EPA were to grant a waiver.⁵ The court did so only after careful consideration of extensive testimony indicating that, in the absence of an injunction, vehicle manufacturers would be forced to choose between prematurely expending huge resources in an attempt to comply with CARB's standards and massively reducing their product lines, thereby depriving California dealerships of the products their customers demand. CARB's suggestion that the deadlines set out in its standards cannot be considered by EPA during its review directly conflicts with the basis upon which the Court in *Central Valley* issued its injunction.

⁵ *See Central Valley Chrysler-Jeep, Inv. v. Witherspoon*, 2007 U.S. Dist. LEXIS 3002 (Jan. 16, 2007).

III. CONCLUSION

On behalf of NADA, we thank EPA for considering this supplemental filing. Consistent with its June 15 comments, NADA urges EPA to recognize that the clearly inadequate lead times set out in CARB's standards also and alone justify denial of the waiver request. In light of the massive potential consequences CARB's standards would have on dealerships, on their employees, and on consumers, EPA should consider a limited reopening of the docket in this proceeding to allow such further evidence as might be appropriate to clarify this issue further.

Respectfully submitted,



Andrew D. Koblenz
Vice President and General Counsel



Douglas I. Greenhaus
Director, Environment, Health and Safety

Enclosed: Appendix A