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Dickinson/DC/USEPA/US
11/07/2007 11:48 AM

To Karl Simon, Robert Doyle, Michael Horowitz, Jeff Alson,
William Charmley

cc

bcc

Subject CARB new comments on GHG waiver

Jeff and Bill - see page 2 (comment is only 4 pages) for quick discussion of NERA/Sierra and costs, etc.

This also contains a discussion of the Vt decision re EPCA issues, etc - same as what CLF stated,



CARB11-5-07.pdf

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Arnold Schwarzenegger
Governor

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FED EX OVERNIGHT TRACKING NO. 7987 9977 0741

November 5, 2007

Mr. David Dickinson
Compliance and Innovative Strategies Division
U.S. Environmental Protection Agency
1310 L Street, NW, Room 644
Washington, DC 20005

RE: California State Motor Vehicles Pollution Control Standards; Request for
Waiver of Federal Preemption; Opportunity for Public Hearing, Docket ID
#EPA-HQ-OAR2006-0173; 72 FR 21260 (April 30, 2007)

Dear Mr. Dickinson:

A series of comments by waiver opponents submitted months after the June 15, 2007 comment deadline have been entered into the subject Docket.¹ See e.g. Association of International Automobile Manufacturers (AIAM, Document ID Nos. 3628 & 3628.1), Alliance of Automobile Manufacturers (Alliance, Document ID 3639), Automotive Trade Policy Council (ATPC, Document ID 3645), National Automobile Dealers Association (NADA, Document ID 3646 & attchs), and NERA Economic Consulting/Sierra Research (NERA/Sierra, Document ID Nos. 3651-3651.2). The Air Resources Board (ARB) is not responding in detail to these comments because they are untimely and simply repackage previously discredited arguments. In the event the U.S. Environmental Protection Agency (U.S. EPA) chooses to give these late comments any credence, we are providing here a concise rebuttal based on our previous submissions and the *Green Mountain* decision on which waiver opponents attempt to rely. *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie*, No. 2:05-cv-302, Slip Op. ARB trusts that opponents' late comments will not affect U.S. EPA's ability to act promptly on California's request.

¹ All Document numbers cited hereinafter are to the prefix Docket ID #EPA-HQ-OAR2006-0173.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption.
For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

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Regarding the NERA/Sierra October 2007 submittals, ARB has shown that global warming will exacerbate ozone impacts and that these standards are among the many measures needed to reduce greenhouse gas emissions and consequent temperature and ozone impacts. See ARB June 14, 2007 comment (Document ID 1686) Sections III.B.1. & 6. Also, ARB obviously did not rely on Mr. Duleep's analysis in submitting its waiver request in December 2005. Rather, ARB later cited Mr. Duleep's expert reports and testimony to show that despite using a different methodology to evaluate the standards' technological feasibility and cost, he arrived at the same basic conclusion – that manufacturers can comply through model year 2016 – which the *Green Mountain* court easily found more persuasive than NERA/Sierra's work. Slip Op. at 59-78. This is not surprising, as Mr. Duleep is among the foremost experts in his field and his firm has routinely completed projects for federal agencies, including U.S. EPA. The *Green Mountain* court denied industry's motion to exclude Duleep's testimony, finding such arguments "ultimately unconvincing" (*id.* at 72), and by contrast found Plaintiffs' retained experts Harrison (NERA) testimony "obviously questionable" and Austin (Sierra) as having "overstated both technological difficulty, and cost of compliance." *Id.* at 208.

The NERA/Sierra October 2007 comments ignore ARB's principal argument concerning their June, 2007 Report (Document ID Nos. 1437, 1447, 1447.1-5): U.S. EPA cannot rely on the NERA/Sierra June 2007 submittals to assess the Board's prior GHG protectiveness determination, especially because opponents could have presented their novel combined ZEV/GHG impact argument and study at the time of that determination in 2004. NERA/Sierra October 2007 also continues to point to ARB's original ZEV cost estimates (which ARB later adjusted), when we have shown that the proper analogy is to ARB's reasonable, and industry's over-estimated, LEV costs. Their 2004 compliance cost estimates (Austin/Sierra Research Report No. SR2004-09-04 and previously unmentioned appendices) are now finally submitted for the record – too late for effective public comment – but ARB extensively rebutted the claims therein (and in related oral testimony) in our original December, 2005 submission. See e.g. FSOR (Document ID 0010.116) Comment & Response Nos. 168-171, 205, 206, 207, 209, 211-213, 220-221, 241-242, 246, 255-257, 259, 282-283, 295, 296, 301, 329-330, 360, 402-403, 407; 440-444, 458-459, 463-464, and 466.

NERA/Sierra's October 2007 comments reflect a number of rhetorical devices that are distracting and ultimately unavailing. They call their 2004 cost estimates not admittedly wrong but rather as having "evolved over time," when the result is the same and their current estimates in fact remain higher than those found to be overstated in the Vermont trial. They invoke the higher authority of "economic practice" to justify a lack of common sense. They repeatedly assert they adequately substantiated their modeling inputs, yet cannot specify sources among their earlier mass filings or their current, late-submitted

data. And they have not overcome the fundamental errors in their assumptions and methodology that ARB identified in its July 2007 response, including excessive cost estimates, outdated vehicle-sales data, indirect estimates of fuel efficiency, stale gasoline prices, obsolete model mixes, nonsensical models, omitted effects of new vehicle price on income, and false assumptions. The errors all contribute to NERA/Sierra's excessive projections of fleet turnover and rebound effects. Their repetition of previously discredited assertions can only be seen as an effort to serve the automakers' broader campaign to postpone an U.S. EPA decision.

AIAM's and the Alliance's late supplemental comments concerning the impact of *Green Mountain* downplay that Court's primary reasoning rejecting their Energy Policy and Conservation Act (EPCA) preemption claims. The Court's opinion clearly explained that an examination of the Clean Air Act and EPCA statutes and their legislative histories reveals overlap but not conflict, following *Massachusetts et al. v. EPA* (Slip Op. at pp. 104-12), and California's standards are neither expressly (pp. 120-29) nor impliedly (pp. 132-222) preempted by EPCA. Opponents' comments attempt to turn the Court's supplemental discussion of Plaintiffs' EPCA policy concerns (pp. 113-19) into a holding requiring U.S. EPA to examine consumer choice, auto industry impacts, and safety. However, this supplementary discussion – which the Court's conclusion (pp. 234-39) does not even repeat or summarize – comes nowhere close to suggesting U.S. EPA may stray from applying only the 209(b) factors to this proceeding. These AIAM and Alliance claims were also effectively rebutted by the Conservation Law Foundation's comments. See Document ID 3642.

ATPC essentially repeats this same flawed analysis of *Green Mountain*, then presents the well-worn "sky is falling" cost and lead time arguments that its members made to no avail before Judge Sessions. Again, any of the significant numbers that ATPC refers to depend entirely on Mr. Austin's analysis of the costs of compliance and his conclusion that manufacturers would leave the market. Mr. Austin's projections in this regard are unsupported, as Judge Sessions found and California has shown in this waiver proceeding. The more reasonable cost figures generated in California's analyses clearly do not rise to the threshold needed to deny this waiver under applicable waiver case law. As Judge Sessions found (and any observer of the auto industry knows), "Ford, DaimlerChrysler and General Motors contemplate lowering their United States production capacity and reducing their workforces, which suggests that they will sell fewer vehicles independent of the regulation" and "the numbers of jobs that these automakers already plan to eliminate dwarf the number of jobs that would be eliminated at OEMs under any of Harbour's predictions." (Slip Op. at pp. 215-16.) In fact, just last week Chrysler announced 12,000 job layoffs that obviously have nothing to do with the subject greenhouse gas regulations. The same is true of recent lost sales. ATPC's

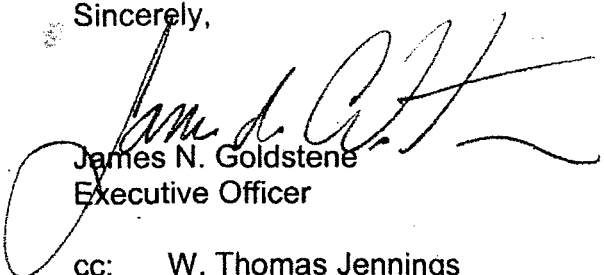
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members hold the key to their competitiveness – selling vehicles people want to buy – and this regulation will not change that.

NADA's comments likewise say nothing new, and again dwell on Plaintiffs' cost and feasibility arguments that failed before Judge Sessions. Having reviewed 16 days of testimony painstakingly documenting the current and potential future state of the auto industry, Judge Sessions observed that manufacturers' witnesses' compliance scenarios were even less believable than NERA/Sierra's. Slip Op. at pp. 146-52. The Court concluded, "In light of the public statements of industry representatives, history of compliance with previous technological challenges, and the state of the record, the Court remains unconvinced automakers cannot meet the challenges of Vermont and California's GHG regulations." *Id.* at 239. U.S. EPA should be similarly unconvinced, and should grant our request immediately.

Please enter this letter in the subject Docket. If you need any additional information from ARB regarding our response to these late comments or about other waiver matters, please contact David Aron Livingston, Senior Staff Counsel, at (916) 324-8406.

Sincerely,



James N. Goldstene
Executive Officer

cc: W. Thomas Jennings
Chief Counsel
Air Resources Board

David Aron Livingston
Senior Staff Counsel
Office of Legal Affairs