

Robert Meyers /DC/USEPA/US

Sent by: Shela Poke-Williams

09/04/2007 02:21 PM

To Alison Davis, Bryan Wood-Thomas, David Dickinson, John Hannon, Justin Cohen, Karl Simon, Margo Oge, Maureen Delaney, Michael Horowitz, Rob Brenner, Robert Doyle
cc Dana Hyland, Don Zinger, Gail-R Jones, George Sugiyama, Gladys Bryant-Akers, Janet McDonald, Karen Orehowsky, Socrates Michael

bcc

Subject Rescheduled: CA Waiver (Sep 4 03:00 PM EDT in 5415 ARN; call in #866-299-3188; conference code # 202-564-7434)

Meeting

Date 09/04/2007 03:00:00 PM

Time 03:00:00 PM to 03:45:00 PM

Chair Robert Meyers

Invitees

Required Alison Davis; Bryan Wood-Thomas; David Dickinson; John Hannon; Justin Cohen; Karl Simon; Margo Oge; Maureen Delaney; Michael Horowitz; Rob Brenner; Robert Doyle

Optional Dana Hyland; Don Zinger; Gail-R Jones; George Sugiyama; Gladys Eryant-Akers; Janet McDonald; Karen Orehowsky; Socrates Michael

FYI

Location 5415 ARN; call in #866-299-3188;
conference code # 202-564-7434

POC Gladys/Karen

Purpose: To brief PDAA on the CA waiver status

EPA-2446

Robert Doyle /DC/USEPA/US
09/19/2007 09:38 AM

To Tad Wysor
cc
bcc
Subject Re: FYI: Story on VT ruling's effect on CA Waiver decision factors...

Thanks, Tad .

Where was this from? (looks like *Inside EPA*)

EPA-2447

BD

Tad Wysor/AA/USEPA/US

Tad Wysor/AA/USEPA/US
09/19/2007 08:17 AM

To David Dickinson/DC/USEPA/US@EPA, Karl Simon/DC/USEPA/US@EPA, Robert Doyle/DC/USEPA/US@EPA
cc William Charmley/AA/USEPA/US@EPA, Kathryn Sargeant/AA/USEPA/US@EPA
Subject FYI: Story on VT ruling's effect on CA Waiver decision factors...

Tuesday, September 18, 2007

Ruling Backing Air Board Auto GHG Rules May Bolster Waiver Fight

A major legal victory this week for the California air board's greenhouse gas (GHG) emission standards for automobiles may also bolster the state's fight to obtain from U.S. EPA a Clean Air Act waiver to implement the rules, sources say. Most observers are expecting EPA will deny the waiver, triggering another long legal fight that could delay implementation of the regulation not only in California but at least 12 states that have adopted the rules.

The legal battles are considered critical to California's efforts to reduce GHG emissions to 1990 levels by 2020, officials say, because transportation accounts for about 40% of the state's overall GHG emissions.

In a Sept. 12 ruling, Judge William Sessions of the U.S. District Court in Vermont rejected auto industry claims that Vermont auto GHG rules modeled after the California regulations are preempted by various federal statutes, including the Clean Air Act and the Energy Policy & Conservation Act (EPCA), which governs corporate average fuel economy (CAFE) standards.

The ruling in *Green Mountain Chrysler-Plymouth-Dodge et al. v. Crombie et al.*, was made under the assumption that EPA will grant California's waiver in order to address the relevant legal claims, although it is widely expected that the waiver will be rejected by the end of the year.

Among the key issues, Sessions ruled that "Congress did not intend that regulations adopted by California for which EPA granted a waiver under Section 209(b) of the Clean Air Act be preempted," according to the 244-page ruling. "The regulations set GHG emissions standards and are sufficiently unrelated to fuel economy standards not to be expressly preempted. Further, Congress did not intend EPCA's CAFE standards to occupy the field of fuel economy exclusively, given that [the National Highway Traffic Safety Administration] must coordinate with other federal agencies and take into consideration other federal standards which may affect fuel economy."

Sessions' ruling in favor of the legality of the state auto GHG standards is also expected to result in a favorable decision in a nearly identical pending case against ARB in U.S. District Court in Fresno, *Central Valley Chrysler-Jeep, Inc., et al., v. Catherine E. Witherspoon*.

Several attorneys involved in both cases say they believe the auto industry will appeal the Vermont court's decision to the U.S. Second District Court of Appeals. An industry official said in a written statement that the automakers are considering an appeal.

Beyond ruling on the key preemption issues, Sessions also appears to support the argument that EPA should grant California the Clean Air Act waiver necessary for the regulations to be implemented. EPA has said it will decide on the waiver by the end of the year; ARB applied for the waiver in December 2005.

Under the Clean Air Act, EPA can reject California's waiver request if it finds ARB's decision in adopting the GHG auto regulations was arbitrary and capricious; or the state does

not need the standards to meet compelling and extraordinary conditions; or the standards are not consistent with certain sections of the act, including section 7521(a) of title 42 of the act. This section requires that regulations only take effect after the EPA administrator considers development and application of technology, “giving appropriate consideration to the cost of compliance” within a compliance period, according to an explanation of the provisions contained in this week’s Vermont court ruling.

Further, EPA considers that a state standard is inconsistent with this section if it “affords inadequate lead time to permit development of necessary technology giving appropriate consideration to the cost of compliance within that time period,” according to Sessions’ ruling.

Sessions points out that “over the years” EPA has denied portions of waiver applications from California to ensure consistency with this part of the act.

One of the auto industry’s arguments against EPA granting the waiver to California is that there is inadequate lead time to develop necessary technology at an appropriate cost in order to satisfy the requirements of the regulation.

But Sessions points out in his ruling that EPA can modify the requirements of California’s GHG regulation to allow more lead time in granting the waiver. He further opines that evidence presented in the Vermont trial indicates the auto industry is prepared to meet the GHG rules, despite its protests.

“On this issue, the automotive industry bears the burden of proving the regulations are beyond their ability to meet,” Sessions wrote. “There is no question that the GHG regulations present great challenges to automakers. . . . At the same time, two factors suggest the industry can meet these challenges. First, EPA clearly has the authority and flexibility to address lead time concerns in the waiver process. Second, automakers describe intensive efforts to develop and utilize new technologies to increase fuel efficiency and reduce emissions.”

Sessions describes how American automakers are using hybrid technology to dramatically improve fuel economy; offering clean diesel technology in a growing number of vehicles; and making “dramatic improvements to powertrain technologies” that may be available soon.

“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,” the ruling concludes.

A state attorney said Sessions’ comments should significantly bolster the state’s arguments for the EPA waiver and hurt automaker arguments that technological barriers and cost impacts should block the waiver. The source also pointed out that the Vermont ruling has already been sent to EPA officials considering the California waiver request.

“Sessions’ analysis of the technological feasibility of the regulations is very helpful,” the state lawyer said. “We think our regulations meet the criteria of the waiver provisions, so we think they should just grant it. But the point is that if EPA thinks -- in the context of the waiver criteria and applying those standards -- that it can’t approve the waiver, they could approve it [conditionally]. They’ve done that before.”

The Vermont ruling provides “more ammunition” to the argument that meeting the GHG regulations is feasible, the source added.

Gov. Arnold Schwarzenegger earlier this year sent a legal notice to EPA demanding that the agency make a decision on the waiver by Oct. 25. If EPA does not meet this deadline, the governor and state attorney general have vowed to sue the agency to compel a waiver decision.

Auto industry officials appear to be relying on EPA and other federal agencies to come up with national GHG regulations for vehicles and new CAFE standards that would also bolster arguments to deny California’s waiver request.

“Automakers support improving fuel economy standards nationally, rather than piecemeal and will continue to work with the Congress, NHTSA and EPA to reduce our oil dependence while increasing fuel economy,” said Dave McCurdy, president & CEO of the Alliance of Automobile Manufacturers, in a Sept. 12 written statement.

With regard to California's waiver request to EPA, McCurdy said: "The Alliance remains committed to working with policymakers to make certain that the EPA's judgment is based on credible, sound scientific data as to what policies truly impact California, its citizens and global climate concerns."