

✘ No one is backing down yet in the multiple battles over California's request for a Clean Air Act waiver to allow it to implement its rules limiting greenhouse gas emissions from cars and trucks. EPA's announcement that it would reconsider the Bush administration's denial of that request [was published in the Federal Register](#) on March 6. The agency held a public hearing on the waiver issue on March 5. The transcript has now been posted in [the public docket](#) — it's document 7176 — along with the written testimony submitted.

Under Clean Air Act section 209 only California, which regulated tailpipe emissions before the U.S. did, is eligible for a waiver, and only if the state finds that its standards are at least as protective as the federal standards that would otherwise apply. EPA must grant a waiver unless it finds: (1) that the state's protectiveness determination is arbitrary and capricious; (2) that the state does not need its standards to meet "compelling and extraordinary conditions;" or (3) the state's standards do not provide enough lead time to allow for the development of needed technology. Last spring, [EPA administrator Stephen Johnson denied the waiver](#) on the grounds that section 209 was not "intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems." It seems highly unlikely that the current EPA will repeat that argument, or that a court would endorse it in the face of the Supreme Court's decision in *Massachusetts v. EPA*, 547 U.S. 497 (2007), which ruled that CO<sub>2</sub> was a pollutant and rejected a claim that the fuel efficiency law forecloses regulation of GHG emissions from cars under the Clean Air Act.

In the alternative, the Bush EPA concluded that no waiver should be issued because the effects of climate change in California are not "compelling and extraordinary compared to the effects in the rest of the country." California contends (as it has done all along) that it does not need to justify its need for CO<sub>2</sub> limits separately from its need for conventional pollutant controls and that, in any case, climate change presents compelling and extraordinary problems for California even if those problems are not unique. At the hearing, California's witnesses cited effects of warming on air quality, water resources, sea level rise, and more. There was even testimony that some of California's cities develop localized "CO<sub>2</sub> domes" that produce slightly higher local temperatures, and that California's share of the deaths attributable to global warming exceeds its proportion of the nation's population.

California also made the case that its GHG vehicle emission standards, including the most stringent limits that must be met by 2016, can be met with technologies available today, in part because technology development has outpaced what was expected when the standards were being developed. A University of Michigan expert supported that view. Finally, in response to a question raised by EPA, California argued that the extended delay in review of

its waiver request (originally submitted in 2005) should not affect EPA's review of the lead time allowed. Although California's GHG emission limits are set to kick in for model year 2009 (that is, for cars that are already on the streets), California argues that the auto industry had plenty of notice, and that its standards should go into effect no later than 45 days after a waiver is granted.

Senator Carl Levin (D-Mich.) appeared at the hearing to oppose the waiver request.

Representatives of New Mexico, New York, Washington, and Massachusetts, Maine, and Maryland (some of the 14 states that have adopted California's GHG standards), the National Association of Clean Air Agencies, EDF, NRDC, Sierra Club, the National Wildlife Federation, Environment California, the Union of Concerned Scientists, the Consumer Federation of America, Public Citizen, Advanced Biofuels USA, Atlantic Biomass Conversions, Religious Action Center of Reformed Judaism, and PIRG testified in favor of the waiver.

A panel of industry representatives opposed California's request. None of the auto manufacturers sent representatives; they relied instead on trade organizations including the Alliance of Automobile Manufacturers, AIAM, National Automobile Dealers Association and the National Association of Minority Automobile Dealers, and CSM Worldwide. Their chief argument was that there should be a single national standard, and that the current CAFE program is a good standard. Their witnesses made essentially no effort to address the legal standards for granting or denying a waiver, concentrating instead on the political argument that a national standard is better policy, especially in light of the current fragile state of the industry. An auto dealer in Maine took a very different position, arguing that consumers in fact want clean cars and that the industry has hurt itself by failing to build clean cars.

EPA's representatives did not tip their hands, but there is no reason to reconsider the waiver denial unless EPA is now leaning toward granting the waiver.

Meanwhile, [as Cara recently noted](#), the auto industry is hardly giving in. They have appealed the three District Court decisions that have gone against them on the issue of whether the CAFE law preempts California's standards (they have not won any so far). According to the [Warming Law blog](#), oral argument is scheduled for March 19 in the Second Circuit on the appeal from *Green Mountain Chrysler-Plymouth Dodge v. Crombie* 508 F. Supp. 2d 295 (D. Vt. 2007); briefing is complete in the 9th Circuit on the appeal from *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp., 2d 1151 (E.D. Cal. 2007); and an appeal has been filed from *Association of International Automobile Manufacturers et al v. Sullivan*, 588 F.Supp.2d 224 (D.R.I.,2008). It seems certain that they will file yet another

lawsuit (or multiple lawsuits) if EPA issues the waiver California has requested. And they are taking their political argument to the broadest audience they can find. Time Magazine, for example, [recently reported](#) their claims that California's GHG standards are effectively fuel efficiency standards and therefore preempted, and that "the goals embedded in the California regulations are basically unattainable under current conditions, which include a severe shortage of cash for innovation and research."