The Legality of EPA's Greenhouse Gas Waiver Denial

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Editors' Summary

In December 2007, EPA denied a request submitted by California pursuant to §209 of the CAA. That request for a waiver from federal preemption, if granted, would have allowed California to set its own motor vehicle emission standards for greenhouse gases (GHGs). This waiver request is unique; it marks the first waiver request submitted by California to regulate GHGs in order to mitigate climate change. Its subsequent denial is significant for, primarily, two reasons. First, this was the first waiver request ever flatly denied by EPA. Second, this was the first post-Massachusetts v. U.S. Environmental Protection Agency decision by EPA to reject its clear authority to regulate GHGs under the CAA.

Climate change is a global problem.[1] Faced with nonaction on the federal level, states have taken the initiative to reduce greenhouse gas (GHG) emissions to mitigate climate change.[2] In particular, California has enacted two pieces of climate change legislation, AB 1493 and AB 32.[3] Whereas AB 32 comprehensively seeks to reduce GHG emissions, AB 1493 targets emissions from the mobile sources. Pursuant to the federal Clean Air Act (CAA),[4] California has the ability to set its own emission standards from mobile sources, but only if it receives a waiver of preemption from the U.S. Environmental Protection Agency (EPA).[5] For the first time since the enactment of the CAA, EPA has flatly denied a request for waiver.[6]

This Article considers the legality of that decision. Part I describes the CAA's framework for mobile source emission standards including (1) preemptive federal standards, (2) the possibility that EPA may waive federal preemption for California, and (3) the legal standards used to decide past waiver requests. Part II presents California's waiver request to set emission standards for GHGs and its subsequent denial by EPA. Then, Part III critiques the legal issues presented by EPA's denial including, (1) whether it is appropriate to consider GHG emission standards in isolation, (2) whether California has met the statutory standard for "compelling and extraordinary conditions," and (3) the validity of other considerations raised by EPA. Part IV analyzes the broader legality concerns raised by EPA's GHG waiver denial.

1. *See generally* Intergovernmental Panel on Climate Change (IPCC), Fourth Assessment Report, Climate Change 2007: Synthesis Report, Summary for Policymakers (2007) [hereinafter IPCC Report].
2. *See generally* Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. Pa. L. Rev. (2007); Pew Center on Global Climate Change, Learning from State Action on Climate Change (2008), http://www.pewclimate.org/docUploads/States%20Brief%20(May%202008).pdf; Regional Greenhouse Gas Initiative (RGGI), *Homepage*, http://www.rggi.org (last visited Dec. 31, 2008); Western Climate Initiative (WCI), *Homepage*, http://www.westernclimateinitiative.org (last visited Dec. 31, 2008); Midwestern Greenhous Gas Reduction Accord, *Homepage*, http://www.midwesternaccord.org (last visited Dec. 31, 2008).
3. Assembly Bill 1493, Cal. Health & Safety Code §43018.5 (West 2007), 13 Cal. Code Regs. §1961.1 (2008) [hereinafter AB 1483]; Assembly Bill 32, California Global Warming Solutions Act of 2006, Cal. Health & Safety Code §§38500-38599 (West 2007).
4. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
5. *See id.* CAA §§202-250 (tit. II).
6. Some of California's waiver requests had been denied partially, but none had ever been denied in its entirety. *See* Congressional Research Service, Report for Congress, *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act*, Dec. 27, 2007 [hereinafter CRS Report].

I. CAA Emission Standards

A. Preemptive Federal Standards and California Standards

Title II of the CAA authorizes EPA to set emission standards for mobile sources.[7] Specifically, §202(a) requires EPA's Administrator to prescribe mobile source emission standards for air pollutants, "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[8] States are not allowed to adopt their own emission standards,[9] with the exception of California.[10] California's exception lies within §209(b)'s waiver provision. EPA can waive the federal standard and allow California to implement its own standard.[11] Any state other than California that has a CAA nonattainment area may adopt a standard that is identical to California's standard.[12] Thus, there are two sets of motor vehicle emission standards in the United States: (1) those set by EPA; and (2) those set by California pursuant to an EPA waiver.

B. History of Legal Standards for Waivers

In the past, EPA has always deferred to California's decisions to set its own emission standards and granted waiver rather readily.[13] EPA's deference to California traces directly from a plain reading of the §209(b) waiver provision.[14] Section 209(b) instructs the Administrator to grant waiver from federal preemption if California determines that its "standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[15] Once California has made that protectiveness determination, the Administrator must grant waiver unless he makes one of three specific findings. First, the Administrator can deny waiver if California's protectiveness determination was arbitrary and capricious.[16] Second, the Administrator can deny waiver if he determines that California "does not need such State standards to meet compelling and extraordinary conditions."[17] Third, the Administrator can deny waiver if California's standards and enforcement procedures are inconsistent with §202(a).[18]

While some of California's waiver requests have been denied partially or their effective date delayed until feasible, none had ever been entirely denied.[19] The Administrator, then, had never made one of the three specific findings to deny a waiver. As a result, the only past legal challenges to waiver decisions have been challenges to EPA waiver grants brought by the automobile industry.[20] Those cases reinforce the directive, from both §209(b) and its legislative history, that EPA's review is to be highly deferential to California's determinations.[21]

As part of the 1977 CAA Amendments, the waiver provision was restructured to enhance EPA's deference to California's determinations.[22] A previous requirement that California's standards be more stringent than federal standards was removed.[23] That requirement was supplanted in favor of the new requirement that California's standards "be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[24] California, then, was given more leeway to set its own standards following its own protectiveness determinations. At the same time, EPA's role was limited; "Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight."[25] The 1977 Amendments also specifically limited the EPA Administrator's role by memorializing the three specific grounds for waiver denial in §209(b)(1)(A)-(C). That is, the 1977 Amendments brought §209(b)(1)(A)-(C) into existence. Moreover, the addition of "in the aggregate" led California and EPA to conclude that the Administrator's second inquiry, pursuant to §209(b)(1)(B) was to focus on California's need for an emissions program.[26]

Section 209(b)(1)(B) instructs the Administrator to deny a waiver if he finds that California does not "need such State standards to meet compelling and extraordinary conditions." If read in isolation, that section could require EPA to inquire into California's need for each emission standard it seeks to impose. But a broader textual construction, supported by legislative history, permits a less intrusive inquiry into California's need for a program.[27] First, the use of the plural "standards" provided EPA and California textual guidance to inquire

7. CAA §§202-250 (tit. II).
8. *Id.* §202(a)(1).
9. *Id.* §209(a).
10. *Id.* §209(b).
11. *Id.*
    > The [EPA] Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—
    > (A) the determination of the State is arbitrary and capricious,
    > (B) such State does not need such State standards to meet compelling and extraordinary conditions, or
    > (C) such State standards and accompanying enforcement procedures are not consistent with section [202](a) of this title.
    >
    > The only state that had adopted emissions control standards, other than crankcase emission standards, prior to March 30, 1966, was California. Therefore, California is the only "state" that can waive the EPA-set national standards.
12. *Id.*§177.
13. *See* Motor & Equipment Mfrs. Ass'n v. EPA, 627 F.2d 1095, 9 ELR 20581 (D.C. Cir. 1979) (MEMA I); Motor & Equipment Mfrs. Ass'n v. Nichols, 142 F.3d 449, 28 ELR 21111 (D.C. Cir. 1998) (MEMA II); United States v. Chrysler Corp., 591 F.2d 958, 9 ELR 20091 (D.C. Cir. 1979); Ford Motor Co. v. EPA, 606 F.2d 1293 (D.C. Cir. 1979); *see* CRS Report, *supra* note 6.
14. CAA §209(b).
15. *Id.*
16. *Id.* §209(b)(1)(A).
17. *Id.* §209(b)(1)(B).
18. *Id.* §209(b)(1)(C). Consistency with §202(a) is determined by technological feasibility, adequacy of lead time, and consideration of cost. *MEMA I*, 627 F.2d at 1095.
19. CRS Report, *supra* note 6, at 14.
20. MEMA II, 142 F.3d 449, 28 ELR 21111 (D.C. Cir. 1998); United States v. Chrysler Corp., 591 F.2d 958, 9 ELR 20091 (D.C. Cir. 1979); *MEMA I*, 627 F.2d at 1095; Ford Motor Co. v. EPA, 606 F.2d 1293 (D.C. Cir. 1979).
21. *See id.* (various case cites).
22. *Ford Motor Co.*, 606 F.2d at 1293; S. Rep. No. 95-127, 95th Cong. 87 (1977); H.R. Rep. No. 95-294, 95th Cong. 302 (1977).
23. *Id.*
24. CAA §209(b).
25. *Ford Motor Co.*, 606 F.2d at 1297.
26. 49 Fed. Reg. 18892 (May 3, 1984); *see* CRS Report, *supra* note 6, at 13.
27. *See supra* note 26.

into California's need for a *program*, rather than its need for a particular *standard*.[28] The addition of "in the aggregate" to §209(b), during the restructuring of the waiver provision in 1977, supports the harmonization of the two sections.[29] That textual harmony is achieved by reading "such State standards" in §209(b)(1)(B) to refer back to "standards, in the aggregate." The effect of this interpretation provides greater deference to California's determinations, beyond protectiveness and into its needs.

On very few occasions have waiver grants prompted legal challenges.[30] On each occasion, the Administrator's decision was deemed reasonable, not arbitrary or capricious.[31]

II. California's Waiver Request to Set GHG Emission Standards

A. California's GHG Emission Standards and Waiver Request

On July 22, 2002, California enacted legislation to regulate emissions of GHGs from motor vehicles.[32] AB 1493 announced that the "[c]ontrol and reduction of emissions are critical to slow the effects of global warming," and cited several "compelling and extraordinary" impacts that global warming would specifically impose on California.[33] To reduce those impacts, AB 1493 authorized the California Air Resources Board (CARB) to establish GHG regulations "in accordance with any limitations that may be imposed pursuant to the federal Clean Air Act [ ] and [its] waiver provisions."[34] On September 24, 2004, CARB issued its final regulations for GHGs to go into effect for the 2009 model year.[35] Then, on December 21, 2005, Catherine Witherspoon, Executive Officer of CARB, requested a waiver pursuant to §209(b).[36]

B. Delay of Waiver Decision

EPA delayed considering California's waiver request in anticipation of the U.S. Supreme Court's *Massachusetts v. U.S. Environmental Protection Agency* decision.[37] The *Massachusetts* case directly affected California's waiver request because it dealt with the regulation of GHGs pursuant to Title II of the CAA. While *Massachusetts* answered that GHG emissions are air pollutants subject to Title II regulation, California's waiver request directly attempts to regulate GHG emissions pursuant to Title II.

Massachusetts held that GHG emissions are air pollutants within the meaning of the CAA, subject to EPA's §202 regulatory authority.[38] So, after *Massachusetts*, the Administrator was left to make an endangerment finding for GHGs, which, if positive, would effectively require EPA to regulate GHG emissions from mobile sources.[39] At the same time, EPA renewed its consideration of California's waiver request to implement its own GHG emission standards from mobile sources.

C. EPA's Waiver Denial

EPA re-opened its consideration of California's waiver request by holding two public hearings.[40] Then, on December 19, 2007, the EPA Administrator notified California, in the form of a letter (Letter) to Gov. Arnold Schwarzenegger (R-Cal.), that its request for waiver had been denied.[41] Later, on February 29, 2008, EPA released a more thoroughly reasoned explanation of EPA's decision to deny California's waiver request (Notice of Decision).[42]

1. December 19, 2007, Waiver Denial Letter

EPA first notified California that its waiver request had been denied in a letter addressed to Governor Schwarzenegger on December 19, 2007.[43] The Letter described notice-and-comment proceedings, including two public hearings consisting of testimony from over 80 individuals, thousands of written comments, as well as scientific and technical material.[44]

The Administrator's primary rationale for rejecting California's waiver request distinguished this waiver request for GHG regulations from all other past waiver requests for other air pollutants.[45] He found it critical that GHG emissions are global in nature, whereas emissions from other air pollutants remain localized.[46] Furthermore, he pointed out that the

28. 49 Fed. Reg. at 18889-90.
29. *Id.*
> The interpretation that my inquiry under (b)(1)(B) goes to California's need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statute as well. Specifically, if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase ". . . does not need such state standards" (emphasis supplied), which apparently refers back to the phrase "State standards . . . in the aggregate," as used in the first sentence of §209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e., "standards," further confirms that Congress did not intend EPA to review the need for each individual standard in isolation. Given that the manufacturers have not demonstrated that California no longer has a compelling and extraordinary need for its own program . . . I cannot deny the waiver on this basis.

30. *See supra* note 20 (various case cites).
31. *Id.*
32. AB 1493, *supra* note 3.
33. *Id.*
34. *Id.*
35. *See* CRS Report, *supra* note 6; AB 1493, *supra* note 3.
36. *See* CRS Report, *supra* note 6.
37. 127 S. Ct. 1438, 37 ELR 20075 (2007).
38. *Id.*
39. *Id.* More than one year later, EPA has still not yet made an endangerment finding. Instead, EPA released an Advanced Notice of Proposed Rulemaking (ANPR) presenting information relevant to and soliciting comment on the possibility of an endangerment finding. 73 Fed. Reg. 44354-520 (July 30, 2008).
40. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156-69 (Mar. 6, 2008) [hereinafter Notice of Decision]. One hearing was held in Washington, D.C., on May 22, 2007, and a second hearing was held in Sacramento, California, on May 30, 2007. The Notice of Decision was released on EPA's website on Feb. 29, 2008, and published in the *Federal Register* on Mar. 6, 2008.
41. Letter from Stephen L. Johnson, EPA Administrator, to Governor Arnold Schwarzenegger (Dec. 19, 2007) [hereinafter Letter].
42. Notice of Decision, *supra* note 40.
43. Letter, *supra* note 41.
44. *Id.* at 1.
45. *Id.*
46. *Id.* at 1.

global nature of the pollutant distinguishes California's current waiver request from all of its prior requests. The Administrator viewed this request as one to set local standards to address a global problem, whereas prior requests sought to set local standards to address local problems.[47]

The Administrator also expressed his "firm[ ] belie[f] that, just as the problem extends far beyond the borders of California, so too must [ ] the solution."[48] Grounded in this belief, the Administrator announced his support for new national fuel economy standards signed into law earlier that same day as part of the Energy Independence and Security Act (EISA) of 2007.[49] He further asserted that these new standards were better because they require fuel economy of 35 miles per gallon (mpg) in all states whereas California's standards would only require 33.8 mpg. The Administrator asserted that this uniform, national resolution is better than that of California and the "patchwork of other states" that had adopted California's standards.[50] There are two undercurrents driving this point. First, the Administrator announced a preference for national level action. Second, the Administrator confused fuel economy standards with CAA emission standards. He assumed a preemptive effect from the new fuel economy standards upon any GHG emission standards.

In conclusion, the Administrator anchored his policy rationales in statutory language, stating that "[i]n light of the global nature of the problem of climate change, I have found that California does not have a 'need to meet compelling and extraordinary conditions.'"[51] He also instructed his staff to draft documents further explaining the rationale for his decision.[52] That more explicit statement of the Administrator's reasoning was released on February 29, 2008, in a Notice of Decision to deny California's request for waiver of CAA preemption.[53] In the interim between the December 19, 2007, denial Letter and the February 29, 2009, Notice of Decision, California joined 15 other states and 5 environmental groups to challenge EPA's waiver denial in the U.S. Court of Appeals for the Ninth Circuit. The petition for review was filed in the Ninth Circuit, as opposed to the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, because, the petitioners maintained, the December 19, 2007, decision was not "of national scope and impact."[54]

47. *Id.*
48. *Id.*
49. Pub.L. 110-140 121 Stat. 1492.
50. Letter, *supra* note 41.
51. *Id.* at 2. *See also* CAA §209(b)(1)(B). The Administrator appears to quote §209(b)(1)(B) of the CAA, but does so without citing the statute and without directly quoting the statutory language. Section 209(b)(1)(B) says that no waiver will be granted if: "[S]uch State does not need such State standards to meet compelling and extraordinary conditions." Meanwhile, the Administrator states that "California does not have a 'need to meet compelling and extraordinary conditions.'" The difference, although slight, is that the statute requires consideration of California's *standards* whereas the Administrator is focused on California's needs.
52. *See* Letter, *supra* note 41.
53. *See* Notice of Decision, *supra* note 40.
54. CAA §307. The Notice of Decision does include the D.C. Circuit jurisdiction triggering language. Thus, EPA moved to dismiss the Ninth Circuit petition for lack of jurisdiction. A parallel petition for review was filed by California in the D.C. Circuit. California also filed a petition for review of the Final Notice of Decision, subsequent to its publication in the *Federal Register*.

2. February 29, 2008, Notice of Decision

The EPA Administrator, in the Notice of Decision, found that "California does not need its greenhouse gas standards for new motor vehicles to meet compelling and extraordinary conditions."[55] This language mirrored and grounded the Administrator's decision in CAA §209(b)(1)(B)'s requirement that emission standards are needed "to meet compelling and extraordinary conditions."[56] The Administrator clarified that §209(b)(1)(B) was the sole statutory basis for his decision; therefore, he did not address the requirements imposed by §209(b)(1)(A) and (C).[57] While founded on statutory text, his decision focused on congressional intent.[58] The primary rationale for the Administrator's finding rested upon his "belie[f] [that] section 209(b)(1)(B) was [not] *intended* to allow California to promulgate state standards for emissions

. . . designed to address global climate change."[59] The Administrator explained that the intent behind §209(b) of the CAA was to allow California to continue to address local and regional air pollution problems.[60] That intent drove his conclusion that §209(b)(1)(B) "was [not] intended to allow California to promulgate *state* standards . . . to address *global* [ ] problems."[61] Therefore, the Administrator concluded, GHGs are not regulable by California through exercise of §209(b) waiver.[62]

The Administrator's second, alternative, rationale was "that the effects of climate change in California are [not] compelling and extraordinary compared to the effects [of climate change] in the rest of the country."[63] That is, his alternative reasoning conducted the statutory inquiry by way of comparison. The precise statutory test for §209(b)(1)(B) required California to demonstrate conditions that are more compelling and more extraordinary than the rest of the nation. Effectively, the Administrator's finding relied on a new interpretation of §209(b)(1)(B). This new interpretation led to critical departures from EPA's own waiver precedent by decreasing the traditional level of deference given to California's policy determinations. More generally, the Administrator conducted an altogether new waiver inquiry.

55. *See* Notice of Decision, *supra* note 40.
56. *See id.*
57. *See id.* at 12157. Section 209(b)(1)(A) requires the Administrator to deny waiver if California's determination is arbitrary and capricious. Section 209(b)(1)(C) requires the Administrator to deny waiver if California's standards and enforcement procedures are inconsistent with §202(a).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* (Emphasis added.)
62. *Id.*
63. *Id.*

III. Legal Issues Specifically Presented by EPA's Denial

A. Should GHG Emission Standards Be Considered in Isolation?

1. EPA's §209(b)(1)(B) Inquiry

In both the Letter and Notice of Decision, EPA concluded that §209(b)(1)(B) should be interpreted differently for GHG emissions.[64] In the Letter, the Administrator presented the rationale that GHGs warrant different legal treatment because they are global pollutants. That is, because emissions of GHGs are equally distributed in the atmosphere, they make equal contributions to climate change, regardless of their point of emission. So, emissions reductions in California, as a result of these standards, will not ensure any mitigation of the effects of climate change in California. This rationale was the focus of the Administrator's Letter but also appears as a policy reason to support EPA's legal rationale in the Notice of Decision.

In the Notice of Decision, EPA took three specific steps in departure from its own prior waiver precedent. Each step related to the global nature of the pollutant.[65] First, EPA separated California's GHG emission standards from its broader regulatory program. Second, EPA imposed a causation requirement between the emission regulations and problem addressed. Third, EPA read §209(b)(1)(B) as ambiguous when applied to GHGs.

EPA, first, separated out the GHG limits that are the subject of this waiver request from emission standards for which California has been granted waivers as part of its comprehensive regulatory program for motor vehicle emissions.[66] In the past, EPA had considered California's waiver provision from a broader context, whether California needed its own, "separate motor vehicle program to meet compelling and extraordinary conditions."[67] Now, EPA did not consider, nor disputed, that California needs its own motor vehicle program. Instead, EPA distinguished these standards from the rest of California's emissions program because the global nature of the pollution problem does not have "close causal ties to conditions in California."[68] Thus, EPA added a causal connection as an evidentiary requirement to California's waiver requests (the second departure).[69] This connection had never been required in the past, primarily because California's determinations were given greater deference. Now, though, the causal connection is a necessary component of EPA's §209(b)(1)(B) waiver decision that will always serve as a barrier to a waiver for GHG emissions.

EPA's third departure from past waiver precedent read ambiguity into §209(b)(1)(B).[70] The ambiguity arises when reading §209(b)(1)(B)'s "such State standards" in isolation from §209(b). EPA contended that there are three permissible readings of "such State standards" from "such State does not need *such State standards* to meet compelling and extraordinary conditions." First, "such State standards" could mean the program as a whole. Second, "such State standards" could mean the standards for similar vehicles. Or, third, "such State standards" could mean those standards specifically proposed in the pending waiver request.[71]

In the past, EPA focused on the plural "standards," to mean the emissions program as a whole.[72] Here, EPA refocused its statutory inquiry based on its construction of the problem being addressed and the pollutant being regulated. That is, EPA will continue to read "such State standards" to refer to the program as whole when California is attempting to regulate traditional air pollutants for local pollution problems (the first reading).[73] But EPA will read "such State standards" to refer to those standards for the particular pollutant when the pollutant and the problem are global (the third reading).[74] EPA supported this interpretation by examining the waiver provision's legislative history wherein Congress was focused on local conditions and local pollution.[75] The ambiguity of "such State standards" is EPA's necessary hook to interpret §209(b)(1)(B) differently for GHGs and receive deference for its construction.[76]

These three departures allowed EPA to conclude that "[t]he intent of Congress in enacting §209(b) and in particular Congress' decision to have a separate §209(b)(1)(B), was to require EPA to specifically review whether California continues to have compelling and extraordinary conditions and the need for state standards to address those conditions."[77] As a result, EPA will treat GHGs differently pursuant to §209(b)(1)(B) and grant a waiver only if the emissions to be regulated are the cause of the problem addressed.[78] So, only if California caused climate change, and could directly redress it, would California be able address it.[79] Consequently, EPA reasoned that, since "[a]tmospheric concentrations of greenhouse gases are an air pollution problem that is global in nature, and this air pollution problem does not bear the same causal link to factors local to California . . . GHGs are not the kind of local or regional air pollution problem that Congress intended to identify in the [§209(b)(1)(B)]."[80] Therefore, the Administrator found "that California does not need GHG standards to meet compelling and extraordinary conditions."[81]

64. *Compare* Letter, *supra* note 41, *with* Notice of Decision, *supra* note 40.
65. *See* Notice of Decision, *supra* note 40, at 12159.
66. *Id.* at 12161.
67. *Id.*
68. *Id.* at 12160.
69. *Id.*
70. *Id.* at 12161.
71. *Id.*
72. *See id.* at 12159.
73. *See id.* at 12161.
74. *Id.*
75. *Id.*
76. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 14 ELR 20507 (1984).
77. *See* Notice of Decision, *supra* note 40, at 12161.
78. *Id.*
79. *Id.* In effect, EPA erases California's waiver provision if the condition is climate change and the pollutant is a GHG.
80. *Id.* at 12163.
81. *Id.*

2. Did EPA Conduct the Proper Statutory Inquiry?

While the legal standard announced by the Administrator in the Letter cannot be right, the legal standard announced by EPA in the Notice of Decision could be correct, or at least reasonable.[82] Either way, it is relevant that the Notice of Decision departed significantly from EPA's past §209(b)(1)(B) inquiry.

The foundation for EPA's denial of California's waiver request is a policy justification that GHGs, as a different kind of air pollutant, should be treated in a different manner legally.[83] That justification cannot be directly grounded in §209(b) because there is no distinction among pollutants in §209(b).[84] Additionally, there is nothing in *Massachusetts* which prescribes less than full regulatory treatment of GHGs as CAA pollutants.[85] Moreover, *Motor and Equipment Manufacturers Ass'n v. U.S. Environmental Protection Agency* (*MEMA I)*[86] states that "[t]he plain meaning of the statute indicates that Congress intended to make the waiver power coextensive with the preemption provision."[87] This places EPA on tenuous footing with GHGs because *Massachusetts* clearly subjects GHG emissions to preemption pursuant to §209(a).[88] So, because §209(a) and (b) are co-extensive, GHG preemption must be at least capable of being waived by EPA pursuant to §209(b). Therefore, the only statutory foundation available for constructing the waiver provision differently for GHG emissions lies within §209(b)(1)(B)'s "such State standards."[89]

Here, for the first time, EPA reads "such State standards" as ambiguous. Previously, "such State standards" had always referred to California's emissions program as a whole without inquiry into the particular pollutant or specific standard for which a waiver was being requested.[90] In a 1984 waiver determination, then-EPA Administrator William D. Ruckelshaus found no ambiguity; he relied on the plain meaning of §209(b)(1)(B) and congressional intent to determine that "such State standards" meant "State standards . . . in the aggregate."[91] Now though, EPA, in its Notice of Decision, has found textual ambiguity and identified three possible readings of "such State standards." Additionally, while Administrator Ruckelshaus' construction relied on specific legislative history regarding the language, current EPA Administrator Stephen L. Johnson relied on a broader, more purposive reading of legislative history regarding the waiver provision more generally. Notably, Administrator Ruckelshaus uses legislative history from the 1977 enactment of the current §209(b)(1)(B) whereas Administrator Johnson cites legislative history from the enactment of the original waiver in 1966. The 1966 waiver provision, of course, did not include §209(b)(1)(B)—the statutory section upon which he based his decision. The reviewing court will have to similarly read ambiguity into clear text by relying on preexisting legislative history.[92]

This will likely be the most contentious dispute in the forthcoming litigation for three reasons. First, because textual ambiguity is determined judicially this is the least deferential point to EPA.[93] Second, it is the most legally forceful point, actually grounded in statute, to support the Administrator's finding. Third, it is a necessary construction for both of the Administrator's findings in the Notice of Decision. The Administrator relies on reading "such State standards" to refer to the current, proposed standards for GHG emissions to (1) conclude that GHG emissions were not intended to be regulated through the waiver provision, and (2) begin his inquiry into "compelling and extraordinary conditions."

Next, if the court agrees with EPA's construction of §209(b)(1)(B) and finds ambiguity, it can only defer to EPA's interpretation if that interpretation is reasonable.[94] Here, there is a great deal of deference to EPA's expertise in making the correct policy judgments within permissible statutory readings. If the reviewing court does agree that §209(b)(1)(B) is ambiguous, it is unlikely that EPA's interpretation would be deemed unreasonable. In particular, EPA's policy rationale to consider GHG emissions in isolation is almost clearly reasonable. It is at least reasonable to distinguish global pollutants causing a global pollution problem from more traditional pollutants causing local problems that can be more readily redressed through local regulation. Thus, if reading "such State standards" to mean those standards for GHGs and not the broader regulatory program, is determined correct, it will almost necessarily be reasonable.

82. *Chevron*, 467 U.S. at 843 (Step 2).
83. *See* Notice of Decision, *supra* note 40, at 12160.
84. CAA §209(b).
85. 127 S. Ct. at 1438; CAA §209(a) ("No State . . . shall adopt or enforce any standard relating to the control of emissions . . . subject to this part." Presumably, until EPA makes a positive endangerment finding (if ever), California could withdraw its request and assert the argument that GHGs are not subject to Title II and, therefore, are not preempted. CARB, in its waiver request, reserved the right to later withdraw its waiver request if GHG were not defined as air pollutants within §202 or, more specifically §209.).
86. 627 F.2d 1095, 9 ELR 20581 (D.C. Cir. 1979).
87. *Id.* at 1107.
88. 127 S. Ct. at 1438.
89. CAA §209(b)(1)(B).
90. 49 Fed. Reg. at 18889-90; 71 Fed. Reg. 78192 (Dec. 28, 2006).
91. 49 Fed. Reg. at 18889-90:

> The interpretation that my inquiry under (b)(1)(B) goes to California's need for its own mobile source program is borne out not only by the legislative history, but by the plain meaning of the statute as well. Specifically, if Congress had intended a review of the need for each individual standard under (b)(1)(B), it is unlikely that it would have used the phrase ". . . does not need such state standards" (emphasis supplied), which apparently refers back to the phrase "State standards . . . in the aggregate," as used in the first sentence of §209(b)(1), rather than to the particular standard being considered. The use of the plural, i.e., "standards," further confirms that Congress did not intend EPA to review the need for each individual standard in isolation. Given that the manufacturers have not demonstrated that California no longer has a compelling and extraordinary need for its own program . . . I cannot deny the waiver on this basis.

92. The Administrator's reading presents an interpretation that quite possibly "goes beyond the scope of whatever ambiguity [the statute] contains." City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 24 ELR 20810 (1994).
93. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842, 14 ELR 20507 (1984).

Chevron Step 1 does not defer to an agency's determination of ambiguity but examines the text independently. It is not implausible that a reviewing court would find ambiguity.

94. *Id.* at 843.

B. Does California Need GHG Emission Standards to Meet "Compelling and Extraordinary Conditions"?

EPA's secondary rationales rely on considering GHGs in isolation but move further along the §209(b)(1)(B) inquiry to explore whether California has "compelling and extraordinary conditions." First, in the Letter, the Administrator concluded that California does not "have a need to meet compelling and extraordinary conditions." Then, in the Notice of Decision, EPA concluded that "the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country."

1. The Predominant Effects Inquiry

The Administrator's reasoning in the December 19, 2007, Letter effectively eliminated the possibility that California will ever be granted a waiver to address climate change. The Administrator characterized past waivers as dealing only with "pollutants that predominantly affect[ed] local and regional air quality," challenges that were "exclusive or unique to California."[95] This is the forceful point of differentiation between past waivers and the current request; climate change will never predominantly affect California, nor will it be an exclusive or unique problem: it is a global problem.[96] What the Administrator does not address, though, is both the in-between (from predominant effect to unique or exclusive) and the next, causally related step (after the problem is identified, one must address its effects).

While it is true that GHG emissions are global pollutants,[97] this observation does not consider the local effects of global climate change on California. The Administrator assumed that "greenhouse gas emissions harm the environment in California and elsewhere regardless of where the emissions occur."[98] This assumption ended the inquiry before seriously considering the problem. Even though GHG emissions, regardless of their point of emission, equally contribute to global climate change, the effects of global climate change on various nations and states are different and local. That is, a uniformly shared cause does not necessarily (and will not with respect to climate change), lead to uniform effects. For example, although similarly emitted GHGs in California and Kansas will equally contribute to climate change, the effects of global climate change on California will necessarily be different than the effects of global climate change on Kansas. Thus, even though GHG emissions from both states contribute to the climate change problem, the climate change effects on each state will be significantly different because each state has a different environment, including geography, climate, ecology, and land uses. The Administrator's reasoning ignores the unique effects of climate change on California.

While it will always be absurd to argue that climate change will "predominantly affect" California, it is equally absurd to claim that the impact of climate change on California is not "unique or exclusive" to California. The Administrator misses the causal connection from the global problem to its local effects, which will always be as clearly and necessarily unique as the obviously unique size and shape of the state of California on a map. Moreover, a "predominantly affects" standard is not the equivalent of a "compelling and extraordinary" standard. The Administrator's language does not announce or explicate a new waiver standard for climate change, nor does it apply the past standard,[99] but clearly applies a new standard. It remained unclear until the Notice of Decision was issued, what kind of conditions California would need to demonstrate to be granted waiver for "compelling and extraordinary conditions." The standard could require California to be predominantly affected by climate change (an impossible standard). Or the standard could require California to demonstrate unique and exclusive challenges (a high, but plausibly demonstrable standard). The Notice of Decision clarified that to satisfy the "compelling and extraordinary conditions" requirement, California would need to exhibit conditions that are significantly different from, or worse than, the rest of the nation.

2. The Compelling and Extraordinary Inquiry

EPA's first rationale for denying the GHG waiver, as stated in the Notice of Decision, ended its inquiry after determining that GHGs should be considered separately (because that result was not intended by Congress). EPA's alternative rationale set forth in the Notice of Decision, though, moved beyond congressional intent to consider whether California's GHG standards are needed to meet "compelling and extraordinary conditions." Again, because EPA had never before denied a waiver request and there had never been a legal challenge grounded in §209(b)(1)(B), the requisite "need" and the meaning of "compelling and extraordinary" remained open to interpretation. Whereas "such State standards" more clearly refers to the broader program when reading the entirety of §209(b), "need" and "compelling and extraordinary" only appear in §209(b)(1)(B). Additionally, the words "compelling and extraordinary" are necessarily more ambiguous than "such State standards." Whereas the "such" in "such State standards" begs for connection between the statutory sections and the specific standards it refers to, "compelling and extraordinary" are looser, subjective, patently ambiguous terms. A plain text interpretation would require California to have (1) compelling and extraordinary conditions (to be identified by the Administrator) that (2) can be redressed by emission standards.[100] EPA focused on the "compelling and extraordinary conditions" prong to determine that California does not exhibit them, without addressing the redressability prong

95. Letter, *supra* note 41.
96. IPCC Report, *supra* note 1.
97. *Id.*
98. Letter, *supra* note 41, at 1.
99. MEMA I, 627 F.2d 1095, 9 ELR 20581 (D.C. Cir. 1979).
100. Section 209(b)(1)(B)'s inquiry bears striking resemblance to "strict scrutiny."

(which was considered within but not determinative in EPA's primary rationale).[101]

EPA found that California did not exhibit "compelling and extraordinary conditions" after comparing the local effects of climate change on California to the effects on the nation as a whole.[102] EPA relied on plain language and legislative history to determine that impacts on California must be sufficiently different or unique from the rest of the nation to qualify as "compelling and extraordinary."[103] So, to attain a waiver without a §209(b)(1)(B) finding, California would need to show its conditions are: (1) unique and (2) unique enough to distinguish itself from the rest of the nation. This is a strict interpretation of "compelling and extraordinary," beyond mere uniqueness, almost resembling the Letter's "predominantly affects" test.

EPA did not dispute comments that California's effects are unique: "[D]eclining snowpack and early snowmelt and resultant impacts on water storage and release, sea level rise, salt water intrusion, and adverse impacts to agriculture (e.g., declining yields, increased pests, etc.) forests, and wildlife."[104] EPA relied on Intergovernmental Panel on Climate Change reports to examine the impacts of climate change on California, both observed and projected, as exhibited by temperature change, precipitation increase, and sea rise.[105] First, EPA recognized that California has observed a greater temperature increase than the nation as a whole.[106] Second, while California has experienced increased precipitation, EPA noted that its increase is not conclusively greater than that in the rest of the nation.[107] As for sea rise, while California has exhibited rising sea levels, EPA found that those levels were roughly the same elsewhere in the United States.[108] While recognizing that California has been and will continue to be negatively impacted by climate change, EPA did not find those impacts to be sufficiently different from those impacts observed and projected in the nation as a whole.[109] Therefore, EPA did not find "compelling and extraordinary" conditions to warrant a waiver.[110] That conclusion is entirely reasonable but, of course, reliant upon considering GHG emissions in isolation both factually and legally.

101. The "redressability" prong of §209(b)(1)(B) might have been a better prong for EPA to hang its determination upon. That is, CARB can more easily argue that California has demonstrated "compelling and extraordinary conditions" than it can argue that its emission standards (or program) will actually redress global climate change.
102. Notice of Decision, *supra* note 40, at 12168.
103. *Id.* at 12164; *see* S. Rep. No. 403, 90th Cong. 32 (1967). EPA quotes this Senate Report to support its understanding of the "compelling and extraordinary" standard. (California must demonstrate "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards.")
104. Notice of Decision, *supra* note 40, at 12164.
105. *Id.* at 12165.
106. *Id.*
107. *Id.*
108. *Id.* at 12166. But, coastline is not equivalent "elsewhere in the U.S." The comparison for sea level, then, is not comparative to the nation, in the aggregate, but only to other coastal states, e.g., Alaska and Louisiana.
109. *Id.* at 12168.
110. *Id.*

C. Has EPA Raised Other Relevant Considerations?

1. Relationship Between Emission Standards and Fuel Economy Standards

In the December 19, 2007, Letter, the Administrator suggested that EISA fuel economy standards provide better "environmental benefits" than California's GHG emission standards.[111] The relevance of the connection between fuel economy standards and emission standards is legally unfounded. *Massachusetts* directly placed GHG regulation within the ambit of EPA's authority and dismissed the possibility that fuel economy standards might preempt CAA standards.[112] Additionally, two district court decisions challenging adoption of California's standards have rejected the argument that California GHG emission standards are preempted by fuel economy standards.[113] The obvious point driving that conclusion is that fuel economy standards and emission standards come from different statutes.

Fuel economy standards were originally established by the Energy Policy and Conservation Act (EPCA) of 1975, and then amended by EISA, whereas as emission standards are set pursuant to the CAA. While both standards reduce GHG emissions, their name, purpose and the standards themselves are different. The purpose of fuel economy standards is to reduce reliance on fossil fuels by promoting fuel efficiency,[114] while the purpose of CAA emission standards is to reduce pollution.[115] One purpose is economic with environmental benefits, while the other is purely environmental. Additionally, while fuel economy standards will likely reduce GHG emissions by requiring more efficient fuel use, emission standards actually target air pollution. Moreover, as a matter of fact, California's GHG emission standards do more to mitigate climate change than simply requiring GHG emissions reductions from tailpipes.[116]

111. Letter, *supra* note 41, at 1.
112. 127 S. Ct. at 1438:

> EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. *See* 68 Fed. Reg. 52929. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare." 42 U.S.C. §7521(a)(1), a statutory obligation wholly independent of the Department of Transportation's mandate to promote energy efficiency. *See* Energy Policy and Conservation Act, §2(5), 89 Stat. 874, 42 U.S.C. §6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

113. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 37 ELR 20232 (D. Vt. 2007); Central Valley Chrysler Jeep v. Goldstone, No. 04-6663, 2007 U.S. Dist. LEXIS 4372878, 37 ELR 20309 (E.D. Cal. Dec. 11, 2007).
114. Energy Policy and Conservation Act of 1975; Energy Independence and Security Act of 2007.
115. 42 U.S.C. §7401, CAA §101.
116. AB 1493, *supra* note 3, *codified at* Cal. Health & Safety Code §43018.5; *see also* CARB, Comparison of Greenhouse Gas Reductions for the United States and Canada Under U.S. CAFE Standards and California Air Resources Board Greenhouse Gas Regulations (2008), *available at* http://www.arb.ca.gov/cc/ccms/reports/pavleycafe_reportfeb25_08.pdf.

The California GHG emission standards also target air conditioning emissions and provide for alternative compliance through reductions in life-cycle emissions.[117] The alternative compliance scheme assigns a fuel adjustment factor for all vehicles. The fuel adjustment factor quantifies upstream emissions for all vehicles, regardless of fuel source, so that the life-cycle GHG emissions of alternatively fueled vehicles can be compared to those using fossil fuels.[118] By equating life-cycle emissions, the manufacturers of alternatively fueled vehicles are given an opportunity to participate in the GHG emissions program and are rewarded for, not only their lower, or nonexistent, GHG emissions, but also for their lower life-cycle emissions. This creates an incentive for all automobile manufacturers falling within the regulatory framework to produce alternatively fueled, low emissions vehicles. The alternative compliance scheme, then, does more than fuel economy standards (and even classic emission standards) to ensure a reduction in GHG emissions. The import is that California's standards, if effective, will actually reduce GHG emissions and mitigate climate change. Meanwhile, fuel economy standards have no scheme to reduce GHG emissions beyond those achieved as a tertiary benefit from more efficient fuel use. That is, at their most efficacious, the two different standards do not achieve a unitary goal because their purposes are not co-extensive.

Furthermore, the standards themselves are incomparable.[119] First, the standards are written differently. Fuel economy standards are set based on fleetwide sales. Meanwhile, emission standards differentiate only by weight—sales have no impact. Second, the two standards have different enforcement regimes. The penalties are not only different, but typically, manufacturers will just pay penalties for violations of their fleetwide fuel economy standards caused by inefficient sports cars and sport utility vehicles. That is, the market allows them to avoid the cost of compliance. Emission standards, though, cannot be avoided by simply paying a penalty. Last, while California's GHG emission standards were scheduled to go into effect for the 2009 model year, the new fuel economy standards do not become effective until the 2020 model year. To argue that fuel economy standards that become effective 11 years in the future are better than current emission standards is not only prospective but somewhat speculative because they are two different regulatory regimes that will likely exhibit unequal efficacies.

As a matter of law and fact, then, fuel economy standards should play no role in EPA's waiver calculus.

The Administrator, in the December 19, 2007, Letter, while praising the enactment of EISA fuel economy standards, also suggests (1) a dislike for the "patchwork" regime, and (2) a preference for a national regime of climate change mitigation.[120] Both of these considerations are legally irrelevant to his waiver findings.

117. *See* CARB, *supra* note 116.
118. AB 1493, *supra* note 3, 13 Cal. Code Regs. §1961.1(d)-(e) (2008).
119. *Compare* 49 U.S.C. §32901(a), *with* CAA §202(a) *and* California Health and Safety Code §43018.5.
120. Letter, *supra* note 41.

2. Patchwork

The patchwork regime is not a true patchwork, but an emissions regime in which there are two standards: (1) the federal program; and (2) California's program. The CAA prescribes this regime by providing California the §209(b) waiver provision and enabling other states to adopt California standards pursuant to §177. The CAA scheme mandates, albeit permissively, this very patchwork. So, as a matter of law, this is the regime the CAA imagines and, as a matter of fact, it is not a patchwork at all, but a regime with two standards. Therefore, the Administrator's disdain for patchwork resolutions deserves no place in his waiver decisionmaking process.

3. Dislike for State-Level Action

The Administrator's preference for national-level action, as opposed to state-level action, likewise, warrants no place in his waiver decisionmaking process. The Administrator's ability to deny a waiver is limited to one of the three specific findings spelled out in §209(b)(1). None of these specific findings reserves any room for the Administrator to shirk his statutorily mandated duties in favor of a preference for legislation. Furthermore, as described above, the waiver provision, together with §177, preserves an honorary position for state-level action within the CAA. As a matter of fact, because climate change is a global problem, any broader, more comprehensive resolution will be a more effective solution. The Administrator's preference, then, makes a good deal of practical sense. But that preference must be limited; it can inform his statutory decision, but cannot be determinative. Therefore, while, as a matter of fact the Administrator's preference for national action makes sense, there is no legal room for him to rest his decision on these grounds.

IV. Broader Legal Issues Presented by EPA's Waiver Denial

A. Comparison of Letter to Notice of Decision

> I give up. Now I realize fully what Mark Twain meant when he said: "The more you explain it, the more I don't understand it."[121]

EPA used §209(b)(1)(B)'s "compelling and extraordinary" language as a basis for its decision in both its December 19, 2007, Letter and February 29, 2008, Notice of Decision. First, the Administrator concluded in the December 19, 2007, Letter that "[i]n light of the global nature of the problem of climate change, I have found that California does not have a 'need to meet compelling and extraordinary conditions.'"[122] Second, the Administrator clarified, in the Notice of Decision, the following:

121. Securities & Exchange Comm'n v. Chenery Corp. (Chenery II), 332 U.S. 194, 214 (1943) (Jackson, J., dissenting).
122. Letter, *supra* note 41, at 2.

> I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.[123]

Although these rationales are not identical, they are basically consistent. They both frame California's waiver request as regulation of local emissions to remediate a global problem. Although the Letter did very little to explain how the global nature of the pollutant relates to the statute, the Notice of Decision attempted that connection. Furthermore, the Administrator promised as much in the Letter.[124] So, the same justification is highlighted in both documents and serves as a substantial point of consistency. However, there are two major points of inconsistency between the Letter and Notice of Decision.

First, missing from the Notice of Decision are the Letter's secondary policy justifications: (1) preference for EISA fuel economy standards over emission standards; (2) preference for a national resolution; and (3) disdain for state-level action.[125] This is a notable departure because, as above, those are weak justifications for waiver denial. The preference for national legislation is a policy preference completely divorced from §209(b) and the preemptive effect of fuel economy standards on emission standards was dismissed in *Massachusetts*. The Letter having promised "further detail," one would have expected the Notice of Decision at least to mention these justifications. At minimum, and in the light most favorable to the Administrator, their absence could indicate that they played little or no role in his finding. But then, if that is the case, the Administrator would have been well served to say as much in the Notice of Decision. So, their absence, instead, leaves the impression that these justifications did play a part in the Administrator's decisionmaking, but once their relatively weak legal value was determined, they were dropped from the Notice of Decision. That is, the Notice of Decision seems to be a post hoc rationalization which is an inadequate basis for review.[126] Whether that remaining impression can be characterized as arbitrary and capricious is unlikely,[127] but it, at least, raises an inference in the direction of bad faith.[128]

The second inconsistency is that there is a different statutory justification for the findings presented in the Letter and Notice of Decision. The Letter did not cite directly §209(b)(1)(B) but misquoted it to conclude that "California does not have a need to meet compelling and extraordinary conditions." The Notice of Decision, on the other hand, properly cited and quoted §209(b)(1)(B). Taking the Administrator at his own word, the misquote offers a different legal standard. On its face, if the Administrator cannot even simply restate the relevant statutory text that requires him to make a determination, how can that determination be correct? A blatant misunderstanding of statutory language cannot be upheld.[129] Moreover, the language in the Letter focused on California's "needs to meet" conditions rather than California's "needs for standards to meet" conditions. These are unquestionably different legal standards; this is not just a mere misquote, but it represents the sole legal justification for the Administrator's finding. The former standard is laxer and more generally permissive of waiver; applied strictly it would only require a demonstration of a general need to control the air pollution condition. Meanwhile, the latter standard is more difficult to attain because it requires specific needs for emission standards to control the pollution condition. The obvious import is that the former is not the correct legal standard imposed by the statute. This highlights the questionable legality of the Letter standing on its own,[130] and again, raises an inference that the Notice of Decision is a post hoc rationalization[131] that could rise to arbitrary and capricious decisionmaking.[132]

Beyond that textual inconsistency between the legal standards announced in the Letter and Notice of Decision, though, there is more legal inconsistency between the Letter's "predominantly affects" standard and the Notice of Decision's

123. Notice of Decision, *supra* note 40, at 12157.

124. Letter, *supra* note 41, at 2 ("[I] have instructed my staff to draft appropriate documents setting forth the rationale for this denial in further detail.").

125. The Notice of Decision does state that EPCA fuel economy standards played no part in the Administrator's decision but, curiously, does not mention the EISA fuel economy standards praised in the Letter. ("[M]y decision is based solely on the statutory criteria in section 209(b) of the Act and this decision does not attempt to interpret or apply EPCA or any other statutory provision.").

126. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 1 ELR 20110 (1971) ("[M]ere[ ] 'post hoc rationalizations . . . have traditionally been found to be an inadequate basis for review." (Internal citations omitted.); Securities & Exchange Comm'n v. Chenery Corp. (Chenery I), 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

127. *Overton Park*, 401 U.S. at 416 ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."); *see also* Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983):

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise . . . . [W]e must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

128. *Overton Park*, 401 U.S. at 416:

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. . . . [T]here must be a strong showing of bad faith or improper behavior before such inquiry may be made.

Chenery I, 318 U.S. at 94: "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.'" (Internal citation omitted.)

129. *Chenery I*, 318 U.S. at 80: "[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."

130. *Id.* "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

131. *See Overton Park*, 401 U.S. at 402; *Chenery I*, 318 U.S. at 80.

132. *Overton Park*, 401 U.S. at 402.

alternative reasoning. The alternative finding, in the Notice of Decision, "that the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country," is different from a finding that climate change does not "predominantly affect[ ]" California. There is basic consistency between these two standards because they both compare California's pollution impacts to those in the rest of the country. But, "predominant[ ] affects" are necessarily worse than "compelling and extraordinary" conditions. A "predominantly affects" standard would require California to show that its effects predominate over the effects in the rest of the nation. A "compelling and extraordinary" standard, instead, only requires a showing of unique, or worse than average conditions. Also, while the "compelling and extraordinary" standard is grounded in §209(b)(1)(B), there is no statutory mention of "predominantly affects" anywhere in §209(b).

The most important question regarding the inconsistencies between the Letter and Notice of Decision was the legal significance assigned each document. California and EPA have already litigated this point and it has been determined that the Final Notice, not the Letter, is the "reviewable 'final action.'"[133] The remaining litigation directly stemming from the GHG waiver denial must then attempt to somehow review the two documents together as one decision[134]—a decision that appears patently inconsistent.[135] If the reviewing court attaches any legal significance to the Letter and attempts to understand the combined documents as the Administrator's final decision, he almost certainly looks less reasonable and more arbitrary and capricious.[136] Additionally, misquoting §209(b)(1)(B) in the Letter could be damning for EPA because grounding a decision in a blatantly incorrect understanding of the statute is arguably worse than grounding a decision in policy justifications divorced from the statute.[137] Likewise, if the Notice of Decision is treated as the sole final decision and no significance is assigned to the Letter, EPA has a much stronger argument that the Administrator's decision is deserving of *Chevron* deference, because whatever its merits, it is at least grounded in §209(b)(1)(B).[138]

B. Is EPA's Reasoning Consistent With Massachusetts*?*

In *Massachusetts*, the Court chastised EPA for making a regulatory decision based on reasoning "divorced from the statutory text."[139] The majority instructed that even if EPA had been correct to interpret §202(a)'s text as ambiguous, its judgment must be based "within defined statutory limits," and not from a "laundry list" of policy considerations or scientific uncertainty.[140] The analog question presented here, following EPA's decision to deny California's GHG waiver request, is whether that decision is similarly grounded in reasoning divorced from the statute.

EPA's finding in the Letter relied on policy justifications and misquoted statutory text that betrays a misunderstanding of the statute. Misquoting and misunderstanding the statute is even more tenuous agency decisionmaking than answering a statutory question with policy answers.[141] Consequently, it opens that decision to *Chenery* review in addition to *Overton Park* arbitrary and capricious review (invoked in *Massachusetts*). If the Letter is taken seriously as a significant component of the Administrator's final decision, the Administrator's decision will be on unconvincing grounds, similar to those which rendered EPA's alternative conclusion in *Massachusetts* arbitrary and capricious.[142]

Beyond the inferences that can be made from EPA's inconsistent reasoning, there are striking similarities between EPA's finding, as stated in the Notice of Decision, to EPA's argument in *Massachusetts*.[143] In *Massachusetts*, EPA argued, primarily, that carbon dioxide was not an "air pollutant" pursuant to §202(a) of the CAA.[144] To reach that conclusion, EPA relied on post-enactment legislative history indicating that Congress did not intend to address climate change by regulating GHG emissions.[145] Here, in the Notice of Decision, EPA relies on contemporaneous legislative history to reason that Congress did not intend §209(b)(1)(B) to allow California to address climate change by regulating GHG emissions.[146]

While contemporaneous legislative history may be more persuasive than post-enactment legislative history to glean the meaning of statutory text,[147] that is the only divergence in EPA's method of statutory interpretation between the Notice of Decision and its interpretation of §202(a) in *Massachusetts*.[148] Both interpretations relied on intent rather than plain statutory text to broaden the Administrator's authority to consider policy rationales when exercising his judgment. Furthermore, EPA's §209(b)(1)(B) reading relied on legislative intent to distinguish global pollutants and global pollution from traditional pollutants and local pollution. Critically, EPA did not point to anything in the legislative history that actually expands the §209(b)(1)(B) inquiry into the standards, as opposed to the more limited inquiry into the program as a whole. Also, there is nothing in the legislative history that directly supports EPA's reading; EPA finds intent by way of

133. California v. EPA, No. 08-70011, 38 ELR 20219 (9th Cir. July 25, 2008); California v. EPA, No. 08-1063 (D.C. Cir. Oct. 8, 2008).
134. California v. EPA, No. 08-1178 (D.C. Cir. filed May 5, 2008).
135. *Chenery I*, 318 U.S. at 80.
136. *See id.*; *Overton Park*, 401 U.S. at 402. *See also* Chenery II, 332 U.S. 194 (1943). In fact, the Notice of Decision likely serves as the *Chenery II* reasoned justification. The combined inconsistency between the Letter and Final Notice presents a likely meritorious arbitrary and capricious argument and serves as a *Chenery I* case-in-point.
137. *See Massachusetts*, 127 S. Ct. at 1438; *Chenery I*, 318 U.S. at 80.
138. *Chevron*, 467 U.S. at 837; 127 S. Ct. at 1438.
139. 127 S. Ct. at 1438, §VII.
140. *Id.*
141. *See Chenery I*, 318 U.S. at 80; *compare* Letter, *with Massachusetts*, 127 S. Ct. at 1438, §VII.
142. 127 S. Ct. at 1438, §VII.
143. *Compare* Notice of Decision, *with Massachusetts*, 127 S. Ct. at 1438, §VII.
144. 127 S. Ct. at 1438, §VII.
145. *Id.*
146. Notice of Decision, *supra* note 40, at 12161. While EPA relied on legislative history contemporaneous to the enactment of the original waiver provision, it did not explore more persuasive legislative history from the 1977 CAA Amendments that led to the current text of §209(b)(1)(B). That legislative history was cited by Administrator Ruckelshaus and aided his prior interpretation of "such State standards" to refer to California's emissions program.
147. William Eskridge Jr., Dynamic Statutory Interpretation 218-22 (1994).
148. *Compare* Notice of Decision, *with Massachusetts*, 127 S. Ct. at 1438.

negative inference.[149] However, both EPA's primary reasoning in *Massachusetts*, and here, in EPA's Notice of Decision, are grounded in the statutory mandate they are required to perform. Statutory interpretation critiques aside, EPA's primary reasoning for its finding to deny the waiver followed the statutory inquiry and, therein, complied with the requirements set forth in *Massachusetts*.

Similarly, EPA's alternative reasoning followed an arguably correct statutory inquiry, assuming ambiguity will be found. In *Massachusetts*, EPA's alternative conclusion was a declination to regulate to avoid "conflict with other administration priorities."[150] That is precisely the "reasoning divorced from statute" that the Court prohibits.[151] Here, though, the alternative finding is a fact-based determination "that the effects of climate change in California are [not] compelling and extraordinary compared to the effects in the rest of the country."[152] This finding, while conducting an inquiry modeled on statutory language, imposes an additional hurdle to require California's conditions to be significantly worse than the national average.[153] Regardless if that is the correct inquiry, it is arguably reasonable and based upon EPA's interpretation of the appropriate §209(b)(1)(B) inquiry. There is no question that it is grounded in the statute.

The specific holding from *Massachusetts* is that GHGs are air pollutants within the CAA. Once GHGs are air pollutants regulable pursuant to §202(a), the next logical conclusion is that they are subject to §209(a) preemption and waivable pursuant to §209(b). Instead of taking the logical path, though, EPA effectively carves an odd exception for GHGs from §209(b). EPA understands that GHGs are §202(a) air pollutants, assumes §209(a) preemption, and, then reads ambiguity into §209(b), but only as applied to this pollutant. That reading remains possible, and maybe even reasonable, after *Massachusetts*. Nonetheless, it is inconsistent with a broader understanding of *Massachusetts*. Once GHGs are placed within Title II of the CAA, it makes little sense to include them in one provision and then exclude them from another provision, especially complementary, interactive provisions. This nonsensical application of a judicial directive effectively erases GHGs out of §209(b) and more generally undermines judicial deference to agency decisions.

As discussed above, EPA's finding in its Letter as opposed to its Notice of Decision differ. While the Letter looks exactly like "reasoning divorced from statutory text," the Notice of Decision is grounded, albeit shakily, in statutory text. The inquiry here, then, depends on how the D.C. Circuit will synchronize the inconsistencies.

149. Notice of Decision, *supra* note 40, at 12161 ("Congress did not justify this provision based on pollution problems of a more national or global nature in justifying this provision.").
150. 127 S. Ct. at 1438.
151. *Id.* §VII.
152. Notice of Decision, *supra* note 40, at 12157.
153. *Id.*

V. Conclusion

EPA's decision to deny California's request for waiver of preemption relied upon three points of questionable legality. First, EPA impermissibly reads ambiguity from clear statutory text (*Chevron* Step 1) to consider this waiver request for GHG emissions in isolation from California's emissions program. Second, the Letter is almost certainly a misunderstanding of the law (*Chenery*) and reasoning divorced from the statute (*Massachusetts*). Third, EPA boldly relies on the same reasoning that was rejected by the Supreme Court in *Massachusetts* to distinguish this waiver request from all prior waiver requests. Those three points expose the likely illegality of EPA's waiver denial.

VI. Postscript

The legality concerns of EPA's GHG waiver denial have raised many hackles, including those of California, the 18 other states adopting California's standards, environmental public interest groups, Congress, federal agencies with investigatory powers, and the candidates running for President in 2008. California, the states, and the public interest groups are directly challenging the denial in court—their petition for review is pending in the D.C. Circuit.[154] The denial was the subject of three pieces of legislation introduced by the 110th Congress, many U.S. Senate and U.S. House of Representatives committee hearings, and a thorough investigation by the House Committee on Oversight and Government Reform.[155] The denial precipitated federal agency investigations by the U.S. Government Accountability Office as well as EPA's Inspector General.[156] A referral by Sen. Barbara Boxer (D-Cal.) to have the U.S. Department of Justice investigate the denial never materialized into an actual investigation.[157] During the 2008 presiden-

154. California v. EPA, No. 08-1063 (D.C. Cir. Oct. 8, 2008).
155. S. 2555, 110th Cong. (2008); H.R. 5560, 110th Cong. (2008); Memorandum Re: EPA's Denial of the California Waiver, House Committee on Oversight and Government Reform (May 19, 2008), *available at* http://oversight.house.gov/ story.asp?ID=1956; Boxer Statement on California Waiver Decision Documents, U.S. Senate Committee on Environment and Public Works (Jan. 23, 2008), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Majority. PressReleases&ContentRecord_id=a7d537e1-802a-23ad-4595-b2b9bcea8770&Region_id=&Issue_id=.
156. An investigation conducted by EPA's Inspector General concluded to find no wrongdoing by EPA staff. Response to Congressional Inquiry Concerning EPA's Preparation and Provision of Information Regarding California Waiver Decision, U.S. Environmental Protection Agency, Office of Inspector General (Nov. 26, 2008), *available at* http://www.epa.gov/oigearth/reports/2009/20081126-09-P-0043.pdf. Another investigation conducted by EPA's Inspector General concluded to find that the waiver denial met statutory procedural requirements. EPA's California Waiver Decision on Greenhouse Gas Automobile Emissions Met Statutory Procedural Requirements, U.S. Environmental Protection Agency, Office of Inspector General (Dec. 9, 2008), *available at* http://www.epa.gov/ oig/reports/2009/20081209-09-P-0056.pdf. *See* Letter from Hillary Clinton, U.S. Senator for California (Feb. 8, 2008), *available at* http://clinton.senate.gov/news/statements/ record.cfm?id=292763; Letter from Dianne Feinstein, U.S. Senator for California (Jan. 2, 2008), *available at* http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=3c50a6ad-f0ca-a34c-5a86-fbc696391ecf&Region_id=&Issue_id=5b8be264-7e9c-9af9-7e66-cefbc53eab29
157. Letter from Barbara Boxer, U.S. Senator from California and Sheldon Whitehouse, U.S. Senator for Rhode Island, to Michael Mukasey, U.S. Attorney General (Oct. 2, 2008), *available at* http://whitehouse.senate.gov/ newsroom/press/release/?id=C60C1985-4B98-4FBC-8763-A5F99EA3A554.

tial debates, each candidate was asked their position on the waiver denial and both majority party candidates expressed interest in reversing the decision, if elected.[158] Soon after President-elect Barack Obama's election in November 2008, his subordinates made clear their commitment to move forward on climate change mitigation and their intent to reconsider the decision to deny California's GHG waiver. That commitment was echoed by EPA Administrator-designate Lisa P. Jackson at her Senate confirmation hearing on January 14, 2009. When questioned about California's GHG waiver denial, Ms. Jackson replied: "You have my commitment . . . I would immediately revisit the waiver, looking at the science and rule of law and relying on the expert advice of EPA's employees in making a determination."[159]

158. Transcript of GOP Debate at Reagan Library (Jan. 30, 2008), *available at* http://www.cnn.com/2008/ POLITICS/01/30/GOPdebate.transcript/index.html.

159. Hearing on the Nominations of Lisa P. Jackson to be Administrator of the U.S. Environmental Protection Agency and Nancy Helen Sutley to be Chairman of the Council on Environmental Quality Before the U.S. Senate Committee on Environment & Public Works, 110th Cong., 1st Sess. (2009), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=ae2c3342-802a-23ad-4788-d1962403eb76. Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions: Stem Cell, Climate Rules Among Targets of President-Elect's Team*, Wash. Post, Nov. 9, 2008, at A16, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/08/AR2008110801856.html; Jonathan Weisman, *Obama Is Likely to Use Executive Power To Halt Drilling, Fund Stem-Cell Work*, Wall St. J., Nov. 10, 2008, http://s.wsj.net/article/SB122624781089211609.html.