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## Western Environmental Law Center

**Defending the West** Wildlands, Water, and Western Communities

June 15, 2007

The Honorable Stephen L. Johnson, Administrator  
United States Environmental Protection Agency  
EPA West (Air Docket); Mail Code 6102T  
1200 Pennsylvania Ave., NW, Room B108  
Washington, D.C. 20460

RE: California State Motor Vehicles Pollution Control Standards  
Request for Waiver of Preemption under Clean Air Act Section 209(b),

Attention: Docket ID No. EPA-HQ-OAR-2006-0173

Dear Mr. Administrator:

We write on behalf of the undersigned Oregon and Washington organizations in strong support of California's request for a waiver of federal preemption under the Clean Air Act<sup>1</sup> to allow its vehicle greenhouse gas (GHG) emissions limit program to go into effect.

The environment, public health, and economy of Oregon and Washington are presently threatened by climate change and the certainty of worse to come absent decisive changes that reduce GHG atmospheric concentrations. Reductions of GHG emissions in California, no less than reductions of such emissions in Oregon and Washington, are essential to mitigating the impacts of climate change in Oregon and

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<sup>1</sup> Clean Air Act §209(b), 42 U.S.C. §7543(b) (1990).

Washington. The inverse is also true: reductions in GHG emissions in Oregon and Washington will reduce the effects of climate change in California, and elsewhere.

According to a recently published statement of 50 scientists with expertise on climate change, impacts in the Pacific Northwest have already occurred and will become far worse unless meaningful action is quickly taken. Average regional temperatures have increased 1-3°F over the last century, with the most recent warming trend (1975 to present) attributed to human-caused atmospheric GHG concentration increases.<sup>2</sup> Hydrologically important consequences of regional warming have already occurred, including a 35 percent decline in spring snowpack, a shift in peak streamflow by 1-3 weeks, and an increase in winter and decrease in summer flows.”<sup>3</sup>

Regional annual average temperature is likely to increase approximately 2.7°F by 2030, and 5.4°F by the 2050s, resulting in shifting isotherms and changes in vegetation zones, higher elevation treelines, earlier animal and plant breeding, a longer and more intense allergy season, rising sea levels, declining snowpacks, longer fire seasons, and drier summers with a likely “increase in drought stress and vulnerability of forests to insects, disease and fire.”<sup>4</sup> Warmer stream and river temperatures will threaten the population of native fish, including salmon.<sup>5</sup> Native plant and animal species will be stressed and rendered more vulnerable to displacement by invasive species emboldened

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<sup>2</sup> *Id.* at 4.

<sup>3</sup> Philip Mote, Eric Salathé, and Cynthia Peacock, *Energy-Relevant Impacts of Climate Change in the Pacific Northwest*, Climate Impacts Group, University of Washington (July 2006) at 3.

<sup>4</sup> *Scientific Consensus Statement on the Likely Impacts of Climate Change on the Pacific Northwest* (Dec. 2004) at [http://inr.oregonstate.edu/download/climate\\_change\\_consensus\\_statement\\_final.pdf](http://inr.oregonstate.edu/download/climate_change_consensus_statement_final.pdf).

<sup>5</sup> Washington State Department of Ecology, *Climate Change: Disrupting our Climate, Environment and Communities*, at <http://www.ecy.wa.gov/climatechange/warming/htm>.

to expand northward into new territory.<sup>6</sup> Scientists and public health officials predict, as well, an increase in unhealthy air days, a related escalation of heat-related illnesses and deaths, and an expanded prevalence of insect-carried diseases – including malaria and Lyme disease.<sup>7</sup> Flooded homes likely also will trigger the growth of indoor molds and fungus.<sup>8</sup> Increased health care costs combined with a projected decrease in profits in the agricultural, forestry, hydroelectricity, and tourism industries pose serious challenges to the regional economy.<sup>9</sup>

In sum, climate change is already happening -- and Oregon and Washington already feel the impact. Moreover, the stress that global and regional warming will place on the environment, economy, and social fabric of Pacific Northwest states, among others, will mount over the next few decades “as a result of the continuing long-term effects of greenhouse gases and the energy systems now in use.”<sup>10</sup> Unless a fundamental change in direction begins this decade, it may be impossible to avoid “far-ranging undesirable consequences,” including mass species extinctions.<sup>11</sup> Fortunately, a number of impacts can be avoided, reduced, or delayed by serious mitigation actions that can be

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<sup>6</sup> *Id.*

<sup>7</sup> Governor Kulongoski’s Vehicle Emission Workgroup, Governor’s Vehicle Emissions Workgroup Report 36-37 (2005), available at <http://www.deq.state.or.us/aq/orlev/docs/05Nov02WorkgroupRpt.pdf> [hereinafter Governor].

<sup>8</sup> *Climate Change: Disrupting our Climate, Environment and Communities*, Washington State Department of Ecology, available at <http://www.ecy.wa.gov/climatechange/warming/htm>.

<sup>9</sup> Governor, *supra* note 7 at 37.

<sup>10</sup> James Hansen, *The Threat to the Planet*, The New York Review (July 13, 2006) available at [www.nybooks.com/articles/19131](http://www.nybooks.com/articles/19131).

<sup>11</sup> *Id.* Similarly, “[e]ven the most stringent mitigation efforts cannot avoid further impacts of climate change in the next few decades.” IPCC Working Group II Contribution to the Fourth Assessment Report, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Summary for Policy Makers* (April 2007).

undertaken now.<sup>12</sup> The determination of several states to reduce their GHG contributions is therefore rationally predicated on the need to undertake serious change at all levels.<sup>13</sup>

Vehicles contribute a large share to total GHG emissions from fossil fuels in Oregon and Washington.<sup>14</sup> Accordingly, pursuant to section 177 of the Clean Air Act, Washington and Oregon have adopted California's vehicle GHG emission limits.<sup>15</sup> Implementation of the programs in both states is contingent upon EPA granting California a waiver of federal preemption pursuant to section 209(b) of the Clean Air Act.<sup>16</sup> EPA's continuing refusal to grant California's waiver request, in spite of the merits of the California program, renders hollow section 177's promise that states can take effective action to protect the environment when California standards provide greater protection than applicable federal standards.<sup>17</sup>

The Register notice invites comment on whether California's determination that its standards are at least as protective of public health and welfare as are the applicable

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<sup>12</sup> *Id.*

<sup>13</sup> Were Oregon, Washington, and California a single nation, that entity would be the world's seventh-largest carbon dioxide emitter. Governor's Advisory Group on Global Warming, *Oregon Strategy for Greenhouse Gas Reductions* (hereinafter *Strategy*), State of Oregon (Dec. 2004) at 25.

<sup>14</sup> GHG emissions from vehicles constitute approximately 31, 27, and 33 percent of total emissions in Oregon, Washington, and California, respectively. Western Environmental Law Center calculations based on data in WashPIRG Foundation, *The Carbon Boom: State and National Trends in Carbon Dioxide Emissions Since 1990* (April 2007) at 35-40. See also *Strategy* at 77; State of Washington, Department of Community, Trade and Economic Development, *Washington State's Greenhouse Gas Emissions: Sources and Trends* (June 2004) at 6.

<sup>15</sup> Wash. Rev. Code §70.120A.010 (2005); Or. Admin. R. 340-257-0010 (2005).

<sup>16</sup> Washington's program is also contingent on Oregon's program being in effect. Wash. Rev. Code §70.120A.010.

<sup>17</sup> In addition to the three West Coast states, nine other states -- Maine, Vermont, New York, Pennsylvania, Massachusetts, Rhode Island, Maryland, Connecticut, and New Jersey -- have adopted California's limits. See *Maryland Governor Signs Clean Car Bill Adopting California Emissions Standards*, Green Car Congress (Apr. 25, 2007) at [www.greencarcongress.com/2007/04/maryland\\_govern.html](http://www.greencarcongress.com/2007/04/maryland_govern.html).

federal standards is arbitrary and capricious, whether California needs such standards to meet a compelling and extraordinary condition, and whether California's standards are consistent with section 202(a) of the Clean Air Act.<sup>18</sup> The notice, as well, asks about the relevance to these criteria of the fact that California's program relates to global climate change and the Supreme Court's recent decision in *Massachusetts v. EPA*.

First, California's determination that, in the aggregate, its vehicle emissions standards are at least as protective as applicable federal standards is well-founded, not arbitrary or capricious. EPA previously approved California's vehicle emissions limits for other pollutants, including its standards for non-methane organic gas, oxides of nitrogen, carbon monoxide, particulates, and formaldehyde – so-called LEV I and LEV II standards.<sup>19</sup> That approval settles that California's existing vehicle emission limits program is at least as protective as applicable federal standards. The only remaining substantive question in assessing the protective nature of California's present petition is whether the state's vehicle GHG emission limits are at least as protective as applicable federal standards for limiting just such emissions. Because EPA has failed, to date, to enact any specific limitations on vehicle GHG emissions, California's standards must be found to be more protective if: (1) GHG emissions constitute pollutants under the Clean Air Act, (2) California's program will lead to reductions in vehicle GHG emissions, and (3) those reductions render California's program more protective of public health and welfare than no reductions.

The Supreme Court decision in *Massachusetts v. EPA* noted that “[t]he harms

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<sup>18</sup> 72 Fed. Reg. 21260, 21261 (Apr. 30, 2007).

<sup>19</sup> 68 Fed. Reg. 19811 (Apr. 22, 2003).

associated with climate change are serious and well recognized,”<sup>20</sup> that human-caused emissions of greenhouse gases are a principal cause of climate change, and that the transportation sector contributes a significant share of global carbon dioxide emissions.<sup>21</sup> In addition, the court held that GHG emissions clearly qualify as pollutants under the Clean Air Act’s “capacious” definition of the term.<sup>22</sup>

Lowering vehicle GHG emissions that otherwise would accumulate is an important step toward climate change mitigation, even if it is only one step,<sup>23</sup> particularly when GHG emissions reductions to be realized in California are combined with those to be realized in opt-in states, including Oregon and Washington. We note, in this regard, that initiatives to limit GHG emissions from vehicles constitute one of several key mitigation measures identified by the Intergovernmental Panel on Climate Change (IPCC) to arrest the projected growth of global GHG emissions.<sup>24</sup> By 2016, California’s program, if allowed to go into effect, will reduce fleet average GHG emissions from new passenger cars and light trucks by more than a third.<sup>25</sup> In Oregon alone, implementation of California’s GHG vehicle emission limit is expected to result in 16,000 fewer tons of carbon dioxide released per day by the year 2030.<sup>26</sup> Clearly, then, EPA’s waiver will

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<sup>20</sup> *Massachusetts v. EPA*, 127 S.Ct. 1438, 1442 (2007).

<sup>21</sup> *Id.* at 1457.

<sup>22</sup> *Id.* at 1462.

<sup>23</sup> *See id.* at 1457 (rejecting EPA’s argument that the agency’s failure to regulate vehicle GHG emissions has too attenuated a relation to climate change for it to be a justiciable matter).

<sup>24</sup> IPCC, Working Group III Contribution to the Fourth Assessment Report, *Climate Change 2007: Mitigation of Climate Change: Summary for Policy Makers* 14 (May 2007).

<sup>25</sup> For heavier light-duty trucks and medium-duty passenger vehicles, California’s program will lead to a 24 percent reduction in vehicle GHG emissions by 2016. California EPA Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption: Support Document (hereinafter CARB) (Dec. 21, 2005) at 7. Calculations are by the Western Environmental Law Center.

<sup>26</sup> Governor, *supra* note 7, at 24.

substantially limit GHG emissions that would otherwise be generated. Accordingly, California's determination that its program is at least as protective of public health and welfare as applicable federal standards is neither arbitrary nor capricious.

Second, California needs to limit GHG vehicle emissions to meet compelling and extraordinary conditions. We summarized, *supra*, some of the evidence illustrating that Oregon and Washington will need to confront grave challenges presented by climate change, but none of that undermines the fact that climate change presents a compelling and extraordinary condition for California.<sup>27</sup> California's need for its requested section 209(b) waiver is grounded in the fact that climate change imposes an environmental threat extreme in California's modern history, one moreover that the state is forced to confront absent any present federal effort to contain vehicle GHG emissions. Moreover, as California has noted, the state "is particularly vulnerable" to climate change impacts, including, in its Bay-Delta area, "to saltwater intrusion from sea-level rise, levee collapse, and flooding, any of which would severely tax California's increasingly fragile water-supply system."<sup>28</sup>

Third, as California has fully explained,<sup>29</sup> its vehicle GHG emissions standard and accompanying enforcement procedures are consistent with section 202(a) of the Clean

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<sup>27</sup> To claim otherwise – namely that California could not receive a section 209(b) waiver if the "compelling and extraordinary conditions" it cites were less significant than those faced by other states – would be to turn section 209(b) and section 177 on their heads and consign both California and those other states to federal protections that may be less protective or, as in the present case, non-existent. In this regard, see 49 Fed. Reg. 18887 (May 3, 1984).

<sup>28</sup> CARB, *supra* note 17, at 17-18. The state notes, as well, that "[t]he predicted decrease in winter snow pack would exacerbate these impacts by reducing spring and summer snowmelt runoff critical for municipal and agricultural uses, a situation further strained by fish and wildlife considerations. Also, of course, California's high ozone levels – clearly a condition Congress considered – will be exacerbated by higher temperatures from global warming." *Id.*

<sup>29</sup> CARB, *supra* note 17, at 19-43.

Air Act because the requisite technology to meet its standard either presently exists or else industry is likely to be able to develop and deploy the requisite technology by the standard's compliance deadlines.

Finally, we note that the Energy Policy and Conservation Act<sup>30</sup> (EPCA) fuel economy provisions for new vehicles are simply not relevant to EPA's consideration of this petition or to the California Air Resources Board's authority to implement its vehicle GHG regulations. Auto manufacturers have challenged the California standard on the ground that it is an attempt to impose fuel economy standards for new vehicles and so is preempted by EPCA. But the Supreme Court has settled this issue in *Massachusetts*, holding that even though the Department of Transportation's responsibility to set mileage standards might overlap with EPA's environmental duties – because compliance with reduced vehicle GHG emission limits may be obtained by increasing fleet mileage capacity – that "in no way licenses EPA to shirk its environmental responsibilities" to directly limit vehicle GHG emissions.<sup>31</sup> It follows that EPA is similarly bound to uphold its statutory obligation to permit California – and states opting-in to California's program – to enact and enforce vehicle GHG emission limits that are at least as protective of public health and welfare, particularly here, in the context of federal abdication of responsibility for restricting vehicle GHG emissions.

Please include these comments in Docket ID No. EPA HQ-OAR-2006-0173.

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<sup>30</sup> Energy Policy and Conservation Act of 1975, 49 U.S.C. §§32902-32919.

<sup>31</sup> *Massachusetts*, 127 S.Ct. at 1461-62.

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