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Governor Schwarzenegger Takes the EPA to Court

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by William M. Sloan, Travis R.A. Neal

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Governor Schwarzenegger has found a new predator invading his turf, and he has taken to the courts to defeat it. California, along with 15 other states and five environmental groups, recently petitioned the Ninth Circuit for review of the Environmental Protection Agency's ("EPA") denial of a waiver which would have allowed the state to enforce tough regulations on greenhouse gas emissions ("GHG") from new vehicles. Previous governor Gray Davis signed the bill requiring the reductions almost five and a half years ago.

After the California Air Resources Board ("CARB") adopted the regulations requiring a gradual reduction in fleet average GHG emissions, California asked the EPA for a waiver of federal preemption. Under the Clean Air Act, regulation of mobile sources (i.e., vehicles) is unique in that only California may apply for a waiver and if granted, other states may implement California's regulation. The EPA received the application in late 2005, took comments and held two public hearings in the summer of 2007, and on December 19, 2007, Stephen Johnson, Administrator of the EPA, announced in a letter to Governor Schwarzenegger that his agency would deny the waiver. Even though the letter may not constitute final action by the EPA—the decision generally must first be published in the Federal Register—California could not contain itself and it petitioned for judicial review on January 2.

The EPA's first legal maneuver may be to request a transfer from the Ninth Circuit to the more agency-friendly D.C. Circuit. Most challenges of EPA regulations must be filed in that circuit. California argued it may file their case in the Ninth Circuit because Johnson's letter did not state that the action had "nationwide scope or effect," the finding that triggers review by the D.C. Circuit only. However, the letter may not constitute final action, and now that the EPA has been alerted to this omission, it may include such a statement when it publishes its final decision in the Federal Register. Once published, one would expect the EPA to request the transfer.

The case may highlight three substantive arguments: 1) the meaning of section 209, 2) the effectiveness of the regulation now that it cannot apply to 2009 models, and 3) whether California's regulation is more protective than the federal standards to be adopted under the recently passed energy bill.

Section 209 states that a waiver shall not be granted if California does not need the standards "to meet compelling and extraordinary conditions." As a coastal state with limited fresh water resources, the effect of climate change on California may indeed be severe, involving rising sea levels, a reduction in the Sierra snowpack, and higher temperatures that would exacerbate the state's ozone nonattainment problem, which is already the worst in the nation. A recent Stanford University study added fodder to this argument when it found Californians' health will be disproportionately affected by GHG emissions, because their state is home to six of the most polluted cities in the United States. However, unlike other air pollutants regulated under the Clean Air Act, GHGs affect the environment no matter where they are emitted. According to the Congressional Research Service, which just published a report on California's regulation, even if the regulation was implemented by all 16 states, it would only reduce worldwide GHG emissions by 0.6 %. Thus, the EPA may argue that the only effective way to address California's conditions is to implement a national standard. This argument does not find much support in the EPA's past practices because the agency has granted waivers for regulations that were only incremental steps; they did not by themselves solve the pollution problems they were meant to address.

The EPA may argue California's regulations are moot because they were to apply beginning with the 2009 fleet of automobiles. These models will become available in the next few months, well before any court can review

the EPA's decision. However, while the regulation requires gradual reduction in fleet average GHG emissions from 2009 to 2016, automakers would not be penalized for failing to meet reductions until 2014. Arguably, they could reduce GHG emissions on an abbreviated schedule if a court overturns the EPA's denial. Further, the EPA has the power to delay the effective date of California's regulation, an action it has taken in the past. For example, in 1975 the agency did not allow a California regulation to apply to 1977 model cars but did allow the regulation to apply to 1978 models. A court might overturn the denial and remand the matter to the EPA with the understanding that the EPA could grant the waiver and move the effectiveness of the regulation to a feasible date.

The last argument involves the Energy Independence and Security Act, the bill signed by President Bush on December 19, 2007, that requires a fleet average of 35 miles per gallon by 2020 and an annual production of 36 billion gallons of renewable fuels by 2022. In Johnson's letter, he asserted that the fuel efficiency standards under the new law would be more protective than California's regulations. Under section 209, California must "determine that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." The EPA must defer to this finding, unless the agency denies the waiver on the ground that California's determination was arbitrary and capricious. This may be difficult for the EPA to show. The efficiency standards under the recently signed energy bill have not yet been adopted by any agency, and, when they are, it is not clear how the standards will be phased in. According to a January 2, 2008, assessment by CARB, even when fully implemented, the federal regulations will not be as effective at reducing GHG emissions from new vehicles. For the time being, California's regulation stands alone, and thus its reduction in GHG emissions appears to be as protective of public health as the federal standards.

Unlike an action sequence in one of Governor Schwarzenegger's movies, the court process is never a quick one, and California may have filed this petition in the hopes that if a Democratic president were elected, the federal government would be willing to settle the lawsuit. Morrison & Foerster will remain current on all developments in the case. Please contact the firm for the latest news on California's lawsuit and all GHG-related matters.