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MEMORANDUM

May 19, 2008

To: Members of the Committee on Oversight and Government Reform

Fr: Committee on Oversight and Government Reform, Majority Staff

Re: EPA's Denial of the California Waiver

For the past five months, the Oversight Committee has been investigating the decision by the Environmental Protection Agency to reject California's petition to regulate greenhouse gas emissions from cars and trucks. During the course of the investigation, the Committee obtained over 27,000 pages of documents from the Environmental Protection Agency (EPA) and deposed or interviewed eight key officials. This memorandum summarizes some of the significant evidence the Committee has received.

The record before the Committee shows: (1) the career staff at EPA unanimously supported granting California's petition; (2) Stephen Johnson, the Administrator of EPA, also supported granting California's petition at least in part; and (3) Administrator Johnson reversed his position after communications with officials in the White House.

The Position of EPA Staff. Internal EPA documents and transcribed interviews with EPA staff show that the agency career staff all supported granting the California petition. This recommendation and the reasons for it were communicated to the Administrator in several meetings. A September 21, 2007, meeting was significant. As one EPA staffer described it, "Administrator Johnson essentially polled the room on what people's final opinions were about granting or not granting a waiver." According to five EPA staff who were in the meeting, not a single staffer argued that the California waiver should be denied.

A briefing prepared by the lead staff lawyer for EPA's General Counsel stated: "After review of the docket and precedent, we don't believe there are any good arguments against granting the waiver. All of the arguments ... are likely to lose in court if we are sued." Similarly, a briefing from the Office of Transportation and Air Quality and the Office of General Counsel stated:

OTAQ and OGC are reviewing these options from a legal, technical, and waiver precedent perspective and other options may fall in or out of our review. The clearest and most defensible option is to grant the waiver. The other options have high to very high vulnerability to legal challenge.

The EPA staff interviewed by the Committee were unable to identify any agency documents that argued in favor of denial prior to December 19, 2007, the day California's petition was denied.

The Position of Administrator Johnson. EPA Associate Deputy Administrator Jason Burnett told the Committee that Administrator Johnson supported granting California's petition for a waiver of preemption under the Clean Air Act. In a deposition, he testified that Administrator Johnson "was very interested in a full grant of the waiver" in August and September 2007 and then thought that a partial grant of the waiver "was the best course of action." Mr. Burnett explained: "the Administrator was interested in initially a full grant, and became interested in a partial grant, asked for me and others to explore ways of making a partial grant work."

According to Mr. Burnett's deposition testimony, Administrator Johnson's preference for a full or partial grant of the waiver did not change until after he communicated with the White House. When asked by Committee staff "whether the Administrator communicated with the White House in between his preference to do a partial grant and the ultimate decision" to deny the waiver, Mr. Burnett responded: "I believe the answer is yes." When asked "after his communications with the White House, did he still support granting the waiver in part," Mr. Burnett answered: "He ultimately decided to deny the waiver." Mr. Burnett also affirmed that there was "White House input into the rationale in the December 19th letter" announcing the denial of the waiver and in the formal decision document issued in March 2008.

The Position of the White House. The record before the Committee suggests that the White House played a pivotal role in the decision to reject the California petition, but it does not explain the basis for the White House intervention. During his deposition, Mr. Burnett was asked to identify the White House officials who spoke with Administrator Johnson and to describe the substance of their communications with Administrator Johnson. Mr. Burnett informed the Committee that he had been directed not to answer any questions about the involvement of the White House in the decision to reject California's petition.

The President has an obligation under the Constitution to take care that the laws of the United States are faithfully executed. In this case, the applicable law is the Clean Air Act, which requires that California's petition to regulate greenhouse gas emissions from motor vehicles be decided on the merits based on specific statutory criteria. It would be a serious breach if the President or other White House officials directed Administrator Johnson to ignore the record before the agency and deny California's petition for political or other inappropriate reasons. Further investigation will be required to assess the legality of the White House role in the rejection of the California motor vehicle standards.

I. INTRODUCTION

A. California's Waiver Request

The Clean Air Act authorizes two sets of standards to control tailpipe pollution from motor vehicles: (1) federal standards and (2) state standards established by California, which can also be adopted by other states. Section 209(b) of the Clean Air Act requires EPA to waive federal preemption for California motor vehicle standards if the agency determines that California's standards in the aggregate will be at least as protective of public health and welfare as federal standards. EPA may reject a waiver request only if the Administrator finds: (1) California's determination regarding protectiveness is "arbitrary and capricious;" (2) California does not need state standards "to meet compelling and extraordinary conditions;" or (3) California's standards are not consistent with statutory requirements for adequate lead-time and technological feasibility.¹

The special authority for California to set its own motor vehicle standards was part of the Air Quality Act of 1967 and was retained when Congress adopted the original 1970 Clean Air Act.² This authority was expanded in the 1977 amendments, with Congress recognizing that "the underlying intent" of section 209 is "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare."³

In internal documents, EPA has recognized that the language of section 209, its legislative history, court decisions, and consistent EPA interpretation of the provision over several decades all indicate that California has the "broadest possible discretion in developing [its] program, and EPA has only narrow and circumscribed discretion to deny a waiver to California."⁴ According to these internal documents, the "[b]urden of proof is on parties opposing a waiver," and "EPA traditionally looks broadly at whether [California] has conditions such that it still needs its own motor vehicle emission program. [EPA has] not examined the need and conditions for specific standards or specific air pollution problem[s]."⁵

¹ Clean Air Act §209(b).

² See *Motor & Equipment Mfrs. Ass'n v. EPA* ("MEMA I"), 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dept. of Environmental Conservation*, 17 F.3d 521, 525 (2nd Cir. 1994).

³ H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977).

⁴ Environmental Protection Agency, *California Request for a Waiver of Preemption of GHG Standards*, at 5 (Apr. 30, 2007) (briefing slides for Administrator Johnson). See also *Motor & Equipment Mfrs. Ass'n v. EPA* ("MEMA I"), 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979).

⁵ Environmental Protection Agency, *California Request for a Waiver of Preemption of GHG Standards*, at 7, 10 (Apr. 30, 2007) (briefing slides for Administrator Johnson).

In September 2004, California amended its existing motor vehicle regulations to include standards requiring cars and light-duty trucks to limit emissions of greenhouse gases.⁶ The standards begin with the 2009 model year and phase-in gradually over eight years.⁷ By the 2016 model year, they would cut global warming pollution from new vehicles by almost 30%.⁸ Thirteen other states — Arizona, Connecticut, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington — have already adopted the California standards. Together, these 14 states' consumers buy over 40% of the new vehicles sold nationwide each year.⁹

On December 21, 2005, California requested that EPA grant a waiver of preemption under section 209(b) for the California greenhouse gas emissions standards.¹⁰ EPA took no public action on the waiver request until the Supreme Court ruled in *Massachusetts v. EPA* on April 2, 2007, that greenhouse gases are air pollutants under the Clean Air Act.¹¹ EPA then published a notice on April 30, 2007, announcing a public hearing and a comment period on the waiver request.¹² The public comment period closed on June 15, 2007.¹³

⁶ California Environmental Protection Agency Air Resources Board, Final Regulation Order — Amendments to Sections 1900 and 1961 and Adoption of New Sections 1961.1, Title 13, California Code of Regulations as Approved by OAL, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Trucks and Medium-Duty Vehicles as Approved by OAL (Sept. 24, 2004 hearing date) (online at www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm).

⁷ California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document, at 6 (Dec. 21, 2005).

⁸ California Environmental Protection Agency Air Resources Board, *ARB Approves Greenhouse Gas Rule* (Sept. 24, 2004) (press release) (online at www.arb.ca.gov/newsrel/nr092404.htm).

⁹ Union of Concerned Scientists, *Automakers v. the People* (online at www.ucsusa.org/clean_vehicles/avp/) (accessed May 8, 2008).

¹⁰ Letter from Catherine Witherspoon, Executive Director, California Air Resources Board, to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, Re: Regulations to Control Greenhouse Gas Emissions From Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b) (Dec. 21, 2005).

¹¹ *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

¹² Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

¹³ Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; 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, 12157 (Mar. 6, 2008).

On December 19, 2007, Administrator Johnson announced that he had “found that California does not have a ‘need to meet compelling and extraordinary conditions’” and that he had decided to deny California’s waiver request.¹⁴ In an unusual departure from agency practice, the Administrator announced this decision without releasing a decision document explaining the legal basis for the decision. The formal legal justification for the decision was not released until March 6, 2008, when Administrator Johnson wrote in the Federal Register:

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.¹⁵

B. The Committee’s Investigation

Upon learning of Administrator Johnson’s decision to deny the waiver, Chairman Waxman announced that the Committee would be investigating “how and why this decision was made.”¹⁶ On December 20, 2007, Chairman Waxman wrote to Administrator Johnson requesting documents relating to the California waiver request.¹⁷

EPA initially resisted producing many documents to the Committee. As a result, Chairman Waxman issued subpoenas to compel production of documents on three occasions. Chairman Waxman issued two subpoenas to require production of documents that the Committee staff had reviewed but that EPA had refused to produce.¹⁸ After the issuance of the subpoenas, these documents were provided to the Committee.

¹⁴ Letter to Arnold Schwarzenegger, Governor of California, from Stephen L. Johnson, Administrator, U.S. EPA (Dec. 19, 2007).

¹⁵ Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; 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, 12157 (Mar. 6, 2008).

¹⁶ Committee on Oversight and Government Reform, Chairman Waxman’s Statement on EPA Denial of California Waiver Request (Dec. 19, 2007) (online at www.oversight.house.gov/story.asp?ID=1672).

¹⁷ Letter from Chairman Henry A. Waxman to Stephen Johnson, Administrator, U.S. EPA (Dec. 20, 2007).

¹⁸ Committee on Oversight and Government Reform, Subpoena to Stephen L. Johnson (Feb. 8, 2008) (compelling production of five sets of briefing slides for the Administrator). Committee on Oversight and Government Reform, Subpoena to Stephen L. Johnson (Mar. 13, 2008) (compelling production of 196 internal EPA documents).

On April 8, 2008, Chairman Waxman issued a third subpoena for the production of communications between EPA and persons in the White House.¹⁹ EPA continues to withhold some documents from the Committee that are responsive to this subpoena. The White House Counsel's office has informed Committee staff that EPA possesses 32 documents that evidence telephone calls or meetings in the White House involving at least one high-ranking EPA official and at least one Assistant to the President or the President himself. The White House Counsel's office has described these documents as "indicative of deliberations at the very highest level of government."²⁰

In total, the Committee has received over 27,000 pages of documents from EPA. The Committee staff has also conducted transcribed interviews and a deposition of eight EPA officials.²¹

II. CHRONOLOGY OF EVENTS

Previously undisclosed internal EPA documents and the Committee's interviews and deposition with key EPA staff provide new insights into the decisionmaking process inside EPA. These documents, interviews, and deposition show that EPA's career staff who worked on the California waiver petition all supported granting the request; that Administrator Johnson supported the position of his career staff at least in part; and that there was an unexpected reversal in the Administrator's position after he communicated with White House officials. This section of the memorandum describes key milestones in the administrative process.

A. The June 15, 2007, Briefing

Over a period of several months, EPA staff held a series of briefings for the Administrator on the California waiver request. One of the earlier briefings occurred on June 15, 2007.

¹⁹ Committee on Oversight and Government Reform, Subpoena to Stephen L. Johnson (Apr. 8, 2008).

²⁰ Meeting between Committee on Oversight and Government Reform staff, EPA staff, and White House staff (Apr. 22, 2008).

²¹ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Dina Washburn Kruger (Jan. 31, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Brian McLean (Feb. 5, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Robert David Brenner (Feb. 6, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge (Feb. 7, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney (Feb. 11, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo (Feb. 12, 2008); Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett (May 15, 2008).

At the June 15 briefing, Administrator Johnson reviewed a series of “briefing slides” prepared by the staff. One briefing slide presented a review of the public comments submitted to EPA. The slide included the May 2007 “initial assessment” of the Office of Transportation and Air Quality (OTAQ) career staff: “CA met the statutory criteria for a waiver.”²² It further noted that the staff’s “interim assessment based on waiver record to date also supports this conclusion.”²³

According to an internal EPA e-mail, Bob Meyers, the Principal Deputy Assistant Administrator for the Office of Air and Radiation, was upset that this staff view was included in the briefing slides. Mr. Meyers’s chief of staff wrote:

We had a fairly significant slip up in preparing Friday’s GHG briefing for the Administrator. It’s the very last bullet on page 6 — “OTAQ’s initial assessment.” ... Bob was not happy when he read that page during the briefing. ... I wanted to let someone in OTAQ know about this so we can permanently delete the offending language and not have it arise again.²⁴

B. The September 12, 2007, Briefing

By August 2007, the staff was refining its assessment of the merits of California’s request and developing decision options for the Administrator. This culminated in a briefing to the Administrator on September 12, 2007.

On August 29, Karl Simon, the director of the OTAQ division primarily responsible for the waiver, advised his staff to drop the denial option from the list of options presented in draft briefing slides. Regarding the options, he wrote: “I think we should also do something to indicate that not all of these are equal and that the most defensible position remains a clean approval.”²⁵ The draft slides included the following statement:

OTAQ and OGC [Office of General Counsel] are reviewing these options from legal, technical, and waiver precedent perspective and other options may fall out of our review. Not all of these options are defensible and clearest option is to grant the waiver.²⁶

The next day, a new draft of the slides was circulated. This draft included an explicit staff assessment:

²² Environmental Protection Agency, *President’s GHG Rule: Status Briefing* (June 15, 2007).

²³ *Id.*

²⁴ E-mail from Don Zinger to Karl Simon and Sarah Dunham (June 18, 2007; 5:36 p.m.).

²⁵ E-mail from Karl Simon to David Dickinson (Aug. 29, 2007; 9:51 p.m.).

²⁶ Attachment to e-mail from Ben DeAngelo to Rona Birnbaum, at 40 (Aug. 30, 2007; 5:50 p.m.).

From a legal, technical and policy perspective (and waiver precedence) CA has made the requisite protectiveness determination and those opposing the waiver have not clearly demonstrated that any of the section 209(b) criteria have been met. A waiver should be granted.²⁷

As the slides were being reviewed, the EPA General Counsel, Roger Martella, requested that that they “be focused on our options beyond granting.”²⁸ The next day, the career staff attorney followed this direction by preparing a new briefing document entitled, “California GHG Waiver: Arguments Against Granting.”²⁹ When he sent the document to Mary Ann Poirier, the Deputy General Counsel, he explained: “It is meant to be stripped-down and frank, to give Roger my best advice on the pros and cons of options short of a full grant.”³⁰ Before describing the options other than a full grant of the waiver request, the slides included a strongly-worded “caveat” page, which stated:

After review of the docket and precedent, we don’t believe there are any good arguments against granting the waiver. All of the arguments discussed here are likely to lose in court if we are sued. The arguments here are the best of a bad lot, going from most to least plausible.³¹

The option of denying the waiver based on California’s lack of compelling and extraordinary conditions is then presented as the third of six options. An apparently later version of the caveat page is phrased similarly:

After review of the docket and precedent, we believe the arguments against granting the waiver have high to very high legal vulnerability. All of the arguments discussed here would more likely than not lose in court if they are challenged. The arguments here are presented in decreasing order of defensibility.³²

On September 11, Karl Simon sent the latest version of the briefing slides to Bob Meyers, the acting head of the air office. Mr. Simon explained: “I modified the options discussion a bit to better reflect the current state of analysis and OGC’s views.”³³ The options slide did not include a denial option and began with the following statement:

²⁷ Attachment to e-mail from David Dickinson to Karl Simon, et al., at 3 (Aug. 31, 2007; 4:17 p.m.).

²⁸ E-mail from Michael Horowitz to Mary Ann Poirier (Sept. 4, 2007; 4:36 p.m.).

²⁹ Attachment to e-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.).

³⁰ E-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.).

³¹ Attachment to e-mail from Michael Horowitz to Mary Ann Poirier (Sept. 5, 2007; 1:36 p.m.).

³² Environmental Protection Agency, California GHG Waiver: Arguments Against Granting (undated).

³³ E-mail from Karl Simon to Karen Orehowsky (Sept. 11, 2007; 8:18 a.m.).

OTAQ and OGC are reviewing these options from a legal, technical, and waiver precedent perspective and other options may fall in or out of our review. The clearest and most defensible option is to grant the waiver. The other options have high to very high vulnerability to legal challenge.³⁴

At this point, the briefing slides also included a number of explicit “staff evaluations” regarding the compelling and extraordinary conditions criterion. For example, the staff found:

- “CA continues to exhibit extraordinary ozone conditions. CA conditions, such as population and density, coastline, salt-water intrusion, wildfires, agricultural economy, snow pack and melt, etc, when aggregated, represent serious conditions on their own and when compared with other states.”³⁵
- “The GHG standards are reasonably viewed as necessary to address both climate change and ozone conditions within the state.”³⁶
- “Opponents have not met their burden of demonstrating that CARB’s [California Air Resources Board] GHG program will not have an incremental benefit for both climate change and ozone conditions.”³⁷

Evidence obtained by the Committee indicates that Mr. Meyers insisted on removing these staff evaluations from the briefing slides so that the information was only communicated to the Administrator orally. None of the staff evaluations regarding the compelling and extraordinary conditions or the legal defensibility of the various options available to the Administrator remained in the final slides that were presented to the Administrator on September 12.

The day the slides were sent to Mr. Meyers’s office, Karl Simon sent an e-mail explaining that Mr. Meyers’s assistant “is fixing the inclusion of staff evaluations. Note that Bob dropped two slides — the summary of the NERA report and the options summary page. I am pushing back.”³⁸ Christopher Grundler, the Deputy Director of the Office of Transportation and Air Quality, replied: “what do you mean, ‘fixing’? as in, deleting?”³⁹ Mr. Grundler also asked: “Did you get direction NOT to convey staff evaluations or options?”⁴⁰ Mr. Simon responded:

³⁴ Attachment to e-mail from Karl Simon to Karen Orehowsky, at 32 (Sept. 11, 2007; 8:18 a.m.).

³⁵ *Id.* at 26.

³⁶ *Id.* at 22.

³⁷ *Id.* at 24.

³⁸ E-mail from Karl Simon to Margo Oge, et al. (Sept. 11, 2007; 1:03 p.m.).

³⁹ E-mail from Christopher Grundler to Karl Simon (Sept. 11, 2007; 1:24 p.m.).

⁴⁰ E-mail from Christopher Grundler to Karl Simon (Sept. 11, 2007; 11:22 p.m.).

“yes, in a written form. we will be having the conversation though.”⁴¹ This understanding is reflected in Mr. Grundler’s handwritten notes on the options slide presented to Mr. Meyers. Next to the OTAQ and OGC analysis, Mr. Grundler wrote: “Bob changes this.”⁴² And at the bottom of the page, he wrote: “Staff evaluation Bob deletes — Karl should take original to meeting with Steve verbally go over staff evaluation.”⁴³ During her interview, Maureen Delaney, a career Program Analyst in the Office of Air and Radiation, confirmed that removing the staff evaluations from the slides was “a management-level decision” done at the “political level.”⁴⁴

Despite the removal of the staff evaluations from the briefing slides, career EPA staff clearly communicated their professional assessment to the Administrator at the September 12 briefing. Margo Oge, the Director of the Office of Transportation and Air Quality, told Committee staff: “verbally there was a staff evaluation ... that California has met that criteria.”⁴⁵ When asked by Committee staff about the staff evaluations, Maureen Delaney explained: “I believe that they were spoken, even though they weren’t included in the briefing, and they indicated generally that ... we did not have reason to deny the waiver.”⁴⁶

C. The September 20 and 21, 2007, Briefing

After the September 12 briefing, EPA staff began preparing slides for the next briefing with the Administrator on September 20 and 21. The purpose of this briefing was to present an in-depth analysis of the decision options available to the Administrator.

On September 18, a career staff attorney in the Office of General Counsel transmitted his first draft of the options slides. The conclusions slide included the following analysis:

- “Most defensible action is to grant waiver.”
- “Denial based on lack of need for standards to meet compelling and extraordinary conditions has high legal risk and is contrary with central tenets of prior EPA procedure and likely EPA statements defending its own GHG rule.”⁴⁷

⁴¹ E-mail from Karl Simon to Christopher Grundler (Sept. 12, 2007; 8:07 a.m.).

⁴² Christopher Grundler’s notes on draft briefing slides (undated).

⁴³ *Id.*

⁴⁴ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 11-12, 72-73 (Feb. 11, 2008).

⁴⁵ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 43-44 (Feb. 7, 2008).

⁴⁶ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 13 (Feb. 11, 2008).

⁴⁷ Attachment to e-mail from Michael Horowitz to John Hannon, at 16 (Sept. 18, 2007; 9:58 a.m.).

The next version of the options slides did not include this conclusions slide, but did include legal analysis of the options. The slides stated that the option of granting the waiver was “consistent with past interpretation of statute, EPA practice case law, and the record.”⁴⁸ The slides also noted: “we routinely grant CA waivers for standards more stringent than EPA standards.”⁴⁹ The document raised several “issues” regarding the denial option based on lack of compelling and extraordinary conditions, including the observation that denial would be “[i]nconsistent with precedent saying we look at vehicle program as a whole, not individual standards.”⁵⁰ The slides also explained that such a denial “would undercut EPA arguments regarding benefits of federal [greenhouse gas emissions control] program in terms of ozone and general climate change benefits.”⁵¹ After Bob Meyers and Associate Deputy Administrator Jason Burnett edited the slides, much of this legal analysis was removed and did not appear in the final briefing slides for Administrator Johnson.⁵²

Nevertheless, EPA career staff made it clear to the Administrator at the options briefing that they believed that the statutory criteria for granting the waiver request had been met. Karl Simon told the Committee the EPA career staff view “[t]hat the waiver criteria were met” was discussed at the briefing.⁵³ Several participants of the meeting told Committee staff that Mr. Johnson ended the briefing by going around the room and asking the staff for their individual recommendations. Ben DeAngelo, a Senior Analyst for Climate Change, explained: “Administrator Johnson essentially polled the room on what people’s final options were about granting or not granting a waiver.”⁵⁴

According to the five EPA employees who attended the meeting and were interviewed by Committee staff, every EPA employee who expressed an opinion supported granting the waiver in full or in part. A partial grant of the waiver would involve granting the waiver for the first two to three model years starting with the 2009 model year. No one in the meeting advised the Administrator to deny the waiver. Karl Simon told Committee staff that “most people took the

⁴⁸ Attachment to e-mail from Michael Horowitz to Roger Martella, et al., at 6 (Sept. 19, 2007; 9:34 a.m.).

⁴⁹ *Id.* at 17.

⁵⁰ *Id.* at 16.

⁵¹ *Id.* at 17.

⁵² E-mail from Michael Horowitz to Allison Starmann (Sept. 19, 2007; 10:53 p.m.); E-mail from Michael Horowitz to Mary Ann Poirier (Sept. 24, 2007; 2:29 p.m.).

⁵³ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 33 (Jan. 30, 2008).

⁵⁴ Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 19 (Feb. 12, 2008).

opportunity” to offer a recommendation that “approval or partial approval would be the way to go.”⁵⁵ Margo Oge explained:

What I recall is that all the attendants, with the exception of Bob Meyers who was not asked to express his opinion ... were either supporting granting the full waiver or granting partial waiver.⁵⁶

Jason Burnett told Committee staff: “all EPA recommendations that I am aware of, whether they be staff or me or someone in a similar position, were to grant the waiver.”⁵⁷

General Counsel Roger Martella also supported a partial granting of the waiver, although he said that he believed the agency could defend any of the options placed in front of the Administrator.⁵⁸ According to Mr. Burnett, Mr. Martella “stated that the legal risk was higher with denying the waiver and that the legal risk was lowest with granting the waiver.”⁵⁹

This interview testimony is supported by written notes and summaries of the meeting. Karl Simon’s handwritten notes indicate that the Administrator “polled everyone but BM [Bob Meyers] for recommendation — all supported at least 2B,” a partial grant of the waiver.⁶⁰ Ben DeAngelo’s summary of the meeting stated: “OTAQ and OGC folks said granting the waiver straight-up is probably most defensible.”⁶¹ Christopher Grundler’s handwritten notes simply stated: “all agreed on granting waiver.”⁶² A second note reads: “All attendees agree for full or partial granting the waiver.”⁶³

⁵⁵ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 82-83 (Jan. 30, 2008).

⁵⁶ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 21-22 (Feb. 7, 2008).

⁵⁷ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 129 (May 15, 2008).

⁵⁸ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 22 (Feb. 7, 2008).

⁵⁹ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 23 (May 15, 2008).

⁶⁰ Handwritten notes of Karl Simon on California GHG Waiver: Options Briefing for the Administrator (Sept. 21, 2007). +

⁶¹ E-mail from Ben DeAngelo to Dina Kruger (Sept. 21, 2007; 5:07 p.m.).

⁶² Handwritten notes of Christopher Grundler on *California GHG Waiver: Options* (undated).

⁶³ *Id.*

D. The October 30, 2007, Briefing

After the options briefing, some EPA staff expected the Administrator to reach a decision soon.⁶⁴ However, on October 9, Administrator Johnson called another meeting, during which he tasked the staff with providing additional information on a number of topics related to the waiver. The final briefing for the Administrator involving career staff was held on October 30. The October 30 briefing slides were intended to provide the Administrator with the information he had requested.

According to the career staff interviewed by the Committee, the final briefing slides represented the professional views of EPA's technical and legal staff.⁶⁵ The slides included the following conclusions:

- "Fundamental circumstances of geographic, climatic, human and motor vehicle populations remain compelling and extraordinary (including ozone and PM [particulate matter]) and fit the GHG circumstances which will not only exacerbate the ozone conditions but also such conditions are highly vulnerable to climate change."
- "The potential for climate change to exacerbate California's unique tropospheric ozone problem is one element of California's compelling and extraordinary conditions. However, it is by no means the sole foundation for the compelling and extraordinary argument. In fact, climate change impacts on California's wildfire, water resource, and agricultural situation may be the state's greatest concerns."
- "California exhibits a number of specific features that are somewhat unique and may be considered compelling and extraordinary with regard to both the need for mitigation actions and its potential vulnerability to climate change."⁶⁶

The briefing slides also contained legal analysis regarding the agency's litigation prospects if the waiver was granted or denied. The slide entitled "If We Grant" stated that EPA would face a "Likely Suit by Manufacturers" and that "EPA is almost certain to win such a suit."⁶⁷ The slide entitled "If We Deny" stated that EPA would face an "[a]lmost certain lawsuit

⁶⁴ See Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo (Feb. 12, 2008).

⁶⁵ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 31 (Feb. 7, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 34, 39 (Feb. 12, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 72, 76, 153-154 (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Dina Kruger, at 26, 31, 32 (Jan. 31, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Brian McLean, at 29, 32 (Feb. 5, 2008).

⁶⁶ Environmental Protection Agency, Briefing for the Administrator: California's GHG Waiver Request: Follow-Up on Additional Questions (Oct. 30, 2007).

⁶⁷ *Id.*

by California” and that “EPA’s litigation risks are significantly higher than if a waiver is granted.”⁶⁸

In earlier drafts of the briefing slides, the “If We Deny” slide included stronger language. An October 29 draft provided the following legal prognosis: “EPA likely to lose suit.”⁶⁹ According to Karl Simon, at the October 29 pre-briefing with Bob Meyers, “there was some discussion on some of — the way to characterize the legal advice.”⁷⁰ Maureen Delaney told Committee staff: “the last statement on what would happen if California sued under a denial, that was changed, and I think changed the meaning somewhat.”⁷¹ When asked whether the earlier draft slides better represented the views of the career staff, she responded: “That conclusion, yes.”⁷² Ms. Delaney added: “It was a stronger statement in the previous — in the draft version.”⁷³

The evidence obtained by the Committee shows that EPA staff clearly informed Administrator Johnson that they believed the compelling and extraordinary conditions criterion was met. Margo Oge told Committee staff:

When Ben presented this information to the Administrator and presented it to me, clearly, clearly what I am hearing is that California meets this extraordinary and compelling needs, the conditions. ...

If you read this whole document ... in its totality, you would walk away with the same impression that I walk away when I talked to the experts ... that California has met the criteria of compelling and extraordinary needs based upon these facts. And that is what Ben told the Administrator.⁷⁴

When asked by Committee staff whether there was “any question in your mind that this staff view that the waiver criteria were met was clearly communicated to Administrator

⁶⁸ *Id.*

⁶⁹ Attachment to e-mail from Betsy White to Jo Beth Banas, et al. (Oct. 29, 2007; 3:30 p.m.).

⁷⁰ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 68 (Jan. 30, 2008).

⁷¹ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 25 (Feb. 11, 2008).

⁷² *Id.*

⁷³ *Id.* at 76.

⁷⁴ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 60-61 (Feb. 7, 2008).

Johnson,” Maureen Delaney replied: “Was there any doubt? No.”⁷⁵ In addition, Ben DeAngelo’s summary of the meeting states:

In addition to the argument that climate change may exacerbate CA’s tropospheric ozone problem — for which CA has historically demonstrated compelling and extraordinary conditions — I think Johnson now better appreciates that there are additional conditions in CA that make them vulnerable to climate change.⁷⁶

Similarly, Jason Burnett agreed that career staff “clearly communicate[d] to the Administrator that they believed that the compelling and extraordinary conditions criterion was met.”⁷⁷

During the October 30 briefing, career EPA staff explicitly told the Administrator that granting the waiver was the most legally defensible option, while a denial of the waiver would be unlikely to survive legal challenge. When asked by Committee staff whether he thought the options of granting, partially granting, or denying the waiver request were all legally defensible, Karl Simon replied: “I think it depends on your definition of ‘legally defensible.’ ... It would get you in the courthouse door.”⁷⁸ He explained that the Administrator was told that the available options were “legally defensible” only in the sense that they “get you past rule 11 sanctions” in federal court for raising a frivolous claim.⁷⁹ Referring to a lawsuit challenging EPA’s denial of the waiver request, Mr. Simon stated: “I think the odds are that we will lose.”⁸⁰

Margo Oge also thought that the evidence before the Administrator all pointed toward granting the waiver. She told Committee staff:

working on the waiver for the time that we had been working and looking at the legislative history, the precedent has been set by EPA approving the California waivers for the past 40 years ... my view was and continues to be, based on the Clean Air Act and all these factors, granting of the waiver was the most defensible way to proceed.⁸¹

⁷⁵ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 26 (Feb. 11, 2008).

⁷⁶ E-mail from Ben DeAngelo to Brian McLean, et al. (Oct. 31, 2007; 12:54 p.m.).

⁷⁷ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 128 (May 15, 2008).

⁷⁸ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 69 (Jan. 30, 2008).

⁷⁹ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 133 (Jan. 30, 2008) (“passed” in original transcript).

⁸⁰ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 111 (Jan. 30, 2008).

⁸¹ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 88-89 (Feb. 7, 2008).

Maureen Delaney agreed that “the thrust of the explanation to him [Administrator Johnson] was that if he denied the waiver, EPA would likely lose any subsequent lawsuit.”⁸² During her interview, she said: “I think, as we pointed out, some [options] were more likely to survive a litigation risk than others.”⁸³ Ms. Delaney added: “There are varying shades of what would be defensible. ... Most people felt that a denial would be ... a significant litigation risk.”⁸⁴

Ben DeAngelo confirmed that the legal jeopardy of a denial was fully explained to Administrator Johnson during the October 30 briefing.⁸⁵ When asked by Committee staff what conclusions about the legal defensibility of different options he drew from the October 30 briefing, Mr. DeAngelo stated: “I had heard by this stage in the process now a number of times from the legal people that granting the waiver was, in their minds, most legally defensible and that was my takeaway.”⁸⁶

According to Jason Burnett, the legal jeopardy of a denial was communicated to the Administrator on a number of occasions. He told Committee staff that the legal judgment of General Counsel Roger Martella and his office was that “denying the waiver had very significant legal risk.”⁸⁷ He explained:

I believe that it was communicated in several fora, through this slide, verbally when these slides were presented to the Administrator, and in multiple meetings that we had, that Roger Martella, I, and others had, with the Administrator.⁸⁸

E. The December 19, 2007, Decision

On December 19, 2007, Administrator Johnson sent a two-page letter to Governor Arnold Schwarzenegger of California announcing that he intended to deny the waiver petition. The stated basis for the denial was California’s lack of compelling and extraordinary conditions.

⁸² Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 28 (Feb. 11, 2008).

⁸³ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 93 (Feb. 11, 2008).

⁸⁴ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 94 (Feb. 11, 2008).

⁸⁵ Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 76-77 (Feb. 12, 2008).

⁸⁶ Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 77 (Feb. 12, 2008).

⁸⁷ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 127 (May 15, 2008).

⁸⁸ *Id.* at 127.

Career staff who had worked on the issue for months were surprised by the decision to deny the waiver because it did not appear to be supported by the record. When asked by Committee staff if he was surprised by the decision, Rob Brenner, the Director of Policy Analysis and Review, responded:

Yes, I was surprised. I expected that it would probably be either a grant of the waiver or a partial waiver. ... I felt that ... the analyses that had been put together seemed to point towards either a full or a partial waiver.⁸⁹

Maureen Delaney told Committee staff that she also was surprised by the decision: “Personally, having been at the briefings, and it was contrary to the advice that I thought that he had received from the staff, so I was surprised.”⁹⁰ She explained: “it was difficult to see how he arrived at that decision, given the information that had been provided and the consensus among the staff ... It seemed like a difficult place to get to.”⁹¹

In his deposition, Mr. Burnett told the Committee that the Administrator’s December 19 decision was a reversal of the Administrator’s prior position. According to Mr. Burnett, Administrator Johnson “was very interested in a full grant of the waiver” in August and September.⁹² Mr. Burnett told the Committee that “at some point in the process,” the Administrator then modified his view and believed that a partial grant of the waiver “was the best course of action.”⁹³ Mr. Burnett explained: “the Administrator was interested in initially a full grant, and became interested in a partial grant, asked for me and others to explore ways of making a partial grant work.”⁹⁴ Mr. Burnett added: “over the course of a period of months he certainly shifted his focus and his stated interests to me and others from a full grant to a partial grant.”⁹⁵

According to Mr. Burnett, Administrator Johnson’s preference for a full or partial grant of the waiver did not change until after he communicated with the White House about the matter. When asked by Committee staff “whether the Administrator communicated with the White House in between his preference to do a partial grant and the ultimate decision” to deny the

⁸⁹ Committee on Oversight and Government Reform, Transcript of Interview of Rob Brenner, at 32 (Feb. 6, 2008).

⁹⁰ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 34 (Feb. 11, 2008).

⁹¹ Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 63-64 (Feb. 11, 2008).

⁹² Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 118 (May 15, 2008).

⁹³ *Id.* at 119.

⁹⁴ *Id.* at 123.

⁹⁵ *Id.* at 139.

waiver, Mr. Burnett responded: “I believe the answer is yes.”⁹⁶ When asked “after his communications with the White House, did he still support granting the waiver in part,” Mr. Burnett answered: “He ultimately decided to deny the waiver.”⁹⁷ Mr. Burnett also affirmed that there was “White House input into the rationale in the December 19th letter.”⁹⁸

At the time of the December 19 decision to deny the California waiver, there were apparently no EPA employees or agency documents arguing for this decision. Five EPA staff — Margo Oge, Karl Simon, Ben DeAngelo, Maureen Delaney, and Rob Brenner — told the Committee they were unaware of any EPA employees who espoused or agreed with the argument that California did not meet the compelling and extraordinary conditions criterion.⁹⁹ They also told the Committee that they were unaware of any pre-December 19 internal EPA documents recommending that the waiver be denied based upon a lack of compelling and extraordinary conditions.¹⁰⁰ On December 20, the day after Administrator Johnson announced his decision to deny California’s waiver request, the most recent internal draft of the decision document was written as if the waiver was to be granted in full.¹⁰¹

F. The March 6, 2008, Federal Register Notice

Typically when an EPA Administrator announces a final decision, the agency releases an analysis explaining the basis for the decision on the same day. This did not happen in the case of the denial of the California waiver. EPA did not release a formal legal justification for the denial until March 6, 2008, when the official decision document was published in the Federal Register. This decision document included a more detailed discussion of the rationale for denial put forth in the Administrator’s December 19, 2007, letter to Governor Schwarzenegger. The primary legal justification offered by the Administrator was that Section 209 of the Clean Air Act was not

⁹⁶ *Id.* at 60.

⁹⁷ *Id.* at 120.

⁹⁸ *Id.* at 140.

⁹⁹ Committee on Oversight and Government Reform, Transcript of Interview of Margo Oge, at 95 (Feb. 7, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 36 (Feb. 11, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 105 (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 87 (Feb. 12, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Rob Brenner, at 36 (Feb. 6, 2008).

¹⁰⁰ Committee on Oversight and Government Reform, Transcript of Interview of Karl Simon, at 112 (Jan. 30, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Brian McLean, at 35 (Feb. 5, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Robert David Brenner, at 38 (Feb. 6, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Maureen Delaney, at 37 (Feb. 11, 2008); Committee on Oversight and Government Reform, Transcript of Interview of Benjamin DeAngelo, at 87 (Feb. 12, 2008).

¹⁰¹ E-mail from David Dickinson to Michael Horowitz, et al. (Dec. 20, 2007; 6:53 a.m.).

“intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems.” He also rejected the view that “the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.”¹⁰²

III. THE POSITION OF THE WHITE HOUSE

The record before the Committee — in particular the deposition testimony of Mr. Burnett — indicates that the White House played a decisive role in the rejection of the California motor vehicle standards. Before communicating with White House officials, Administrator Johnson supported the position of career EPA staff that the waiver should be granted. He reversed himself only after these communications.

Little is known publicly about the White House position. According to press accounts, the CEOs of Ford and Chrysler met with Vice President Dick Cheney prior to the denial and urged the Administration to reject the waiver.¹⁰³ After Administrator Johnson announced that the waiver would be denied, a White House spokesman said that the White House supported this decision.¹⁰⁴

During the deposition of Mr. Burnett, Committee staff repeatedly asked about the White House role. In response, Mr. Burnett told the Committee that he had been instructed by EPA not to answer these questions. Based on the instructions from EPA, Mr. Burnett refused to answer:

- With whom in the White House did Administrator Johnson communicate about the California waiver before it was denied?¹⁰⁵
- “Can you tell us the time at which that communication with the White House occurred?”¹⁰⁶
- “Will you tell us the substance of those communications?”¹⁰⁷

¹⁰² U.S. EPA, California State Motor Vehicle Pollution Control Standards; 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, 12157 (Mar. 6, 2008).

¹⁰³ *EPA blocks Calif. fuel rules*, Detroit News (Dec. 20, 2007).

¹⁰⁴ Press Gaggle by Tony Fratto, White House Office of the Press Secretary (Dec. 21, 2007) (online at www.whitehouse.gov/news/releases/2007/12/20071221-5.html).

¹⁰⁵ Committee on Oversight and Government Reform, Transcript of Deposition of Jason Burnett, at 58 (May 15, 2008).

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *Id.* at 61.

- “Do you know if the Administrator communicated or met with the President on this matter?”¹⁰⁸
- Did White House staff “ever communicate to you a preference or an expectation regarding the outcome of the California waiver?”¹⁰⁹
- With whom in the White House did you communicate about the California waiver?¹¹⁰
- “Can you tell us the reason that ... [the Administrator] told you his mind changed?”¹¹¹

In addition, as described above, EPA has withheld from the Committee documentary evidence of interactions between EPA and the White House about the California waiver before the denial decision was announced. The White House Counsel’s office has informed Committee staff that EPA possesses 32 documents that evidence telephone calls or meetings in the White House involving at least one high-ranking EPA official and at least one Assistant to the President or the President himself. The White House Counsel’s office has described these documents as “indicative of deliberations at the very highest level of government.”¹¹²

IV. CONCLUSION

The record before the Committee answers many questions about what transpired within EPA prior to the denial of California’s petition to regulate greenhouse gas emissions from motor vehicles. The record indicates that the California waiver had unanimous support among the career EPA staff and was backed at least in part by EPA Administrator Johnson. What the record does not answer, however, is why the California petition was denied given the strong support inside EPA.

It appears that the White House played a significant role in the reversal of the EPA position. This raises questions about the basis for the White House actions. The Clean Air Act contains specific standards for considering California’s petition. It would appear to be inconsistent with the President’s constitutional obligation to faithfully execute the laws of the United States if the President or his advisors pressured Administrator Johnson to ignore the record before the agency for political or other inappropriate reasons.

Additional investigation by the Committee will be required to assess the basis for the White House intervention in the decision.

¹⁰⁸ *Id.* at 61.

¹⁰⁹ *Id.* at 61.

¹¹⁰ *Id.* at 61.

¹¹¹ *Id.* at 123.

¹¹² Meeting between Oversight and Government Reform Committee staff, EPA staff, and White House staff (Apr. 22, 2008).