IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE JEEP, et al.,

Plaintiffs,

v.

GEORGE CROMBIE, in his official capacity as Secretary of the Vermont Agency of Natural Resources, et al.,

Defendants.

THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS,

Plaintiffs,

v.

GEORGE CROMBIE, in his official capacity as Secretary of the Vermont Agency of Natural Resources, et al.,

Defendants.

Case Nos. 2:05-CV-302 and
2:05-CV-304
(Consolidated)

OPPOSITION OF PLAINTIFF ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS TO DEFENDANTS' AND DEFENDANT-INTERVENORS' CONSOLIDATED MOTION FOR JUDGMENT ON THE PLEADINGS

RAYMOND B. LUDWISZEWSKI
CHARLES H. HAAKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Of Counsel

DEBRA L. BOUFFARD
R. JEFFREY BEHM
SHEEHEY FURLONG & BEHM P.C.
30 Main Street
P.O. Box 66
Burlington, VT 05402-0066
Telephone: (802) 864-9891
Facsimile: (802) 864-6815

Attorneys for Association of International Automobile Manufacturers

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MEMORANDUM OF PLAINTIFF ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS IN OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' CONSOLIDATED MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff, the Association of International Automobile Manufacturers ("AIAM"), hereby respectfully submits this Memorandum in Opposition to the Defendants' and Defendant-Intervenors' Motion for Judgment on the Pleadings ("Defendants' Motion").

I. INTRODUCTION

This Court has before it two motions arguing that this action may be resolved now as a matter of law. On November 13, 2006, AIAM filed a motion for summary judgment demonstrating that (a) carbon dioxide is the primary emission covered by the DEC Regulations; (b) a carbon dioxide emissions regulation is functionally indistinguishable from a fuel economy regulation because CO2 emissions are a direct function of the amount of carbon-containing fuel consumed by a vehicle, and improving fuel economy is the only known practical way to reduce emissions of CO2 from today's gasoline-powered automobiles; (c) the relationship between the DEC Regulations and a fuel economy standard is so direct that one can mathematically translate the CO2-equivalent emissions limits to equivalent miles-per-gallon fuel economy levels; and (d) the National Highway Traffic Safety Administration (NHTSA) – the expert agency designated by Congress to administer the federal Corporate Average Fuel Economy ("CAFE") program – has determined that "[a] state's adoption and enforcement of a CO2 standard for motor vehicles would infringe on NHTSA's discretion to establish CAFE standards consistent with Congress' guidance and threaten the goals that Congress directed NHTSA to achieve." Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566, 17668 (Apr. 6, 2006) (the "Light Truck Standards").

In their motion for judgment on the pleadings, the Defendants argue that even if these facts are true, the DEC Regulations cannot be expressly or impliedly preempted by EPCA as a matter of law. The crux of their argument is that if the State of California can obtain a Section 209(b) waiver from U.S. EPA for that State's AB 1493 Regulations, then the regulations constitute "other motor vehicle standards of the Government" which NHTSA must "consider" in determining the maximum feasible average fuel economy level under EPCA, and therefore cannot be preempted by that statute. *See* Defendants' Motion at 5.

In advancing their argument, the Defendants are rowing against a growing current of authorities that have rejected this argument – chief among them being both federal agencies that have considered the question and the court in the parallel California litigation, *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006). The *Central Valley* court addressed the very same question and concluded that "Section 209(b) does not provide that the regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from preemption by other federal statutes," and further held that the requirement that NHTSA "consider" such regulations does not save them from preemption. *Id.* at 1173. NHTSA has made the same determination, concluding that "EPCA's decisionmaking factor provision is neither a saving clause nor a waiver provision," and it does not "sav[e] state emissions standards that effectively regulate fuel economy from preemption." Light Truck Standards, 71 Fed. Reg. at 17996.

The Defendants offer no valid basis for this Court to conclude that both the *Central Valley* court and NHTSA are incorrect on this issue. Indeed, the plain language of both the Clean Air Act and EPCA dispels any notion that EPCA's broad and unconditional preemption provision is somehow abrogated by the requirement that NHTSA "consider" California

emissions standards that receive a waiver from Clean Air Act preemption. Nor do the Defendants offer any authority for the novel proposition that California – and the states that follow California under Section 177 of the Clean Air Act – can enact a *de facto* fuel economy regulation in the face of ECPA's express preemption provision, and thereby usurp the exclusive authority of NHTSA to set national fuel economy standards that further the multifaceted goals of EPCA. The law, in fact, provides just the opposite. *Geier v. American Honda Motor Co*., 529 U.S. 861 (2000).

The Defendants, therefore, have failed to show that as a matter of law the DEC Regulations are immune from the preemption challenges asserted in this action. Given that their only legal defense is without any support in the law and must therefore be rejected, and given that AIAM has shown that the DEC Regulations are "related to fuel economy standards" and conflict with the federal fuel economy program, this Court should deny the Defendants' motion for judgment on the pleadings and grant AIAM's motion for summary judgment.[1]

II. LEGAL STANDARD ON A MOTION FOR JUDGMENT ON THE PLEADINGS

In its motion for summary judgment, AIAM demonstrated that the DEC regulations effectively establish state fuel economy standards for cars and trucks sold in Vermont, and that the regulations conflict with the NHTSA's exclusive responsibility under EPCA to determine the "maximum feasible average fuel economy level" for light duty vehicles. 49 U.S.C. § 42902(a), (c). The facts set forth in AIAM's motion for summary judgment are substantially the same as

[1] The Defendants also argue that the Court should dismiss this action as unripe because they concede that the DEC Regulations will not be enforceable unless and until there is a waiver under Section 209(b) of the Clean Air Act. This argument is merely a rehash of their motion to dismiss, which this Court denied in its Order of November 30, 2006. For this reason, AIAM will not address this portion of the Defendants' Motion.

those alleged in its complaint, which on a motion for judgment on the pleadings must be accepted as true and construed in a light most favorable to the plaintiff. *Todd v. Exxon Corp*., 275 F.3d 191, 197 (2d Cir. 2001). AIAM's motion for summary judgment is also based on facts set forth in the Federal Register, of which this Court may take judicial notice, 44 U.S.C. § 1507, and which the Court may consider on a motion for judgment on the pleadings. *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993). The question presented by the Defendants' Motion is whether, even if those facts are true, the Defendants have a complete defense to the preemption claims asserted in this action such that they are entitled to a judgment as a matter of law.[2] As discussed below, they do not.

III. ARGUMENT

A. The Court In *Central Valley Chrysler-Jeep v. Witherspoon* Has Rejected The Defendants' Arguments

Unfortunately for the Defendants, the legal argument they advance for why the DEC Regulations cannot be preempted by EPCA runs head-on against the decision of the court in *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006). The defendants in that case – which include some of the same environmentalist intervenors as are involved in this action and in which the State of New York participated as *amicus curiae* – argued "that California's regulations are permissible because the EPCA requires NHTSA to take such regulations into account in setting the CAFE level," and that "Congress integrated Section 209 standards into the EPCA by requiring NHTSA to account for 'other motor vehicle standards

[2] The Defendants' Motion is also directed at various claims that are asserted in the action brought by the Green Mountain Chrysler-Plymouth-Dodge-Jeep Plaintiffs (Case No. 2:05-CV-302) that are not asserted by AIAM – such as claims under Section 177 of the Clean Air Act, the United States Foreign Policy, the Dormant Commerce Clause, and antitrust statutes. AIAM does not address these points in this opposition brief.

of the Government on fuel economy . . . .' 49 U.S.C. § 32902(f)." *Central Valley*, 456 F. Supp. 2d at 1170-71.

The *Central Valley* court correctly rejected this argument, holding that "[n]othing in the statutory language or the legislative history of the Clean Air Act, the EPCA, or any other statute before the court indicates Congress's intent that an EPA waiver would allow a [state] regulation to disrupt the CAFE program." *Id.* at 1172. The court further held that "Section 209(b) does not provide that the regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from preemption by other federal statutes." *Id.* at 1173.

The court also directly addressed the contentions that "requiring NHTSA to consider the California regulations made them 'part of EPCA'" and that "the requirement that NHTSA consider the California regulations [under Section 32902(f)] amounts to Congressional authorization of such regulation, regardless of their effects on the EPCA's goals," *id.* at 1174, as the Defendants contend here. The court dismissed these arguments, reasoning:

> Defendants appear to read into this language a mandate that the EPCA accommodate other regulations, including those granted an EPA waiver.
>
> * * *
>
> However, a congressional requirement that a decision maker "consider" a factor does not deserve the weight that Defendants place on it. Congress's use of the term "consider" in a statute requires an actor to merely "investigate and analyze" the specified factor, but not necessarily act upon it. … The language of section 32902(f) merely requires NHTSA to investigate and analyze what effect the "other" regulations will have on fuel economy.

Id. at 1173-74 (*citing City of Davis v. Coleman*, 521 F.2d 661, 679 (9th Cir. 1975); *J.H. Miles & Co., Inc. v. Brown*, 910 F. Supp. 1138, 1156 (E.D. Va. 1995); *T.S. v. Ridgefield Bd. of Educ.*, 808 F. Supp. 926, 931 (D. Conn. 1992); and *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 (1st Cir. 1991)). Accordingly, the court held that neither Section 209(b) of the Clean Air Act nor

Section 32902(f) of EPCA immunizes California's AB 1493 Regulations (upon which the DEC Regulations are based) from preemption under EPCA.[3]

Lest there be any doubt that the *Central Valley* court has expressly considered and rejected every argument offered by the Defendants concerning the issue of EPCA preemption, the following table juxtaposes the arguments set forth in the Defendants' Motion against the *Central* Valley court's conclusions:

Defendants' Argument	*Central Valley* Court's Conclusion
"[O]nce approved by EPA under Section 209(b), California and Vermont's emission standards achieve federal status under EPCA as 'other motor vehicle standards of the Government.' 49 U.S.C. §32902(f). Given this status, Vermont's standards cannot be preempted under Section 32919(a)." Defendants' Motion at 12.	"Section 209(b) does not provide that the regulations, once EPA grants a waiver, become federal law and are thereby rendered immune from preemption by other federal statutes. … [T]he statutory language [of the Clean Air Act] explicitly disclaims any special status for the California regulations under other federal statutes." *Central Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1173.
"[M]otor vehicle emission standards whose fuel economy effects NHTSA is required to consider when setting CAFE standards under Section 32902(f) cannot be 'state standards relating to fuel economy standards' that are preempted under Section 32919(a)." *Id.* at 5	"'EPCA's decisionmaking factor provision is neither a saving clause nor a waiver provision.'" *Id.* at 1174 (quoting Light Truck Standards, 71 Fed. Reg. at 17669).

[3] Although it is true that the holding of the *Central Valley* court was in reference to the conflict preemption claims asserted in that action, there is no reason in law or logic why the result would be any different with respect to EPCA's express preemption provision. Indeed, the inclusion of an express preemption clause worded as broadly as EPCA's strengthens preemption here.

Defendants' Argument	*Central Valley* Court's Conclusion
"Once approved by EPA under Section 209(b), California and Vermont's GHG standards, like the other standards covered by Section 32902(f), will therefore make up the regulatory background or baseline that informs NHTSA's calculation of maximum feasible fuel economy levels." *Id.* at 9.	"Defendants contended that requiring NHTSA to consider the California regulations made them 'part of EPCA.' Defendants urge that the requirement that NHTSA consider the California regulations amounts to Congressional authorization of such regulation, regardless of their effects on the EPCA's goals. However, a congressional requirement that a decision maker 'consider' a factor does not deserve the weight that Defendants place on it." *Id.* at 1173.
"Congress did not intend for EPCA's fuel economy program to supplant 'other motor vehicle standards of the Government,' 49 U.S.C. § 32902(f), including, specifically, EPA-approved emission standards. … Rather, to achieve the objectives of Congress, NHTSA must consider such standards when deciding maximum feasible fuel economy levels." *Id.* at 21.	"The requirement that the Secretary 'shall consider" the effect of the California regulations does not indicate congressional intent to permit regulations that are obstacles to the EPCA's goals, such as ensuring vehicle safety, the economic health of the industry, and consumer choice." *Id.*
"[I]f California's (and Vermont's) GHG emissions standards are approved by EPA under Clean Air Act Section 209(b), the GHG regulations cannot obstruct congressional objectives or NHTSA's method of determining CAFE standards." *Id.* at 21.	"On its face, the language [of Section 209(b)] does not endorse regulations that present obstacles to the objectives of the EPCA, nor do the criteria considered by EPA in granting a waiver ensure that such interference will not occur." *Id.*

Recognizing the inextricable box in which the *Central Valley* court's decision has placed them, the Defendants do not even attempt to distinguish that case. Rather, they are reduced to arguing repeatedly that that court was simply incorrect in its holding and reasoning. *See, e.g.*, Defendants' Motion at 5 ("the *Central Valley* court made a fundamental mistake" on the EPCA preemption claim); *id.* at 13 ("the *Central Valley* court erred" in its construction of Section 32902(f)); *id.* at 21 n.11 ("the *Central Valley* court erred" in its discussion of the *Skysign* case); *id.* at 22 ("the *Central Valley* court erred" in its reliance on NHTSA's discussion of preemption in the Light Truck Standards). As discussed below, however, the *Central Valley* court's decision

on this issue was not in error. To the contrary, it is entirely consistent with NHTSA's interpretation of its obligations under Section 32902(f), and it is correct on the merits.

B. NHTSA Agrees That Section 32902(f) Does Not Limit The Preemptive Scope Of Section 32919(a) Or Allow States To Adopt Regulations That Conflict With EPCA's Goals

Not only has the *Central Valley* court considered and rejected the Defendants' argument, but NHTSA has as well. In fact, this question was squarely presented to NHTSA during the rulemaking for the recent Light Truck Standards. When NHTSA issued its notice of proposed rulemaking for the Light Truck Standards, the agency set forth its initial conclusions that state greenhouse gas regulations are preempted by EPCA and conflict with the federal fuel economy program. *See* Notice of Proposed Rulemaking: Average Fuel Economy Standards for Light Trucks: Model Years 2008-2011, 70 Fed. Reg. 51414, 51457 (Aug. 30, 2005). This discussion was the subject of extensive comments. For example, Defendant-Intervenor, Natural Resources Defense Council, argued in its comments to the proposed rulemaking that state greenhouse gas regulations cannot be preempted because "the National Highway Transportation Safety Administration [sic] is required by law to take federal and California air pollution standards into account when determining new fuel economy targets." *See* Request for Judicial Notice (filed concurrently herewith), Exh. A (comments of NRDC) at 30. NHTSA addressed these comments in a section of the preamble to the final Light Truck Standards entitled "EPCA's Provision Specifying Factors To Be Considered in Setting Average Fuel Economy Standards Does Not Limit Preemption Under 49 U.S.C. Chapter 329." Light Truck Standards, 71 Fed. Reg. at 17669.

> EPCA does not include any exception to its preemption provision that would cover State GHG and CO2 standards. Nevertheless, some commenters opposing preemption suggested that Section 32902(f), which lists the factors that NHTSA must consider in determining the level at which to set fuel economy standards, prevents preemption by requiring consideration, by NHTSA, of the effect of other Government standards, including emissions standards, on fuel economy.

> EPCA's decisionmaking factor provision is neither a saving clause nor a waiver provision. Nor does NHTSA interpret it as saving state emissions standards that effectively regulate fuel economy from preemption. The agency interprets that provision only to direct NHTSA to consider those State standards that can otherwise be validly adopted and enforced under State and Federal law.

Id.

NHTSA also addressed the argument raised by the Defendants here that a CO2 regulation should be treated no differently from a preemption perspective than the regulation of any other automobile emission, the control of which may impact fuel economy either positively or negatively.[4] *See* Defendants' Motion at 15 ("Congress understood that Clean Air Act emission standards – including both EPA and California standards – could have significant positive and negative impacts on fuel economy"). Mindful of California's authority to enact emissions regulations under the Clean Air Act and the requirement in EPCA that it take such regulations into account in setting fuel economy standards, the agency engaged in a "carefully calibrated interpretation of EPCA's express preemption provision that harmonizes the two acts to the extent possible." Light Truck Standards, 71 Fed. Reg. at 17669. NHTSA's well-reasoned conclusion reconciles the two statutes in such a way so as to avoid any conflict between their language or intent:

> NHTSA does not interpret EPCA's express preemption provision as preempting State emissions standards that only incidentally or tangentially affect fuel economy. These standards include, for example, given current and foreseeable technology, the existing emissions standards for CO, HC, NOX, and particulates. They also include the limits on sulfur emissions that become effective in 2007. NHTSA considers such standards under the decisionmaking factors provision of EPCA since, under applicable law, they can be adopted and enforced and therefore can have an effect on fuel economy.

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[4] Thus, the Defendants are demonstrably wrong where they contend that "NHTSA offers no compelling reason for distinguishing between emission standards for carbon dioxide and other pollutants that invoke the same technology." Defendants' Motion at 26.

> * * *
>
> Preempted standards [on the other hand] include, for example: (1) A fuel economy standard; and (2) A law or regulation that has essentially all of the effects of a fuel economy standard, but is not labeled as one (example: State tailpipe CO2 standard).
>
> This reading of EPCA's express preemption provision allows that provision to function in a consistent way, without irrational limitation, to protect the national CAFE program from interference by any State standard effectively regulating fuel economy. It also simultaneously maximizes the ability of EPCA and the Clean Air Act to achieve their respective purposes.
>
> NHTSA's judgment is that the agency should distinguish between motor vehicle emission standards for emissions other than CO2 (e.g., HC, CO, NOX and PM) and motor vehicle emission standards for CO2. Those other emissions are not directly and inextricably linked to fuel economy. NHTSA's current view is that standards for emissions other than CO2 merely affect the level of CAFE that is achievable and thus only incidentally affect fuel economy standards. Accordingly, we believe that regulation of these emissions is not rulemaking inconsistent with the operation of preemption principles under EPCA.

Id.

This is the critical distinction that the Defendants overlook. California's authority to enact emissions regulations for traditional pollutants such as carbon monoxide, hydrocarbons and oxides of nitrogen remains unquestioned, even though the control of such pollutants may have an indirect or tangential impact on fuel economy. But a CO2 regulation does not have an indirect or tangential impact on fuel economy. It is fuel economy. A requirement, for example, that a gasoline-powered car emit no more than 205 grams of CO2 per mile is the same thing as requiring it to achieve at least 43 miles per gallon. *See* Haskew Affidavit (filed in support of AIAM's motion for summary judgment), ¶ 22; Haake Affidavit (filed in support of AIAM's motion for summary judgment), Exh. E (CARB memorandum stating that the 2016 standard for passenger cars "amounts to 43 mpg"). It is therefore impossible for NHTSA to merely take a state CO2 regulation into account without completely succumbing to the fuel economy regime required by that state regulation. This is the basis for NHTSA's conclusion that the argument

advanced by the Defendants here "would irrationally limit [EPCA's preemption] provision and leave NHTSA's role in administering the CAFE program open to a substantial risk of abrogation." Light Truck Standards, 71 Fed. Reg. at 17669.

C. NHTSA's Preemption Discussion Is Entitled to Deference

The Defendants try to sidestep NHTSA's conclusion that a state CO2 regulation is preempted by EPCA and would interfere with the federal fuel economy program by arguing that it "is merely an agency legal opinion," "has nothing to do with that rule," and is therefore entitled to no deference at all. Defendants' Motion at 22. The Defendants are wrong on all accounts.

First, NHTSA's determination is derived from a detailed and technical analysis of the relationship between CO2 emissions and fuel economy, as well as an assessment of the impact of state standards on the federal program. *See, e.g.*, Light Truck Standards, 71 Fed. Reg. at 17659-61 (describing the technical basis for its conclusion that "[f]uel consumption and CO2 emissions from a vehicle are two 'indissociable' parameters" such that "fuel economy is directly related to emissions of greenhouse gases such as CO2"). As such, the discussion falls squarely within the agency's technical expertise and is entitled to deference. *See Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (noting that Chevron deference is applicable even to questions of agency jurisdiction and preemption of state power); *Blue Cross & Blue Shield, Inc. v. Dep't of Banking & Finance*, 791 F.2d 1501, 1506 (11th Cir. 1986) (determination by Office of Personnel Management that state statute was preempted by ERISA was entitled to "'great deference'" if the determination is reasonable) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 322 (2d Cir. 2000), is instructive on this point. The issue there was whether the Federal Communications Act and

regulations promulgated by the Federal Communications Commission ("FCC") preempt a local zoning board's power to condition a permit to construct a communications tower on a requirement that the owner remedy any radio frequency interference. The Second Circuit held that they did. In doing so, the court relied in part on a prior adjudicatory decision by the FCC that a different locality's attempt to regulate radio frequency interference was preempted by the Federal Communications Act. The court noted that "[a]n agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rule-making, but also when it interprets through adjudication," and concluded that such deference was afforded to decisions regarding preemption. *Id.*

Second, NHTSA's determination on this point was an indispensable part of its rulemaking. NHTSA has the sole responsibility under federal law for determining what the "maximum feasible" fuel economy level is and for setting standards at that level. Allowing the individual states to effectively set a more stringent standard for light trucks would render NHTSA's rulemaking a dead letter. Light Truck Standards, 71 Fed. Reg. at 17668 (state CO2 regulations "would 'abrogate EPCA's regime,' rendering NHTSA's careful balancing of consideration[s] a nullity"). Unsurprisingly, a federal agency may declare state regulation preempted in order to protect the discretionary powers conferred on it by Congress. *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982); *Flagg v. Yonkers S&L Ass'n*, 396 F.3d 178, 182-83 (2d Cir. 2005).

Here, NHTSA's preemption analysis flows from that agency's "special understanding of the likely impact of both state and federal requirements, as well as [its] understanding of whether (or the extent to which) state requirements may interfere with federal objectives." *Medtronic*,

Inc. v. Lohr, 518 U.S. 470, 506 (1996) (Breyer, J., concurring in part and concurring in the judgment). Thus, NHTSA's conclusion that "[a] state's adoption and enforcement of a CO2 standard for motor vehicles would infringe on NHTSA's discretion to establish CAFE standards consistent with Congress' guidance and threaten the goals that Congress directed NHTSA to achieve," Light Truck Standards, 71 Fed. Reg. at 17669, is entitled to deference.[5]

Finally, NHTSA had to decide the validity of the California CO2 regulations in order to fulfill its obligation to consider "the effect of other motor vehicle standards of the Government on fuel economy," in setting the CAFE standard. 49 U.S.C. § 32902(f). The dilemma faced by NHTSA is that because CO2 emission limits are the functional equivalent of fuel economy standards, the only way for NHTSA to have taken the DEC Regulations into account in the Light Truck Standards would have been for the agency to establish the CAFE standards at the same level as mandated by these state standards – and conclude that such a standard would be economically practical and not have adverse safety consequences. Otherwise, there would be effectively two separate fuel economy regimes: the more stringent standard in those states adopting the California greenhouse gas regulations, and the CAFE standards applicable in the rest of the country. EPCA, however, mandates just one national fuel economy regime. Therefore, NHTSA had to determine if the DEC Regulations constituted a valid exercise of state

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[5] The Defendants set up a straw-man where they argue that NHTSA's determination relies upon EPA's conclusion that the Clean Air Act does not authorize federal regulation of greenhouse gases which is currently under review in the Supreme Court. Defendants' Motion at 23. While it is true that NHTSA referred to EPA's conclusion that "Congress has not authorized the Agency to regulate CO2 emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks," Light Truck Standards, 71 Fed. Reg. at 17658 (quoting Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003)), it is clear that that discussion was a very minor part of EPCA's entire analysis of the preemption issue, which spans sixteen pages in the Federal Register. *Id.* at 17654-70.

authority in order to decide whether it was required to take them into consideration in setting the CAFE standards.

D. An Independent Analysis Shows That The DEC Regulations Are Not Immune From Federal Preemption By Virtue Of Section 209(b) Of The Clean Air Act And Section 32902(f) Of EPCA

Even if this Court were not to defer to NHTSA's determination that state greenhouse gas regulations are both expressly and impliedly preempted by EPCA, and even if the Court were not entirely persuaded by the reasoning of the *Central Valley* court, an independent analysis would lead to the same conclusion. Nothing in either the Clean Air Act or EPCA can be read to immunize the DEC Regulations from preemption under Section 32919(a) of EPCA or to allow the State of Vermont to enact a regulation that conflicts with the federal fuel economy program.

1. Section 209(b) Of The Clean Air Act Does Not Waive Preemption Under Other Federal Laws

The heart of the Defendants' argument is that "[o]nce approved by EPA under Section 209(b), California's emission standards achieve federal status under EPCA as 'other motor vehicle standards of the Government,'" and therefore cannot be preempted under EPCA. Defendants' Motion at 12 (quoting 49 U.S.C. § 32902(f)). Neither of the statutory provisions cited has the effect the Defendants ascribe to them.

First, the plain language of the waiver provision of Section 209(b) of the Clean Air Act refutes the broad application espoused by the Defendants. Under the Clean Air Act, states are preempted from enacting emissions regulations from new motor vehicles. Section 209(a) of the Act provides in relevant part:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part [42 U.S.C. §§ 7521, *et seq*.].

42 U.S.C. § 7543(a). The only exceptions to this broad general preemption appear in Section 209(b) and Section 177 of the Act. Section 209(b) is a grandfather clause for states that had adopted their own motor vehicle emissions standards "prior to March 30, 1966," a proviso that deliberately applied only to California. 42 U.S.C. § 7543(b). Under that section, EPA is to "waive" federal preemption for a California standard if certain preconditions are met. *Id.* Section 177 provides a mechanism for other states to adopt California's emissions standards. 42 U.S.C. § 7507.

On its face, Section 209(b) provides only that a waiver exempts a California regulation from express preemption under "***this section.***" 42 U.S.C. § 7543(b)(1) (emphasis added). The statute further provides that "compliance with such State standards shall be treated as compliance with applicable Federal standards ***for purposes of this title*** [42 U.S.C. §§ 7521 et seq.]." *Id.* § 7543(b)(3) (emphasis added). The plain negative implication of these provisions is that a waiver under Section 209(b) does not "federalize" the California regulations and does not waive preemption under any other federal law.

In fact, the notion that an emissions regulation waived under Section 209(b) is given the status of federal law has been rejected by at least two courts in contexts that, though not directly on point, were indicative of the differentiation between a California state standard and a federal standard. *See Virginia v. EPA,* 108 F.3d 1397 (D.C. Cir. 1997) (holding that EPA could not require states in the Northeast Ozone Transport Region to adopt California's vehicle emissions standards and noting that the California standards are a type of "control measure" or "program" that states could implement, but not a federal standard or law); *United States v. Chrysler Corp.*, 591 F.2d 958, 961 (D.C. Cir. 1979) ("Federal preemption of state law displaces state authority. The decision [of the EPA] not to preempt simply allows both federal and state authorities to

regulate emission controls."). *See also Central Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1173 ("[T]he statutory language [of Section 209(b)] explicitly disclaims any special status for the California regulations under other federal statutes.")

Accordingly, even if California were to obtain a waiver for its AB 1493 Regulations, that waiver would only exempt the regulations from preemption under the Clean Air Act. It would not render the regulations immune from challenge under any other federal law.

2. Section 32902(f) Of EPCA Does Not Abrogate EPCA's Broad Express Preemption Provision Or Countenance A State Regulation That Would Upset The Federal Fuel Economy Program

The Defendants also argue that the requirement in Section 32902(f) of EPCA that NHTSA must "consider … other motor vehicles standards of the Government" in setting fuel economy standards has the substantive effect of rendering a state regulation immune from preemption – even if that regulation is "related to fuel economy standards" under Section 32919(a) and even if the regulation poses a direct conflict with the federal fuel economy program. Defendants' Motion at 11-13. The Defendants' argument, however, finds no support in the statute, in the caselaw, or in logic.

The fallacy of the Defendants' argument on this point appears on the face of their brief where they try to rewrite EPCA's express preemption provision. They argue that "Section 32919(a) preempts any state standard that is related to fuel economy standards and that fall [sic] outside Section 32902(f)." Defendants' Motion at 14 (underline in original). Of course, the text of EPCA's express preemption provision contains no such exception. As NHTSA has concluded:

> EPCA does not include any exception to its preemption provision that would cover State GHG and CO2 standards [and] . . . EPCA's decisionmaking factor provision is neither a saving clause nor a waiver provision. Nor does NHTSA interpret it as saving state emissions standards that effectively regulate fuel economy from preemption.

Light Truck Standards, 71 Fed. Reg. at 17669.

The requirement of Section 32902(f) that NHTSA "consider" other motor vehicles standards likewise fails to support the expansive reading the Defendants attribute to it. In interpreting a statute, a court must give words their plain meaning. *Tyler v. Douglas*, 280 F.3d 116, 122 (2d Cir. 2001). Black's Law Dictionary defines "consider" as "to fix the mind on, with a view to careful examination; to examine, to inspect. To deliberate about and ponder over. To entertain or give heed to." Black's Law Dictionary 306 (6th ed. 1990). As the *Central Valley* court correctly pointed out, "Congress's use of the term 'consider' in a statute requires an actor to merely 'investigate and analyze' the specified factor, but not necessarily act upon it." *Central Valley Chrysler-Jeep*, 456 F. Supp. 2d at 1173 (quoting *City of Davis v. Coleman*, 521 F.2d 661, 679 (9th Cir. 1975)).

This interpretation of the limited impact of the "consider" requirement is supported by countless cases. *See, e.g., U.S. v. Kingdom (U.S.A.), Inc.*, 157 F.3d 133, 136 (2d Cir. 1998) (although 18 U.S.C. § 3553(a) provides that a district court "shall consider … any pertinent policy statement issued by the Sentencing Commission" the court is not bound by them and may impose a sentence outside of the ranges set forth in the policy statement); *Conservation Law Foundation v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000) (although the Federal Power Act requires the Federal Energy Regulatory Commission to "consider" the recommendations of the United States Fish and Wildlife Service under 16 U.S.C. § 803, it may reject those recommendations if they are inconsistent with the purposes of the Act); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 n.2 (D.C. Cir. 1991) ("NEPA does not require that any particular substantive action be taken in response to the environmental impact statement. The statute merely requires that the agency consider the statement and that it be made available to legislators, agencies, and

the public so that environmental concerns will be adequately taken into account."); *Getty v. Federal Sav. and Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) ("When a statute requires agencies to 'consider' particular factors, 'it imposes upon agencies duties that are essentially procedural.'") (quoting *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980)). The Defendants do not cite a single case that supports their argument that the requirement that an agency "consider" a state regulation renders that regulation immune from a preemption challenge, or gives the state free reign to enact regulations that conflict with a federal program.

Finally, the only textual support cited by the Defendants for their argument – the definition of "Federal standards" in Pub. L. No. 94-163 § 502(d)(3)(D)(i) which has since been repealed – provides no support at all. *See* Defendants' Motion at 10, 17. When EPCA was originally enacted, the statute provided for specific fleet-average fuel economy levels for model years 1978 through 1980. Pub. L. No. 94-163 § 502(a)(1). EPCA allowed a manufacturer to seek a relaxation of these statutorily mandated standards if the manufacturer could show that "Federal standards" resulted in a "fuel economy reduction" (and if certain other conditions were met). Pub. L. No. 94-163 § 502(d). As a definitional matter, the statute provided that "[f]or the purposes of this subsection" – i.e., subsection (d) to Section 502 – the term "Federal standards" includes "emissions standards applicable by reason of Section 209(b) of [the Clean Air] Act." Pub. L. No. 94-163 § 502(d)(3)(D)(i). The limitation of the definition of "Federal standards" only "[f]or the purposes of this subsection" necessarily means that it has no impact on the preemption provision which was set forth in a different subsection of EPCA. Pub. L. No. 94-163 § 509(a); 49 U.S.C 32919(a).

Simply put, nothing in the plain language of Section 32902(f) or in the legislative history of EPCA commands NHTSA to bow completely to a state regulation – especially if that regulation would upset the federal fuel economy program. That, however, is precisely what the Defendants would have this Court hold. With respect to gasoline-powered motor vehicles, there is no dispute that a standard requiring a passenger car to emit no more than 205 grams of CO2 per mile is identical to requiring it to achieve a fuel economy of at least 43 miles per gallon. Hughes Depo. at 270:8-271:18 (attached as Exh. C to the Haake Aff. filed in support of AIAM's motion for summary judgment); Albu Depo. at 61:14-63:19 (attached as Exh. D to the Haake Aff. filed in support of AIAM's motion for summary judgment); Albu Depo. Exh. 4 (attached as Exh. E to the Haake Aff. filed in support of AIAM's motion for summary judgment). No other emissions regulation enacted by either U.S. EPA or the State of California has the direct effect of imposing a minimum fuel economy level. If NHTSA were required to not just "consider" the DEC Regulation, but to also affirmatively adjust the fuel economy for passenger cars to account for them, then the only action it could take would be to set the CAFE standards at the level comparable to the California CO2 emissions standard – in effect, substituting California's judgment for its own. To do otherwise would mean that the CAFE standards would be effectively null and void in those states adopting the California regulations because fuel economy would be controlled by the more stringent California standard and not by CAFE.

Finally, the Defendants' statutory construction argument should be rejected because it would effectively foreclose any court or agency from determining whether the DEC Regulations are preempted by EPCA – a procedural anomaly Congress could never have intended. As the Defendants point out, the DEC Regulations will only be enforceable if U.S. EPA grants the waiver that has been requested by the State of California. Significantly, in its waiver request, the

California Air Resources Board argued that EPA's review of the waiver request is narrowly confined to the criteria specifically enumerated in Section 209(b) and may not include considering preemption under any other statute: "U.S. EPA cannot apply any additional criteria – such as potential conflicts with other law – in evaluating California's waiver requests." *See* Request for Judicial Notice (filed concurrently herewith) Exh. B at 10. In an earlier waiver request, CARB similarly claimed:

> EPCA is administered not by U.S. EPA but by the National Highway Traffic Safety Administration (NHTSA). Arguments raising constitutional claims and preemption issues not involving the [Clean Air Act] are ***beyond the scope of the Administrator's review*** and a waiver or scope-of-the-waiver proceeding is ***not the proper forum*** for such claims.

Id., Exh. C at 15 (emphasis added). The D.C. Circuit has held that it is not an abuse of discretion for EPA to refuse to look beyond the narrow confines of Section 209(b) in assessing a waiver and to decline to consider whether the California regulations are otherwise unconstitutional. *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1114 (D.C. Cir. 1979).

Here, the Defendants argue that if the waiver is granted, then as a matter of law the DEC Regulations cannot be expressly or impliedly preempted by EPCA. If the Defendants are right, then any review of EPCA preemption would be procedurally barred – EPA cannot consider the question in deciding the waiver, and if the waiver is granted, then the Court here has nothing to decide because as a matter of law there is no preemption. In the end, no court or federal agency would have the authority to assess whether the regulations are preempted under EPCA. A reading of the Clean Air Act and EPCA that procedurally forecloses any review of an important constitutional question cannot be a correct interpretation of the law, and yet it is the inevitable outcome of the Defendants' position.

3. The Legislative History Of The 1977 and 1991 Clean Air Act Amendments Refute The Defendants' Argument

The Defendants cite the legislative history of the Clean Air Act Amendments of 1977 for the proposition that that Act envisions that California or federal emissions standards will require the use of technologies that will simultaneously reduce emissions and improve fuel economy. Defendants' Motion at 16. However, a closer look at those amendments as well as the 1990 Clean Air Act Amendments demonstrates that Congress has consistently differentiated between emissions standards that only tangentially impact fuel economy and CO2 standards that effectively dictate fuel economy.

As the Defendants' correctly point out, one concern expressed in the legislative history of the Clean Air Act Amendments of 1977 was whether "the automobile industry can achieve the [emissions] standards specified in the Committee bill while it simultaneously meets the mandated fuel economy goals" in EPCA. H.R. Rep. No. 95-294 at 248 *reprinted in* 1977 U.S.C.C.A.N 1077, 1327.[6] Relying in part on a study conducted by the National Academy of Sciences ("NAS"), the committee concluded that the industry could. *Id.* at 1324-26. Significantly, the Committee referred to the NAS's "finding that fuel economy should occur ***independent of emission levels***" and that "[a] significant improvement [in fuel economy] can be achieved by changes that ***are independent of emissions***." *Id.* at 1325-26 (emphasis added). The NAS considered a number of measures that would enhance fuel economy but would not implicate the emissions standards of the Clean Air Act. These measures included a reduction in the weight of vehicles; change in the vehicle mix to include a larger proportion of smaller cars;

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[6] As discussed above, at that time the EPCA statute provides for specific fleet-average fuel economy levels for model years 1978 through 1980. Pub. L. No. 94-163 § 502(a)(1).

reduction in the ratio of engine power to vehicle weight; use of more efficient transmissions; use of radial tires and improved suspensions; and use of aerodynamic configurations that reduce drag. *Id.* Thus, contrary to the Defendants' argument, *see* Defendants' Motion at 25-26, Congress and the NAS specifically differentiated between those measures that reduce fuel consumption from those measures that reduce the emission of pollutants.

Unlike the emission of pollutants such as carbon monoxide, hydrocarbons and oxides of nitrogen – which can be controlled through measures other than reducing the amount of fossil fuel consumed by a motor vehicle – carbon dioxide emissions can only be reduced by cutting fuel consumption. This was one of the reasons that Congress declined to set CO2 emissions limits in the Clean Air Act Amendments of 1990. A Senate committee bill first offered in 1989 in connection with these amendments included such a provision specifically requiring EPA to set CO2 emission standards for motor vehicles. S. Rep. No. 101-228 at 98-100, 644, § 216 (1989). That provision was heavily criticized, in part because the impact of such regulation would be

> to mute all laws and regulations dealing with corporate average fuel economy (CAFE). … To meet the committee bill's CO2 standard, in fact, cars will eventually have to attain a 40-mile per gallon fuel economy. Consequently, the CAFE standard becomes mute – a "deadwood" artifact of law with no consequence. The committee provision would have the effect of completely supplanting the current CAFE standard.

Senate Comm. on Environment and Public Works, S. Prt. 103-38 (statement of Senator Symms) *reprinted in* IV A Legislative History of the Clean Air Act Amendments of 1990 at 5042, 5047. The final version of the Senate bill did not include this provision. Instead, the 1990 amendments provided for other, explicitly non-regulatory, approaches to addressing the issue of CO2 emissions and global warming. *See* 42 U.S.C. § 7403(g); 42 U.S.C. § 7671a(e).

4. Even If Section 32909(f) Were A Savings Clause, This Court Would Still Be Required To Determine Whether The Implementation Of The DEC Regulations Would Conflict With The Goals Of EPCA

Even if this Court were to agree with the Defendants and find that Section 32902(f) amounts to an exception to the broad preemption provision of Section 32919(a) – and as discussed above it should not – that would not render the regulations immune from considerations of conflict preemption. The case of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), speaks directly to this point.

The issue in *Geier* was whether a common law tort action claiming that an automobile manufacturer was negligent for not installing airbags in its vehicles was preempted by a Federal Motor Vehicle Safety Standard (FMVSS 208). FMVSS 208 required auto manufacturers to equip some, but not all, of their vehicles with passive restraints. The National Traffic and Motor Vehicle Safety Act (pursuant to which the safety standard was promulgated) contained an express preemption provision, but that provision contained a savings clause that exempted state common law claims from preemption. The Court nevertheless held that although the savings clause removed the common law tort claim from the scope of the Act's express preemption provision, it did "*not* bar the ordinary working of conflict pre-emption principles." *Geier,* 529 U.S. at 869 (italics in original). The Court found that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." *Id.* The Court further noted that it "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Id.* at 870 (citing *United States v. Locke*, 529 U.S. 89 (2000); *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-228 (1998) and *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

Turning to the merits, the Court found that the federal safety standard did not express a policy of "the more airbags, and the sooner, the better." *Geier*, 529 U.S. at 874. Rather, the standard was designed to "bring about a mix of different [passive safety] devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives." *Id.* at 875. The court therefore held that a rule of tort law that required auto makers to install airbags on all of their vehicles or face civil liability would stand "as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* at 881.

Like the safety standard at issue in *Geier*, EPCA does not express a policy of "the more fuel efficient vehicles, and the sooner, the better." Rather, its purpose is to reach a delicate balance between fuel economy, consumer choice, economic impact on the industry, employment, and safety. Based on these criteria, NHTSA determines what the "maximum feasible" fuel economy level is. *See, e.g.*, Light Truck Standards, 71 Fed. Reg. at 17569 (stating that NHTSA "balanced the express statutory factors and other relevant considerations, such as safety concerns, effects on employment and the need for flexibility to transition to a Reformed CAFE program that can achieve greater fuel savings in a more economically efficient way" and "determined that the standards … represent the maximum feasible fuel economy level ….")

This reasoning of *Geier* should therefore apply with even greater force here. The express preemption provision at issue in *Geier* specifically allowed for the type of common law action that was before the Supreme Court – thus signaling Congress' intent that such actions not be preempted. Nevertheless, the Court held that the common law action before it was preempted because it conflicted with the goals of the federal safety standard. Here, there is no exception to

the broad preemption provision in EPCA. The only indication offered by the Defendants that Congress intended to allow a California emissions standard to conflict with EPCA's goals and NHTSA's administration of the federal fuel economy program is that the agency "consider" such standards in setting CAFE levels. If the express savings clause in *Geier* was insufficient to abrogate the principle of conflict preemption, then Section 32902(f) certainly fails to do so.

Therefore, even if the "consider" requirement of Section 32902(f) had the effect of limiting the scope of the express preemption provision of Section 32919(a) as the Defendants claim, this Court would still need to determine whether the DEC Regulations conflict with the federal fuel economy program. On this basis alone, the Defendants' Motion must be denied.

IV. CONCLUSION

For the reasons set forth above and in AIAM's separate motion for summary judgment, the Defendants are not entitled to a judgment on the pleadings. The DEC Regulations are related to "fuel economy standards" under EPCA's express preemption provision and on their face conflict with the federal CAFE program. Nothing in either the Clean Air Act or EPCA grants the State of Vermont the authority to regulate fuel economy or to enact a regulation that conflicts with the goals of EPCA. The Defendants' Motion should be denied.

DATED: January 16, 2007

Respectfully submitted,

/s/ Debra L. Bouffard

DEBRA L. BOUFFARD
R. JEFFREY BEHM
SHEEHEY FURLONG & BEHM P.C.
30 Main Street
P.O. Box 66
Burlington, VT 05402-0066
Telephone: (802) 864-9891
Facsimile: (802) 864-6815

Attorneys for Association of International Automobile Manufacturers

RAYMOND B. LUDWISZEWSKI
CHARLES H. HAAKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Of Counsel

CERTIFICATE OF SERVICE

I, Debra L. Bouffard, counsel for Plaintiff Association of International Automobile Manufacturers, hereby certify that on January 16, 2007, I served a copy of (1) Opposition of Plaintiff Association of International Automobile Manufacturers to Defendants' and Defendant-Intervenors' Consolidated Motion for Judgment on the Pleadings; (2) Appendix of Other Authorities; and (3) Request for Judicial Notice with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Robert B. Hemley, Esq.
Matthew B. Byrne, Esq.
Gravel and Shea
76 St. Paul St.
P.O. Box 369
Burlington, VT 05402-0369

Kevin O. Leske, Esq.
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

Bradford W. Kuster, Esq.
Conservation Law Foundation
15 East State St., Suite 4
Montpelier, VT 05602

Benjamin A. Krass, Esq.
Matthew Forte Pawa, Esq.
Law Offices of Matthew F. Pawa, P.C.
1280 Centre St., Suite 230
Newton Centre, MA 02459

Stuart A.C. Drake, Esq.
Andrew Clubok, Esq.
Kirkland & Ellis, LLP
655 Fifteenth St., N.W.
Washington, D.C. 20005-5793

Yueh-ru Chu, Esq.
New York State Office of the
Attorney General
120 Broadway, 26th Floor
New York, NY 10271

Dated: January 16, 2007.

By: */s/ Debra L. Bouffard*
Debra L. Bouffard
SHEEHEY FURLONG & BEHM P.C.
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891

Attorneys for Association of International Automobile Manufacturers