UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREEN MOUNTAIN CHRYSLER-PLYMOUTH-DODGE-JEEP, et al., Plaintiffs,	)	
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, Plaintiff, v. GEORGE CROMBIE,[1] Secretary of the Vermont Agency of Natural Resources, et al., Defendants.	)	Case Nos. 2:05-CV-302, and 2:05-CV-304 (Consolidated)

DEFENDANTS AND DEFENDANT-INTERVENORS' OPPOSITION TO PLAINTIFF ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS' MOTION FOR SUMMARY JUDGMENT

Defendants and Defendant-Intervenors (collectively "Defendants" or the "State"), agree with Plaintiff Association of International Automobile Manufacturers ("AIAM") that Plaintiffs' claim under the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. §§ 32901-32919, presents a legal issue that can – and should— be adjudicated now without the need of a trial. Furthermore, as demonstrated by Defendants' and Defendant-Intervenors' Consolidated Motion for Judgment on the Pleadings and Memorandum in Support ("Def. JOP") (Doc. #162, filed November 13, 2006), Defendants believe that no trial is necessary for this Court to resolve any of the claims presented in these cases.

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[1] Secretary George Crombie has been substituted for former Acting Secretary Dalmasse, pursuant to Fed. R. Civ. P. 25(d)(1).

Defendants' arguments in opposition to AIAM's motion overlap substantially with the arguments already presented in Defendants' own motion for judgment on the pleadings. Thus, in order to avoid duplication, wherever possible this brief in opposition will summarize those arguments and refer the Court to the relevant pages of Defendants' memorandum in support of the motion for judgment on the pleadings. [2]

STANDARD OF REVIEW

Defendants agree with AIAM that the EPCA claim raises "primarily legal issues," AIAM Memorandum in Support of Motion for Summary Judgment ("AIAM Mem.") at 3, and that the claim may be decided on the law. This makes resolution of both AIAM's motion and Defendants' motion for judgment on the pleadings particularly appropriate at this time. Kirkland v. N.Y.S. Dep't of Correctional Servs., 482 F. Supp. 1179, (D.C.N.Y. 1980) (summary judgment was appropriate when the intervenors' briefs raised only legal issues); Romano v. Terdik, 939 F.Supp. 144, 146 (D.C. Conn. 1996) (summary judgment is proper to determine questions of statutory construction because they are legal issues).

In these cases, summary adjudication for either party is further appropriate because with respect to the EPCA claim the Defendants maintain that there are no material facts in dispute. Estate of Ester D. Reddert v. United States of America, 925 F.Supp. 261, 266 (D.C.N.J. 1996) (summary judgment was proper where resolution of issues depended upon interpretation of specific statutory language and applicable law). Finally, summary judgment may be entered in favor of the non-moving party. Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971) (court had power to enter summary judgment

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[2] Accordingly, the Defendants incorporate by reference their JOP.

for the defendant even though the defendant did not move for summary judgment); see also Faustin v. City of Denver, 423 F.3d 1192, 1198-99 (10th Cir. 2005).

THE ENERGY POLICY AND CONSERVATION ACT DOES NOT PREEMPT VERMONT'S GREENHOUSE GAS REGULATIONS.

The Plaintiffs attempt to cast the EPCA issue as a "straightforward" case of express and implied federal preemption. It is not. Unlike typical federal-state preemption cases, the "state" emission standards at issue here were adopted under federal authority granted to Vermont by Congress through the Clean Air Act. More importantly, once California's emission standards are approved by the Environmental Protection Agency under Section 209(b) of the Clean Air Act, California's and Vermont's standards gain federal status under EPCA, the very statute on which Plaintiffs base their preemption arguments.[3] For this reason, neither express nor implied preemption applies. The Defendants respectfully request that this Court deny AIAM's motion for summary judgment and enter judgment for the State of Vermont on Plaintiffs' claim of EPCA preemption.[4]

[3] As this Court has recognized when it denied the State's motion to dismiss for lack of ripeness, Vermont validly adopted the GHG regulations under Section 177 of the Clean Air Act, and now awaits final approval of California's standards by EPA through the Section 209 waiver process. Memorandum Opinion and Order at 5-6 (Doc. 165, filed Nov. 30, 2006). Based on this Court's decision that these cases are ripe, this Court should assume that EPA will grant the waiver for the purposes of adjudicating the pending dispositive motions.

[4] This Court should consider this as a cross-motion for summary judgment on the EPCA claim or enter judgment based on the Defendants' judgment on the pleadings. In the alternative, summary judgment may be entered for the non-moving party. See supra., p. 2-3.

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ARGUMENT

I. Once Approved, Vermont's Regulations Are Part Of The Federal Regulatory Structure And Not Preempted.

In two expressly coordinated federal laws, (i.e., the Clean Air Act and EPCA), Congress provided both specific criteria and procedures for the federal government to determine whether a California emission standard is valid under federal law.[5] The procedure is that California must seek a waiver of Clean Air Act preemption from EPA under Section 209(b). EPA can deny the waiver if, among several conditions, it determines California's standard is "not consistent" with EPA's own authority to regulate vehicle emissions at the federal level under Section 202 of the Act. 49 U.S.C. § 209(b)(1)(C). The threshold question whether the Clean Air Act authority under Section 202 (and therefore Section 209) extends to carbon dioxide and other greenhouse gases is presently before the Supreme Court in Massachusetts v. EPA. Beyond that, under Section 209(b)(1)(C) EPA evaluates whether the state standard meets requirements set forth in Section 202 concerning technological feasibility, economic practicability, leadtime, and safety. 42 U.S.C. §§ 7521(a)(2) & (a)(4).

If EPA grants the waiver under Section 209(b), then the California emission standard becomes an "other motor vehicle standard of the Government" under Section 32902(f) of EPCA.[6] Def. JOP at 13-14. Section 32902(f) explicitly requires the National Highway

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[5] It is important to recognize that AIAM's arguments completely fail to acknowledge any relevance of the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, to the legal issue presented in this case.

[6] Pub. L. No. 94-163 § 502(d)(3)(D)(i) ("Each of the following is a category of Federal standards: (i) Emissions standards under section 202 of the Clean Air Act, and emissions standards applicable by reason of section 209(b) of such Act."); S. Conf. Rep. 94-516 at 156 (1975), reprinted in 1975 U.S.C.C.A.N. 1956, 1997; see NHTSA, Final Average Fuel

Traffic Safety Administrations ("NHTSA") to take into account these standards, like any other federal emission standards, when setting federal fuel economy standards. Def. JOP at 9-12. Once approved by EPA under Section 209(b), California and Vermont's GHG standards, like the other standards covered by Section 32902(f), will make up the regulatory background or baseline that informs NHTSA's calculation of maximum feasible fuel economy levels.

If California's and Vermont's standards make fuel economy more difficult to achieve, then NHTSA can relax the fuel economy standards accordingly. If those standards improve fuel consumption at the same time that they reduce emissions, then NHTSA has authority to make fuel economy standards stronger. But EPCA does not give NHTSA any additional authority to approve or reject an EPA-approved California standard or to pick and choose among which "other motor vehicle standards of the Government" it will consider. Def. JOP at 11-14.

Thus, the fatal flaw in AIAM's so-called "preemption" arguments – both express and implied – is found within EPCA itself. Section 32919(a) does not preempt emission standards that Section 32902(f) recognizes as "other motor vehicle standards of the Government." Likewise, these emission standards cannot be impliedly preempted on either a field or conflict theory because they are part of EPCA's statutory scheme. Def. JOP at 9-28.

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Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17566, 17567 (2006) (including California's emissions standards in the section entitled "Federal Motor Vehicle Emissions Standards").

II. AIAM's Four Preemption Arguments Lack Merit.

AIAM makes four specific arguments to support their motion for summary judgment. As summarized below (and in the memorandum in support of Defendants' judgment on the pleadings), all of AIAM's arguments should be rejected.

A. Defendants Have Demonstrated That NHTSA's View Is Entitled To No Deference And Is Wrong.

AIAM's principal legal argument is that this Court should simply defer to NHTSA – an administrative agency – on its view that "state CO2 regulations" are preempted. AIAM Mem. at 16-17. In the judgment on the pleadings, Defendants have demonstrated that this Court should not rely on NHTSA's opinion. Def. JOP at 22-27.

As an initial matter, NHTSA's opinion on CO_2 regulations is premised on EPA's position that the Clean Air Act does not authorize regulation of greenhouse gas emissions. Def. JOP at 23. EPA's position is currently under review in Massachusetts. v. EPA, 415 F.3d 50 (D.C. Cir. 2005), cert. granted June 26, 2006, oral argument held Nov. 29, 2006, where the Supreme Court is considering whether greenhouse gases may be regulated under the Clean Air Act. Insofar as NHTSA also opines that EPCA itself preempts California and Vermont from regulating carbon dioxide emissions, the Defendants have demonstrated that NHTSA's opinion is not entitled to deference and is wrong on the merits. Def. JOP 22-27.[7]

B. EPCA Section 32902(f) Gives EPA-Approved Emission Standards Federal Status, Making Preemption Analysis Inapplicable.

AIAM fails to take into account the existence of Section 32902(f), where Congress specified that certain state standards should be regarded as federal standards under EPCA's

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[7] NHTSA's view on this issue is also being challenged by California and Vermont (and other states and environmental groups) in the U.S. Court of Appeals for the Ninth Circuit. See People ex rel. Lockyer v. NHTSA, No. 06- 72317 (filed May 2, 2006).

statutory scheme. Because Section 32902(f) confers federal status on state emission standards that are approved by EPA under the Clean Air Act, the preemption case law that AIAM cites is inapplicable and irrelevant. In any event, if this Court were to apply the Supreme Court's current case law on "related to" preemption clauses – rather than the out-of-date cases cited by AIAM (Mem. at 18) – these state emission standards would survive.

Defendants have shown that EPCA's preemption provision, Section 32919(a), does not apply to EPA-approved California standards because these regulations have federal status as "other motor vehicle standards of the Government" that NHTSA is required to consider under Section 32902(f). See Def. JOP at 11-18. Thus, this case does not involve a question of federal preemption, "straightforward" or otherwise. AIAM Mem. at 1, 18.

Even if this Court analyzed Vermont's greenhouse gas regulations under the Supreme Court's current "related to" preemption case law, Vermont's regulations would not be preempted by Section 32919(a). AIAM places great weight on the broad "connection" test described in Morales v. Trans Word Airlines, 504 U.S. 374 (1992). AIAM Mem. at 18. But the Supreme Court has since distanced itself from the Morales "connection" test, explaining in N.Y.S. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins., that the court's task in interpreting a 'related to' clause is to look "to the objectives of the [applicable federal] statute as a guide to the scope of the state law that Congress understood would survive." 514 U.S. 645, 656 (1995); see also In Re WTC Disaster Site, 414 F.3d 352, 376 (2d Cir. 2005). It is clear from examination of EPCA and the Clean Air Act that Congress understood California (and Vermont) emission standards approved by EPA would survive. Def. JOP at 18-19.

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109 State Street
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C. AIAM's Field Preemption Argument Fails Because EPCA Incorporates Emission Standards Authorized By The Clean Air Act.

AIAM next makes implied preemption arguments. AIAM Mem. at 19-23. At the outset, the Court should find that no inquiry into implied preemption is necessary here. The Supreme Court has held that where an express preemption provision "provides a 'reliable indicium of congressional intent with respect to state authority,'" neither field nor conflict preemption principles apply. Malone v. White Motor Corp., 435 U.S. 497, 505 (1978). This is such a case. As shown above, EPCA Section 32902(f) limits the preemptive scope of Section 32919(a) by giving EPA-approved California standards the status of "other motor vehicle standards of the Government." This is a definitive indicium that Congress did not intend these standards to be preempted. Accordingly, this Court's preemption analysis should end here.

Even under field preemption principles, however, there is no merit to AIAM's argument that California's and Vermont's standards "intrude into the field of fuel economy that has been reserved exclusively to the federal government." AIAM Mem. at 20. In claiming field preemption, one must show a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1947). In this case, EPCA left specific room for EPA-approved state emission standards, which qualify as "other motor vehicle standards of the Government" that NHTSA must consider under Section 32902(f). Def. JOP at 10-11, 20. The "field" that is impliedly preempted by EPCA cannot logically include other motor vehicle standards that are expressly recognized by Section 32902(f) of EPCA.

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D. Emission Standards Recognized As "Other Motor Vehicle Standards Of The Government" Do Not Conflict With The Objectives Of EPCA.

Relying on Geier v. American Honda Motor Co., 529 U.S. 861 (2000), AIAM argues that the California and Vermont standards conflict with the EPCA regime. AIAM Mem. at 21-22. The preemption analysis in Geier, however, is not applicable to this case because Geier addressed a federal statute fundamentally different from the one in play here. In this case, EPCA confers federal status on the state emission standards in question here. In contrast, the state tort-law requirement under review in Geier had no federal authorization or sanction within the federal vehicle safety law, the National Traffic and Motor Vehicle Safety Act.

The Geier Court concluded only that "[n]othing in the language of the [safety statute's] saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." Id. at 869. If there had been a provision in that statute demonstrating the intent to preserve a state action or state regulation, the Court expressly indicated that it would have given effect to it. Id. at 872 ("We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. … But there is no reason to believe Congress has done so here.").

In this case, Congress has expressly indicated its intent that certain state regulations (i.e., those that qualify as "other motor vehicle standards of the Government") are preserved, not preempted. Congress specifically required that NHTSA consider these regulations in its decisionmaking process. 49 U.S.C. § 32902(f). Thus, these "Government" standards are not extraneous state actions that upset the balance struck by Congress in EPCA because Congress expressly provided that those standards are a part of EPCA. These standards cannot conflict with EPCA, because they are part of that statutory scheme. While it is

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possible that conflict preemption under Geier might apply regarding a state standard that has no sanction within EPCA itself, that situation is not presented here.[8]

For these reasons, the various differences that AIAM alleges between the California and Vermont standards, on the one hand, and the CAFE standards, on the other, are immaterial to this case. AIAM Mem. at 22-23 (listing various alleged differences including the classification of vehicles, fuel economy levels, and pace for the adoption of fuel saving technologies). Congress did not give NHTSA authority to declare that other "Government" standards are invalid. To the contrary, NHTSA must "consider" them as part of its decisionmaking. Plaintiffs may wish that Congress had given NHTSA a separate, second role in approving or disapproving California (and Vermont) emission standards, but Congress did not do so. If they believe that NHTSA should have this power, they must seek a change from Congress.

CONCLUSION

For all the foregoing reasons, this Court should enter judgment for the State of Vermont on Plaintiffs' EPCA claim.

Respectfully submitted,

[8] The other cases cited by AIAM are equally unavailing. AIAM Mem. at 22 n.8. The first two, Michigan Canners & Freezers Ass'n, Inc., v. Agri. Mktg & Bargaining Bd, 467 U.S. 461 (1984), and Edgar v. MITE Corp., 457 U.S. 624 (1982), are each straightforward conflicts cases in which no provision of the applicable federal law authorized or sanctioned the state law or standard in question. The third case, Palmer v. Liggett Group., Inc., 825 F.2d 620 (1st Cir. 1987), merely resembles Geier in that there was no indication in the applicable federal law that Congress intended to preserve application of the state tort law system to the regulated circumstance. Unlike those cases, California's and Vermont's emission standards are expressly incorporated into EPCA once EPA issues a waiver under Section 209(b) of the Clean Air Act.

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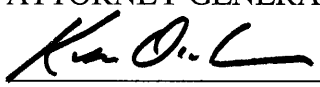
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

Kevin O. Leske
Assistant Attorney General
Scot L. Kline
Elaine O'Grady, *Of Counsel*
109 State Street
Montpelier, VT 05609-1001
Counsel for Defendants

ANDREW M. CUOMO
ATTORNEY GENERAL OF
THE STATE OF NEW YORK
Norman Spiegel
Yueh-ru Chu
Simon Wynn
Assistant Attorneys General
Environmental Protection Bureau
120 Broadway, 26th floor
New York, NY 10271
Counsel for Defendant-Intervenors
The State of New York and Comm'r Denise M. Sheehan

David D. Doniger
Natural Resources Defense Council
1200 New York Ave., NW
Washington, DC 20005
Counsel for Natural Resources Defense Council

Bradford W. Kuster
Stephen F. Hinchman
Christopher M. Kilian
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
Counsel for Defendant-Intervenors
Conservation Law Foundation, Sierra Club, NRDC, Environmental Defense and Vermont Public Interest Research Group

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

Matthew F. Pawa
Benjamin A. Krass
Law Offices of Matthew F. Pawa, P.C.
1280 Centre Street, Suite 230
Newton Centre, MA 02459
(617) 641-9550
Attorneys for Defendant-Intervenors Sierra Club, NRDC, and Environmental Defense

Dated: January 16, 2007

**Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT 05609**