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17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF CALIFORNIA – FRESNO

19 CENTRAL VALLEY CHRYSLER-JEEP, INC.,
20 et al,
21 Plaintiffs,

22 v.
23 Catherine E. WITHERSPOON, in her official
24 capacity as Executive Officer of the California
25 Air Resources Board,
26 Defendant,

27 THE ASSOCIATION OF INTERNATIONAL
28 AUTOMOBILE MANUFACTURERS
29 Plaintiff-Intervenor,

30 SIERRA CLUB, NATURAL RESOURCES
31 DEFENSE COUNCIL, ENVIRONMENTAL
32 DEFENSE, BLUEWATER NETWORK,
33 GLOBAL EXCHANGE and RAINFOREST
34 ACTION NETWORK,
35 Defendant-Intervenors.

CASE NO. CIV-F-04-6663-REC-LJO

**OPPOSITION OF PLAINTIFF-
INTERVENOR THE ASSOCIATION OF
INTERNATIONAL AUTOMOBILE
MANUFACTURERS TO DEFENDANT AND
DEFENDANT INTERVENORS' MOTION
FOR SUMMARY JUDGMENT (RIPENESS)**

DATE: November 27, 2006
TIME: 1:30 p.m.
JUDGE: Anthony W. Ishii

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Defendants have craftily based their Motion and the supporting documents on certain
 4 kernels of truth in an apparent hope to win AIAM's concession about the Motion's merits. After all,
 5 AIAM agrees with the bare statements that "U.S. EPA has not issued a waiver" for the AB 1493
 6 Regulations challenged here. Defendants' Memorandum at 1. AIAM also believes that "in the
 7 absence of a waiver from U.S. EPA, CARB's regulations are unenforceable," *id.* at 3, though it is
 8 apparent that "enforcement" has different practical meanings to Defendant and the automobile
 9 industry. And AIAM would like to be comforted by the statement by CARB's Chief Deputy
 10 Executive Officer that his agency "will not enforce the adopted greenhouse gas regulations against
 11 any regulated party until U.S. EPA has issued a waiver of preemption for the regulations."
 12 *Declaration of Thomas A. Cackette* ¶ 11. However, the Defendants' argument that this Court does
 13 not have jurisdiction over the matter for lack of ripeness – notwithstanding the fact that this Court
 14 certainly had jurisdiction to consider their earlier motion for judgment on the pleadings – is based
 15 entirely on this bare and uncertain promise not to "enforce" the regulations.

16 Setting aside the issue of whether non-binding assurances from an employee of defendant not
 17 to engage in a preempted act is sufficient to strip a court of its jurisdiction (a matter that is addressed
 18 in the opposition brief concurrently filed by the Plaintiffs), there is one glaring and fatal omission
 19 from the Defendants' papers that demonstrates why this Motion must be denied. Even though the
 20 AB 1493 Regulations are currently preempted and unenforceable, the Defendants do not claim, nor
 21 could they credibly claim, that the automobile industry is free to defer any action to comply with the
 22 regulations unless and until a waiver is granted.

23 The Defendants' omission of such a claim reveals their true agenda. Just because the CARB
 24 staff member has said CARB will not *formally* "enforce" the AB 1493 Regulations through the
 25 imposition of sanctions for failure to comply before a waiver is granted, that does not mean that the
 26 agency is not currently seeking to obtain the benefit of the regulations *as a practical matter* (and
 27 subjecting the manufacturers to the burden) by requiring manufacturers to act now to ensure that they
 28 are able to comply if a waiver is granted in the future. This subtle distinction between what CARB is

1 telling this Court about “enforcement” in this Motion and what the agency expects from the
 2 manufacturers is significant in light of three undisputed facts. First, the waiver process under Section
 3 209(b) of the Clean Air Act can take several years. Second, CARB’s own witness testified that for
 4 some manufacturers it will take up to *six years* from today to make the changes necessary to comply
 5 with the 2011 model year standard, and up to *seven years* to comply with the 2012 standard. Third,
 6 and most significantly, if EPA grants a waiver and these regulations are not enjoined, then CARB
 7 will enforce the regulations immediately, and no forgiveness will be forthcoming to account for the
 8 extensive lead time the Defendants admit is required for compliance.

9 Thus, what the Defendants desire is to have a proverbial sword of Damocles hanging over the
 10 automakers’ heads. Manufacturers simply cannot wait to see if EPA will grant the waiver before
 11 they must undertake expensive actions to ensure that they will be able to comply with the regulations
 12 if and when the sword ultimately drops. Thus, the automobile manufacturers must make the choice
 13 now between beginning the work to comply with the regulations, or do nothing and face the risk of
 14 future sanctions for noncompliance.

15 This is precisely the type of Hobson’s choice the ripeness doctrine set forth in Supreme Court
 16 precedent was specifically developed to prevent. The law is well-settled that pre-enforcement review
 17 of a state regulation is available where the action presents a predominantly legal question, and the
 18 plaintiff is faced with “the immediate dilemma to choose between complying with newly imposed,
 19 disadvantageous restrictions and risking serious penalties for violation.” *Reno v. Catholic Soc. Servs.,*
 20 *Inc.*, 509 U.S. 43, 57 (1993). This action is therefore ripe for review.

21 II. STATEMENT OF FACTS

22 As this Court is aware from other briefings in the matter, compliance with the AB 1493
 23 Regulations requires reductions in carbon dioxide (CO₂). Reducing CO₂ emissions from motor
 24 vehicles presents a unique challenge for automobile manufacturers. Because the amount of CO₂
 25 emitted depends only on the quantity and type of fuel burned, and because there is no exhaust
 26 aftertreatment device that can capture or reduce CO₂ emissions from motor vehicles, the only way to
 27 reduce CO₂ from gasoline-powered motor vehicles is to improve fuel economy. *See* November 7,
 28 2006 Declaration of Harold M. Haskew in Support of Motion of Plaintiff-Intervenor Association of

1 International Automobile Manufacturers' Motion for Summary Judgment, filed concurrently
2 herewith ("Haskew Decl.") ¶¶ 9-10.

3 Analyses by CARB in the rulemaking record show that in order to meet these new standards,
4 automobile manufacturers must redesign the cars and trucks they sell to incorporate a number of
5 advanced fuel savings technologies. For example, by 2012 the regulations set a fleet-wide average
6 limit for passenger cars and small light-duty trucks (the PC/LDT1 category) of 233 grams of CO₂-
7 equivalent per mile driven, which translates to a fleet-wide fuel economy average of approximately
8 38.9 miles per gallon assuming no air conditioning credit, and 36.9 miles per gallon assuming full air
9 conditioning credit. *Id.*, ¶¶ 22-23. In order to meet this standard, CARB has determined in its Staff
10 Report and Initial Statement of Reasons (the "ISOR")¹ that automobile manufacturers will need to
11 incorporate a "near-term technology package" into their cars and trucks. The "near-term technology
12 package" includes a number of automotive technologies that when used in various combinations lead
13 to increased fuel economy and reductions in CO₂ emissions. *See* May 2, 2005 Declaration of John
14 M. Cabaniss, Jr., in Support of Opposition of Proposed Intervenor, Association of International
15 Automobile Manufacturers' to Motion to Dismiss First Amended Complaint, filed concurrently
16 herewith ("Cabaniss Decl.") ¶ 15. ISOR at 59, 63-67.

17 The extent to which a particular manufacturer will be compelled to include a "near-term
18 technology package" on its cars and trucks depends on the baseline fuel economy of that
19 manufacturer's fleet. *Id.*, ¶ 16, ISOR at 116-117. CARB's most recent analysis of this issue is
20 contained in its Addendum Presenting and Describing Revisions to the Initial Statement of Reasons
21 on September 10, 2004 (the "Revisions to ISOR")² at 12, Revised Table 6.2-3. According to this
22 analysis, CARB has determined that Honda will have to incorporate a "near-term technology
23 package" on 24% of its PC/LDT1 fleet in order to meet the 2011 model year standard, while Nissan
24

25 ¹ Relevant portions are attached as Exhibit 1 to the Request for Judicial Notice filed herewith, and
26 the entire documents can be found at <http://www.arb.ca.gov/regact/grnhsgas/isor.pdf>.

27 ² Relevant portions are attached as Exhibit 2 to the to the Request for Judicial Notice filed
28 herewith; the entire documents can be found at
<http://www.arb.ca.gov/regact/grnhsgas/addendum.pdf>.

1 will need to incorporate a “near-term technology package” on 49% of its PC/LDT1 fleet. *Id.* By the
 2 following year, Honda will need to have incorporated a “near-term technology package” on 81% of
 3 its PC/LDT1 fleet in order to meet the 2011 model year standard, while Nissan will need to have
 4 incorporated a “near-term technology package” on 93% of its PC/LDT1 fleet. *Id.*³

5 The “near-term technology package” described by CARB includes a number of automotive
 6 technologies, most of which are relatively new to the industry and available on only a few production
 7 models of cars and trucks. The package includes, for example, stoichiometric gasoline direct
 8 injection, continuously variable transmission, and cylinder deactivation. *Cabaniss Decl.*, ¶¶ 15-18.
 9 What most of these technologies have in common is that a substantial amount of lead time –
 10 combined with a considerable level of investments of capital and engineering resources – is required
 11 to integrate these technologies into a car or truck. *Cabaniss Decl.*, ¶ 19. This lead time is necessary
 12 in order to develop the new technologies, manufacture the tooling required to produce and implement
 13 the new technology, order component parts from suppliers, test the production processes and vehicle
 14 performance, test the vehicle for safety and reliability, and obtain the necessary certifications. *Id.*,
 15 ¶ 20.

16 CARB agrees that considerable lead time will be required for an automobile manufacturer to
 17 bring its fleet into compliance with the new standards. At the time of the rulemaking, CARB
 18 concluded that the minimum lead-time to achieve compliance is four years. Anything shorter than
 19 that, CARB stated, simply would not be feasible. As CARB explained in Section 7.2 of the ISOR
 20 concerning regulatory alternatives:

21 *Staff also considered proposing more stringent vehicle standards. This could be*
 22 *accomplished by shortening the phase-in period*, or by building into the standard
 23 some degree of early penetration of technologies that the staff technical analysis
 24 determined would not be available for widespread application in the near and/or mid
 25 term periods. Staff concluded that in either case, *manufacturers would have a very*
 26 *difficult time incorporating the needed technologies across their fleet as rapidly as*
 27 *would be necessary*. Comments received from manufacturers and their consultants on
 28 the June 14, 2004 draft staff proposal, which used a three-year phase in schedule

3 These are CARB estimates. The actual requirements of the manufacturers may be different and may in fact require more extensive product redesign in order to comply with these new regulations. *Cabaniss Decl.* ¶ 16.

1 rather than the four-year phase in schedule recommended now, served to reinforce this
 2 point. Staff therefore rejected this alternative on the grounds that *more stringent*
standards would not be technically feasible.

3 ISOR at 137 (emphasis added). *See also id.* at 2 (“The phase-in period for both the near-term and
 4 mid term standards has been extended to four years” in the initial draft of the ISOR).⁴

5 Depositions of CARB staff taken in this case confirms that the lead time provided in the
 6 regulations is unreasonably short and that it will in fact take manufacturers much longer. CARB’s
 7 designated witness on lead time, Steve Albu, testified that it will actually take some manufacturers *up*
 8 *to six years* in order to bring their fleets into compliance with the 2011 model year standards, and *up*
 9 *to seven years* to comply with the 2012 model year standard. *Deposition of Steve Albu* at 258:20-
 10 259:10; 272:15-273:19. Nissan specifically would require five years to comply with the 2011
 11 standard, and five to six years to comply with the 2012 standards, according to CARB. *Id.* at 263:11-
 12 16; 275:22-276:7. The model year for a given motor vehicle can begin as early as January of the
 13 preceding year. Cabaniss Decl. ¶ 14. Thus, if CARB is correct, then Nissan cannot afford any delay
 14 in making the necessary changes to ensure that its 2011 model year fleet, which begins in 2010,
 15 comply with the standards.

16 It is therefore clear that even CARB’s own analyses show that the AB 1493 regulations
 17 present automobile manufacturers with a clear and immediate dilemma. The regulations require
 18 significant improvement in the fuel economy of new cars and trucks sold in California. Meeting
 19 these new standards would require quick and fundamental design changes in the bodies, engines and
 20 powertrains of new motor vehicles. Making these design changes would require an enormous
 21 investment by automobile manufacturers and would take years to implement.

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 23
 24
 25 ⁴ These engineering challenges are compounded by the fact that the typical product cycle for the
 26 models of cars and trucks manufactured by AIAM members is five to eight years. Cabaniss
 27 Decl., ¶ 22. This product cycle is necessary to recoup the substantial investment made in
 28 developing, testing, marketing and machine tooling for a new product. *Id.* If a substantial change
 is required to the major components of an automobile – such as to the body, engine or
 transmissions – before the scheduled end of the vehicle’s life cycle, then the sunk costs for that
 vehicle may never be adequately recouped. *Id.*, ¶ 24.

III. ARGUMENT

The “basic rationale” of the ripeness requirement is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]” *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1171 (9th Cir. 2001). The ripeness inquiry has a constitutional component rooted in the “case or controversy” requirement of Article III of the U.S. Constitution, and a prudential component that focuses on whether the record is adequate to ensure effective review. *City of Auburn*, 260 F.3d at 1171. As discussed below, AIAM’s action satisfies both of these components.

A. AIAM’s Claims Are Constitutionally Ripe

The Defendants’ entire argument for why this action is not constitutionally ripe centers around their statement that “[u]nless U.S. EPA grants California’s pending waiver request, California’s regulations are unenforceable ...” Defendants’ Memorandum at 5. AIAM agrees with this concession. But just because CARB cannot enforce the regulations now through the imposition of sanctions does not mean that this action is not ripe as a constitutional matter.

Under the doctrine of constitutional ripeness, a court may not hear a case unless “there exists a constitutional ‘case or controversy, that the issues presented are definite and concrete, not hypothetical or abstract.’” *City of Auburn*, 260 F.3d at 1171 (quoting *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). This tenet of ripeness requires the court “to consider whether the plaintiffs face ‘a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement,’ or, by contrast, if the alleged injury is too ‘imaginary’ or ‘speculative’ to support jurisdiction.” *Id.* (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

Here, there is nothing abstract about the disagreement presented in this action. Section 32919 of EPCA provides that “a State or a political subdivision of a State **may not adopt or enforce** a law or regulation related to fuel economy standards or average fuel economy standards . . .” 49 U.S.C. § 32919(a) (emphasis added). Here, CARB has adopted regulations that require automobile manufactures to improve the fuel economy of their vehicle fleets in the California market and thereby

1 reduce emissions of CO₂. Thus, the mere adoption of the AB 1493 Regulations is a preempted act,
2 and whether a waiver is granted will not change that.

3 Additionally, there can be no dispute that the pendency of the regulations has an immediate
4 impact on AIAM's members. As discussed above, each and every automobile manufacturer covered
5 by the regulations will be required to make significant changes to their fleets in order to comply. The
6 Defendants admit that as a practical matter, the obligation to take these steps is immediate; otherwise
7 there will not be enough time to bring their fleets into compliance before the regulations are
8 ultimately enforced. Finally, AIAM's claims are clearly redressable because if this Court were to
9 find the AB 1493 Regulations preempted, then its members will be relieved of this immediate
10 obligation to comply. *See, e.g., National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir.
11 2002) ("the members' injury is redressable because if Audubon wins on its preemption claims, the
12 federal parties will resume their prior use of leghold traps, thereby redressing the injury by protecting
13 the bird population.")

14 Thus, this challenge falls squarely within the line of cases holding that if "promulgation of the
15 challenged regulations presents plaintiffs with the immediate dilemma to choose between complying
16 with newly imposed, disadvantageous restrictions and risking serious penalties for violation," the
17 controversy is ripe. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (construing *Abbott*
18 *Labs.*). *See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n.*,
19 461 U.S. 190, 201 (1983) (case ripe where "decisions to be made now or in the short future may be
20 affected" by whether the court intervenes); *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006)
21 ("A case may be ripe even before formal enforcement if a 'direct and immediate' impact is suffered
22 from the challenged policy").

23 The cases cited by the Defendants are therefore distinguishable because they did not present
24 the same immediate hardship to the plaintiffs. In *International Truck and Engine Corp. v. Lloyd*,
25 CIV S-01-1245 (E.D. Cal. Oct. 24, 2001) (cited in Defendants' Memorandum at 4), for example, the
26 court specifically recognized that in some cases "the very promulgation of a law may itself affect a
27 party enough to satisfy the constitutional requirement," but held that the case before it was not such a
28 case because the plaintiff had not shown that the regulation "require[d] immediate changes in its

1 present conduct so it could avoid future sanctions.” *See also Texas v. United States*, 523 U.S. 296,
 2 301 (1998) (cited in *Defendants Memorandum* at 5) (“This is not a case like *Abbott Laboratories* . . . ,
 3 where the regulation at issue had a ‘direct effect on the day-to-day business’ of the plaintiffs, because
 4 they were compelled to affix required labeling to their products under threat of criminal sanction.
 5 Texas is not required to engage in, or to refrain from, any conduct, unless and until it chooses to
 6 implement one of the noncleared remedies”); *Anderson v. Green*, 513 U.S. 557 (1995) (cited in
 7 *Defendants Memorandum* at 4) (action not ripe because plaintiffs would suffer no harm unless or
 8 until they were granted reduced benefits under California’s Aid to Families with Dependent Children
 9 program, which required a waiver).

10 In short, the holding of the court in *City of Auburn* is directly applicable here:

11 the enactment of these regulations “puts [AIAM’s members] in a dilemma that it was
 12 the very purpose of the Declaratory Judgment Act to ameliorate.” *Abbott Lab.*, 387
 13 U.S. at 152. The decision to comply will surely be costly, and “the alternative to
 compliance . . . may be even more costly. . . .” *Id.* at 153. This Hobson’s Choice
 suggests the ripeness of the issue for review.

14 *City of Auburn*, 260 F.3d at 1127. This Court should therefore reject the Defendants’ argument that
 15 this action is not ripe as a constitutional matter.

16 **B. AIAM’s Claims Are Ripe As A Prudential Matter**

17 AIAM’s claims in this action are prudentially ripe for the same reasons they are
 18 constitutionally ripe, namely: (1) The AB 1493 Regulations are final, (2) there is no further or
 19 contingent factual development that would assist this court in deciding the legal preemption issue,
 20 and (3) the regulations present AIAM members with an immediate dilemma between taking steps
 21 now to comply with the regulations or risk sanctions for being out of compliance in the future.

22 As set forth in *Abbot Labs*, the test for ripeness in the pre-enforcement context depends on
 23 “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court
 24 consideration.” *Abbott Labs.*, 387 U.S. at 149. “Whether an issue is ripe for judicial determination
 25 depends on the combined weight of the question’s fitness for adjudication and the hardship to the
 26 parties if review is delayed.” *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982).
 27 Thus, “the two ripeness branches must operate on a sliding scale.” *Neb. Pub. Power Dist. v. MidAm.*
 28 *Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000). As one court describes the test:

1 Fitness and hardship function as independent but related variables, the former as a
 2 measure of the interests of the court and agency in postponing review and the latter as
 3 a measure of the challenging party's countervailing interest in securing immediate
 4 judicial review. *The judiciary's ultimate determination of ripeness in a specific
 setting depends on a pragmatic balancing of those two variables and the underlying
 interests which they represent.*

5 Under this 'practical common sense' approach, the ripeness inquiry does not turn on
 6 nice legal distinctions. [Citation] *Courts confronted with close questions of ripeness
 are appropriately guided by the presumption of reviewability, especially when the
 affected person is confronted with the dilemma of choosing between
 disadvantageous compliance or risking imposition of serious penalties.*

7 *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986) (emphasis
 8 added). Here, AIAM easily satisfies both prongs of ripeness.

9 **1. AIAM's Claims are Fit For Review Despite The Pendency of California's
 10 Waiver Application**

11 The Defendants' argument that this action is not ripe because of the contingency surrounding
 12 EPA's consideration of California's waiver request pertains to the "fitness" prong of the ripeness
 13 inquiry. *Texas v. United States*, 523 U.S. 296, 300 (1988) (cited in Defendants' Memorandum at 5).⁵
 14 It is well settled, however, that actions challenging state or local regulations on preemption grounds
 15 raise predominantly legal questions and are therefore fit for review. *See, e.g., Pacific Gas & Elec.
 16 Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("The question of
 17 pre-emption is predominantly legal, and although it would be useful to have the benefit of [the state's
 18 interpretation and application of its regulations], resolution of the pre-emption issue need not await
 19 that development."). In *Hotel Employees. & Restaurant Employees. Int'l Union v. Nev. Gaming
 20 Comm'n*, 984 F.2d 1507, 1513 (9th Cir. 1992), for example, the Ninth Circuit held that "[p]reemption

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 23 ⁵ The Defendants also argue that the pendency of *Massachusetts v. EPA* in the U.S. Supreme Court
 24 provides another prudential reason why this case is not ripe. *Defendants' Memorandum* at 6-7.
 25 Of course, they provide no authority to support this argument. Additionally, this is the second
 26 time the Defendants have argued that this Court should defer ruling on this action on account of
 27 the *Massachusetts v. EPA* matter. This Court has already denied the Defendants' request to
 28 continue this action pending the decision in *Massachusetts v. EPA*, affirming the Magistrate
 Judge's conclusion "that a delay will impair Plaintiffs' ability to plan, research, and implement
 technologies necessary to comply with the challenged regulations." *See* Memorandum Opinion
 and Order Re Defendant-Intervenors' Motion for Reconsideration of the Order Denying Request
 to Modify the Scheduling Order (ECF 345) at 5.

1 is predominantly a legal question, resolution of which would not be aided greatly by development of
2 a more complete factual record.”

3 Here, there is nothing about the waiver process that will impact the fitness of this action for
4 review. EPA’s action on the California waiver request will have no impact on whether the
5 regulations are “related to fuel economy standards or average fuel economy standards.” 49 U.S.C.
6 § 32919. Moreover, as discussed above, the fact that the regulations are currently unenforceable is
7 irrelevant to the preemption inquiry because EPCA forbids the mere adoption of the AB 1493
8 Regulations.

9 **2. The Facts Show That AIAM Satisfies The Hardship Prong.**

10 The Defendants argue that “no amount of hardship can confer federal jurisdiction to consider
11 claims that are jurisdictionally unripe, as these contingent claims are.” Defendants’ Memorandum at
12 7. The Defendants, however, do not support this statement with any citation to the law. In fact, it is
13 well settled that even if future contingent events have an impact on the factual development of a case
14 (which is not the case here), the action may nevertheless be ripe if the plaintiff is currently suffering a
15 redressable harm. Thus, courts have held that “the prospect or fear of future events may have a real
16 impact on present affairs,” such that a preemption challenge is ripe. *Wright, Miller & Cooper*
17 § 3532.2, at 143. *See, e.g., Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891, 110 S. Ct. 3177, 111 L.
18 Ed. 2d 695 (1990) (although pre-enforcement review is normally precluded, “the major exception . . .
19 is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct
20 immediately”); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 417-419, 86 L.
21 Ed. 1563, 62 S. Ct. 1194 (1942) (finding challenge ripe where plaintiffs must comply with
22 burdensome Federal Communications Commission rule at once or risk later loss of license and
23 consequent serious harm).

24 Here, the AB 1493 Regulations place AIAM’s members in an immediate dilemma: either act
25 now to change their product plans so as to ensure compliance, or do nothing and risk sanction for
26 noncompliance. As discussed above, CARB determined that starting with the 2009 model year and
27 thereafter, automobile manufacturers will be required to offer significantly redesigned automobiles in
28 order to meet CARB’s aggressive new CO2 emission standards. The extent of the changes required

1 increases dramatically as the standards become progressively more stringent. The changes CARB
2 envisions – such as turbocharging the engine, installing a six-speed transmission, or providing for
3 stoichiometric gasoline direct injection – go to the very foundation of automotive design. Designing
4 new cars with these types of advanced technologies requires substantial lead time. CARB’s own
5 witnesses testified that immediate action is required in order to ensure compliance as far off as the
6 2012 model year. “To delay a decision would impose upon [AIAM members] the uncertainty of not
7 knowing whether they will be required to incur the substantial expenses and comply with the
8 numerous regulatory requirements imposed by the” CARB Greenhouse Gas Regulations. *Skull*
9 *Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1239 (10th Cir. 2004).

10 Nowhere do the Defendants deny this fact. Rather, they posit a number of hypothetical ways
11 by which the manufacturers may not have to produce cars and trucks that conform to the AB 1493
12 Regulations by the 2009 model year. First, they claim that in granting a waiver, EPA must take lead
13 time into account. Defendants’ Memorandum at 7. But EPA has never denied or modified a waiver
14 because of insufficient lead time *after* the date a waiver is granted. Indeed, there have been a number
15 of instances where EPA has not completed its review of a California standard until after the first
16 model year of applicability has started, and yet did not delay the effective date of the standard. *See,*
17 *e.g., California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption--*
18 *Notice of Decision*, 67 Fed. Reg. 54180 (Aug. 21, 2002) (waiver decision made in 2002 for rule that
19 was phased in beginning in 1998). In contrast, there is only one example where EPA has required a
20 delay in the effective date of a regulation it was reviewing, and then it was only because there would
21 be insufficient test facilities to conduct the necessary testing for another year. *See California State*
22 *Motor Vehicle Pollution Control Standards: Waiver for Federal Preemption*, 40 Fed. Reg. 30311,
23 30314 (July 18, 1975). Thus, automobile manufacturers cannot delay working on compliance with
24 these standards until after the waiver decision, and hope that they will still have enough time to bring
25 their fleets into compliance. If EPA acts consistent with its prior course of conduct in this area, by
26 then it would be too late.

27 The Defendants also argue that if EPA grants the waiver, the Plaintiffs could seek review in
28 the D.C. Circuit. Defendants’ Memorandum at 8. Of course, the Defendants fail to recognize that an

1 appeal to the D.C. Circuit can be a drawn out process, and they do not address what the status of the
2 regulations would be during the appeal. The fact is that it would be folly for the manufacturers to sit
3 idly on their hands in the optimistic hope that if the waiver is granted, they will still be successful in
4 the D.C. Circuit and ultimately be relieved of the obligation to comply with the regulations.
5 Prudence, therefore, counsels firmly against a delay in deciding the merits of this action.

6 **IV. CONCLUSION**

7 For the reasons set forth above, AIAM's action is ripe for review because the challenged state
8 action is final and fit for review, and because the AB 1493 Regulations work an immediate hardship
9 on AIAM's members. Therefore, the Defendants' Motion to Dismiss should be denied.

10 DATED: November 13, 2006

11 KIMBLE, MACMICHAEL & UPTON

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13 By: _____ /s/
Jon Wallace Upton

14 Attorneys for Intervenor,
15 Association of International Automobile Manufacturers

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