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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA – FRESNO
12

13 CENTRAL VALLEY CHRYSLER-JEEP, INC.,
KITAHARA PONTIAC GMC BUICK, INC.,
14 MADERA FORD MERCURY, INC., MADERA
CHEVROLET, FRONTIER DODGE, INC.,
15 TOM FIELDS MOTORS, INC., PISTORES
CHRYSLER DODGE JEEP, BOB WILLIAMS
16 CHEVROLET, COURTESY OLDSMOBILE
CADILLAC, INC., MERLE STONE
17 CHEVROLET, INC., MERLE STONE
PORTERVILLE, INC., STURGEON AND
18 BECK INCORPORATED, SWANSON
FAHRNEY FORD, INC., and the ALLIANCE
19 OF AUTOMOBILE MANUFACTURERS,

20 Plaintiffs,

21 v.

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

24 Defendants.

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

**OPPOSITION OF PROPOSED
INTERVENOR, ASSOCIATION OF
INTERNATIONAL AUTOMOBILE
MANUFACTURERS, TO MOTION TO
DISMISS FIRST AMENDED COMPLAINT**

DATE: June 13, 2005
TIME: 1:30 p.m.
COURTROOM.: One
JUDGE: Robert E. Coyle

25 Proposed Intervenor, the Association of International Automobile Manufacturers, hereby
26 respectfully submits this Opposition to Defendant's Motion to Dismiss Plaintiffs' First Amended
27 Complaint (the "Motion").
28

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I. INTRODUCTION

Three years ago, this Court preliminarily enjoined the enforcement of the "Zero Emission Vehicle" regulations that the California Air Resources Board ("CARB") had adopted. This Court found that aspects of the regulations "clearly have the purpose of regulating the fuel economy performance of" cars and trucks sold in California, and "will have the practical effect of regulating fuel economy." *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*, 2002 U.S. Dist. LEXIS 20403 at *8-*9 (E.D. Cal., June 11, 2002). In granting the preliminary injunction, the Court ruled that because the ZEV regulations related to fuel economy of new motor vehicles, there was a "strong likelihood" the plaintiffs would prevail on their claim that they were preempted by the Energy Policy and Conservation Act of 1975 ("EPCA"), as amended 49 U.S.C. §§ 32901. *Id.* at *22.

The Court now has before it again an attempt by CARB to impose fuel economy standards -- only this time CARB seeks to impose a sweeping new regulatory scheme that would require entire fleets of cars and trucks to conform to their strict miles per gallon mandates. The CARB regulations challenged in this action are, once again, preempted by EPCA. Moreover, these regulations control the emissions of carbon dioxide ("CO₂") from new motor vehicles, and they are therefore also preempted by the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*

The *Central Valley Chrysler-Jeep* Plaintiffs filed this action challenging the CARB Greenhouse Gas Regulations on a number of grounds, including preemption under EPCA and preemption under the Clean Air Act. Because the new regulations are clearly preempted and place immediate burdens on automobile manufacturers, AIAM has sought to intervene on behalf of its members -- which include such high volume manufacturers as American Honda Motor Company, Hyundai Motor America, Nissan North America, Inc., and Toyota Motor North America, Inc., all of which are directly affected by these regulations. AIAM's Proposed Complaint In Intervention alleges that the CARB Greenhouse Gas Regulations are preempted by EPCA and the Clean Air Act, as does the *Central Valley Chrysler-Jeep* action.

The Defendant filed the instant Motion to Dismiss the *Central Valley Chrysler-Jeep* First Amended Complaint (the "FAC"), arguing that the causes of action in the FAC are not ripe for review and that the doctrine of primary jurisdiction prevents this Court from considering the Clean

1 Air Act count. Although AIAM's Motion to Intervene is still pending, AIAM seeks leave to file this
2 Opposition Brief to that Motion Dismiss because, as a practical matter, the adjudication of that
3 Motion would be directly applicable to its pending Complaint In Intervention.

4 AIAM does not wish to duplicate the arguments that have so cogently been set forth in the
5 *Central Valley Chrysler-Jeep* Plaintiffs' Opposition Brief. Thus, AIAM will not address the primary
6 jurisdiction and venue arguments raised in the Motion to Dismiss as the Alliance's Opposition Brief
7 convincingly dispatches with those points. Rather, AIAM submits this brief to focus on two issues
8 pertinent to the ripeness inquiry not directly addressed in the *Central Valley Chrysler-Jeep* Plaintiffs'
9 Brief.¹

10 First, the Defendant's ripeness argument – that the existence of the remaining, non-substantive
11 ministerial actions somehow mean that CARB's Board did not "adopt" a new regulation on
12 September 24, 2004 – ignores all CARB has done over the past two and a half years, which is to
13 irrevocably commit California to regulating fuel economy and vehicular emissions of carbon dioxide.
14 This brief will provide additional background and detail concerning the chronology of CARB's
15 activities in the two years leading up to the Board hearing. This regulatory history will help
16 illuminate the single-mindedness with which CARB has pursued CO₂ emissions standards, and the
17 folly of awaiting the completion of ministerial steps that will do nothing to head off the inevitable
18 clash between these standards and federal law. This history shows that as soon as CARB took its
19 first steps towards promulgating the challenged regulations, its entire decision-making process was
20 focused almost exclusively on regulations that would require automobile manufacturers to produce
21 vehicles for the California market with significantly improved fuel economy. CARB followed this
22 path unwaveringly all the way through to its Board meeting on September 24, 2004, when it
23 explicitly adopted the challenged regulations. CARB's decision-making is complete, and the agency

24
25 ¹ Throughout this brief, AIAM will refer to various documents in the rule-making record and to the
26 Declaration of John M. Cabaniss, Jr., submitted herewith. AIAM concurs with the *Central Valley*
27 *Chrysler-Jeep* Plaintiffs that because the Defendant has brought her Rule 12(b)(1) Motion to
28 Dismiss based on the face of the pleading, the allegations contained in the First Amended
Complaint are controlling to this Motion. However, AIAM offers this additional evidence in
order to provide a different perspective on some of the issues raised in this Motion.

1 has given no indication that it has any intent to alter the course it charted two year and a half years
2 ago. Accordingly, this action is as fit for review as it will ever be.

3 Second, the Defendant's arguments concerning the alleged lack of immediate harm to the
4 automobile manufacturers is incredible in light of CARB's own assessments in its rule-making
5 documents concerning the impacts of its regulations. CARB has determined that compliance with its
6 new regulations would require manufacturers to fundamentally redesign their fleets to include new
7 technologies that improve fuel economy. The types of technologies envisioned by CARB would
8 require a significant amount of lead time to develop and integrate into new cars. Indeed, CARB
9 determined that the minimum lead time required for automobile manufacturers to bring their fleets
10 into compliance with these new standards is four years. Even though AIAM has pointed out to
11 CARB that its assessment is overly optimistic and that the lead time required is substantially longer,
12 the point here is that the Defendant's argument that there is no immediate impact on automobile
13 manufacturers is utterly refuted by CARB's own assessments in the rulemaking record.

14 As stated in its Proposed Complaint in Intervention, AIAM has consistently embraced
15 progressive positions regarding motor vehicle regulation to address the issues of global climate
16 change and fuel economy improvement, and its members have worked hand-in-hand with federal
17 regulators to establish standards that not only meet these goals, but also carefully balance other
18 factors such as consumer demand, technological feasibility, and economic practicality. *See AIAM*
19 *Complaint in Intervention*, ¶¶ 13-14. In addition, AIAM members have been among the industry
20 leaders in introducing advanced automotive technologies that both reduce emissions and promote
21 fuel economy – technologies such as hybrid-electric and alternative fueled vehicles. Now, however,
22 CARB's bureaucracy, driven by the single-minded goal of radical fuel economy improvement, has
23 taken upon itself the task of dictating to the automobile industry – and the consuming public – the
24 types of ultra fuel efficient cars and trucks that will be sold in California. These actions are
25 unconstitutional because they frustrate Congress' intent to provide uniform, nationwide fuel economy
26 standards, and are further expressly preempted by both EPCA, and the Clean Air Act. Because the
27 issues presented in this action are concrete and no further factual development will aid this Court in
28

1 rendering a decision, there is no constitutional or prudential reason to delay reaching the merits of
2 this action.

3 **II. FACTUAL BACKGROUND**

4 **A. CARB Has Unequivocally Stated Its Intent To Regulate Vehicular Carbon
5 Dioxide Emissions And Single-Mindedly Embarked On A Path To Do So.**

6 AIAM adopts the factual recitation contained in the *Central Valley Chrysler-Jeep Plaintiffs'*
7 *Opposition Brief*. AIAM believes, however, that a more fulsome discussion of the rule-making
8 history concerning the CARB Greenhouse Gas Regulations will demonstrate the finality of these
9 regulations. From the very inception of its decision-making process, CARB engaged in a single-
10 minded pursuit of regulations to limit vehicular emissions of CO₂ – which, as the *Central Valley*
11 *Chrysler-Jeep Plaintiffs' Brief* points out, is no different than a fuel economy standard. In light of
12 this history, there can be no doubt that CARB's adoption of the challenged regulations at its
13 September 24, 2004, Board meeting amounts to a definitive statement of CARB's intention to
14 regulate fuel economy in order to fulfill its mandate under AB 1493.

15 Less than three months after AB 1493 was passed, CARB charted the course that ultimately
16 culminated in the adoption of the regulations at issue here. For example, at its September 26, 2002,
17 board meeting, CARB staff made a slide presentation concerning the implementation of AB 1493.
18 *See Staff Presentation to Board Regarding AB 1493 Implementation.*² After laying out those
19 measures that AB 1493 prohibited CARB from pursuing in order to reduce greenhouse gas emissions
20 from motor vehicles (such as imposing additional taxes on fuel, reducing the speed limit, or
21 restricting vehicle miles traveled), the CARB staff presentation included the following slide:

22 //

23 //

24 _____
25 ² Available at <http://www.arb.ca.gov/cc/092602board/092602bdpres.pdf>. AIAM is not offering
26 this or any of the other items from the administrative record cited in this brief for the truth or
27 reliability of the matters asserted therein, but rather simply to show that these records exist and
28 that CARB made certain statements in those records. Pursuant to Federal Rule of Evidence 201,
this Court can take judicial notice of the fact that CARB made the indicated statements in the
administrative record.

What Is Left?

Technology	GHG Reduction, %	Current Models Using This Technology
Off-the-Shelf Engine Technology		
1 Variable Valve Timing	3-8	BMW, Honda
2 Cylinder Deactivation	3-6	Cadillac
3 Smaller engine with supercharger	5-7	Mercedes
4 Throttleless engine	3-6	BMW
5 Hybrid electric drive	15-30	Toyota Prius
Off-the-Shelf Transmission Technology		
1 5-speed automatic	2-3	Ford Explorer (SUV)
2 Continuously variable transmission	4-8	Saturn VUE (SUV)
Emerging Engine Technology		
1 Camless engine	15	
2 Variable compression ratio	2-6	
Emerging Transmission Technology		
1 Automatic shifting manual	3-5	(vs 4 speed automatic)
2 Advanced continuous variable transmission	4-8	(vs 1st generation CVT)
Vehicle technologies		
1 Better aerodynamics, 10%	1-2	Mercedes E
2 42 volt electronics	1-3	Toyota Crown (Japan)
3 Integrated starter/generator, with regeneration (engine off at idle)	5-10	Toyota Prius
4 Lower rolling resistant tires/wheels	1-1.5	Honda Civic EX
Other emerging technologies		
1 Better catalyst to reduce N2O & CH4	tbd	
2 HFC-free air conditioner	tbd	

Id. at 11.

These regulatory options – what CARB describes as "what is left" after accounting for the options AB 1493 took off the table – are various engine, powertrain and other automotive technologies that reduce vehicular emissions of CO₂ (through improving fuel economy), such as hybrid-electric engines and advanced transmissions. While CARB has since abandoned the methodology supporting the calculations in this slide concerning CO₂ reduction from the various technologies, the point in showing the slide is to demonstrate that CARB's direction in this rule-making immediately zeroed in on automotive technologies to reduce vehicular emissions of CO₂, and that concentrated focus did not change in the two years of rule-making that followed.

Thus, between December of 2002 and April of 2004, CARB held six public workshops and symposia discussing its regulatory approach.³ In each one of these, CARB or its consultants

³ The history and background of CARB's rule-making process for these regulations can be found on the web page CARB established for its climate change program: <http://www.arb.ca.gov/cc/cc.htm>.

1 discussed approaches for requiring automobile manufacturers to implement automotive technologies
2 to reduce CO₂ emissions.

3 After conducting these workshops, CARB circulated a draft Staff Proposal and Draft Initial
4 Statement of Reasons for the proposed rulemaking (the "Draft ISOR") on June 14, 2004.⁴ Consistent
5 with its entire approach, the Draft ISOR focused predominantly on the very same CO₂ reducing
6 technologies identified by CARB staff way back in September of 2002. This Draft ISOR was
7 discussed at four public workshops (including one in Fresno, which certainly weighs heavily against
8 defendant's challenge to venue) and subjected to a so-called "peer review." On August 6, 2004,
9 CARB staff published a final Staff Report and Initial Statement of Reasons (the "ISOR").⁵ Just as
10 the initial board presentation and the Draft ISOR did before it, the final ISOR unequivocally set forth
11 CARB's intention to regulate vehicular emissions of CO₂. *See generally ISOR* § 5 (discussing
12 various CO₂ reducing technologies). The ISOR was subsequently subject to some modifications,
13 which are set forth in the Addendum Presenting and Describing Revisions to the Initial Statement of
14 Reasons on September 10, 2004 (the "Revisions to ISOR").⁶

15 The culmination of CARB's decision-making process took place at a public hearing on
16 September 23-24, 2004, at which CARB passed Resolution 04-28 approving the proposed regulations
17 (with four minor non-substantive changes). Indeed, CARB's own statements leave little doubt that
18 the agency had completed its decision-making process by that time and given its final approval to the
19 regulations challenged in this action. In CARB's October 19, 2004, Notice of Public Availability of
20 Modified Text, CARB states, unequivocally and without reservation:

21 At a public hearing held September 23-24, 2004, the Air Resources Board (the Board
22 or ARB) ***approved a new section 1961.1, title 13, California Code of Regulations***
23 ***(CCR), and approved amendments to sections 1900 and 1961, title 13, CCR*** and
24 amendments to the "California Exhaust Emission Standards and Test Procedures for
2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty
Vehicles" incorporated by reference in section 1961, title 13, CCR. ***These new***

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26 ⁴ Available at http://www.arb.ca.gov/cc/factsheets/cc_isor.pdf.

27 ⁵ Available at <http://www.arb.ca.gov/regact/grnhsgas/isor.pdf>.

28 ⁶ Available at <http://www.arb.ca.gov/regact/grnhsgas/addendum.pdf>.

1 ***regulations and amendments will establish requirements to control greenhouse gas***
2 ***emissions from motor vehicles, pursuant to Assembly Bill (AB) 1493.***

3 *See Notice of Public Availability of Modified Text.*⁷

4 The above recitation is just a summary of the history of CARB's decision-making. A
5 complete timeline of all of the steps CARB has undertaken in completing its decision-making process
6 concerning these regulations is attached hereto as Appendix "A."⁸ The purpose of laying out this
7 decision-making history is not to endorse that decision-making as being in any way sufficiently
8 thorough or scientifically rigorous.⁹ Rather, this regulatory history is offered simply to show the
9 fallacy of CARB's position that these regulations are not final. The fact is that CARB's two-year
10 decision-making concerning its implementation of AB 1493 is as complete and final as it ever will
11 be, and CARB has irrevocably committed itself to regulating vehicular emissions of CO₂. Indeed, in
12 analyzing other potential regulatory alternatives, CARB recognized that doing anything less would
13 have failed to satisfy AB 1493:

14 the alternative of no or less stringent standards was rejected because it would not
15 achieve the maximum reductions and therefore would fail to meet the statutory
16 requirement.

17 *See ISOR at 137.*

18 All that remains to be completed are purely ministerial steps that will have no impact on the
19 substance of the challenged regulations: the submission by Defendant Witherspoon of the final
20 regulations and Final Statement of Reasons to the Office of Administrative law, and approval by that
21 office. Cal. Govt. Code §§ 11343, 11346, 11349. The Defendant claims that under California's
22 Administrative Process Act, these steps must be completed no later than September of this year.

23 *Motion at 34 n.22.*

24 ⁷ Available at <http://www.arb.ca.gov/regact/grnhsgas/15day.pdf>.

25 ⁸ This timeline is based on documents in the public record and available on CARB's Climate
26 Change web page.

27 ⁹ Indeed, these regulations are being challenged in California state court on the ground that
28 CARB's rulemaking was both substantively and procedurally inadequate under California law.
See Fresno Dodge, Inc. v. California Air Resources Board, Case No. 04CECG03498 (Superior
Court, Fresno County, filed Dec. 7, 2004).

1 **B. CARB's Own Analyses Show That The Challenged Regulations Impose**
2 **Immediate Hardship On Automobile Manufacturers.**

3 The regulations CARB approved at its September 24, 2004 Board Meeting establish fleet-
4 wide standards limiting the emission of greenhouse gases from motor vehicles manufactured for sale
5 in California. The standards are expressed in terms of grams of CO₂ equivalent per mile driven.
6 *Cabaniss Decl.*, ¶ 10. The amount of "CO₂ equivalent" emissions is determined by measuring the
7 amount of CO₂ emitted by a motor vehicle per mile driven and then adjusting to account for the
8 "global warming potential" of the emission of other greenhouse gasses. *Id.* As the *Central Valley*
9 *Chrysler-Jeep* Plaintiffs have pointed out, there is an inextricable link between emissions of CO₂ and
10 fuel economy. The regulations promulgated by CARB, however, set fuel economy standards that are
11 much more stringent than the current federal CAFE standards of 27.5 miles per gallon for passenger
12 cars and 21.0 miles per gallon for light duty trucks. 49 C.F.R. §§ 531.5 and 533.5.¹⁰

13 CARB has determined that in order to meet these new standards, automobile manufacturers
14 will be forced to redesign the cars and trucks they sell in California to incorporate new and state-of-
15 the-art technology that currently do not appear on many of their product lines. For example, by 2011
16 the CARB Greenhouse Gas Regulations set a fleet-wide average limit for passenger cars and small
17 light-duty trucks of 267 grams of CO₂-equivalent per mile driven, which translates to a fleet-wide
18 fuel economy average of approximately 33.2 miles per gallon. *Cabaniss Decl.*, ¶ 12. In order to
19 meet this standard, CARB has determined that automobile manufacturers will need to incorporate a
20 "near-term technology package" into their cars and trucks. The "near term technology package"
21 includes a number of automotive technologies, which when used in various combinations lead to
22 reductions in CO₂ emissions. *Id.*, ¶ 15; *ISOR* at 59, 63-67.

23 The extent to which a particular manufacturer will be compelled to include a "near term
24 technology package" on its cars and trucks depends on the baseline fuel economy of that
25 manufacturer's fleet. *Cabaniss Decl.*, ¶ 16, *ISOR* at 116-117. Thus, for example, CARB has

26 _____
27 ¹⁰ The CAFE standard for light duty trucks is scheduled to increase to 21.6 and 22.2 miles per
28 gallon for the 2006 and 2007 model years, respectively. 49 C.F.R. §§ 533.5.

1 determined that Honda will have to incorporate a "near term technology package" on 24% of its
2 passenger cars and small light duty trucks in order to meet the 2011 model year standard. *Cabaniss*
3 *Decl.*, ¶ 16; *Revisions to ISOR* at 12, Revised Table 6.2-3. Nissan, in contrast, will need to
4 incorporate a "near term technology package" on 49% of its entire passenger cars and small light
5 duty trucks in order to meet the 2011 model year standard, according to CARB estimates. *Id.*¹¹

6 The "near-term technology package" described by CARB includes a number of automotive
7 technologies which are new to the industry and are currently available on only a very few production
8 models of cars and trucks. The package includes, for example, stoichiometric gasoline direct
9 injection ("DI"). *Cabaniss Decl.*, ¶ 18. DI engines inject fuel directly into the combustion chamber.
10 This approach is far more difficult and requires much higher injection pressures than the current
11 method of injecting fuel into the intake before the engine. It requires a complete redesign of the fuel
12 system, addition of expensive, high-pressure injectors, and a complete recalibration of the computer
13 controls. *Id.* Integrating such a technology would take a considerable amount of time and
14 engineering effort. *Id.* The 2011 model year begins in early 2010.¹² Thus, to the extent that new
15 cars and trucks would need to include such a new technology and be ready for delivery to the market
16 in January of 2010, work on such a project would have to begin immediately.

17 The stoichiometric gasoline direct injection is just one example of the type of vehicle design
18 change CARB believes will be necessary in order to meet its new fuel economy regulation. There
19 are a number of others.¹³ What all of these technologies have in common is that a substantial amount
20 of lead time – combined with a considerable level of investments of capital and engineering resources
21 – is required to integrate these technologies into a car or truck. *Cabaniss Decl.*, ¶ 19 This lead time

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23 ¹¹ These are CARB estimates. The actual requirements of the manufacturers may be different and
24 may in fact require more extensive product redesign in order to comply with these new
regulations. *Cabaniss Decl.* 16.

25 ¹² The model year for a given motor vehicle can begin as early as January of the preceding year.
26 Thus, the 2011 model year can begin in January 2010. *Cabaniss Decl.*, ¶ 14.

27 ¹³ Another technology is the use of a six-speed automatic transmission. *Cabaniss Decl.*, ¶ 18.
28 These transmissions use a fundamentally different layout of the gear shafts within the
transmission which requires very expensive changes in tooling and manufacturing. *Id.*

1 is necessary in order to develop the new technologies, develop the tooling required to produce and
2 implement the new technology, order component parts from suppliers, test the production processes
3 and vehicle performance, test the vehicle for safety and reliability, and obtain the necessary
4 certifications. *Id.*, ¶ 20. Because of this long lead time, the fundamental design of the body and
5 platform as well as the engine, transmission and other components of the powertrain of a new or
6 redesigned vehicle is completed many years in advance of the time the vehicle enters production. *Id.*

7 CARB agrees that considerable lead time will be required for an automobile manufacturer to
8 bring its fleet into compliance with the new standards. Based on its most recent analysis, CARB
9 concluded that the minimum lead-time to achieve compliance is four years. Anything shorter than
10 that, CARB has stated, simply would not be feasible. As CARB explained in Section 7.2 of the ISOR
11 concerning regulatory alternatives:

12 ***Staff also considered proposing more stringent vehicle standards. This could be***
13 ***accomplished by shortening the phase-in period***, or by building into the standard
14 some degree of early penetration of technologies that the staff technical analysis
15 determined would not be available for widespread application in the near and/or mid
16 term periods. Staff concluded that in either case, ***manufacturers would have a very***
17 ***difficult time incorporating the needed technologies across their fleet as rapidly as***
would be necessary. Comments received from manufacturers and their consultants on
the June 14, 2004 draft staff proposal, which used a three-year phase in schedule
rather than the four-year phase in schedule recommended now, served to reinforce this
point. Staff therefore rejected this alternative on the grounds that ***more stringent***
standards would not be technically feasible.

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

20 Again, the purpose of this discussion is not to lend undue credence to CARB's analysis
21 concerning the types of technologies that will be necessary to bring fleets into compliance with these
22 regulations or CARB's conclusions regarding lead-time. In fact, as discussed in the accompanying
23 Cabaniss Declaration, a four-year lead time is, if anything, on the short side for implementing any
24 *one* of the technologies CARB assumed would be necessary for compliance. *Cabaniss Decl.*, ¶ 19.
25 Moreover, CARB's analysis assumes that a manufacturer will have to integrate a number of these
26 new technologies in one automobile at the same time, which would compound the engineering
27 challenges and require lead times significantly longer than four years. *Id.* Nevertheless, the point
28

1 remains that employing CARB's own unrealistically short lead time, the planning and engineering for
2 the required modifications in the 2009 and 2010 model years would need to begin immediately.¹⁴

3 Thus, even CARB's own analyses show that these regulations present automobile
4 manufacturers with a clear and immediate dilemma. The regulations require major reductions in the
5 amount of CO₂ emitted from new cars and trucks sold in California beginning with the 2009 model
6 year. Meeting these new standards would require quick and fundamental design changes in the
7 bodies, engines and powertrains of new motor vehicles. Making these design changes would require
8 an enormous investment by automobile manufacturers and would take years to implement.

9 **III. THE PREEMPTION CHALLENGES PRESENTED HERE ARE FIT**
10 **FOR REVIEW BECAUSE CARB'S DECISION-MAKING IS COMPLETE**
11 **AND IRREVOCABLY COMMITTED TO REGULATING FUEL ECONOMY.**

12 The overwhelming weight of the Defendant's ripeness argument rests upon a single pillar: the
13 notion that "[i]n a case challenging state regulations, finality is a fundamental requirement for that
14 case to be ripe," and "this case does not meet this requirement because it challenges proposed
15 regulatory amendments that are not yet final." *Motion* at 19. This argument is entirely wrong in two
16 respects.

17 First, the Defendant ignores the fact that CARB's decision-making became final on September
18 24, 2004, when (to use its own words) it "approved a new section 1961.1, title 13, California Code of
19 Regulations (CCR), and approved amendments to sections 1900 and 1961, title 13, CCR . . . [to]
20 establish requirements to control greenhouse gas emissions from motor vehicles, pursuant to
21 Assembly Bill (AB) 1493." *See Notice of Public Availability of Modified Text, supra*.

22 "Courts traditionally take a pragmatic and flexible view of finality." *Ass'n of Am. Med. Colls.*
23 *v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). *See also Assiniboine & Sioux Tribes of Ft. Peck*

24
25 ¹⁴ 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.

1 *Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 789 (9th Cir. 1986) ("Finality
2 is a pragmatic, flexible concept."). "The core question is whether the agency has completed its
3 decision-making process, and whether the result of that process is one that will directly affect the
4 parties." *Ass'n of Am. Med. Colls.*, 217 F.3d at 780.

5 The decision-making process whereby CARB adopted and approved the Greenhouse Gas
6 Regulations spanned over two years and included:

- 7 • Board meetings dating back to September of 2002 concerning the implementation
8 of AB 1493.
- 9 • No fewer than ten public workshops and symposia held by CARB between
10 December 3, 2002, and July 13, 2004, concerning CARB's regulatory approach.
- 11 • The completion of a Draft Staff Report and Draft Initial Statement of Reasons for
12 the proposed regulations.
- 13 • The completion by CARB staff of eight final Technical Support Documents
14 concerning such matters as the economic impacts of the proposed regulation and
15 an overview of the science concerning climate change.
- 16 • The completion of a "peer review" of the Initial Statement of Reasons by six peer
17 reviewers drawn from academia.
- 18 • The completion of the final Staff Report and Initial Statement of Reasons.
- 19 • A public hearing on September 23-24, 2004 at which CARB passed Resolution
20 04-28 approving the proposed regulations (with four minor non-substantive
21 changes).

22 *See Appendix A Hereto* (timeline of CARB's decision-making). As discussed above, AIAM does not
23 endorse this decision-making as being adequate in any respect. Rather, the point of the discussion is
24 to demonstrate that as far as CARB is concerned, its decision-making concerning the implementation
25 of AB 1493 is as complete as it will ever be. Moreover, this recitation of CARB's decision-making
26 also demonstrates that CARB has long since crossed the Rubicon of regulating fuel economy, and
27 there is no indication that CARB has any intention of turning back now.¹⁵

28 ¹⁵ Additionally, the Defendant's statement that "[i]f the process stopped right now, for any reason,
the challenged proposed regulatory amendments would not impose any obligations on anyone,"
Motion at 23, is entirely disingenuous. CARB does not indicate that it has any intent of failing to
[Footnote continued on next page]

1 Accordingly, CARB's vote to approve the regulations challenged here amounts to a
2 "definitive statement of [the] agency's position" that it will reduce greenhouse gas emissions by
3 placing fleet-wide limits on vehicular emissions of CO₂. *Am. Med. Colls.*, 217 F.3d at 780. Only a
4 complete about-face by CARB entailing an entire repudiation of its rulemaking over the past two and
5 a half years would change that. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir.
6 2001) ("Only an about-face by the Counterclaim Cities would save Qwest from civil or criminal
7 penalties" for failing to comply with the challenged ordinances).

8 Second, even if the Defendant were correct that her delay in submitting the final regulation to
9 the OAL for approval means that the regulations are not technically "final," her argument still fails
10 because it "focuses on the possible ultimate result of the state regulatory process, [and] does not take
11 into account the case law that preemption may operate to spare a party from that very process." *NE*
12 *Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 342 (3d Cir. 2001). Indeed, the law is
13 well-settled that a challenge to an incomplete regulatory decision-making process is ripe where the
14 entire process is preempted by federal law.

15 In *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 453-54, 456 (9th Cir. 1993), for example,
16 the plaintiffs had obtained a license from the Federal Energy Regulatory Commission to build and
17 operate a hydroelectric facility in a national forest in California. They could not operate the project,
18 however, because of an ongoing water rights permitting process being undertaken by the California
19 State Water Resources Control Board. The plaintiffs sued, arguing that the permitting process was
20 preempted by the Federal Power Act. In affirming the grant of an injunction in favor of the plaintiffs,
21 the Ninth Circuit rejected the defendant's argument that the action was not ripe because the state
22 board had not reached a final determination regarding the permit:

23 The State Board argues that Sayles' claim is premature. Because no permit
24 requirements will be imposed by the State Board until the completion of the state
water rights permit process, it argues that we cannot determine at this stage whether its

25 _____
26 [Footnote continued from previous page]

27 proceed with the regulatory process. Indeed, stopping the process right now and failing to
28 implement these regulations is simply not an option for CARB. *See ISOR* at 137 ("[T]he
alternative of no or less stringent standards was rejected because it would not achieve the
maximum reductions and therefore would fail to meet the statutory requirement.").

1 requirements would conflict with federal requirements. This argument fails for two
2 reasons. First, as we explain below, Congress has occupied the entire field, so
preemption will not depend on whether the state requirements conflict with the federal
3 requirements. Second, *occupation of the field implies as a corollary that the state
process itself, regardless of the results, is preempted.*

4 *Id.* at 453 (emphasis added) . *See also Union Pac. R.R. Co. v. Cal. PUC*, 346 F.3d 851, 872 n.22 (9th
5 Cir. 2003) ("CPUC argues this claim is not ripe because no standards are issued. This argument fails
6 because it is clear that any standard required would impermissibly burden interstate commerce.");
7 *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404, 410 (8th Cir. 1985)
8 (holding that preemption claim against ongoing Arkansas state agency proceedings concerning
9 interstate power purchase contracts which were claimed to be within FERC's sole jurisdiction was
10 ripe because the plaintiff "challenge[d] not the state's ultimate substantive decision but its authority to
11 even conduct the contemplated proceeding.")

12 The above preemption cases are illustrative of a broader and equally well-settled principle in
13 ripeness law: that a not-yet-complete regulatory process may be challenged where the agency has
14 irrevocably committed itself to an illegal course of action. For example, in *Trustees for Alaska v.*
15 *Hodel*, 806 F.2d 1378 (9th Cir. 1986) the plaintiffs filed an action against the Secretary of Interior
16 seeking a declaration requiring the Secretary to produce an environmental impact statement before
17 submitting a report to Congress. The Secretary argued that the action was not ripe because the
18 Congressional report was not even complete. The court rejected this ripeness challenge because the
19 issue raised in the complaint – whether the secretary was required to complete an environmental
20 impact statement prior to the Congressional report – required no further factual development since
21 the agency had committed itself to not submitting an EIS for public comment:

22 The disagreement here is concrete. The Department will not provide presubmission
23 public review and comment. Its decision is clear and final and the issue is therefore fit
for judicial review.

24 *Id.* at 1381. *See also Nev. ex rel. Loux v. Herrington*, 777 F.2d 529, 535 (9th Cir. 1985)
25 (challenge to Department of Energy Guidelines ripe; "[w]hile not formally adopted by DOE under
26 the Administrative Procedure Act, the Guidelines were issued in both draft and revised form to all
27 relevant states and Indian tribes, and . . . 'express the administrative construction of the NWPA that
28 subsequently formed the basis for DOE's partial denial of Nevada's grant request."); *Friedman Bros.*

1 *Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982) (NEPA challenge ripe even though agency
2 action was not yet final; "[w]hile UMTA [Urban Mass Transportation Administration] has not made
3 a final commitment to fund construction of the bus depot, [fn] the agency has spoken its last word on
4 the project's environmental impact.").

5 This line of cases is directly applicable to the facts presented here because from the very
6 outset of its regulatory decision-making, CARB single-mindedly committed itself to adopting
7 standards limiting vehicular emissions of CO₂ and such standards are indistinguishable from the fuel
8 economy standards under EPCA. Thus, whatever standards CARB ultimately settled on within this
9 framework – whether they were to require passenger cars to meet a fuel economy of 43 mpg by 2016
10 or some different standard – those standards were bound to be preempted by EPCA's provision that
11 "a State may not adopt or enforce a law or regulation related to fuel economy standards or average
12 fuel economy standards for automobiles . . ." 49 U.S.C. § 32919(a). Once CARB irrevocably
13 committed itself to regulate fuel economy and set about adopting attendant standards, this action was
14 sufficiently fit for judicial review.

15 **IV. CARB'S OWN REGULATORY ANALYSIS DEMONSTRATES THAT**
16 **ITS REGULATIONS IMPOSE AN IMMEDIATE AND SEVERE HARDSHIP**
17 **ON AUTOMOBILE MANUFACTURERS.**

18 The Defendant's argument regarding the alleged lack of significant hardship created by the
19 CARB Greenhouse Gas Regulations is based on a patent misstatement of the law and an utter
20 disregard of CARB's own analyses concerning the impact of its regulations.

21 First, the Defendant's legal argument that "because the proposed regulatory amendments are
22 not yet final, the court need not even consider Plaintiffs' hardship," *Motion* at 31, is entirely incorrect.
23 As the *Central Valley Chrysler-Jeep* Plaintiffs' Opposition Brief points out, "whether an issue is ripe
24 for judicial determination depends on the combined weight of the question's fitness for adjudication
25 and the hardship to the parties if review is delayed." *Friedman Bros. Inv. Co.*, 676 F.2d at 1319
26 (citations omitted). *See also Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 434 (D.C. Cir.
27 1986) ("Fitness and hardship function as independent but related variables . . . The judiciary's
28

1 ultimate determination of ripeness in a specific setting depends on a pragmatic balancing of those two
2 variables and the underlying interests which they represent.")

3 In fact, the only case offered by the Defendant to support her contrary proposition,
4 *Association of American Medical Colleges*, actually proves the opposite. The Defendant's argument
5 that that case "ruled that the hardship question was not applicable because the challenged practice
6 was 'not a final rule,'" *Motion* at 32, is disingenuously based on a partial quote from the case. When
7 read in its entirety, it is clear that the Ninth Circuit specifically examined the hardship to the plaintiffs
8 even though the regulatory action was not final:

9 Strictly speaking, plaintiffs' case falls outside the *Abbott Laboratories* rule since the
10 PATH initiative is not a final rule ***and it relates to liability for past billing practices***
11 ***rather than requiring a costly change in present conduct. Courts typically read the***
Abbott Laboratories rule to apply where regulations require changes in present
conduct on threat of future sanctions.

12 *Ass'n of Am. Med. Colls.*, 217 F.3d at 783 (emphasis added). The court found that in contrast to
13 *Abbott Laboratories*, the plaintiffs before it were not faced with "an immediate Hobson's choice"
14 between "adjusting their businesses or disregarding the new rules." *Id.* at 783-84. Thus, contrary to
15 the Defendant's characterization of that case, *Association of American Medical Colleges*
16 demonstrates that the ripeness inquiry requires a weighing of the fitness prong and the hardship
17 prong.

18 In addition to misstating the law, the Defendant also turns a blind eye to CARB's own
19 analyses when she argues that "any hardship to the manufacturer plaintiffs [is] speculative." *Motion*
20 at 33. Indeed, this statement is incredible in light of the record compiled by CARB in adopting these
21 regulations, a record showing that automobile manufacturers face an immediate dilemma between
22 adjusting their behavior now in order to comply with the regulations on the timetable prescribed, or
23 doing nothing while risking substantial sanctions for future non-compliance.

24 As discussed above, CARB determined that as soon as the 2009 model year, automobile
25 manufacturers will be required to offer completely redesigned automobiles for the California market
26 in order to meet CARB's aggressive new CO₂ emission standards. The changes CARB envisions –
27 such as turbocharging the engine, installing a six-speed transmission, or providing for stoichiometric
28 gasoline direct injection – go to the very foundation of automotive design. Designing new cars with

1 these types of advanced technologies requires substantial lead time. CARB itself has determined that
2 a manufacturer will be required to integrate these technologies in order to bring its fleet into
3 compliance with these regulations, and CARB conceded that it would take a minimum of four years
4 to do so.¹⁶ In fact, CARB concluded that it would not have been possible to shorten the phase-in
5 period because "more stringent standards would not be technically feasible" since "manufacturers
6 would have a very difficult time incorporating the needed technologies across their fleet as rapidly as
7 would be necessary." *ISOR* at 137. Accordingly, the rule set forth in *Abbott Labs* and its progeny is
8 directly applicable here: If "promulgation of the challenged regulations presents plaintiffs with the
9 immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions
10 and risking serious penalties for violation," the controversy is ripe. *Reno v. Catholic Soc. Servs., Inc.*,
11 509 U.S. 43, 57, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993) (construing *Abbott Labs*.)

12 There is, therefore, no prudential reason to delay a decision in this action on the merits. "To
13 delay a decision would impose upon [AIAM members] the uncertainty of not knowing whether they
14 will be required to incur the substantial expenses and comply with the numerous regulatory
15 requirements imposed by the" CARB Greenhouse Gas Regulations. *Skull Valley Band of Goshute*
16 *Indians v. Nielson*, 376 F.3d 1223, 1239 (10th Cir. 2004). *See also Pac. Gas & Elec. Co.*, 461 U.S. at
17 201-02, 103 S. Ct. at 1721 (preemption claim against moratorium on new nuclear power plants ripe
18 because "to require the industry to proceed without knowing whether the moratorium is valid would
19 impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the
20 citizens of California"). This Court should therefore deny the Defendant's Motion to Dismiss.

21 V. CONCLUSION

22 The "basic rationale" of the ripeness requirement is "to prevent the courts, through avoidance
23 of premature adjudication, from entangling themselves in abstract disagreements[.]" *Abbott Lab.*,
24 387 U.S. at 148. There is nothing abstract about the disagreement presented in this action. CARB

25
26 ¹⁶ As the Cabaniss Declaration points out, a four-year lead time is likely to be an underestimate
27 even for a single technology. For the simultaneous implementation of multiple brand new
28 technologies, such as CARB has concluded will be required, the lead time would be significantly
longer. *Cabaniss Decl.*, ¶ __.

1 has approved regulations that require automobile manufactures to improve the fuel economy of their
2 vehicle fleets in the California market, and thereby reduce the emissions of CO₂ from those motor
3 vehicles. These regulations are on their face preempted by EPCA and the Clean Air Act, and no
4 further factual development will change that. Nevertheless, these regulations on their face put
5 manufacturers such as AIAM members to a choice between starting now to revamp their automotive
6 fleets in order to meet the new CARB requirements, or risk facing serious sanctions in the future for
7 noncompliance. This is precisely the type of Hobson's choice the ripeness doctrine set forth in
8 *Abbott Labs* was specifically crafted to prevent. Accordingly, this action is ripe now.

9 DATED: May 2, 2005

10 KIMBLE, MACMICHAEL & UPTON

11
12 By: _____ /ss/

13 Jon Wallace Upton

14 Attorneys for Intervenor,
15 Association of International Automobile Manufacturers