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Agency Secretary

# Air Resources Board

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Arnold Schwarzenegger  
Governor

February 21, 2006

Stephen L. Johnson, Administrator  
USEPA Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1101A  
Washington, DC 20460

Re: 1998-2003 Amendments to the California Zero Emission Vehicle Regulation;  
Revision to Prior Request for Confirmation That Amendments Pertaining to 2003-  
2006 Model Years Are Within the Scope of Previous Waivers of Preemption  
Under Clean Air Act Section 209(b), and for a Waiver of Preemption for the  
Amended Requirements for MYs 2007 and Subsequent

Dear Mr. Johnson:

In a letter dated September 23, 2004, California Air Resources Board (CARB) Executive Officer Catherine Witherspoon advised the Administrator that CARB had adopted four sets of amendments to the California Zero Emission Vehicle (ZEV) regulation during 1999-2003. She requested that he confirm CARB's determination that the aggregated amendments resulting from the four rulemakings as they affect model years (MYs) 2003-2006 are within the scope of the waiver of preemption under Clean Air Act (CAA) section 209(b) for the original ZEV regulation – adopted as part of California's first generation Low Emission Vehicle (LEV I) rulemaking. She also requested that the Administrator issue a new waiver of preemption for the ZEV regulation amendments applicable to the 2007 and subsequent MYs. After the U.S. Environmental Protection Agency (U.S. EPA) conducted its hearing on the request February 17, 2005, and closed the comment period March 29, 2005, we fully expected that the agency would complete action on this request before the first 2007 MY vehicles could be certified on January 2, 2006. In light of U.S. EPA's failure to take final action to date, and for the reasons set forth below, CARB is now asking that U.S. EPA confirm our determination that the ZEV amendments applicable to 2007 MY vehicles are within the scope of the previous waiver of preemption except to the extent that the amendments affect heavier light-duty trucks in the "LDT2"<sup>1</sup> category. We also reaffirm our request for a new waiver, which should now apply to MYs 2008 and later.

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<sup>1</sup> A "LDT2" is a "LEV II" light-duty truck with a loaded vehicle weight of 3751 pounds to a gross vehicle weight of 8500 pounds, or a "LEV I" light-duty truck with a loaded vehicle weight of 0-3750 pounds. (section 1962(j), title 13, California Code of Regulations.)

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Prior to MY 2007, the ZEV regulation only applies to passenger cars and the lightest light-duty truck category, "LDT1."<sup>2</sup> The ZEV Amendments added section 1962(b)(1)(C), title 13, California Code of Regulations, under which LDT2s become subject to the percentage ZEV requirements during a multi-year phase-in from MY 2007 through MY 2012. In MY 2007, 17 percent of the LDT2s produced and delivered for sale in California by a manufacturer are subject to the ZEV requirements. The applicability of the ZEV requirements to LDT2s increases in 17 percent increments through MY 2011, and LDT2s are fully phased in starting with MY 2012. The Waiver Support Document<sup>3</sup> submitted with our September 23, 2004 request letter explains on page 25 that, "Because LDT2s were not subject to the ZEV requirements when U.S. EPA took its [prior ZEV] waiver actions, [C]ARB has decided to request a new waiver of preemption for the ZEV requirements as they apply to 2007 and subsequent MY vehicles."

We continue to believe that, for the 2007 MY, it is appropriate to treat the new provision pertaining to LDT2s – section 1962(b)(1)(C) – as needing a new waiver of preemption. But in almost all other respects, there is no difference in the way the ZEV Amendments apply to MY 2007 vehicles and the way they apply to MY 2006 vehicles. I have accordingly determined, pursuant to my authority under California Health and Safety Code sections 39515 and 39516, that except for the addition of section 1962(b)(1)(C) and references thereto, the ZEV Amendments applicable to 2007 MY vehicles are within the scope of previous waivers because they (1) do not undermine CARB's protectiveness determinations in the original ZEV waiver or the LEV II waiver, (2) do not cause the California requirements to be inconsistent with section 202(a) of the CAA, and (3) raise no new issues affecting previous waiver determinations of the Administrator.

First, the reasons given in Section VI.B. of the Waiver Support Document for why the ZEV Amendments for the 2006 and earlier MYs do not undermine CARB's protectiveness determinations in the original ZEV waiver or the LEV II waiver similarly apply for MY 2007. In 2001, U.S. EPA found that CARB's 1996 amendments eliminating the percentage ZEV requirements for MYs 1998-2002 were within the scope of the original ZEV waiver. In reaching this conclusion, the Assistant Administrator observed that even without the ZEV provisions, the fleet average NMOG requirement in the waived California LEV regulations imposes more stringent emission standards than

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<sup>2</sup> A "LDT1 is a light duty truck with a loaded vehicle weight of 0-3750 pounds. (section 1962(j), title 13, California Code of Regulations.)

<sup>3</sup> "Basis for California's Request for Clean Air Act Section 209(b) Within the Scope and New Waiver Determinations for the 1999-2003 Amendments to the California Zero Emission Vehicle Regulation," September 2004.

the comparable federal standards.<sup>4</sup> And when U.S. EPA granted the LEV II waiver in 2003, it did so without considering the added emission benefits that may result from California's ZEV requirements. Since the CARB standards for passenger cars and light-duty trucks would be at least as protective as the comparable federal standards without the ZEV requirements altogether, the ZEV amendments as they apply to MY 2007 clearly do not undermine CARB's prior protectiveness determinations.

Second, the amendments applicable to MY 2007 do not cause the California requirements to be inconsistent with section 202(a) of the CAA. One of the two elements of the consistency criterion is an evaluation whether there is inadequate lead time to permit development the technology to meet the California requirements, giving appropriate consideration to the cost of compliance within the time provided.<sup>5</sup> Section VI.C.(1) of the Waiver Support Document identified the many respects in which a variety of previously unavailable compliance options for MYs 2005 and 2006 increase the technological feasibility of meeting the ZEV Amendments compared to the original ZEV requirements which they replaced. Apart from the start of the multi-year phase-in of the ZEV requirements for LDT2s, the MY 2007 requirements are exactly the same as the MY 2006 requirements except for a limited increase in the restriction on the percentage of a manufacturer's requirements for pure ("gold") ZEVs that can be met with credits from MY 2001 through 2005 neighborhood electric vehicles (NEVs).<sup>6</sup> For MY 2006, 75 percent of a manufacturer's "gold" ZEV requirement can be met with credits from these NEVs, while for MY 2007 the cap becomes 50 percent.<sup>7</sup> The September 2004 Waiver Support Document described the numerous compliance options added by the ZEV amendments, which taken together significantly increase the feasibility of compliance. Overall, there can be little question that the ZEV Amendments as they affect MY vehicles are considerably more feasible than the preexisting 10 percent ZEV requirements.

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<sup>4</sup> 66 F.R. 7751 (January 25, 2001).

<sup>5</sup> The other consistency prong involves an evaluation whether inconsistencies between federal and California test procedures that would preclude a manufacturer from conducting one set of tests to demonstrate compliance with the federal and California certification emission standards. The Waiver Support Document explained on pp. 24 and 32 that there is no such inconsistency with respect to the amended ZEV requirements for any model years.

<sup>6</sup> Among the requirements that do not change from MY 2006 to MY 2007 is the "minimum floor" for producing Type III ZEVs (expected to be fuel cell vehicles) for manufacturers choosing the "alternative compliance path" set forth in section 1962(b)(2)(B)1.a. The "minimum floor" requirement is a single requirement applicable over the MY 2005 – MY 2008 period for each manufacturer, which would result in a total of about 250 fuel cell vehicles in California and Section 177 states if all manufacturers were to elect to follow the alternative path. (See Final Statement of Reasons, January 2004, p. 19.)

<sup>7</sup> Section 1962(g)(6), title 13, California Code of Regulations.

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In its March 29, 2005, Supplemental Submittal, CARB acknowledged that the consistency prong of the “within-the-scope” test should address the underlying consistency of the amended standards or enforcement procedures rather than merely compare their feasibility to the previously waived standards. The Waiver Support Document demonstrated the technological feasibility of the amended ZEV requirements for MY 2007. The ZEV requirements are expected to be met with credits from “bronze” partial ZEV allowance vehicles (PZEVs), “silver” advanced technology PZEVs (AT PZEVs, and “gold” pure ZEVs. We noted that for MY 2004, there were 12 bronze PZEV engine families comprising 33 models produced by 11 different manufacturers, and identified some of the technologies used on the PZEV models. We indicated that by the end of 2004, we expected there would be more than 140,000 PZEVs on California’s roads. All of these vehicles generated credits for subsequent MYs, as the percentage ZEV requirements did not apply until MY 2005, and they all qualified for multipliers of 2.0 (MY 2004) or 4.0 (MYs 2002-2003). We also described the introduction of various vehicles certified as AT PZEVs, including the MY 2003 Honda Civic Hybrid and Honda Civic GX (fueled with CNG), the MY 2004 Toyota Prius Hybrid, the MY 2005 Ford Escape Hybrid, and various other hybrids expected to be certified in the near term. We also observed that manufacturers had reported the placement of roughly 21,000 MY 2001-2002 NEVs.

Third, just as we indicated that we are aware of no new issues affecting the previous waiver determinations that are raised by the ZEV Amendments as they affect 2006 and earlier MYs, we are aware of no new issues for the 2007 MY requirements – other than those that may pertain to phase-in of the requirements for LDT2s.

In light of the foregoing analysis, CARB respectfully requests that U.S. EPA confirm my determination that the ZEV Amendments applicable to MY 2007 – other than the provisions of section 1962(b)(1)(C) and references thereto – are within the scope of the original ZEV waiver and the LEV II waiver.

If you have any questions on this matter, please contact me at (916) 322-2892. Legal questions may be directed to General Counsel Tom Jennings at (916) 323-9608.

Sincerely,

Tom Cackette  
Chief Deputy Executive Officer

cc: Julie Becker, Assistant General Counsel  
Alliance of Automobile Manufacturers