

A CLOSER LOOK AT *GREEN MOUNTAIN CHRYSLER v. CROMBIE*

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INTRODUCTION

Hailed as a “major victory for states’ efforts to combat global warming,”¹ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* was the first case in the nation to rule on an alleged conflict between federal fuel economy laws and a set of greenhouse gas (GHG) emission standards for new motor vehicles.² Chief Judge William K. Sessions III of the U.S. District Court for the District of Vermont found no conflict between the Energy Policy and Conservation Act and Clean Air Act emission standards³ that have been adopted by states throughout the country. Interestingly, until Chief Judge Sessions issued his 240-page landmark decision, *Green Mountain* went largely unnoticed, especially as compared to parallel litigation underway in California.⁴

This Article takes a closer look at the *Green Mountain* case. It first briefly reviews the provisions of the two federal statutes principally at issue: the Energy Policy and Conservation Act (EPCA)⁵ and the Clean Air Act (CAA).⁶ Next, it describes the background of the case, including the GHG emissions standards⁷ and the claims set forth by the automobile industry. The Article then details the various pre-trial motions and concludes by analyzing the court’s decision on the pivotal issue of EPCA preemption.

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1. Candace Page, *Vermont Wins Big in Emissions Case: Judge Rejects Carmakers’ Every Claim*, BURLINGTON FREE PRESS, Sept. 13, 2007, at 1A.

2. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 301 (D. Vt. 2007); see Page, *supra* note 1 (noting the *Green Mountain* decision was the first on the GHG emissions standards developed by California).

3. *Green Mountain*, 508 F. Supp. 2d at 347.

4. *Cent. Valley Chrysler Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1163 (E.D. Cal. 2006).

5. Energy Policy & Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (pertinent provisions codified at 49 U.S.C. §§ 32901–19 (2000)).

6. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).

7. 7 VT. CODE R. § 5-1102, app. F (2007) (incorporating by reference CAL. CODE REGS. tit. 13, § 1961.1 (2007)).

I. STATUTORY BACKGROUND

A. *The Clean Air Act*

Congress enacted the CAA “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”⁸ The CAA is considered a model of cooperative federalism that establishes a comprehensive program for controlling and improving the nation’s air quality where the “States and the Federal Government [are] partners.”⁹ However, the CAA vests the U.S. Environmental Protection Agency (EPA) with the “almost exclusive responsibility for establishing automobile emission standards for new cars.”¹⁰ Specifically, CAA section 209(a) prohibits any state or political subdivision from adopting or attempting to enforce “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”¹¹ Thus, the general rule is that “state regulation of automotive tailpipe emissions is preempted by the [CAA].”¹²

The critical exception to this rule is the State of California, which is authorized by federal law to establish its own automobile standards for new automobiles.¹³ This authority, however, is not plenary. Rather, it is subject to approval by EPA via a “preemption waiver.”¹⁴ Congress gave California the authority to seek a waiver because California had uniquely severe air pollution problems and had already begun to regulate automobile emissions.¹⁵ Legislative history makes clear that the waiver provision was intended “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”¹⁶

8. 42 U.S.C. § 7401(b)(1).

9. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

10. *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 452 (D.C. Cir. 1998); *see* 42 U.S.C. §§ 7521, 7543(a)–(b) (empowering the EPA Administrator to set federal motor vehicle emission standards and prohibiting states from enacting their own standards, but allowing for a limited waiver of this prohibition for certain states).

11. 42 U.S.C. § 7543(a).

12. *Motor Vehicle Mfrs. Ass’n v. N.Y. Dep’t of Env’tl. Conservation*, 79 F.3d 1298, 1302 (2d Cir. 1996).

13. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 344 (D. Vt. 2007).

14. *See* 42 U.S.C. § 7543(b). This section, more commonly known as CAA section 209(b), allows for a waiver from preemption for “any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966.” *Id.*

15. *Green Mountain*, 508 F. Supp. 2d at 344.

16. *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998) (quoting H.R.

For the past four decades, California has frequently used its CAA authority to become a “proving ground” for emission-reducing technology, now commonly known as “California emission standards,” much of which EPA later incorporated into federal regulations.¹⁷

Although California’s waiver authority is subject to approval by EPA, the scope of EPA’s oversight is limited. California must first demonstrate to EPA that its regulations “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”¹⁸ EPA is then required to waive federal preemption unless it finds that (1) California’s determination is arbitrary and capricious; (2) California does not need the standards to meet compelling and extraordinary conditions; or (3) the standards are “not consistent” with section 202(a) of the CAA.¹⁹ When determining whether California’s standards are not consistent with CAA section 202(a)(2), EPA must take technical and economic factors into consideration.²⁰ Section 202(a)(2) of the CAA requires that EPA ensure that the regulations only take effect “after such period as the Administrator [of EPA] finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.”²¹ Although EPA has never denied California’s request for a waiver in its entirety, it has denied certain provisions in waiver applications or delayed their implementation in order to comply with the technical or economic considerations required by CAA section 202.²²

Equally as important as California’s waiver authority, Congress enacted CAA section 177 “so that states attempting to combat their own pollution problems could adopt California’s more stringent emission controls.”²³ In the words of one federal court, this so-called “piggy-back” provision “was designed to provide states with another tool in their efforts to meet the [CAA’s National Ambient Air Quality Standards]” and is “carefully circumscribed to avoid placing an undue burden on the automobile manufacturing industry.”²⁴ Section 177 of the CAA allows any state to adopt motor vehicle emission standards if that state’s standards “are

REP. NO. 95-294, at 301–02 (1977)).

17. *Green Mountain*, 508 F. Supp. 2d at 345–46.

18. 42 U.S.C. § 7543(b)(1).

19. *Id.*

20. 42 U.S.C. § 7521(a)(2).

21. *Id.*

22. *Green Mountain*, 508 F. Supp. 2d at 348–49.

23. *Motor Vehicle Mfrs. Ass’n v. N.Y. State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 531 (2d Cir. 1994); *see also* 42 U.S.C. § 7507 (allowing States to adopt standards that “are identical to the California standards”).

24. *Am. Auto. Mfrs. Ass’n v. Cahill*, 973 F. Supp. 288, 295 (N.D.N.Y. 1997).

identical to the California standards for which a waiver has been granted,” and both California and that state adopt the standards at least two years before the commencement of the model year to be regulated.²⁵

In sum, the effect of sections 177 and 209 of the CAA “is that new ‘motor vehicles must be either “federal cars” designed to meet EPA’s standards or “California cars” designed to meet California’s standards.’”²⁶ This shared authority between the federal government and the states represents a compromise “between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements.”²⁷

B. *The Energy Policy and Conservation Act of 1975*

The Energy Policy and Conservation Act of 1975 was “a comprehensive legislative response” to the severe energy crisis of the 1970s.²⁸ In EPCA, Congress imposed new provisions mandating energy conservation throughout U.S. business sectors, including “improved energy

25. 42 U.S.C. § 7507. Section 177 reads in full, as follows:

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

- (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
- (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a “third vehicle”) or otherwise create such a “third vehicle”.

Id.

26. *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998) (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1080 (D.C. Cir. 1996)).

27. *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), *quoted in Green Mountain*, 508 F. Supp. 2d at 304.

28. *Ctr. for Auto Safety v. Thomas*, 847 F.2d 843, 845 (D.C. Cir. 1988), *vacated*, 856 F.2d 1557 (D.C. Cir. 1988); *see also* *Gen. Motors Corp. v. Nat’l Highway Traffic Safety Admin.*, 898 F.2d 165, 166–67 (D.C. Cir. 1990) (describing EPCA as Congress’s “comprehensive response to the energy crisis of 1973”).

efficiency of motor vehicles.”²⁹ In particular, EPCA amended the Motor Vehicle Information & Cost Savings Act by adding provisions “devoted to improving automotive efficiency by establishing average fuel economy standards.”³⁰

In EPCA, Congress set the mandatory average fuel economy standard for passenger automobiles at 18 miles per gallon (mpg) for Model Year (MY) 1978,³¹ with an increase to 27.5 mpg by MY 1985.³² For passenger automobiles after MY 1985 (and for light duty trucks), EPCA directs the Secretary of Transportation to set standards at the “maximum feasible average fuel economy level.”³³ The Secretary of Transportation has in turn delegated this authority to the National Highway Traffic Safety Administration (NHTSA).³⁴ The fuel economy standards set by Congress and NHTSA, which are calculated as a fleet-wide average for a manufacturer in a given year, are known as corporate average fuel economy (CAFE) standards.³⁵

When setting the CAFE standards for automobiles or light trucks at “maximum feasible average fuel economy” levels, EPCA requires NHTSA to consider “[1] technological feasibility, [2] economic practicability, [3] the effect of other motor vehicle standards of the Government on fuel economy, and [4] the need of the United States to conserve energy.”³⁶ Congress did not direct NHTSA exactly how it should balance these factors, rather Congress “gave it broad guidelines within which to exercise its discretion.”³⁷ For example, NHTSA has interpreted “technological feasibility” and “economic practicability” to mean, as a general matter, that

29. 42 U.S.C. § 6201(5) (2000); *Green Mountain*, 508 F. Supp. 2d at 305.

30. *Green Mountain*, 508 F. Supp. 2d at 305–06 (quoting the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, §§ 501–12, 89 Stat. 871, 901–16).

31. Nat’l Highway Traffic Safety Admin., CAFE Overview—Frequently Asked Questions, <http://www.nhtsa.dot.gov/cars/rules/cafe/overview.htm> (last visited Apr. 1, 2008).

32. Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, § 301, 89 Stat. 871, 902. A “model year” is the annual production period for a vehicle or engine family which begins either when such vehicle is first produced or January 2 of the year preceding the year for which the model is named, whichever is later. 40 C.F.R. §§ 85.2302, 85.2304 (2007). The model year must end on December 31 of the year for which the model is named. *Id.* Congress significantly changed these standards in 2007 by amending EPCA. *See generally* 49 U.S.C. § 32902 (2000) (outlining an updated scheme under which the average fuel economy standards are set to begin shifting toward 35 miles per gallon in 2011, rising to fleet-wide in 2020, and then to the “maximum feasible average fuel economy standard” for that model year). Since these changes were not in effect at the time the *Green Mountain* case was commenced, all references herein will be to the 2000 version of § 32902 which was applied in the case.

33. 49 U.S.C. § 32902(a) (2000).

34. 49 C.F.R. § 1.50(f) (2006).

35. 49 U.S.C. § 32902.

36. *Id.* § 32902(f).

37. *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 901 F.2d 107, 121 (D.C. Cir. 1990).

the fuel economy levels: (a) do not restrict consumer choice of automobile and trucks to an unreasonable degree;³⁸ (b) do not “threaten economic hardship for the industry as a whole”;³⁹ (c) do not result in a significant loss in employment in the U.S. automotive industry;⁴⁰ and (d) do not cause adverse safety consequences.⁴¹ EPCA specifies that other federal motor vehicle standards include the emission standards set by EPA under CAA section 202 and also the alternate emission standards developed by California pursuant to CAA section 209(b).⁴² Based on numerous past rulemakings, NHTSA shares the interpretation that it must consider California’s CAA standards when setting CAFE standards.⁴³

EPCA also contains a preemption clause, found in EPCA section 32919(a), which reads:

When an average fuel economy standard prescribed under this chapter is in effect, 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 for automobiles covered by an average fuel economy standard under this chapter.⁴⁴

Congressional testimony when EPCA was enacted demonstrates that manufacturers were concerned about having to comply with varying fuel economy standards in different states. Yet there is neither legislative history explaining the limits to this preemption provision, nor any indication as to whether it applied to emission standards adopted by states under the CAA. As examined below, the court in *Green Mountain* was the first to decide these issues.

38. Pub. Citizen v. Nat’l Highway Traffic Safety Admin., 848 F.2d 256, 260 (D.C. Cir. 1988).

39. Passenger Automobile Average Fuel Economy Standards Model Year 1986, 50 Fed. Reg. 40,528, 40,530 (Oct. 4, 1985) (codified at 49 C.F.R. pt. 531).

40. Fuel Economy Standards—Credits and Fines—Rights and Responsibilities of Manufacturers in the Context of Changes in Corporate Relationships, 69 Fed. Reg. 77,663, 77,667 (Dec. 28, 2004) (to be codified at 49 C.F.R. pt. 534).

41. See Passenger Automobile Average Fuel Economy Standards, 42 Fed. Reg. 33,534, 33,551 (June 30, 1977) (codified at 49 C.F.R. pt. 531) (addressing concerns that “downsizing passenger automobiles as a result of the fuel economy standards” could decrease the safety of such vehicles).

42. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 346 (D. Vt. 2007).

43. See Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17,566, 17,643 (Apr. 6, 2006) (to be codified at 49 C.F.R. pts. 523, 533, 537) (including California’s emissions standards while addressing how best to meet the stricter standards); see also *Green Mountain*, 508 F. Supp. 2d at 346–47 n.54 (citing ten additional NHTSA Federal Register Notices discussing California emission standards as federal standards).

44. 49 U.S.C. § 32919(a) (2000).

II. *GREEN MOUNTAIN CHRYSLER PLYMOUTH DODGE JEEP v. CROMBIE*

The *Green Mountain* case had its roots in the State of California as a challenge to emission standards originally developed by the California Air Resources Board (CARB).⁴⁵ In 2002, the California Legislature exercised its unique authority under CAA section 209(b) by enacting Assembly Bill No. 1493, which required CARB to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.”⁴⁶ In response, the CARB staff analyzed the technologies and the fuels that were available, the effectiveness of such technologies, and their cost.⁴⁷ The end product of CARB’s work was the ambitious GHG emissions standards that were adopted by California on September 15, 2005.⁴⁸ As required by the CAA, California thereafter requested a preemption waiver from EPA.⁴⁹ The promulgation of these standards paved the way for about a dozen other states, including Vermont, to adopt standards identical to California’s standards pursuant to CAA section 177.⁵⁰

Before challenging the standards in the *Green Mountain* case, the same coalition of automobile manufacturers and automobile trade associations filed a lawsuit in California entitled *Central Valley Chrysler-Jeep v. Witherspoon*, asserting virtually identical constitutional and statutory claims that they subsequently alleged in the Vermont case.⁵¹ The litigation in California started in December of 2004.⁵² As soon as the Vermont Agency of Natural Resources adopted its regulations in November of 2005, the

45. The plaintiffs were the Alliance of Automobile Manufacturers, General Motors Corp., Green Mountain Chrysler-Plymouth-Dodge-Jeep, Green Mountain Ford-Mercury, Joe Tornabene’s GMC, Daimler Chrysler Corp., and the Association of International Automobile Manufacturers. Civil Docket, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-cv-302, 2:05-cv-304).

46. CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2007). The bill was introduced by Assemblyperson Fran Pavley, and thus is also known as the “Pavley regulations.” See Deborah Keeth, *The California Climate Law: A State’s Cutting-Edge Efforts to Clean Air*, 30 *ECOLOGICAL L.Q.* 715, 718–722 (2003) (summarizing the development of California’s regulations).

47. See CAL. HEALTH & SAFETY CODE § 43018.5(c) (West 2007) (directing the actions CARB was to take in developing the new regulations).

48. California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21,260, 21,261 (Apr. 30, 2007).

49. *Id.* at 21,260. California applied for a waiver of preemption on December 21, 2005. *Id.*

50. See, e.g., CONN. AGENCIES REGS. § 22a-174-36b (2007); 06-096 ME. CODE R. § 127 (2007); 310 MASS. CODE REGS. 7.40 (2007); N.J. ADMIN. CODE § 7:27-29.1 (2008); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 218-8.1 to -8.5 (2007); OR. ADMIN. R. 340-257-0100 (2007); 25 PA. CODE §§ 126.401–126.441; R.I. Dep’t of Env’tl. Mgmt., Air Pollution Control Regulation No. 37, Rhode Island’s Low Emission Vehicle Program (2007).

51. *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

52. *Cent. Valley*, 456 F. Supp. 2d at 1165.

automobile industry immediately filed suit in federal court in Burlington, Vermont.⁵³

A. *The Vermont Greenhouse Gas Emission Standards*

In 1996, Vermont first exercised its authority under CAA section 177 to adopt California emission standards for new motor vehicles.⁵⁴ Over the next decade, Vermont amended its Low Emissions Vehicle (LEV) program “in order to remain consistent with California’s standards.”⁵⁵ After California developed and adopted its GHG standards, Vermont once again amended its regulations, incorporating by reference California’s GHG standards.⁵⁶ By incorporating California’s regulations by reference in November of 2005, Vermont complied with CAA section 177’s requirements that the regulations be identical to California’s regulations and that they afford at least two model years lead time before their effective date.⁵⁷

Under the regulations, the GHG standards will be gradually phased in between MYs 2009 and 2016.⁵⁸ They apply to large-volume manufacturers beginning in 2009 and small/intermediate manufacturers starting in 2016.⁵⁹ The regulations cover two categories of new vehicles: “passenger cars and small light-duty trucks weighing 0 to 3750 pounds loaded vehicle weight (‘PC/LDT1’) and larger light-duty trucks and medium-duty passenger vehicles weighing 3751 to 8500 pounds loaded vehicle weight (‘LDT2’ or ‘LDT2/MDPV’).”⁶⁰ The regulations do not cover vehicles above 8500 pounds.⁶¹ “There are separate fleet average emission standards for each category, and within each category the sales-weighted average of a manufacturer’s vehicles is required to comply with the standard.”⁶² Therefore, some of a manufacturer’s individual vehicles can have emission

53. See *infra* Part II.B (discussing the complaints filed in the *Green Mountain* case). Many of the same plaintiffs also filed in federal court in Rhode Island. See *Lincoln Dodge, Inc. v. Sullivan*, Nos. 06-70T, 06-69T, 2007 WL 4577377 at *1 (D.R.I. Dec. 21, 2007) (explaining that the plaintiffs’ challenge of Rhode Island’s emissions standards regulation is preempted by EPCA, while noting that “[s]imilar actions have been brought in at least two other federal district courts”).

54. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 338 (D. Vt. 2007).

55. *Id.*

56. 7 VT. CODE R. § 5-1102, app. F (2007) (incorporating by reference CAL. CODE REGS. tit. 13, § 1961.1 (2007)).

57. 42 U.S.C. § 7507 (2000); see *supra* note 32 (defining the term “Model Year”).

58. Tit. 13, § 1961.1(a)(1)(A); *Green Mountain*, 508 F. Supp. 2d at 342.

59. *Green Mountain*, 508 F. Supp. 2d at 341; tit. 13, §§ 1961.1(a)(1), 1961.1(a)(1)(C)–(D).

60. *Green Mountain*, 508 F. Supp. 2d at 341–42; tit. 13, § 1961.1(a).

61. *Green Mountain*, 508 F. Supp. 2d at 342.

62. *Id.*; tit. 13, § 1961.1(a)(1)(B).

levels that exceed the standard as long as that manufacturer can offset those emissions with lower-emission vehicles.⁶³

The regulations address four discrete elements of emissions: (1) carbon dioxide, methane, and nitrous oxide emissions resulting directly from operation of the vehicle; (2) carbon dioxide emissions resulting from operating the air conditioning system (also known as indirect AC emissions); (3) refrigerant emissions, including hydrofluorocarbons, from the air conditioning system due to leakage, losses during recharging, or releases when the vehicle is destroyed (also known as direct AC emissions); and (4) upstream emissions associated with the production and distribution of the fuels used by the vehicle.⁶⁴ The regulations then set a maximum level of the combined emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons, which are weighted on the basis of their relative strength as greenhouse gases.⁶⁵

The emission standards are expressed as grams of carbon dioxide equivalent per mile (gpm).⁶⁶ For example, the PC/LDT1 category allows new vehicles to emit a fleet average of 323 gpm beginning in 2009, which gradually decreases to 205 gpm in 2016.⁶⁷ The LDT2 category allows new vehicles to emit a fleet average 439 gpm beginning in 2009, gradually decreasing to 332 gpm in 2016.⁶⁸ The mathematical relationship between fuel consumption and carbon dioxide emissions allows these emission standards to be expressed as fuel economy standards in miles traveled per gallon of gasoline consumed (mpg).⁶⁹ It is important to note, however, that these calculations are only true for a fleet consisting entirely of gasoline-only powered vehicles—not a fleet utilizing hybrid vehicles or vehicles operating on alternative fuels, such as ethanol.⁷⁰ The automobile industry calculated that for the PC/LDT1 category, the mileage equivalents for gasoline-only fueled vehicles are 27.6 mpg in MY 2009, increasing to 43.7

63. *Green Mountain*, 508 F. Supp. 2d at 342.

64. See tit. 13, § 1961.1(a)(1)(B)(1)(a)–(d) (describing the various factors to consider as well as the equations to use in order to reach the emissions output for each of those factors).

65. *Green Mountain*, 508 F. Supp. 2d at 352 n.59. For example, “methane has about twenty-five times the global warming potential of carbon dioxide, and nitrous oxide has almost three hundred times the global warming potential of carbon dioxide.” *Id.* (citing expert witness Harold M. Haskew’s testimony for the plaintiffs).

66. Tit. 13, § 1961.1(a)(1); *Green Mountain*, 508 F. Supp. 2d at 342.

67. Tit. 13, § 1961.1(a)(1)(A); *Green Mountain*, 508 F. Supp. 2d at 342.

68. Tit. 13, § 1961.1(a)(1)(A); *Green Mountain*, 508 F. Supp. 2d at 342.

69. *Green Mountain*, 508 F. Supp. 2d at 342 n.49.

70. See *id.* at 353 (“Vermont and California regulations are not the equivalent of fuel economy standards because multiple approaches, with various levels of fuel economy, allow compliance with the standard.”).

mpg in MY 2016.⁷¹ For LDT2s, they approximated the mileage equivalents for gasoline-only fueled vehicles as 20.3 mpg in MY 2009, increasing to 26.9 mpg in MY 2016.⁷²

Aside from reducing carbon dioxide emissions from the tailpipe, the GHG regulations provide alternative methods of compliance. For example, a manufacturer receives credits, measured in carbon dioxide equivalent terms, “for reducing the leakage of hydrofluorocarbons from the [vehicle] air conditioning system.”⁷³ Manufacturers can also earn credit for improving air conditioning system efficiency in a way that decreases engine load, which would in turn reduce the vehicle’s carbon dioxide emissions.⁷⁴ These air conditioning credits amount to at least 10 gpm in MYs 2009 to 2012 and at least 12 gpm in 2016.⁷⁵ Thus, because the regulations require reductions of approximately 120 gpm over eight years, the air conditioning credits will be a meaningful aspect of complying with the regulations.

In addition, the GHG regulations provide “upstream . . . emission adjustment factors”⁷⁶ for the use of alternative fuels, such as “corn ethanol (typically blended with gasoline as E85), liquid petroleum gas, and propane and compressed natural gas.”⁷⁷ Thus, the regulations are also concerned with the “life-cycle” GHG emissions impacts, i.e., the impacts associated with the production and transport of fuels, not just the emissions associated with their final combustion in the vehicle. Finally, manufacturers receive credit for complying with the standards before MY 2009, and also for exceeding the standards in later years.⁷⁸ These credits may be “banked” for use in a later model year, transferred between a manufacturer’s smaller and larger vehicle categories, or sold to another manufacturer.⁷⁹ If a manufacturer does not comply with the standard for a particular model year, it has up to five years to make up the shortfall by either generating enough credits or by obtaining credits from another manufacturer.⁸⁰

71. *Id.* at 342 n.49.

72. *Id.*

73. *Green Mountain*, 508 F. Supp. 2d at 342; see tit. 13, § 1961.1(a)(1)(B)(1)(b) (defining a “low-leak air conditioning system” and laying out the requirements manufacturers must meet in order to receive the allowance).

74. *Green Mountain*, 508 F. Supp. 2d at 342–43; see tit. 13, § 1961.1(a)(1)(B)(1)(c) (defining the “A/C Indirect Allowance”).

75. *Green Mountain*, 508 F. Supp. 2d at 381 (citing expert witness K.G. Duleep’s testimony for the defendants).

76. Tit. 13 § 1961.1(a)(1)(B)(1)(d).

77. *Green Mountain*, 508 F. Supp. 2d at 342.

78. Tit. 13 § 1961.1(b)(1)–(2); *Green Mountain*, 508 F. Supp. 2d at 342.

79. *Green Mountain*, 508 F. Supp. 2d at 342.

80. Tit. 13 § 1961.1(b)(3)(A); *Green Mountain*, 508 F. Supp. 2d at 342.

B. *The Green Mountain Complaints*

The “lead” plaintiffs in *Green Mountain* were the Alliance of Automobile Manufacturers, General Motors, DaimlerChrysler, and several local dealers (collectively, the Alliance).⁸¹ Their complaint consisted of six distinct claims for declaratory and injunctive relief: (1) express and implied preemption under EPCA; (2) preemption under the CAA; (3) a statutory violation of the CAA; (4) preemption by U.S. foreign policy and the Federal Government’s foreign affairs powers; (5) violation of the Dormant Commerce Clause; and (6) violation of the Sherman Act.⁸² The Association of International Automobile Manufacturers (International Association) filed a separate complaint alleging claims of preemption under EPCA and the CAA.⁸³ Both complaints were filed on November 18, 2005, and the cases were formally consolidated by Chief Judge William K. Sessions III on April 5, 2006.⁸⁴

1. Energy Policy and Conservation Act Preemption

The primary claim by both plaintiffs was that Vermont’s GHG regulations were preempted by EPCA. They alleged that the GHG standards were “related to” fuel economy standards and therefore fell within EPCA’s express preemption provision found in EPCA section 32919(a).⁸⁵ Both plaintiffs also argued that the regulations were impliedly preempted under the principles of field and conflict preemption.⁸⁶

The thrust of the automobile industry’s EPCA claim was that the GHG standards were de facto fuel economy standards because there is a mathematical relationship between the carbon content of a fuel and the carbon that is released through emissions of carbon dioxide.⁸⁷ In other words, they contended that “the only feasible way to reduce the emissions

81. Complaint at 1, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (No. 2:05-cv-302) [hereinafter Alliance Complaint].

82. *Id.* at 34–43.

83. Complaint for Injunctive and Declaratory Relief at 3, *Green Mountain*, 508 F. Supp. 2d 295 (No. 2:05-cv-304) [hereinafter Int’l Ass’n Complaint].

84. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, Nos. 2:05-cv-302, 2:05-cv-304 (D. Vt. Apr. 5, 2007) (order granting as unopposed motion to consolidate cases).

85. Alliance Complaint, *supra* note 81, at 35; Int’l Ass’n Complaint, *supra* note 83, at 19; *see supra* Part I.B (discussing EPCA and directly quoting the preemption provision contained in EPCA).

86. Alliance Complaint, *supra* note 81, at 35; Int’l Ass’n Complaint, *supra* note 83, at 19.

87. *Green Mountain*, 508 F. Supp. 2d at 351; *see* Int’l Ass’n Complaint, *supra* note 83, at 14, para. 39. “The only way to reduce the amount of CO₂ emitted from a gasoline fueled motor vehicle is to make it burn less fuel per mile driven. . . . Thus, a vehicle with higher fuel economy emits less CO₂ per mile traveled in direct proportion to the increase in its fuel economy.” *Id.*

of CO₂ from motor vehicles is to improve fuel economy.”⁸⁸ The automobile industry further alleged that because NHTSA “exclusively occupies the field of fuel economy regulation” under EPCA, the GHG regulations “impermissibly intrude on that field” and “frustrate the full effectiveness of the CAFE program.”⁸⁹

There was, however, a subtle difference between the arguments set forth by both sets of plaintiffs. The International Association stressed its express preemption claim and argued that no trial was necessary because this claim was purely a legal issue.⁹⁰ The Alliance, on the other hand, emphasized their implied or “conflict” preemption claim and asserted that a full trial was needed to show that, as a factual matter, Vermont’s regulations “stand[] as an obstacle to achievement of the objectives of Congress when it established a national program for the regulation of motor vehicle fuel economy.”⁹¹ Vermont’s standards, the Alliance argued, were “inconsistent with NHTSA’s determination of the ‘maximum feasible’ corporate average fuel economy standards for cars and light-duty trucks,” and would create “an acute, clear, direct and substantial adverse impact on the performance, price, and availability of vehicles that will be sold in Vermont” thereby minimizing consumer choice and resulting in nationwide job loss.⁹²

2. Clean Air Act Preemption

Both sets of plaintiffs next claimed that Vermont’s regulations were preempted by the CAA. Because the regulations qualified as a “standard related to the control of emissions from new motor vehicles,” they alleged that the GHG standards were preempted by CAA section 209(a).⁹³ They requested “a declaration that [Vermont’s] CO₂ regulation is preempted by the [CAA].”⁹⁴ On this point, the plaintiffs made slightly different arguments.

The International Association observed that the “only exceptions to

88. Int’l Ass’n Complaint, *supra* note 83, at 16.

89. *Id.* at 19.

90. See Plaintiffs’ Motion to Deconsolidate and for a Rule 16 Conference with Supporting Memorandum of Law at 2, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304) [hereinafter Alliance Motion to Deconsolidate] (citing the International Association’s motion for summary judgment).

91. Alliance Complaint, *supra* note 81, at 35; Alliance Motion to Deconsolidate, *supra* note 90, at 1–2.

92. Alliance Complaint, *supra* note 81, at 35.

93. *Id.* at 37; see Int’l Ass’n Complaint, *supra* note 83, at 20–21 (discussing the preemption provision of § 209(a) of the CAA); see also *supra* Part I.A (directly quoting the preemption provision).

94. Alliance Complaint, *supra* note 81, at 38; see Int’l Ass’n Complaint, *supra* note 83, at 22 (requesting “a declaration that [Vermont’s] Regulations are preempted by the CAA and unenforceable”).

federal exclusivity” of the CAA were sections 209(b) and 177.⁹⁵ It pointed out that although Vermont seeks to adopt California’s regulations, California “has not obtained a waiver for its . . . [r]egulations, nor has California applied for such a waiver.”⁹⁶ Therefore, it claimed that “contrary to the provisions of Sections 209 and 177 of the CAA,” Vermont has adopted the GHG regulations in violation of the CAA.⁹⁷

The Alliance instead focused on EPA’s position at the time that “regulation of carbon dioxide and greenhouse gases to address climate change is not authorized by section 202(a) of the [CAA].”⁹⁸ They argued that this “authoritative determination by EPA precludes any State from adopting any new motor vehicle emission standards for carbon dioxide or greenhouse gases.”⁹⁹ They alleged that “[a]t a minimum, any State that disagrees with EPA’s position must seek reconsideration of EPA’s interpretation of section 202(a) [of the CAA] before it may adopt new motor vehicle emission standards for carbon dioxide or greenhouse gases.”¹⁰⁰

3. Violation of Section 177 of the Clean Air Act

Distinct from the CAA preemption claim, the Alliance brought a statutory claim under section 177 of the CAA.¹⁰¹ Section 177 of the CAA, as discussed above, allows states to adopt emission standards for new motor vehicles if that state’s standards “are identical to the California standards for which a waiver has been granted,” and the standards are adopted at least two years before the commencement of the model year to be regulated.¹⁰² Although the Alliance did not dispute that Vermont’s regulations complied with these requirements of CAA section 177, they pointed out that section 177 also provides that “[n]othing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards.”¹⁰³ They alleged that Vermont’s regulations would violate section 177 by “directly or indirectly forc[ing] some manufacturers to

95. Int’l Ass’n Complaint, *supra* note 83, at 21.

96. *Id.*

97. *Id.*

98. Alliance Complaint, *supra* note 81, at 37. The complaints in the *Green Mountain* case were filed in November of 2005—before the U.S. Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459–60 (2007) reversed EPA’s stance on this issue.

99. Alliance Complaint, *supra* note 81, at 37.

100. *Id.*

101. *Id.* at 15, 39–40.

102. 42 U.S.C. § 7507 (2000).

103. *Id.*

restrict or limit the sale of some vehicles that would be legal for sale in California, and that could be sold in California in compliance with the CO₂ rules in California.”¹⁰⁴ They asserted that this would occur because “for some manufacturers, the mix of various types of vehicles sold in Vermont differs substantially from the mix of vehicles sold in California,” and therefore some “[m]anufacturers will be forced to limit the availability of some of their California product offerings in Vermont.”¹⁰⁵

4. Foreign Policy Preemption

The Alliance also claimed that the GHG standards “intrude[] upon the foreign policy of the United States and the foreign affairs prerogatives of the President and Congress of the United States.”¹⁰⁶ Specifically, they alleged that because the “President and Congress have committed the United States to the pursuit of multilateral agreements to reduce international greenhouse gas emissions,” Vermont’s regulations conflict with that foreign policy by interfering “with the ability of the United States to speak with one voice upon matters of global climate change.”¹⁰⁷ They further alleged that the GHG regulations conflict with U.S. foreign policy to pursue multilateral agreements to reduce GHG emissions by “diminish[ing] the bargaining power of the United States in negotiating multilateral reductions of greenhouse gases.”¹⁰⁸

5. Violation of the Commerce Clause

The penultimate claim by the Alliance was that the GHG regulations violated the Commerce Clause of the U.S. Constitution.¹⁰⁹ The U.S. Supreme Court has recognized that implicit in Congress’s power to “regulate Commerce . . . among the several States” is “a further, negative command, known as the [D]ormant Commerce Clause.”¹¹⁰ The Dormant Commerce Clause prevents states from engaging in economic protectionism through “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹¹¹ The GHG regulation,

104. Alliance Complaint, *supra* note 81, at 39.

105. *Id.*

106. Alliance Complaint, *supra* note 81, at 41; U.S. CONST. arts. I, § 8, II.

107. Alliance Complaint, *supra* note 81, at 41.

108. *Id.*

109. *Id.* at 42–43; U.S. CONST. art. I, § 8, cl. 3.

110. Okla. Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995) (quoting U.S. CONST. art. I, § 8, cl. 3).

111. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988).

the Alliance claimed, “burdens the production and sale of new motor vehicles by increasing the purchase price to the customer,” and because these burdens were “excessive in relation to its local benefits, the regulation violates the Dormant Commerce Clause.”¹¹²

6. Violation of the Sherman Antitrust Act

The final claim by the Alliance was that Vermont’s regulations were preempted because they would force automobile manufacturers to violate the Sherman Antitrust Act.¹¹³ The Alliance pointed out that the regulation “requires that if one manufacturer owns a ten percent or greater share of another manufacturer, the two companies will be treated as a single manufacturer for compliance purposes.”¹¹⁴ This, they argued, compels certain manufacturers to aggregate their sales data for compliance purposes, which may result in the illegal restraint of trade because it “will likely require the exchange of supply and price information.”¹¹⁵

The automobile manufacturers elaborated that they “attempt to control the mix of vehicles that are sold by raising and lowering prices to encourage and discourage sales of particular vehicle models or groups.”¹¹⁶ Because a manufacturer that was “attempting to comply with a fleet average fuel economy standard will have to ensure that the correct mix of vehicles is sold, . . . price information will likely have to be exchanged and perhaps even fixed.”¹¹⁷ They asserted that this coordination—and in particular, any price fixing—between manufacturers, which are otherwise competitors, violates the Sherman Act by requiring “illegal coordination among manufacturers that are not a single economic entity.”¹¹⁸

C. *The Green Mountain Pre-Trial Motions*

1. Vermont’s Motions to Stay and to Dismiss

From the beginning, the State of Vermont’s position in *Green Mountain* was that the parallel case of *Central Valley* should proceed first.

112. Alliance Complaint, *supra* note 81, at 42.

113. *Id.* at 43–45. The Sherman Act “prohibits [e]very contract . . . or conspiracy in restraint of trade or commerce among the several States.” *Id.* at 44 (quoting 15 U.S.C. § 1 (2000) (alteration in original)).

114. Alliance Complaint, *supra* note 81, at 43.

115. *Id.* at 44.

116. *Id.* at 43.

117. *Id.*

118. *Id.* at 44.

Consistent with this view, Vermont in February of 2006 moved for a stay pending the outcome in *Central Valley*.¹¹⁹ Vermont argued that the California case would have a significant, if not dispositive, effect on the Vermont case because Vermont (and other states) could only maintain their GHG regulations if California's regulations were found to be valid.¹²⁰ Therefore, an adverse ruling in California would entirely obviate the need for courts in other states to consider these same claims. In addition, Vermont asserted that *Green Mountain* was duplicative of *Central Valley*, and, at the very least, a decision in California could greatly narrow the scope of discovery and issues for trial, thereby conserving resources of the Court and the parties.¹²¹

On May 3, 2006, Chief Judge Sessions denied the motion to stay the case, concluding that "any judicial economy must yield to the rights of the plaintiffs to their day in court in their chosen forum."¹²² Although he recognized that "wise judicial administration and conservation of judicial resources counsel against duplicative lawsuits in the federal district courts,"¹²³ Chief Judge Sessions rejected Vermont's argument that the *Green Mountain* case was "duplicative" of the ongoing *Central Valley* case.¹²⁴ He also declined to issue a stay based on hardship to the State of Vermont to defend the case, finding that "although genuine," it was not the type of hardship or inequity that would warrant a stay.¹²⁵ Finally, Chief Judge Sessions was concerned that the stay would likely remain in place for

119. Defendants' Memorandum in Support of Motion to Stay Cases at 1–2, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-cv-302, 2:05-cv-304).

120. *Id.* at 10.

121. *See id.* (noting general judicial adversity to piecemeal litigation). While the stay motion was pending, various local and national environmental advocacy groups moved to intervene as party-defendants in support of the State. The parties were Conservation Law Foundation, Vermont Public Interest Research Group, Environmental Defense, Natural Resources Defense Council, and Sierra Club. Motion of Conservation Law Foundation, Sierra Club, Natural Resources Defense Council, Environmental Defense, and Vermont Public Interest Research Group to Intervene as Party Defendants, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

122. *Green Mountain Chrysler Plymouth Dodge Jeep v. Torti*, Nos. 2:05-cv-302, 2:05-cv-304, slip op. at 7 (D. Vt. May 3, 2006) (order denying stay and granting motion to intervene) [hereinafter Stay Opinion] (order denying defendant's motion to stay pending the outcome of *Cent. Valley Chrysler Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006)). In his opinion and order, Chief Judge Sessions granted the environmental groups' motion to intervene. *See Stay Opinion, supra* at 8–14 (discussing the legal merits of the applicants' motion to intervene as party defendants). The State of New York later moved to intervene as a party defendant and was granted party status on July 27, 2006. Minute Entry for Proceedings Held July 27, 2006, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

123. Stay Opinion, *supra* note 122, at 4 (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

124. *Id.* at 5.

125. *Id.* at 6–7.

too long.¹²⁶ He noted that whichever party lost in the *Central Valley* case would likely appeal and that “[b]y the time an appeal, and conceivably a petition for a writ of certiorari [to the U.S. Supreme Court] is ruled upon, years may have elapsed.”¹²⁷

Following denial of the stay motion, Vermont moved to dismiss the case for lack of jurisdiction.¹²⁸ In that motion, filed under Rule 12(h) of the Federal Rules of Civil Procedure, Vermont argued that the case was not “ripe” because its regulations did not become binding and enforceable until California received a waiver of preemption from EPA.¹²⁹ In support of its position, Vermont cited a recent ripeness case, *Texas v. United States*, where the U.S. Supreme Court held that “[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹³⁰ Vermont noted that although California had applied for a waiver of preemption under CAA section 209(b), EPA had not yet ruled on California’s waiver application.¹³¹ Because it was unknown how and when EPA would act on the waiver application, the automobile industry’s claims that the GHG regulations were invalid (under any of its theories) were “entirely dependent on EPA’s issuance of a waiver.”¹³² Therefore, Vermont urged the court to dismiss the case because “any decision by this court on *any* of [the] claims prior to EPA’s waiver decision would be an impermissible advisory opinion.”¹³³ After both sides submitted briefs on the issue, Chief Judge Sessions took the ripeness motion under advisement and the parties continued in the discovery process throughout the summer of 2006.

The factual and expert discovery that was underway at the time is worth a brief discussion. Because the State of California and the automobile industry in *Central Valley* had already been exchanging innumerable documents and expert witness reports, Vermont coordinated its

126. *Id.* at 7.

127. *Id.*

128. Defendants’ Rule 12(h)(3) Motion to Dismiss for Lack of Jurisdiction and Memorandum of Law in Support, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304) [hereinafter Vermont’s Ripeness Motion].

129. Vermont’s Ripeness Motion, *supra* note 128, at 2; *see* FED. R. CIV. P. 12(h)(3) (explaining that a suit may be dismissed at any time for lack of subject matter jurisdiction).

130. Vermont’s Ripeness Motion, *supra* note 128, at 7 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (alteration in original)).

131. *See id.* at 4 (“Thus, at this point in time it is unknown whether EPA will grant a waiver of preemption to California, deny California’s waiver request, or place conditions on a waiver for the GHG emissions standards.”).

132. *Id.* at 8.

133. *Id.* (emphasis in original).

efforts with the State of California in order to conserve resources.¹³⁴ The States likewise retained the same expert witnesses to counter the automobile industry's allegations on the available engine technologies to reduce GHG emissions, the future infrastructure necessary for alternative fuels, consumer choice in automobiles, employment impacts in the U.S. automobile industry, and vehicle safety.

Vermont's main expert on many of these issues was K.G. Duleep, who has frequently consulted for the Department of Energy, NHTSA, and the National Academy of Science.¹³⁵ Throughout the litigation, Mr. Duleep was the subject of multiple motions to exclude his testimony.¹³⁶ The automobile industry's main expert was Thomas Austin, also a well-known expert in the field of emission controls and fuel economy.¹³⁷ Other experts involved in the case included global warming scientists, economists, automobile emissions specialists, and automobile industry "insiders."¹³⁸ In total, the parties utilized about fifteen different experts and exchanged close to thirty expert reports addressing various factual issues. The parties also exchanged millions of pages of documents, many of which were subject to a protective order because they had been designated as confidential business information by the automobile industry.¹³⁹ A document management company was retained to set up a secure database where all the information was uploaded for review.¹⁴⁰ This enabled the parties to exchange information electronically and allowed the manufacturers to track who had access to their sensitive data. In fact, even photocopying certain documents that contained extremely sensitive information, such as a particular manufacturer's future product plans or prototype engine technologies, was either prohibited or controlled to ensure accountability in case of a leak.¹⁴¹

On November 30, 2006, Chief Judge Sessions denied Vermont's motion to dismiss for lack of ripeness.¹⁴² He first analyzed whether any of

134. See, e.g., Stipulation and Protective Order Regarding Handling of Confidential Information at 8, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304) (allowing the sharing of documents under seal from the *Cent. Valley Chrysler-Jeep v. Witherspoon* litigation).

135. *Green Mountain*, 508 F. Supp. 2d at 326–27.

136. See *id.* at 325–36 (discussing challenges to Duleep's testimony based on methodology and alleged discovery violations).

137. *Id.* at 329 & n.34.

138. See *id.* at 295 (listing interested parties in the case).

139. Stipulation and Protective Order Regarding Handling of Confidential Information at 1, *Green Mountain*, 508 F. Supp. 2d 295 (No. 2:05-cv-302, 2:05-cv-304).

140. See *id.* at 9 ("Highly confidential documents shall be made available electronically, including through secure web-based medium, if appropriate security can be assured.")

141. *Id.* at 8–9.

142. Mem. Opinion and Order at 3, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

the Plaintiffs had standing, noting that the court had “an independent obligation to assure itself that it has subject matter jurisdiction over this suit.”¹⁴³ Because the automobile industry had alleged in their complaints both current and future economic harm, he concluded that “[a]t this early stage of the litigation, the Plaintiffs have satisfied their burden of alleging injury-in-fact.”¹⁴⁴ He also found that in this case “causation and redressability are not at issue if injury-in-fact has been shown.”¹⁴⁵

Chief Judge Sessions acknowledged that “the fact that Vermont’s regulations may never be enforceable should the EPA not grant California its waiver suggests that the Plaintiffs’ challenge could be deemed premature.”¹⁴⁶ Nevertheless, he determined that “early review may be appropriate when ‘the legal question is “fit” for resolution and delay means hardship.’”¹⁴⁷ He found that the “purely legal questions raised in this lawsuit are as well determined now as later,”¹⁴⁸ and accepted the automobile manufacturers’ claim that “it will take years to design, test and produce vehicles capable of meeting the GHG regulations, and that they must begin now if they are to meet the regulations’ deadlines.”¹⁴⁹ On that basis, he held that because the industry had “alleged current injury that is not contingent upon future events, as well as the threat of future injury should the EPA grant the waiver from preemption,” the case was ripe.¹⁵⁰

2. Vermont’s Motion for Judgment on the Pleadings

While the parties were awaiting the district court’s decision on the motion to dismiss on ripeness grounds, Vermont filed a motion for judgment on the pleadings, requesting the court to decide the entire case on legal grounds (i.e., without the need for a trial).¹⁵¹ In response to the

143. *Id.* at 7 (citing *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2003)).

144. *Id.* at 11 (citing *N.Y. Pub. Interest Research Group*, 321 F.3d at 326).

145. *Id.*

146. *Id.* at 15 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

147. *Id.* at 15 (quoting *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000)).

148. *Id.* at 18.

149. *Id.* at 9, 10–11 (noting that “[p]robable economic injury resulting from governmental action that alters competitive conditions will satisfy the injury-in-fact requirement” (citing *Clinton v. City of N.Y.*, 524 U.S. 417, 432–33 (1998))).

150. *Id.* at 17.

151. Defendants’ and Defendant-Intervenors’ Consolidated Motion for Judgment on the Pleadings and Memorandum of Law in Support, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-cv-302, 2:05-cv-304) [hereinafter Vermont’s JOP Motion]; see FED. R. CIV. P. 12(c) (stating when a motion for judgment on the pleadings may be filed).

automobile industry's CAA preemption claim, Vermont pointed out that in *Motor Vehicle Manufacturers Ass'n v. New York State Department of Environmental Conservation*, the Court of Appeals for the Second Circuit held that states are allowed to adopt regulations identical to California's, as long as they do not enforce the regulations until California receives a waiver from EPA.¹⁵² Because the automobile industry had requested a declaration that Vermont's GHG regulations were not enforceable until EPA granted a waiver—a point that Vermont did not dispute—Vermont argued there was nothing more for the court to do on this claim.¹⁵³

As to the preemption under EPCA, Vermont argued that there was a “fatal flaw” in the automobile industry's argument.¹⁵⁴ Vermont noted that EPCA section 32902(f) requires NHTSA to consider “the effect of other motor vehicle standards of the Government on fuel economy” when it sets CAFE standards.¹⁵⁵ When EPA issues a waiver for California emission standards under CAA section 209(b), California's standards (and the identical standards adopted by Vermont under CAA section 177) become “other motor vehicle standards of the Government” under EPCA.¹⁵⁶ In other words, EPCA incorporates emission standards authorized under the CAA into its statutory scheme, and in a sense California and Vermont's emission standards have federal “status” under EPCA.¹⁵⁷ Therefore, the case was not a traditional preemption case that involved the interaction between a state regulation and a federal law. Instead, it required the court to harmonize EPCA and the CAA.¹⁵⁸

Vermont argued that because the CAA standards, like the those covered by EPCA section 32902(f), make up the regulatory background or baseline that informs NHTSA's calculation of maximum feasible fuel economy levels, Congress must have intended them to take precedence over fuel economy standards.¹⁵⁹ In the alternative, Vermont argued that “[e]ven if th[e] Court analyzed [the EPCA] claims using a federal-state preemption analysis, rather than as a case involving the statutory interpretation of EPCA and its relationship to the [CAA], the same result would follow.”¹⁶⁰

152. Vermont's JOP Motion, *supra* note 151, at 8; *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Env'tl. Conservation*, 17 F.3d 521, 534 (2d Cir. 1994).

153. Vermont's JOP Motion, *supra* note 151, at 8; Alliance Complaint, *supra* note 81, at 38; *see* Int'l Ass'n Complaint, *supra* note 83, at 22 (requesting a declaration that Vermont's regulations were preempted by the CAA).

154. Vermont's JOP Motion, *supra* note 151, at 9.

155. *Id.* at 9 (quoting 49 U.S.C. § 32902(f) (2000)).

156. *Id.* at 12 (quoting 49 U.S.C. § 32902(f)).

157. *Id.*

158. *Id.* at 11–12.

159. *Id.* at 12–13.

160. *Id.* at 18.

Vermont also requested the court to dismiss the CAA section 177 claim because that claim had already been rejected by the Second Circuit in a previous CAA case.¹⁶¹ In the 1990's, "New York had adopted all of California's emission standards, including a Zero-Emission Vehicle ('ZEV') sales mandate."¹⁶² The automobile industry alleged a violation of CAA section 177 and argued that "by requiring a certain percentage of California-certified vehicles sold in New York to be ZEVs, New York had effectively limited the sales of all other classes of California vehicles."¹⁶³ The Second Circuit in *Motor Vehicle Manufacturers Ass'n v. New York State Department of Environmental Conservation* rejected this argument by holding:

Congress wanted the plans of opt-in states to be identical to those of California, as is evident from the identity requirement. Ruling in effect that one portion of the plan adopted according to the specific instructions in § 177 somehow at the same time violates § 177, places New York or other potential opt-in states in a Catch-22 position. Like the third vehicle rule, the sales-limitation rule is designed to reinforce the identity requirement. It would be incongruous for us to hold that [NY] wrongly mandated a ZEV sales percentage identical to California's mandate.¹⁶⁴

This ruling, Vermont argued, required the court to dismiss the Alliance's claim because the Second Circuit had already determined that as long as a state's regulations are "identical" to California's regulations, there cannot be a CAA section 177 violation.¹⁶⁵

Vermont responded to the foreign policy claim by arguing that the Alliance could not demonstrate that "Vermont's GHG regulations are in conflict with Executive Branch policies and agreements, the global warming treaty, or any U.S. statutes."¹⁶⁶ Vermont asserted that all the executive agreements on global warming only call for negotiating voluntary agreements with other countries, and argued that "[d]omestic regulatory action cannot pose an obstacle to a federal policy of seeking only voluntary agreements, as a matter of law."¹⁶⁷ To counter the Alliance's allegation that

161. *Id.* at 29.

162. *Id.* at 29 (citing *Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Env'tl. Conservation*, 17 F.3d 521, 536 (2d Cir. 1994)).

163. *Id.*

164. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n*, 17 F.3d at 536-37).

165. *Id.* at 30.

166. *Id.* at 32.

167. *Id.* at 34.

U.S. domestic laws establish that the foreign policy of the United States is to withhold state action on reducing GHG emissions, Vermont argued that no foreign policy against state action could be found in the domestic laws that the automobile industry had cited.¹⁶⁸

In response to the automobile industry's Commerce Clause claim, Vermont countered that "there cannot be a 'dormant' or 'negative' Commerce Clause violation when a state engages in regulatory action that is authorized by federal law."¹⁶⁹ Vermont argued that Congress can "confer regulatory authority upon the states, and any action taken by a state within the scope of its congressional authorization is immune to a dormant Commerce Clause challenge, even if the state's exercise of that authority affects interstate commerce."¹⁷⁰ Because Congress knew that California's development of emission standards would affect interstate commerce, but yet it allowed California to do so, this eliminated any dormant Commerce Clause concerns.¹⁷¹

Finally, Vermont requested that Chief Judge Sessions dismiss the Sherman Act claim as a matter of law because "[a]s a general matter, state laws are not subject to Sherman Act scrutiny."¹⁷² Although Vermont, citing *Rice v. Norman Williams Co.*, acknowledged that a state law may be preempted where "there exists an irreconcilable conflict between the federal and state regulatory schemes[,] . . . [f]ederal antitrust laws do not preempt state law 'simply because in a hypothetical situation a private party's compliance with the statute *might* cause him to violate the antitrust laws."¹⁷³ Instead, "a facial antitrust preemption challenge will only be successful 'when the conduct contemplated by the [regulation] is in all cases a *per se* violation."¹⁷⁴ Because the Alliance had only alleged that "the aggregation provisions *might* have an anticompetitive effect," Vermont argued that the claim "fails to establish an 'irreconcilable conflict' under *Rice*."¹⁷⁵

168. *Id.* at 37 (citing Alliance Complaint, *supra* note 81, at 17–20).

169. *Id.* at 39.

170. *Id.* at 40 (citing *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652–53 (1981)); *see also* *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) (stating that state and local actions specifically authorized by Congress are not subject to the Commerce Clause).

171. Vermont's JOP Motion, *supra* note 151, at 41 (citing *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109–10 (D.C. Cir. 1979)). In addition, Vermont pointed out that the court in the parallel case of *Central Valley* had already dismissed that claim in its interlocutory decision on the State of California's similar motion for judgment on the pleadings. *Id.* at 41–42 (citing *Cent. Valley Chrysler Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1185–86 (E.D. Cal. 2006)).

172. *Id.* at 44 (citing *Central Valley*, 456 F. Supp. 2d at 1186).

173. *Id.* (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (emphasis in original)).

174. *Id.* (quoting *Rice*, 458 U.S. at 661 (emphasis in original)).

175. *Id.* at 45 (citing *Rice*, 458 U.S. at 659 (emphasis in original)).

3. The International Association's Motion for Summary Judgment

On the same day that Vermont moved for judgment on the pleadings, the International Association filed a motion for summary judgment asserting that there was “no genuine issue of material fact,” and that it was entitled to judgment as a matter of law that Vermont’s regulations were “expressly and impliedly preempted.”¹⁷⁶ It argued that “[i]mproving fuel economy is the only known practical way to reduce emissions of CO₂ from today’s gasoline-powered automobiles,” and therefore “there is no functional difference between a CO₂ emission standard and a fuel economy standard.”¹⁷⁷ To support this assertion, the International Association pointed out that “[i]f you know a vehicle’s CO₂ emissions rate, then determining its fuel economy is a matter of a simple mathematical conversion.”¹⁷⁸ It dismissed the significance that Vermont’s GHG standards regulate other GHGs besides carbon dioxide stating that “in reality the contribution of the other greenhouse gases is insignificant when compared with the CO₂ component of the regulations.”¹⁷⁹ Because they alleged there was no factual dispute on these issues, it urged the court to find that Vermont’s regulations were expressly preempted by EPCA.¹⁸⁰

The International Association likewise asserted that there were no material facts in dispute with respect to the implied preemption claim.¹⁸¹ The Association argued that the GHG regulations “upset the balance between the competing interests struck by the federal program”¹⁸² because the standards “require much greater fuel economy than is required under federal law.”¹⁸³ Therefore, in its view, Vermont’s regulations “would abrogate EPCA’s regime, rendering NHTSA’s careful balancing of consideration[s] a nullity” because the fuel economy of the vehicles sold in all states that have adopted GHG regulations would not be determined by the federal CAFE standard, but rather would be determined by the GHG regulations.¹⁸⁴ Thus, the International Association argued, Vermont’s regulations should be impliedly preempted because they “intrude into the

176. Motion of Plaintiff Ass’n of International Automobile Manufacturers for Summary Judgment at 1–2, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-cv-302, 2:05-cv-304) [hereinafter Int’l Ass’n Summary Judgment Motion].

177. Memorandum of Points and Authorities at 1, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304) [hereinafter Int’l Ass’n Summary Judgment Memo].

178. *Id.* at 5.

179. *Id.* at 12.

180. Int’l Ass’n Summary Judgment Motion, *supra* note 176, at 1–2.

181. *Id.*

182. Int’l Ass’n Summary Judgment Memo, *supra* note 177, at 2.

183. *Id.* at 13.

184. *Id.* at 25 (citations omitted).

field of fuel economy regulation which has been reserved for the federal government, and . . . on their face conflict with the federal CAFE program.”¹⁸⁵

D. *The Green Mountain Trial*

The court scheduled a Final Pre-trial Conference and a Motions Hearing for Vermont’s motion for judgment on the pleadings and the International Association’s summary judgment motion for March 2, 2007.¹⁸⁶ However, shortly before the hearing, the Alliance dismissed the dormant Commerce Clause, Sherman Act, and CAA statutory claims.¹⁸⁷ Therefore, the only remaining claims were those alleging express and implied preemption under EPCA, CAA preemption, and preemption under the Foreign Policy and Foreign Affairs powers of the United States.¹⁸⁸

During this hearing, Chief Judge Sessions signaled that he was not going to rule on either Vermont’s or the International Association’s dispositive motions. His preliminary reaction was “that this is a situation that should involve a full record so that the appellate courts would be in a better position to resolve these issues.”¹⁸⁹ Based on this statement, the parties spent several hours advocating for their competing views on a wide spectrum of issues including the legislative history of both the CAA and EPCA and whether the use of air conditioning credits would be a significant compliance method.¹⁹⁰ In the end, Chief Judge Sessions came to his conclusion, stating “this case needs to be resolved in the context of all of the facts, so I am inclined to hold the motions in abeyance and proceed to . . . the trial.”¹⁹¹

On the eve of trial, the parties were thrown another twist: the U.S. Supreme Court released its now-historic decision in *Massachusetts v. EPA*.¹⁹² Issued on April 2, 2007, the *Massachusetts* decision addressed several issues that were pertinent to the *Green Mountain* case, including that carbon dioxide and other GHGs were pollutants under the CAA and

185. *Id.*

186. Minute Entry for *Proceedings* Held March 2, 2007, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-cv-302, 2:05-cv-304) (noting minutes for the proceedings held, including the motion hearing and the final pretrial conference).

187. *Green Mountain*, 508 F. Supp. 2d at 301–02.

188. *Id.*

189. Transcript of Motions Hearing and Pretrial Conference of March 2, 2007 at 12, *Green Mountain*, 508 F. Supp. 2d 295 [hereinafter JOP/SJ Hearing Transcript] (on file with the Vermont Law Review).

190. *See generally id.* at 12–82.

191. *Id.* at 82.

192. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

that EPA had authority to regulate GHGs from new motor vehicles.¹⁹³ Chief Judge Sessions, *sua sponte*, ordered the parties to file briefs by the following day addressing the precise impact of the Supreme Court's decision on the *Green Mountain* case, and also scheduled a hearing for that day to further discuss the *Massachusetts* decision.¹⁹⁴

Vermont argued that the decision in *Massachusetts* resolved both the EPCA and foreign policy claims, and that the court should rule in Vermont's favor on both these claims.¹⁹⁵ Vermont pointed out that the Supreme Court had held that EPA's authority to regulate carbon dioxide emissions from motor vehicles overlapped, but did not conflict, with NHTSA's mandate to promote energy efficiency.¹⁹⁶ According to Vermont, this analysis was equally applicable to California's authority under the CAA.¹⁹⁷ Therefore, Vermont argued that the "EPCA preemption claims fall by the same logic enunciated by the Court in *Massachusetts*."¹⁹⁸ The automobile industry, on the other hand, asserted that the *Massachusetts* decision "has no impact on the claims presented under EPCA."¹⁹⁹ The Supreme Court, they noted, "took no position on the question of *state* power to regulate carbon dioxide, including the question whether EPCA preempts a particular state regulation of carbon dioxide, and has left that question to [the Vermont district court]."²⁰⁰

At the end of the lengthy hearing, Chief Judge Sessions ruled from the bench.²⁰¹ He recognized that there was no question that there was "a lot of language in [the *Massachusetts* decision], and there could very well be implications on this case from that language."²⁰² But, he found that "as to

193. *Id.* at 1459–60. Chief Judge Sessions devoted a separate section of his decision to the *Massachusetts* case. See generally *Green Mountain*, 508 F. Supp. 2d at 307–10 (detailing the procedural history and substantive rulings of *Massachusetts v. EPA*).

194. Notice of Hearing to Discuss the United States Supreme Court Decision in *Massachusetts v. EPA*, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

195. Defendants and Defendant-Intervenors' Brief on the Impact of the U.S. Supreme Court Decision in *Massachusetts v. EPA* at 4, 7, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

196. *Id.* at 4 (citing *Massachusetts*, 127 S. Ct. at 1462).

197. *Id.* at 5.

198. *Id.*

199. Memorandum of Plaintiffs *Green Mountain Chrysler Plymouth Dodge Jeep, et al.* Regarding *Massachusetts v. EPA* at 1, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

200. *Id.* (emphasis in original).

201. See Minute Entry for Proceedings Held Apr. 4, 2007, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304) (finding unresolved issues in *Massachusetts* and setting trial date for Apr. 10, 2007).

202. Transcript of Hearing to Discuss U.S. Supreme Court Decision in *Massachusetts v. EPA* & Testimony of Mr. Duleep April 4, 2007 at 116, *Green Mountain*, 508 F. Supp. 2d 295 [hereinafter Impact of *Massachusetts* Transcript] (on file with the Vermont Law Review).

the ultimate question about whether the California regulations are preempted by EPCA, there is not a direct statement from the Supreme Court.”²⁰³ He concluded that “we have come this far, and it just makes no sense, in my view, to stop it.”²⁰⁴ On that basis, he ruled “we are going to go forward with the trial.”²⁰⁵

After another short delay in order to determine how the parties would introduce alleged “trade secrets” of the various manufacturers, the parties proceeded to a roughly three-week bench trial that was almost exclusively devoted to express and implied preemption under EPCA.²⁰⁶ The trial began on April 10, 2007 and continued on-and-off until May 8, 2007.²⁰⁷ Chief Judge Sessions allocated forty hours to each side to present its case.²⁰⁸ Averaging five hours per court day—with time carefully monitored by the courtroom deputy—the trial finished as planned in sixteen days. The post-trial briefs were submitted in mid-June and the trial record was closed in late June of 2007.²⁰⁹

III. THE DISTRICT COURT’S OPINION AND ORDER

On September 12, 2007, Chief Judge Sessions issued a 240-page Opinion and Order rejecting the automobile industry’s remaining claims.²¹⁰ After addressing numerous evidentiary issues that remained from trial, Chief Judge Sessions ruled on the CAA preemption claim, EPCA express and implied preemption claim, and the foreign policy preemption claim.²¹¹ Most legal observers were surprised how quickly the judge (and his staff) organized and then digested all the evidence presented at trial in a manner that allowed the court to issue such a complex and thorough decision in such a short time frame. The sixteen-day trial resulted in 4,000 pages of transcripts, approximately 700 exhibits, and 24 live witnesses.

203. *Id.* at 113.

204. *Id.* at 116.

205. *Id.*

206. The trial was focused almost exclusively on the EPCA preemption claims. The parties agreed that there would be no live witness on either the CAA preemption claim or the Alliance’s foreign policy claim.

207. Civil Docket, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (Nos. 2:05-cv-302, 2:05-cv-304).

208. *Impact of Massachusetts Transcript*, *supra* note 202, at 116–17.

209. See Notice of Electronic Filing, *Green Mountain*, 508 F. Supp. 2d 295 (May 8, 2007) (setting June 8, 2007 as the deadline for “[p]ost-trial memoranda”).

210. *Green Mountain*, 508 F. Supp. 2d at 295; Jim Downing, *Emission Ruling Is a Victory for State’s Policy: A Federal Judge Decides for Vermont in a Case Brought by the Auto Industry That Echoes a California Law*, SACRAMENTO BEE, Sept. 13, 2007, at D1.

211. *Green Mountain*, 508 F. Supp. 2d at 399.

A. *Clean Air Act Preemption*

Chief Judge Sessions first disposed of the CAA preemption claim in a footnote.²¹² He noted that the parties had agreed “that enforcement of Vermont’s GHG standards is preempted by Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), unless and until the EPA Administrator grants California a waiver under Section 209(b) . . . for its identical GHG regulations.”²¹³ This was based on Vermont’s assertion that it had adopted the regulations pursuant to CAA section 177 and, under Second Circuit precedent, it must wait for EPA to grant California a preemption waiver before enforcing the regulations.²¹⁴ Thus, the enforcement of Vermont’s standards was, in a sense, already preempted until such time as EPA waived preemption of California’s regulations. The industry’s request that Chief Judge Sessions declare Vermont’s regulations preempted was therefore not necessary, and Chief Judge Sessions found the claim was moot.²¹⁵

B. *EPCA Preemption*

In analyzing the EPCA claim, Chief Judge Sessions began with the familiar recitation that the Supremacy Clause “invalidates state laws that interfere with, or are contrary to, federal law.”²¹⁶ He noted that “[s]tate action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment.”²¹⁷ Conflict preemption, in turn, exists either when “compliance with both federal and state regulations is a physical impossibility,”²¹⁸ or “where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”²¹⁹ However, before addressing EPCA’s express preemption

212. *Id.* at 343 n.50.

213. *Id.*

214. *Id.* (citing *Motor Vehicle Mfrs. Ass’n v. N.Y. State Dep’t of Envtl. Conservation*, 17 F.3d 521, 534 (2d Cir. 1994)).

215. *Id.*

216. *Id.* at 343 (quoting *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (internal citations omitted)). Article VI, clause 2, of the U.S. Constitution states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

217. *Green Mountain*, 508 F. Supp. 2d at 343 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)).

218. *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

219. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

provision or engaging in an implied preemption analysis, Chief Judge Sessions found that it was not necessary to engage in these analyses because the preemption doctrines did not apply.²²⁰

1. The preemption doctrines were inapplicable

The crux of the district court's holding was that "[t]he Supremacy Clause is not implicated when federal laws conflict or appear to conflict with one another."²²¹ Instead, when this situation arises, "courts have a duty to give effect to both provisions, if possible."²²² Basically, he recognized that his task was to harmonize the CAA and EPCA in order to determine whether Congress intended a state regulation adopted under the federal CAA to be displaced or "preempted" by EPCA, as the industry alleged.²²³ As set forth in further detail below, he concluded that Congress could not have intended that result.

Chief Judge Sessions first agreed with the arguments presented in Vermont's motion for judgment on the pleadings (and in Vermont's post-trial brief) that once EPA grants a waiver to California for its regulations, those standards become "other motor vehicle standards of the Government" under EPCA's statutory scheme.²²⁴ He concurred with Vermont that when this occurs, NHTSA is required to take their effect into consideration when setting maximum feasible average fuel economy standards.²²⁵ In other words, "[o]nce approved by EPA, California and Vermont's GHG standards become part of the regulatory backdrop against which NHTSA must design maximum feasible fuel economy levels."²²⁶

Chief Judge Sessions focused on the U.S. Supreme Court's recent decision in *Massachusetts*, where the Court held that carbon dioxide (and other GHGs) were "pollutants" under the CAA and where it also found, in Chief Judge Sessions's words, that there was "overlap but no conflict between EPA's authority to regulate greenhouse gases from new motor vehicles under the CAA's Section 202(a) and NHTSA's authority under EPCA to promote energy efficiency by setting mileage standards."²²⁷ Because California and Vermont's regulations were also a product of the

220. *Id.* at 350.

221. *Id.* at 343–44.

222. *Id.* at 344 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

223. *See id.* ("The resolution of a potential conflict between two federal statutes—Section 209(b) of the CAA and EPCA—depends on an analysis of Congressional intent.")

224. *Id.* at 344 (quoting 49 U.S.C. § 32902(f) (2000)).

225. *Id.*

226. *Id.*

227. *Id.* (citing *Massachusetts v. EPA*, 127 S.Ct. 1438, 1461–62 (2007)).

CAA, Chief Judge Sessions reasoned that the resolution of a potential conflict between two federal statutes—namely CAA section 209(b) and EPCA—depended on an analysis of how Congress viewed the relationship between EPCA fuel economy standards and CAA emissions standards when it enacted both federal acts.²²⁸

Thus, the pivotal issue was whether Congress intended EPCA to “override” CAA standards. To determine this, Chief Judge Sessions concentrated on whether Congress was aware of the relationship and possible overlap between emission standards and fuel economy.²²⁹ Legislative history revealed that Congress had identified early on that it was difficult to determine the effect that clean air standards (i.e., emission controls) had on fuel economy.²³⁰ Congress, however, recognized “that use of new technologies had enabled improved fuel economy as well as reduced emissions.”²³¹ Congress therefore “remained well aware of a potential conflict between tighter air pollution control standards and improved fuel economy.”²³² Significantly, despite its recognition of this potential conflict when EPCA was enacted in 1975, Congress subsequently reaffirmed its commitment to address air pollution from the nation’s vehicles via the CAA.²³³ Besides the ambitious new automobile emissions provisions in the CAA amendments of 1977, Congress strengthened the California waiver provisions.²³⁴

This led Chief Judge Sessions to conclude that emissions standards developed by California pursuant to CAA section 209 must have “the same stature as a federal regulation with regard to determining maximum feasible average fuel economy under EPCA” as a standard developed by EPA under section 202 of the CAA.²³⁵ He then held that because “Congress has consistently acknowledged interplay and overlap between emissions reductions regulations and fuel economy regulations,” Congress could not have intended a CAA emission standard that was approved by EPA to conflict with EPCA.²³⁶ On that basis, he dismissed the automobile industry’s EPCA preemption challenge.²³⁷

228. *Id.* (citing *N.Y. Tel. Co. v. N.Y. State Dep’t of Labor*, 440 U.S. 519, 540 n.32 (1979)).

229. *Id.* at 345–47 (discussing the interplay between, and history of, the CAA and EPCA).

230. *Id.* at 345 (citing H.R. REP. NO. 94-340, at 86–87 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1848–49).

231. *Id.* at 346 (citing H.R. REP. NO. 95-294, at 245–46 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1324–25).

232. *Id.*

233. *Id.* at 346.

234. *See id.* at 345–46 (explaining the difference between California’s waiver provision pre-1977 and post-1977).

235. *Id.* at 347.

236. *Id.*

237. *Id.* at 350.

2. EPCA Express Preemption

Even though Chief Judge Sessions rejected the automobile industry's EPCA claim as a matter of law, he nonetheless "conducted a standard federal preemption analysis in the alternative."²³⁸ While to an outsider this may have seemed like an unusual step, his decision to do this was consistent with previous views that he had expressed about the case. For example, at an earlier motions hearing Chief Judge Sessions had recognized that "[t]his is an extraordinary case, and the record should be complete."²³⁹ In addition, he explained that an alternative analysis was advisable because "the express language of EPCA's preemption provision appears literally to forbid the enactment or enforcement of Vermont's GHG regulation" and also because the "Plaintiffs have alleged that the GHG regulation actually conflicts with EPCA's fuel economy standards."²⁴⁰ He also cited an earlier interlocutory decision by the court in *Central Valley* which found a conflict preemption analysis necessary in that case.²⁴¹

Beginning with the plain language of EPCA's preemption provision, Chief Judge Sessions analyzed whether Vermont's regulations were essentially fuel economy regulations, and then turned to whether the GHG standards were "related to fuel economy standards."²⁴² He first made clear that a "presumption against preemption"²⁴³ applied because "Congress acknowledged that the regulation of air pollution from mobile sources was traditionally a state responsibility."²⁴⁴ On this basis, "a Supremacy Clause analysis begins 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.'"²⁴⁵ Therefore, he started with the assumption that "EPCA's preemption provision cannot invalidate Vermont's GHG regulations unless Congress had the clear and manifest purpose to do so."²⁴⁶

Chief Judge Sessions noted that the GHG regulations do not only

238. *Id.*

239. JOP/SJ Hearing Transcript, *supra* note 189, at 132.

240. *Green Mountain*, 508 F. Supp. 2d at 350 (citations omitted).

241. *Id.* (citing *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1172 (E.D. Cal. 2006)) (finding that the challenged state regulation was not immune from a conflict preemption challenge).

242. 49 U.S.C. § 32919(a) (2000); *Green Mountain*, 508 F. Supp. 2d at 351 n.56.

243. *Green Mountain*, 508 F. Supp. 2d at 353 (quoting *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

244. *Id.* at 350 (citing H.R. REP. NO. 89-899 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3608, 3612).

245. *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

246. *Id.* at 351 (citing *Rice*, 331 U.S. at 230).

measure carbon dioxide emissions.²⁴⁷ Rather, the standards are measured in “carbon dioxide equivalents,” which allows the standards to cover GHGs besides carbon dioxide.²⁴⁸ He cited the fact that “[t]he term ‘carbon dioxide equivalent’ includes methane . . . , carbon monoxide, and nitrous oxide” that are weighted on the basis of their relative strength as GHGs.²⁴⁹ He found that although “there is a near-perfect correlation between fuel consumed and carbon dioxide released,” there is not a similar correlation with respect to the emissions of other regulated pollutants including hydrocarbons and carbon monoxide.²⁵⁰ Chief Judge Sessions also recognized that there were several distinct pathways manufacturers could take to achieve compliance with the standards. He cited provisions in the regulations and testimony at trial concerning the credits for air conditioning and the use of alternative fuels and plug-in hybrid vehicles.²⁵¹ These facts led him to conclude that because the GHG standards encompass emissions that do not correlate with fuel economy, the automobile industry’s argument that they were de facto fuel economy standards was not persuasive.²⁵²

Next, he addressed plaintiffs’ arguments that the GHG regulations were “related to” fuel economy standards. Although recognizing that the text of EPCA’s preemption provision was seemingly broad, Chief Judge Sessions turned to the Supreme Court’s guidance that the phrase “related to” provides no meaningful parameters to determining the scope of preemption.²⁵³ Interpreting a recent Supreme Court case involving the “related to” preemption provision in the Employee Retirement Income Security Act,²⁵⁴ Chief Judge Sessions determined that he must “go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive.”²⁵⁵ A “plain wording” reading was simply not appropriate.²⁵⁶

He noted that the prime objective of EPCA was to conserve energy

247. *See id.* at 351 (noting that GHG emissions include methane, nitrous oxide, hydrocarbons, and carbon dioxide).

248. *Id.* at 352; *see supra* Part II.A (explaining Vermont’s GHG emissions standards).

249. *Green Mountain*, 508 F. Supp. 2d at 352; *see supra* Part II.A (outlining how Vermont’s regulations compare GHGs).

250. *Green Mountain*, 508 F. Supp. 2d at 352.

251. *Id.* at 353.

252. *Id.*

253. *See id.* (citing *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)) (“‘Relate to’ could be interpreted to include virtually all state provisions with even a tangential connection to fuel economy.”).

254. Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2000).

255. *Green Mountain*, 508 F. Supp. 2d at 353 (quoting *Travelers Ins. Co.*, 514 U.S. at 656).

256. *Id.*

across the business sectors in order to address the most serious energy crisis in our nation's history.²⁵⁷ Setting minimum fuel economy standards would contribute to this overall goal by improving automotive efficiency, thereby conserving energy.²⁵⁸ States that attempted to adopt or enforce laws that "controlled or superseded a core EPCA function—to set fuel economy standards for automobiles—would appear to be preempted."²⁵⁹ However, he recognized that even if state regulation of GHGs from new vehicles intruded into this core function, Congress had expressly enacted "EPCA against the backdrop of other regulations that affected motor vehicles and [that] could have an effect on fuel economy."²⁶⁰ Included in these "standards of the Government" were "emissions standards under Section 202 of the CAA, emissions standards under Section 209(b) of the CAA, motor vehicle safety standards and noise emission standards."²⁶¹ Because Congress regarded California standards as federal standards under EPCA, which NHTSA had to consider when setting the "maximum feasible average fuel economy,"²⁶² Congress could not have intended these states standards to be preempted because they qualified as a "law or regulation relating to fuel economy standards" under EPCA's preemption provision.²⁶³ Chief Judge Sessions concluded by remarking that "[u]nless this Court is to ignore decades of EPA-issued and approved regulations that also can be said to 'relate to' fuel economy," Vermont's regulations did not "relate to" fuel economy and were not expressly preempted by EPCA.²⁶⁴

3. EPCA Implied Preemption

The district court next addressed whether Vermont's regulations were impliedly preempted under the principles of field or conflict preemption. Under the doctrine of field preemption, "state law is preempted if it attempts to regulate in a field that Congress intended the federal government to occupy exclusively."²⁶⁵ The intent to occupy a field can be discerned where there is a "pervasive scheme of federal regulation that leaves no room for a state to supplement, or where Congress legislates in 'a

257. *See id.* at 305, 354 (noting that EPCA was passed in response to the energy crisis of the 1970s).

258. *Id.* at 354.

259. *Id.*

260. *Id.*

261. *Id.* at 346, 354.

262. *See id.* at 347 ("[O]nce EPA issues a waiver for a California emissions standard, it becomes a motor vehicle standard of the government, with the same stature as a federal regulation with regard to determining maximum feasible average fuel economy under EPCA.").

263. *Id.* at 354; 49 U.S.C. § 32902(f) (2000).

264. *Green Mountain*, 508 F. Supp. 2d at 354.

265. *Id.* (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”²⁶⁶

Chief Judge Sessions again looked to *Massachusetts*, where the Supreme Court held that “the regulation of carbon dioxide emissions from motor vehicles is not the exclusive province of the federal Department of Transportation.”²⁶⁷ Specifically, the Supreme Court had found:

[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s “health” and “welfare,” . . . a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. . . . The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.²⁶⁸

Because the Supreme Court had ruled that NHTSA’s and EPA’s authorities overlap in this area, Chief Judge Sessions found California’s EPA-approved regulations must similarly be outside the field of regulations that Congress intended to displace.²⁶⁹ The court held that “Plaintiffs have not shown that Congress exhibited a clear and manifest intent to render the regulation of carbon dioxide emissions from motor vehicles exclusively a federal domain” under EPCA.²⁷⁰

The court then analyzed whether the GHG regulations conflicted with EPCA or stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁷¹ Chief Judge Sessions stressed that “[t]he mere fact of ‘tension’ between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.”²⁷² Furthermore, “[w]hat constitutes a sufficient obstacle is a matter of judgment, to be informed by reference to the overall federal statutory scheme”²⁷³ and acknowledged that courts “should not find pre-emption too readily in the absence of clear evidence of a conflict.”²⁷⁴

266. *Id.* at 354–55 (quoting *English*, 496 U.S. at 79).

267. *Green Mountain*, 508 F. Supp. 2d at 355 (citing *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007)).

268. *Massachusetts*, 127 S. Ct. at 1462 (internal citations omitted).

269. *Green Mountain*, 508 F. Supp. 2d at 355.

270. *Id.*

271. *Id.* (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987)).

272. *Id.* at 356 (quoting *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)).

273. *Id.* (quoting *Madeira*, 469 F.3d at 241 (internal quotations omitted)).

274. *Id.* (quoting *Geier v. Am. Honda Motor. Co., Inc.*, 529 U.S. 861, 885 (2000)).

The court turned to the various factual disputes on whether Vermont's regulations presented an "obstacle" to EPCA and therefore should be preempted. For example, the industry's central claim was that the GHG standards frustrated congressional intent to maintain nationwide fuel economy standards.²⁷⁵ Here, Chief Judge Sessions pointed out that the "legislative history of EPCA and the CAA, and the agencies' practices, demonstrate that there is no inherent conflict between the mandate of the CAA to regulate air pollution and the mandate of EPCA to regulate fuel economy."²⁷⁶ He found that the Supreme Court in *Massachusetts* had squarely rejected the argument that regulating carbon dioxide emissions from motor vehicles "would require EPA to encroach upon NHTSA's prerogative to set fuel economy standards."²⁷⁷ Citing *Massachusetts*, he stressed again that EPA and NHTSA had "independent statutory obligations that might overlap but could be administered without inconsistency."²⁷⁸

Chief Judge Sessions also spent a considerable part of his opinion performing an in-depth analysis of the numerous factual disputes on technological feasibility and economic practicability.²⁷⁹ As the court noted, "[t]he evidence presented was detailed, technical and complex, and addressed the advantages and disadvantages of the regulation, and its impact on consumers, workers, drivers and passengers, specific companies, the automobile industry as a whole, the international community, and the planet."²⁸⁰ Chief Judge Sessions discussed the expert testimony offered by both sides and, specifically, examined the strengths and weaknesses of Mr. Duleep's and Mr. Austin's competing models as to whether and how the manufacturers could comply with the standards.²⁸¹ The court then evaluated the different compliance pathways, including various technologies, alternative fuels, air conditioning credits, and credit trading.²⁸² This included a detailed look at the use of diesel fuel, availability of ethanol, hydrogen-powered vehicles, and hybrid vehicles.²⁸³ Chief Judge Sessions also analyzed the use of conventional technologies to improve fuel

275. *Id.*

276. *Id.*

277. *Id.* (citing *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007)).

278. *Id.* (citing *Massachusetts*, 127 S.Ct. at 1462).

279. An in-depth discussion of this part of the district court's decision is beyond the scope of this Article. In their post-trial brief and other filings, the parties submitted hundreds of pages devoted to the various factual disputes at issue in the case. See generally Civil Docket, *Green Mountain*, 508 F. Supp. 2d 295 (Nos. 2:05-cv-302, 2:05-cv-304).

280. *Green Mountain*, 508 F. Supp. 2d at 357.

281. See *id.* at 365–69, 377–83 (analyzing Mr. Duleep's and Mr. Austin's baseline assumptions and methodology).

282. See *id.* at 357, 365–84 (analyzing the various options under each type of pathway).

283. *Id.* at 370–77.

economy such as gasoline direct injection (GDI), camless valve actuation, rolling resistance improvements, continuously variable transmission (CVT), and electronic power steering.²⁸⁴ Finally, he looked at the competing evidence concerning the “effect on consumer choice, economic hardship to the automobile industry, employment and safety.”²⁸⁵ Ultimately, the court concluded that the automobile industry did not meet its burden to demonstrate as a factual matter that the regulation was not “technologically feasible or economically practicable.”²⁸⁶

D. Foreign Policy Preemption

Chief Judge Sessions also rejected the foreign policy preemption argument because the Alliance had “failed to demonstrate that Vermont’s GHG regulation represents an insufferable intrusion upon the field of foreign affairs, or that it constitutes a conflict with a national foreign policy.”²⁸⁷ He observed that they had made two arguments: (1) “Vermont’s regulation is preempted in the absence of any conflict with national foreign policy, by virtue of its intrusion into the field of foreign affairs”;²⁸⁸ and (2) “the regulation is preempted because there is a ‘sufficiently clear conflict’ with an ‘express foreign policy of the National Government.’”²⁸⁹

Chief Judge Sessions found that the Supreme Court in *Zschernig v. Miller* held that preemption applies only where a regulation has “‘more than some incidental or indirect effect in foreign countries, and . . . great potential for disruption or embarrassment,’ and ‘seem[s] to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.’”²⁹⁰ Because the foreign policy of the U.S. “on global warming encourages the development of international support for reducing GHG emissions, and that garnering international support depends in part on informing other nations of this country’s commitment to this task on the national, state and local level,”²⁹¹ he rejected the Alliance’s argument that “there will be great potential for disruption or embarrassment if the federal government and individual states follow different policy choices.”²⁹² He further found that “[f]ar from representing an intrusion into the ‘field’ of

284. *Id.* at 377–81.

285. *Id.* at 357; *see also id.* at 384–92 for Chief Judge Sessions’s full analysis.

286. *Id.* at 357.

287. *Id.* at 397.

288. *Id.* at 392 (citing *Zschernig v. Miller*, 389 U.S. 429, 432 (1968)).

289. *Id.* (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003)).

290. *Id.* at 395 (citing *Zschernig*, 389 U.S. at 434–35, 440) (internal citations omitted).

291. *Id.* at 394.

292. *Id.* at 395.

foreign affairs entrusted exclusively to the national government, Vermont's regulation stands out as exemplifying a cooperative federal state approach to the global issues of climate change."²⁹³

Chief Judge Sessions also dismissed the Alliance's assertion that the GHG regulation should be preempted under the Supreme Court's decision in *American Insurance Association v. Garamendi*.²⁹⁴ The district court found that under *Garamendi* preemption was required "if the plaintiffs have demonstrated a clear conflict between the state law and an express national foreign policy."²⁹⁵ He flatly rejected the plaintiffs' argument that "there is an express national foreign policy against adopting unilateral binding limitations on GHG emissions in favor of a comprehensive international response to the issue."²⁹⁶ After surveying the various declarations, resolutions, and agreements regarding GHG emissions,²⁹⁷ he concluded that the "Court has searched in vain for this policy."²⁹⁸ On this basis, he entered judgment for Vermont on the foreign policy claim.²⁹⁹

CONCLUSION

Certainly, *Green Mountain* is significant because it was the first case to analyze and decide the issue of EPCA preemption in the context of GHG emission standards. But the decision has also contributed to nationwide debates on the role states can play in addressing global warming. Of course, the full impact of this "major victory" by Vermont and its allies is unclear.³⁰⁰ The automobile industry has appealed the decision to the U.S. Court of Appeals for the Second Circuit.³⁰¹ Likewise, there will likely be an appeal of the district court's decision in *Central Valley Chrysler* to the Ninth Circuit.³⁰² EPA's decision on California's waiver request will also

293. *Id.*

294. *See id.* at 396 (citing *Garamendi*, 539 U.S. at 420, 425) (finding no conflict between Vermont's regulation and an express national foreign policy).

295. *Id.*

296. *Id.*

297. *See id.* at 392-95 (examining national foreign policies on GHG emissions as embodied in the Byrd-Hagel Resolution, the Kyoto Protocol, and the G-8 Summit Declaration).

298. *Id.* at 396.

299. *Id.* at 397.

300. Candace Page, *Vermont Wins Big in Emissions Case: Judge Rejects Carmakers' Every Claim*, BURLINGTON FREE PRESS, Sept. 13, 2007, at 1A.

301. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, Nos. 07-4342, 07-4360 (2d Cir. filed Oct. 5, 2007).

302. Stay Opinion, *supra* note 122, at 7. *See generally* Order On Motions And Counter-Motions for Summary Judgment on Plaintiffs' Claims for Relief on EPCA Preemption and Foreign Policy Preemption at 2, *Cent. Valley Chrysler Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (No. CV F 04 6663 AWI LJO) (dismissing comparable California auto manufacturers' claims regarding

likely be appealed to the U.S. Court of Appeals for the District of Columbia Circuit, possibly setting up a future showdown in the U.S. Supreme Court to resolve the EPCA preemption issue. It is possible, however, that if more courts find no conflict between CAA emission standards and EPCA's fuel economy standards, the automobile industry will cease litigating this issue and redirect its resources to additional research and development. As Chief Judge Sessions observed on the final page of his decision: "History suggests that the ingenuity of the industry, once put in gear, responds admirably to most technological challenges."³⁰³

AFTERWORD

On December 19, 2007, EPA Administrator Stephen A. Johnson sent a letter to California Governor Arnold Schwarzenegger in which he informed the Governor that he had "decided that EPA will be denying the waiver."³⁰⁴ In his letter, Administrator Johnson stated that his denial was based on his finding that "California does not have a 'need to meet compelling and extraordinary conditions,'" which is one of the criteria in CAA section 209(b) that EPA must assess when deciding a request for a waiver.³⁰⁵ EPA, however, has not released any subsequent documentation detailing its reason for denying California's waiver application. This has led to litigation in the U.S. Court of Appeals for the District of Columbia Circuit, U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Court for the District of Columbia.³⁰⁶ These suits challenge EPA's December 19, 2007 denial and also EPA's delay in issuing any additional reasoning for its denial.

While testifying before the U.S. Senate's Environment and Public Works Committee on January 24, 2008, Administrator Johnson promised that EPA would release its final decisional documents by the end of February 2008. Until the completion of the various court challenges to EPA's decision, the GHG regulations are not enforceable in any state. Furthermore, it remains to be seen what effect, if any, the outcome of the challenges to EPA's waiver denial will have on the pending appeal in the *Green Mountain* case.

EPCA and foreign policy preemption).

303. *Green Mountain*, 508 F. Supp. 2d at 399.

304. Letter from Stephen L. Johnson, Adm'r, U.S. Evtl. Prot. Agency, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007).

305. *Id.* See 42 U.S.C. § 7543(b)(1)(B) (2000) (explaining that a California waiver will not be granted if the EPA Administrator determines that California "does not need . . . [its own emission] standards to meet compelling and extraordinary conditions").

306. *California v. EPA*, No. 08-70011 (9th Cir. filed Jan. 3, 2008); *California v. EPA*, No. 07-1457 (D.C. Cir. filed Nov. 8, 2007); *California v. EPA*, No. 1:07-cv-02024-RCL (D.D.C. filed Nov. 8, 2007). The State of Vermont has joined California in all these cases.