identical filing times, will be considered to have the first-filed application.

The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St. NE., Washington, DC 20426. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

Dated: February 13, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3883 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14130–000; 14137–000]

Riverbank Hydro No. 2, LLC; Lock+ Hydro Friends Fund XXXVI; Notice Announcing Preliminary Permit Drawing

The Commission has received two preliminary permit applications deemed filed on April 1, 2011, at 8:30 a.m.,[1] for proposed projects to be located on the Arkansas River, in Lincoln County and Jefferson County, Arkansas. The applications were filed by Riverbank Hydro No. 2, LLC for Project No. 14130–000 and Lock+ Hydro Friends Fund XXXVI for Project No. 14137–000.

On February 22, 2012, at 9 a.m. (Eastern Time), the Secretary of the Commission, or her designee, will conduct a random drawing to determine the filing priority of the applicants identified in this notice. The Commission will select among competing permit applications as provided in section 4.37 of its regulations.[2] The priority established by this drawing will be used to determine which applicant, among those with identical filing times, will be considered to have the first-filed application.

The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St. NE., Washington, DC 20426. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

[1] Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. 18 CFR 385.2001(a)(2) (2011).

[2] 18 CFR 4.37 (2011).

Dated: February 13, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3882 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–57–000]

Williston Basin Interstate Pipeline Company; Notice of Request Under Blanket Authorization

Take notice that on February 6, 2012, Williston Basin Interstate Pipeline Company (Williston Basin), 1250 West Century Avenue, Bismarck, North Dakota 58503, filed in Docket No. CP12–57–000, an application pursuant to section 157.21 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to replace natural gas compression facilities at its Elk Basin compressor station in Park County, Wyoming, under Williston Basin's blanket certificate issued in Docket No. CP82–487–000 *et al.,* [1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Williston Basin proposes to replace two natural gas-fired 225-horsepower (HP) compressor units installed in 1941, two natural gas-fired 330–HP compressor units installed in 1950, and one natural gas-fired 1,100–HP compressor unit installed in 1970 with one electric-driven 2,500–HP compressor unit. Williston Basin states that the new 2,500–HP electric compressor unit will also increase the certificated horsepower at the Elk Basin compressor station from 4,610 HP to 4,900 Hp. Williston Basin estimates that the proposed electric replacement compressor unit would cost $8,706,486 to install.

Any questions concerning this application may be directed to Keith A. Tiggelaar, Director of Regulatory Affairs, Williston Basin Interstate Pipeline Company, 1250 West Century Avenue, Bismarck, North Dakota 58503, telephone (701) 530–1560 or Email: *keith.tiggelaar@wbip.com.*

This filing is available for review at the Commission or may be viewed on the Commission's web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

[1] 30 FERC ¶ 61,143 (1985).

Dated: February 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3817 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9633–7]

California State Motor Vehicle and Nonroad Engine Pollution Control Standards; Mobile Cargo Handling Equipment Regulation at Ports and Intermodal Rail Yards; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision granting an authorization and waiver of preemption for California's mobile cargo handling equipment regulation at ports and intermodal rail yards.

SUMMARY: Pursuant to section 209(e) of the Clean Air Act (Act), 42 U.S.C. 7543(e), EPA is granting California its request for authorization to enforce it emission standards and other requirements for its mobile cargo handling equipment regulation. To the extent that the mobile cargo handling equipment regulation pertains to the control of emissions from new motor vehicles or new motor vehicle engines

EPA is, pursuant to section 209(b) of the Act, 42 U.S.C. 7543(b), granting California its request for a waiver of preemption.

DATES: Under 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by April 23, 2012. Under 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA–HQ–OAR–2010–0862. All documents relied upon in making this decision, including those submitted to EPA by CARB, and public comments, are contained in the public docket. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue NW., Washington, DC 20460. The public reading room is open to the public on all federal government work days between 8 a.m. and 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room (202) 566–1744. The Air and Radiation Docket and Information Center's Web site is *http://www.epa.gov/oar/docket.html.* The electronic mail (email) address for the Air and Radiation Docket is: *a-and-r-Docket@epa.gov,* the telephone number is (202) 566–1742, and the fax number is (202) 566–9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at *http://www.regulations.gov.* After opening the *www.regulations.gov* Web site, enter EPA–HQ–OAR–2010–0862 in the ''Enter Keyword or ID'' fill-in box to view documents in the record of CARB's mobile cargo handling equipment waiver and authorization request. Although a part of the official docket, the public docket does not include Confidential Business Information (''CBI'') or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality (''OTAQ'') maintains a Web page that contains general information on its review of California waiver requests. Included on that page are links to prior waiver **Federal Register** notices, some of which are cited in today's notice; the page can be accessed at *http://www.epa.gov/otaq/cafr.htm.*

FOR FURTHER INFORMATION CONTACT: David Dickinson, Attorney-Advisor, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue (6405J) NW., Washington, DC 20460. Telephone: (202) 343–9256. Fax: (202) 343–2800. Email: *dickinson.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Chronology

In a letter dated January 29, 2007, the California Air Resources Board (CARB) submitted to EPA its waiver and authorization request pursuant to section 209 of the Clean Air Act (CAA or Act), regarding its regulations for Mobile Cargo Handling Equipment at Ports and Intermodal Rail yards (Mobile Cargo Handling Equipment or CHE).[1] CARB's CHE regulations were adopted at CARB's December 8, 2005 public hearing (by Resolution 05–62) and were subsequently modified after making the regulation available for supplemental public comment by CARB's Executive Officer through Executive Order R–06–007 on June 2, 2006. The CHE regulations are codified at title 12, California Code of Regulations section 2479.[2]

EPA published a **Federal Register** notice for public hearing and comment on CARB's request on February 1, 2011.[3] No hearing request was received and thus no hearing took place. EPA received a total of three written comments from BNSF Railway Company and Union Pacific Railway Company, SSAT Terminal Pier A (SSAT), and Ports America Equipment Services (Ports America).[4] EPA also received supplemental comment from CARB.[5]

CARB has requested that EPA grant a waiver of preemption or grant a new authorization for certain portions of its CHE regulations. For other portions of its CHE regulation, CARB has requested that EPA find the requirements fall within the scope of a previously granted waiver or authorization, or in the alternative grant a new waiver of preemption or authorization. Finally, for one portion of its CHE regulation, CARB has requested that EPA find the requirements are not preempted by section 209 of the Clear Air Act, that if EPA finds they are preempted, the requirements fall within the scope of a previously granted waiver or, in the alternative, EPA grant a new waiver of preemption.[6]

B. CARB Mobile Cargo Handling Equipment Regulations

CARB's CHE regulations set performance standards for engines equipped in newly purchased, leased, or rented (collectively known as ''newly acquired''), as well as in-use, mobile cargo handling equipment used at ports or intermodal rail yards in California. The standards vary depending on the type of vehicle, whether the engine is used in off-road equipment or a vehicle registered as an on-road motor vehicle, and whether they are newly acquired or already in-use.[7]

Yard trucks and other mobile cargo handling equipment registered to operate on California highways acquired after January 1, 2007 must be equipped with engines that are certified to the on-road engine emission standards for the model year in which they are acquired.

Any yard truck not registered for on-road operation (off-road yard trucks) acquired after January 1, 2007 must be equipped either with an engine certified to the on-road emission standards for the model year in which it is acquired or the final Tier-4 off-road emission

[1] *See* CARB's January 29, 2007 request at EPA–HQ–OAR–2010–0862–0001 (CARB's Request). EPA's review of CARB's mobile source standards relating to the control of emissions for new motor vehicles and new motor vehicle engines conducted under section 209(b) of the Act are treated as ''waiver'' requests from CARB. EPA's review of CARB's regulations relating to standards and other requirements relating to the control of emissions from nonroad vehicles and nonroad engines conducted under section 209(e) of the Act are treated as ''authorization'' requests from CARB.

[2] The CHE regulation is designed to use best available control technology (BACT) to reduce diesel PM and NO_X emissions from mobile cargo handling equipment at ports and intermodal rail yards. Mobile cargo handling equipment is any engine-propelled vehicle used to handle cargo at ports and intermodal rail facilities and vehicles used to perform maintenance and repair activities and includes, but is not limited to, yard trucks, top handlers, rubber-tired gantry (RTG) cranes, forklifts, dozers, and loaders.

[3] 76 FR 5586 (February 1, 2011).

[4] *See* EPA–HQ–OAR–2010–0862–0024.1, EPA–HQ–OAR–2010–0862–0025.1, and EPA–HQ–OAR–2010–0862–0026.1, respectively.

[5] *See* EPA–HQ–OAR–2010–0862–0028, CARB's comments submitted on March 17, 2011; and EPA–HQ–OAR–0862–0029, CARB's comments submitted on May 2, 2011.

[6] CARB's initial waiver and authorization request submitted on January 29, 2007 (which full set forth the requisite information to support the granting of a full waiver and authorization), in combination with supplemental comments submitted by CARB on March 17, 2011, make clear CARB's intent to receive a full waiver and authorization to the extent that EPA deems a within the scope determination is inappropriate. As explained below, EPA finds that due to the new application of CARB's standards a full waiver and authorization is necessary.

[7] CARB normally uses the term ''off-road'' while EPA uses the term ''nonroad.'' Similarly, CARB uses the term ''on-road'' while EPA uses the term ''on-highway'' or ''motor vehicles.''

standard applicable to the engine's rated power.

Engines in newly acquired CHE other than yard trucks that are not registered for on-road operation (non-yard trucks) must—if technically feasible and available for purchase, lease, or rental—meet one of two certification standards: (1) The on-road engine certification standards or (2) the off-road Tier 4 certification standards for the model year and rated power of the engine. Alternatively, if neither of the options is feasible or available, a newly acquired non-yard truck must be equipped with an engine that is certified to the most stringent off-road engine emission standards for the type of vehicle and application for the model year in which it is acquired. In addition, under this alternative, within one year of acquiring the vehicle, the owner or operator must install the highest level verified diesel emission control strategy (VDECS) that is approved by CARB and available for that engine. If no VDECS is verified by CARB and available by the end of the one-year period, the owner or operator must install the highest level VDECS within six months after one becomes available.

For in-use yard trucks, whether on-road or off-road, the regulations require they meet one of three compliance options: such vehicles must (1) be certified to the 2007 or later model year on-road engine standards; (2) be certified to Tier 4 off-road standards; or (3) apply VDECS that reduce emissions to levels that comply with diesel PM and NOx emissions of a certified final Tier 4 off-road diesel engine for the same power rating.

The date by which each in-use yard truck in an owner or operator's fleet must be brought into compliance depends on the number of trucks in the fleet, the model year of the trucks, whether the trucks are equipped with on-road or off-road engines, and whether the engines were equipped with VDECS by December 31, 2006.

For in-use non-yard trucks, the regulations identify and establish separate requirements for three categories or vehicles: Basic cargo handling equipment, bulk cargo handling equipment and rubber-tired gantry (RTG) cranes. Basic cargo handling equipment consists of top handlers, side handlers, reach stackers, forklifts, straddle carriers and any other type of equipment (other than RTG cranes) that handles cargo containers. Bulk cargo handling equipment consists of dozers, loaders, excavators, mobile cranes, sweepers, railcar movers, aerial lifts and any other type of equipment (except forklifts) that handles non-containerized or bulk cargo.

For all three categories of in-use non-yard trucks, vehicles can be brought into compliance using any of three options. Option 1 is the same for all three categories: Use of an engine or power system—including diesel, alternative fueled, or heavy-duty pilot ignition engine—certified to the 2007 or later model year on-road or Tier 4 off-road engine standards for the rated power and model year of the engine.

Option 2 two is identical for basic cargo handling equipment and bulk cargo handling equipment, but varies slightly for RTG cranes. Basic cargo handling equipment and bulk cargo handling equipment must comply by installing a pre-2007 model year certified on-road engine or a certified Tier 2 or Tier 3 off-road engine and applying the highest level VDECS that is certified for the specific engine family and model year. However, if no Level 2 or higher VDECS is available, the engine must be upgraded to either a certified Tier 4 off-road engine or a Level 3 VDECS must be installed by December 31, 2015.

Under option 2, RTG cranes use a certified Tier 2 or Tier 3 off-road engine and the highest VDECS available but, in contrast to basic and bulk cargo handling equipment, need not upgrade, regardless of whether or not the highest VDECS available was Level 2 or below.

Option 3 is similar for both basic and bulk cargo handling equipment. Basic cargo handling equipment may comply using a pre-Tier 1 or a Tier 1 off-road engine equipped with the highest level VDECS available. However, if the highest level VDECS available is not Level 3 or higher, the engine must be upgraded to either a certified Tier 4 off-road engine or a Level 3 VDECS by December 31, 2015. For bulk cargo handling equipment, the requirements of this option are the same except an upgrade is required if no Level 2 or higher VDECS is initially available. Lastly, under the option 3, RTG cranes may comply using a pre Tier 1 or certified Tier 1 off-road engine equipped with the highest level VDECS available. However, if no VDECS is available or the highest level VDECS is a Level 1 or 2, then the RTG crane engine must be replaced with a Tier 4 certified off-road engine or a Level 3 VDECS must be installed by the later of December 31, 2015 or December 31st of the model year of the initially compliant engine plus 12 years.

The date by which each in-use non-yard truck in an owner or operator's fleet must be brought into compliance depends on the size and model-year composition of the in-use non-yard trucks in the fleet

C. Previously Granted Waivers and Authorizations

By letter dated July 26, 2004, CARB requested that EPA grant California a waiver of federal preemption for its 2007 California Heavy Duty Diesel Engines Standards, which primarily align California's standards and test procedures with the federal standards and test procedures for 2007 and subsequent model year heavy-duty motor vehicles and motor vehicle engines.[8] After offering an opportunity for hearing and public comment, on August 26, 2005 EPA granted California's request for waiver.[9]

On July 18, 2008, CARB notified EPA of additional regulations and amendments to its new nonroad compression ignition engine regulations. EPA determined that a portion of those regulations fell within the scope of the previously granted authorization and granted a new authorization for the remainder of the regulations.[10]

D. Clean Air Act Waivers of Preemption and Authorizations

Section 209(a) of the Clean Air Act preempts states and local governments from setting emission standards for new motor vehicles and engines. It provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. Section 209(b)(1) requires a waiver to be granted for any State that had 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,[11] if the State

[8] 70 FR 50322 (August 26, 2006)

[9] *Id.*

[10] 75 FR 8056 (February 23, 2010). EPA previously granted an authorization for California's new heavy-duty off-road diesel-cycle engines greater than 130 kW at 60 FR 48981 (September 21, 1995) and subsequently confirmed that amendments to those standards were within the scope of the prior authorization at 69 FR 38958 (June 29, 2004).

[11] Because California was the only state to have adopted standards prior to 1966, it is the only state

determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards (this is known as California's ''protectiveness determination''). However, no waiver is to be granted if EPA finds that: (A) California's ''protectiveness determination'' is arbitrary and capricious [12]; (B) California does not need such State standards to meet compelling and extraordinary conditions [13]; or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[14] Regarding consistency with section 202(a), EPA reviews California's standards for technological feasibility and evaluates testing and enforcement procedures to determine whether they would be inconsistent with federal test procedures (e.g., if manufacturers would be unable to meet both California and federal test requirements using the same test vehicle).[15]

If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within the scope of the previously granted waiver if three conditions are met. These conditions for confirming a within-the-scope request are discussed below.

Section 209(e)(1) of the Act permanently preempts any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles. Section 209(e)(2) of the Act requires the Administrator to grant California authorization to enforce its own standards for new nonroad engines or vehicles which are not listed under section 209(e)(1), subject to certain restrictions. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards. On October 8, 2008, the regulations promulgated in that rule were moved to 40 CFR part 1074, and modified slightly. The applicable regulations, 40 CFR § 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California's determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

As stated in the preamble to the section 209(e) rule, EPA has historically interpreted the section 209(e)(2)(iii) ''consistency'' inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).[16]

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation under section 209(e)(1). To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same ''consistency'' criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California ''standards and accompanying enforcement procedures are not consistent with section 202(a)'' of the Act. Previous decisions granting waivers and authorizations have noted that state standards are inconsistent with section 202(a) if: (1) There is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

EPA can confirm that amended regulations are within the scope of a previously granted waiver of preemption or authorization if three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not undermine our previous determination with respect to consistency with section 202(a) of the Act. Third, the amended regulations must not raise any new issues affecting EPA's prior waiver determinations.

E. Burden of Proof

In *MEMA I,* the U.S. Court of Appeals stated that the Administrator's role in a section 209 proceeding is to:

> Consider all evidence that passes the threshold test of materiality and * * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.[17]

The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an ''accompanying enforcement procedure'' (as opposed to the standards themselves): (1) Protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that ''the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.'' [18]

The court upheld the Administrator's position that, to deny a waiver, there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards.[19] The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.[20]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not

that is qualified to seek and receive a waiver. *See* S.Rep. No. 90–403 at 632 (1967).

[12] CAA section 209(b)(1)(A).

[13] CAA section 209(b)(1)(B).

[14] CAA section 209(b)(1)(C).

[15] *See, e.g.,* 74 FR at 32767 (July 8, 2009); *see also Motor and Equip. Mfrs Assoc.* v. *EPA,* 627 F.2d 1095 (D.C. Cir. 1979) (''*MEMA I*'').

[16] *See* 59 FR 36969 (July 20, 1994).

[17] *MEMA I,* 627 F.2d at 1122.

[18] *Id.*

[19] *Id.*

[20] *Id.*

explicitly consider the standards of proof under section 209 concerning a waiver request for ''standards,'' as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: ''[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.'' [21]

Opponents of the waiver bear the burden of showing that the criteria for a denial of California's waiver request have been met. As found in *MEMA I,* this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

> [t]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.[22]

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: ''Here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.' '' [23] Therefore, the Administrator's burden is to act ''reasonably.'' [24]

F. EPA's Consideration of CARB's Request

EPA sought comment on a range of issues, including whether certain or all of CARBs CHE regulation should be evaluated under the within the scope criteria or under the criteria for a full authorization and waiver of preemption. EPA did not receive any comments contending that any portions of the CHE regulations should be subjected to full waiver or authorization analysis.

CARB maintains that its requirements for newly acquired *on-highway* yard and non-yard trucks are covered by a waiver granted by EPA for 2007 and later model year (MY) on-highway heavy-duty diesel engines, or conversely its requirements are within the scope of that waiver decision.[25]

CARB also maintains that its requirements for newly acquired off-road yard trucks should be analyzed under the within the scope criteria since the compliance options involve either the use of a 2007 and later MY on-highway heavy-duty diesel engine (and thus the same within the scope rationale noted above) or the use of an engine meeting the final Tier 4 off-road engine standards which EPA previously authorized.[26] Similarly, for the requirements associated with newly acquired off-road non-yard trucks CARB also states that options 1 and 2 should be considered within the scope of the prior waiver and authorization noted above, and that option 3 (the VDECS option) should be granted a full authorization.

In addition to the requirements associated with newly acquired mobile cargo handling equipment, the CHE regulations also set forth in-use performance standards applicable to non-new yard and non-yard trucks. To the extent the in-use standards apply to yard and non-yard trucks registered on-road, CARB maintains such requirements are not preempted by section 209(a) of the Act and therefore do not require a waiver from EPA. To the extent the in-use standards apply to non-new off-road yard and non-yard trucks (those not registered for on-road operation) CARB requests a full authorization from EPA.

Despite CARB's contentions, EPA has determined that California's CHE regulations to the extent they apply to nonroad engines require a full authorization and to the extent they apply to new motor vehicles or new motor vehicle engines require a full waiver of preemption. While CARB acknowledges their CHE requirements are standards relating to the control of emissions they nevertheless suggest that such standards have either been previously waived or authorized by EPA. However, the analysis does not end there. The United States Supreme Court's interpretation of ''standard relating to the control of emissions from new motor vehicles or new motor vehicle engines'' in *Engine Manufacturers Association* v. *South Coast Air Quality Management District,* 541 U.S. 246 (2004) supports the conclusion that ''standards'' not merely be limited to a design or performance standard relating to the production of certain vehicles that meet particular emission characteristics but also that the means of enforcing the emission limits is pertinent. California's new engine requirements should be considered as standards relating to the control of emissions. As the Court noted, ''Manufacturers (or purchasers) can be made responsible for ensuring that vehicles *comply* with emission standards, but the standards themselves are separate from those enforcement techniques. While standards target vehicles or engines, standard-enforcement efforts that are proscribed by § 209 can be directed to manufacturers or purchasers.'' [27] In this instance, while the underlying standards as applied toward the production of new heavy-duty diesel highway engines or new nonroad diesel engines have either previously been waived or authorized by EPA, CARB is newly applying the standards to operators at ports and rail yards and requiring them to acquire CHE with specific emission characteristics to the exclusion of other CHE.

Therefore, with respect to newly acquired yard and non-yard trucks EPA will evaluate such requirements under the full waiver criteria. Similarly, for newly acquired off-road yard and non-yard trucks EPA will evaluate such requirements under the full authorization criteria.

In addition to the extent the CHE in-use standards apply to yard and non-yard trucks registered on-road EPA agrees with CARB's assessment that such requirements are not preempted by section 209(a) of the Act (which only applies to ''new'' motor vehicles and ''new'' motor vehicle engines) and therefore do not require a waiver from EPA. Lastly, to the extent the in-use standards apply to non-new off-road yard and non-yard trucks (those not registered for on-road operation) EPA will evaluate such requirements under the full authorization criteria as requested by CARB.

II. Discussion

A. California's Protectiveness Determination

Section 209(b)(1)(A) of the Act requires EPA to deny a waiver if the Administrator finds that California was

[21] *See, e.g.,* 40 FR 21102–103 (May 28, 1975).

[22] *MEMA I,* 627 F.2d at 1121.

[23] *Id.* at 1126.

[24] *Id.* at 1126.

[25] 70 FR 50322 (August 26, 2005).

[26] 75 FR 8056 (February 23, 2010).

[27] *Engine Manufacturers Association* v. *South Coast Air Quality Management District,* 541 U.S. 246,253 (2004).

arbitrary and capricious in its determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. When evaluating California's protectiveness determination, EPA compares the stringency of the California and Federal standards at issue in a given waiver request. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA previously found were not arbitrary and capricious.

Similarly, section 209(e)(2)(i) of the Act instructs that EPA cannot grant an authorization if the Administrator finds that CARB was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

EPA previously found that CARBs regulations establishing emission standards for 2007 and subsequent model year heavy duty on-road diesel engines are as protective of the public health and welfare as comparable federal standards.[28] CARB has found that to the extent the CHE regulations permit newly acquired on-road yard trucks, newly acquired on-road non-yard trucks and in-use yard trucks to comply by using current model year certified on-road diesel engines, they do not undermine the board's previous determination that its emission standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards.[29]

EPA previously found that CARB's regulations for new nonroad Tier 4 engines are at least as protective of the public health and welfare as comparable federal standards.[30] CARB has found that to the extent the CHE regulations permit newly acquired off-road yard trucks, newly acquired off-road non-yard trucks and in-use yard trucks to comply by using Tier 4 off-road CI emission standards engines, they do not undermine the board's previous determination that its emission standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards.[31]

No commenter expressed an opinion or presented any evidence suggesting that CARB was arbitrary and capricious in making its above-noted protectiveness findings. Therefore, based on the record, EPA cannot find that California was arbitrary and capricious in its findings that California's CHE requirements are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

B. Compelling and Extraordinary Conditions

Under section 209(b)(1)(B) of the Act, EPA cannot grant a waiver if California ''does not need such State standards to meet compelling and extraordinary conditions.'' To evaluate this criterion, EPA considers whether California needs a separate motor vehicle emissions program to meet compelling and extraordinary conditions.

Similarly, section 209(e)(2)(ii) of the Act instructs that EPA cannot grant an authorization if the Administrator finds that California does not need such standards to meet compelling and extraordinary conditions. This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.[32]

Over the past forty years, CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California.[33] In Resolution 05–62, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same ''geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.'' [34] Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate motor vehicle emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California a waiver or authorization for its CHE requirements under section 209(b)(1)(B) or section 209(e)(2)(ii), respectively.

C. Consistency With Section 202(a) and 209 of the Clean Air Act

Under section 209(b)(1)(C) of the Act, EPA must deny a California waiver request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with federal test procedures. Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, *i.e.,* if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.

Similarly, Section 209(e)(2)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with section 209. As described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

1. Consistency With Section 209(a)

As noted above, EPA considers CARB's nonroad authorization requests under certain criteria including whether CARB's requirements are consistent with section 209(a) of the Act (to be consistent with section 209(a) of the Clean Air Act, California's requirements must not apply to new motor vehicles or engines). However, in this instance California's CHE requirements affect both new motor vehicles and engines along with affecting nonroad vehicles and engines. To the extent the CHE requirements do affect motor vehicles and engines (CHE motor vehicle requirements) CARB explicitly requests a waiver of preemption under section 209(b) rather than an authorization under section 209(e)(2). EPA is evaluating the CHE motor vehicle requirements under section 209(b). The

[28] 70 FR 50322 (August 26, 2005).

[29] *See* CARB Resolution 05–62.

[30] 75 FR 8056 (February 23, 2010).

[31] *See* CARB Resolution 05–62.

[32] *See* 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

[33] *See, e.g.,* Approval and Promulgation of State Implementation Plans; California—South Coast, 64 FR 1770, 1771 (January 12, 1999). *See also* 69 FR 23858, 23881–90 (April 30, 2004) (designating 15 areas in California as nonattainment for the federal 8-hour ozone national ambient air quality standard).

[34] 49 FR 18887, 18890 (May 3, 1984); *see also* 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

purpose of section 209(b) is to waive the preemption otherwise created by section 209(a). To the extent the CHE requirements affect nonroad vehicles and engines (CHE nonroad requirements) CARB explicitly requests an authorization under section 209(e)(2). By logical extension and definition such CHE nonroad requirements only pertain to nonroad vehicles and engines and are thus not motor vehicles under section 209(a).

No commenter presented otherwise; therefore, EPA cannot deny California's authorization request on the basis that California's CHE requirements are not consistent with section 209(a).

2. Consistency With Section 209(e)(1)

To be consistent with section 209(e)(1) of the Clean Air Act, California's CHE nonroad requirements must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that CHE equipment is not used in farm and construction equipment or vehicles or engines used in locomotives.[35] No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's APS requirements are not consistent with section 209(e)(1).[36]

3. Consistency With Section 209(b)(1)(C) and Section 202(a)

As noted above, EPA's evaluation of CARB nonroad authorization requests (e.g. the CHE nonroad requirements) includes consideration of whether their requirements are consistent with section 209(b)(1)(C) of the Act. In addition, EPA's evaluation of CARB waiver requests (e.g., the CHE motor vehicle requirements) includes consideration of whether their requirements are consistent with section 209(b)(1)(C). Under section 209(b)(1)(C) of the Act, EPA must deny a California request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with federal test procedures. Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, i.e., if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.

CARB states that the CHE regulations are consistent with section 202(a). CARB states that the technological feasibility of the emission requirements related to yard trucks registered for operation on-road is not disputed since such vehicles need only meet the 2007 on-road engines standards previously waived by EPA. CARB's CHE regulations do not change the underlying test procedures for on-road engines. CARB notes that newly acquired non-yard trucks registered for operation on-road are similar to yard trucks noted above in terms of applicable emission standards and test procedures.

With respect to off-road yard and non-yard trucks CARB notes that the applicable emission standards (either the 2007 on-road standards previously waived by EPA or the Tier 4 nonroad standards previously authorized by EPA) are technologically feasible. CARB also notes that to the extent operators use option 3 (the use of a lower tier engine if option 1 and 2 are not available, and the subsequent installation of VDECS) it is feasible given the number of VDECS verified to date.

EPA received comment from SSAT noting problems with ''post 07 yard truck issues'' and challenges associated with non-yard trucks and VDECs. With respect to the yard truck issue it appears that SSAT is concerned that it is only able to use a certain manufacturer's engine and such engine has exhaust gas leak issues that includes disabling the EGR system. SSAT contends that it is dealing with a 25% failure rate. CARB notes in response that the exact nature of the failure rate at the terminals is unclear and its conclusions seem to be based on opinion rather than any data in the record. CARB surmises the problem may be associated with maintenance or operational practices. SSAT provided no further explanation as to why the engine it identified is the only usable engine. Based on the limited information submitted by SSAT, and as CARB notes the fact that 38 other terminals have voluntarily acquired new yard trucks equipped with new on-road CI engines with none reporting EGR problems and none submitting comment to EPA, we find that opponents of the waiver have not met their burden of proof to demonstrate that the new yard truck emission standards are infeasible or otherwise inconsistent with section 202(a).

With regard to non-yard trucks EPA received comment from SSAT and Ports America regarding the use of VDECS for compliance.[37] The commenters' comments include: VDECS become plugged and do not operate properly; the compliance extension provisions are ambiguous, forcing fleet owners to undergo an arduous and expensive process; and the VDECS are expensive.

CARB provides several responses to concerns of improper operating and plugging VDECS. CARB notes that nine Level 3 emission control devices have been verified for non-yard truck applications and that at least 77 VDECS have been installed on a wide-variety of vehicle applications. CARB understands that while excess soot may plug some VDECS there is strong evidence to suggest that fleet owners are not properly performing manual regeneration or that improper sizing of VDECS with engines may be occurring. This coupled with a lack of concrete information and data from the commenters causes CARB to suggest that a showing of infeasibility had not been shown.

CARB also notes that to the extent the use of VDECS is not available its compliance extension provisions provide ample opportunity for fleet operators to comply with the CHE regulations. CARB responds to the commenters' suggestion that the compliance extension provisions are

[35] CARB's waiver and authorization request letter at p. 21, citing section 2479(e)(1)(B) of its regulations.

[36] BNSF Railway Company and Union Pacific Railroad Company note that they are currently complying with the CHE regulation in their efforts to work with the state and to reduce emissions from rail operations. Further, they state that ''Regardless of whether or not EPA issues a waiver for the retrofit component of the CHE rule, the Railroads are not waiving any aspect of preemption or setting any precedent as to preemption or voluntary compliance with other rules or agreements.'' EPA's decision granting a waiver and authorization for CARB's CHE regulations addresses only the specific criteria set forth in sections 209(b) and (e) of the Clean Air Act. It does not address ancillary issues related to harmonizing CAA authority with other federal preemptions, such as Interstate Commerce Commission Termination Act (ICCTA), that restrict the authority of local governments to regulate railroads.

[37] Similar to SSAT's comments on yard trucks it is unclear whether the commenters are raising concerns with newly acquired non-yard trucks or in-use non-yard trucks. EPA notes that in-use requirements for on-road vehicles are not preempted by section 209 of the Act.

ambiguous (extensions are granted by CARB if the VDECS are ''not available'' and ''not feasible'') by pointing to its initial request to EPA for a waiver and authorization where CARB discussed compliance flexibility and relief.[38] CARB maintains that nothing in the comments contradicts CARB's reasons for the provisions or that the terms of the provisions are illusory. CARB notes that to date SSAT has never requested an extension and Ports America has requested and received an extension. CARB also provides an accounting of 88 compliance extension requests it has received with no indication of any problems. In addition, CARB provides a detailed explanation of its administrative process for handling such requests.

Based on the lack of concrete evidence from the commenters that it has incurred unreasonable delays or other difficulties making its compliance with the CHE regulations infeasible, EPA cannot deny CARB's request based on the infeasibility of CARB's compliance provisions.

Finally, with regard to the costs associated with VDECS the commenters note ''The cost of [VDECS] typically cost 40k each dropped 50% on 'some' systems when the economy took a down turn. We are looking at spending millions of dollars to one or two vendors who charge whatever they feel they can get away with.'' CARB replies by noting that nowhere do the commenters assert that the costs make the CHE regulation infeasible. CARB notes that the nature or port terminals and intermodal railroads make them multimillion-dollar businesses with highly polluting equipment. Without hard evidence from the commenters as to why the costs render the regulations infeasible, CARB suggests that costs are a policy question for CARB to consider when adopting the regulation and that EPA should follow its historical practice of deference.

EPA notes that it is required to closely examine costs when making a determination of whether there is evidence in the record to support a finding that CARB's regulations are technologically infeasible. In this instance there is insufficient evidence in the record to demonstrate why the costs of VDECS are inappropriately high when compared to the costs of the underlying vehicles or why the costs are otherwise inappropriately prohibitive. Therefore, based on the record, EPA cannot make a finding that CARB's CHE regulations are inconsistent with section 202(a) based on considerations of costs.

As noted above, EPA's consideration of the consistency with section 202(a) includes a review of whether California's test procedures impose requirements inconsistent with federal test procedures. Because CARB's test procedures are incorporated in previously waived and authorized regulations (e.g., the Tier 4 nonroad standards and the 2007 heavy-duty diesel engine regulations) and such regulations harmonize their test procedures with applicable federal test procedures CARB maintains there is no test procedure inconsistency. We have received no comments presented otherwise; therefore, based on the record before me I cannot deny CARB's request based on a lack of test procedure consistency.

III. Decision

EPA's analysis finds that the criteria for granting a full authorization and a full waiver of preemption have been met for CARB's CHE regulations.

The Administrator has delegated the authority to grant California a section 209(b) waiver to enforce its own emission standards for new motor vehicles and engines and to grant California a section 209(e) authorization to enforce its own emission standards for nonroad engines and equipment to the Assistant Administrator for the Office of Air and Radiation. Having given consideration to all the material submitted for this record, and other relevant information, I find that I cannot make the determinations required for a denial of a waiver request pursuant to section 209(b) of the Act nor can I make the determination required for a denial of an authorization pursuant to section 209(e) of the Act. Therefore I grant both a waiver of preemption and authorization to the State of California with respect to its CHE regulations as set for the above.

My decision will affect not only persons in California but also manufacturers outside the State who must comply with California's requirements in order to produce engines for sale in California. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act.

Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by April 23, 2012. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: November 28, 2011.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

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[38] *See* CARB's January 29, 2007 request at pp. 11–12, and 34 where CARB sets out 5 different types of extensions (e.g., a one year extension if an engine is within one year of retirement, a two-year extension if no VDECS is available, etc.).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of Information Collection—Extension Without Change: Demographic Information on Applicants for Federal Employment.

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) announces that it intends to submit to the Office of Management and Budget (OMB) a request for a one-year extension of the Demographic Information on Applicants, OMB No. 3046–0046.

DATES: Written comments on this notice must be submitted on or before April 23, 2012.

ADDRESSES: Comments should be sent to the Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile (''FAX'') machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number). Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTY). (These are not toll-free