

assistance must prepare and submit DWSRF loan applications. States then review completed loan applications and verify that proposed projects will comply with applicable Federal and State requirements.

As a result of the American Recovery and Reinvestment Act signed by the President on February 17, 2009, the Drinking Water State Revolving Fund received an additional \$2 billion in funding for assistance agreements for projects to be under contract or construction by February 17, 2010. EPA expects an estimated two-fold increase of respondents (in some years) due to this additional funding.

**Burden Statement:** The public reporting and recordkeeping burden for this collection of information is estimated to average 2,410 hours per State and 80 hours per local respondent (including Indian Tribes and Alaska Native Villages) annually. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimate total number of potential respondents:* 1,887 per year.

*Frequency of response:* Annual (for Capitalization Grants and Audits), On Occasion (for Biennial reports and Loan Applications).

*Estimated total average number of responses for each respondent:* One.

*Estimated total annual burden hours per response:* 134.

*Estimated total annual burden hours:* 269,797.

*Estimated total annual costs:* \$10,639,932, which includes \$0 capital/operation & maintenance cost.

**Changes in the Estimates:** There is an increase of 72,927 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This reflects EPA's calculation of the burden hours resulting from a

possible two-fold increase in local respondents and ongoing programmatic implementation needs due to additional funds from the American Reinvestment and Recovery Act of 2009.

Dated: February 16, 2010.

**John Moses,**

*Director, Collection Strategies Division.*

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**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-9114-1]

### California State Nonroad Engine Pollution Control Standards; California New Nonroad Compression Ignition Engines; Notice of Decision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Decision Granting Authorization of California's New Nonroad Compression Ignition Engine Emission Standards

**SUMMARY:** The Environmental Protection Agency (EPA) today, pursuant to section 209(e) of the Clean Air Act (Act), 42 U.S.C. 7543(e), is granting California its request for an authorization of its emission standards and accompanying test procedures for new nonroad compression ignition (CI) engines. EPA is also confirming that one sub-set of California's amended regulations does fall within-the-scope of an authorization that EPA previously granted.

**ADDRESSES:** Materials relevant to this decision are contained in Docket No. EPA-HQ-OAR-2008-0670. The docket is located at The Air Docket, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460, and may be viewed between 8 a.m. and 5:30 p.m., Monday through Friday. The telephone is (202) 566-1742. A reasonable fee may be charged by EPA for copying docket material.

Additionally, 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 <http://www.regulations.gov> Web site, enter EPA-HQ-OAR-2008-0670 in "Search Documents" to view documents in the record of CARB's nonroad compression ignition 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.

**FOR FURTHER INFORMATION CONTACT:** Kristien G. Knapp, Compliance and Innovative Strategies Division, United States Environmental Protection Agency, 1200 Pennsylvania Avenue (6405J), NW., Washington, DC 20460. Telephone: (202) 343-9949. E-mail Address: [knapp.kristien@epa.gov](mailto:knapp.kristien@epa.gov).

## SUPPLEMENTARY INFORMATION:

### I. Introduction

By this decision, issued pursuant to section 209(e) of the Clean Air Act (the "Act"), 42 U.S.C. 7543(e), the Environmental Protection Agency ("EPA") has determined that the California Air Resources Board's ("CARB's") regulations and amendments regarding new nonroad compression ignition ("CI") engine emission standards and testing procedures, that were adopted in 2000 and 2004-05, warrant EPA's authorization. CARB's regulations and amendments meet the criteria for such an authorization as outlined in section 209(e)(2) of the Act. CARB has requested that EPA find that its nonroad CI regulations and amendments fall within-the-scope of previously granted authorizations or, in the alternative, that EPA adopt and apply a new "harmonization construct" when California's emission standards harmonize with federal emission standards. CARB's regulations and amendments affect three power categories of nonroad CI engines as expressed in kilowatts (kW): those less than 19 kW, those greater than 19 kW but less than 130 kW, and those greater than 130 kW. EPA has previously granted authorizations for California's Small Off-Road Engine less than 19 kW ("SORE") regulations.<sup>1</sup> Subsequently, EPA confirmed that CARB's SORE amendments were within-the-scope of that prior authorization.<sup>2</sup> EPA also previously granted an authorization for California's new heavy-duty off-road diesel-cycle engines greater than 130 kW.<sup>3</sup> EPA subsequently confirmed that a later CARB amendment to those standards was within-the-scope of that prior authorization.<sup>4</sup> To summarize, the smallest and largest categories of engines at issue here are the subjects of prior EPA authorizations and within-the-scope determinations, while the middle category of engines presents an entirely new size category for EPA to consider.

<sup>1</sup> 60 FR 37440 (July 20, 1995).

<sup>2</sup> 68 FR 69763 (November 20, 2000).

<sup>3</sup> 60 FR 48981 (September 21, 1995).

<sup>4</sup> 69 FR 38958 (June 29, 2004).

In a letter dated July 18, 2008,<sup>5</sup> CARB requested that EPA confirm that its amendments to the regulations affecting the three nonroad CI engine categories fall within-the-scope of the previously granted authorizations for the less than 19 kW and greater than 130 kW categories. CARB's amendments to the smallest category of engines (those less than 19kW) that were completed as part of its 2000 Rulemaking, did not raise the stringency of those standards and EPA is confirming today that they are within-the-scope of its previous authorization. However, EPA has also found that this authorization request raises new issues with respect to each category that requires EPA to conduct a full authorization inquiry. For the smallest category, while CARB's amendments affecting this category in the 2000 Rulemaking are within-the-scope, increases to those standards' stringency in the 2004–05 Rulemaking raise new issues. For the middle category of nonroad CI engines (those engines between 19 kW and 130 kW), those standards present new issues for EPA's consideration because CARB's 2000 Rulemaking created the category and the 2004–05 Rulemaking increased their stringency. For the largest category of engines, new issues are presented due to increases in stringency as a result of both the 2000 and 2004–05 Rulemakings. These new issues warrant a full EPA authorization evaluation for all three categories. Upon completion of that evaluation, EPA is authorizing CARB to enforce these standards and procedures.

## II. Background

### A. Clean Air Act Nonroad Engine Authorizations

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

<sup>5</sup> EPA–HQ–OAR–2008–0670–0002. CARB originally requested a within-the-scope authorization for its off-road CI engine regulations that it had adopted in 2000, on July 16, 2004. CARB has since asked that its July 18, 2008 request replace that previous request and that EPA consider the 2000 regulations and amendments together with the 2004–05 regulations and amendments as one within-the-scope authorization request.

for new nonroad engine or vehicle emission standards.<sup>6</sup>

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).<sup>7</sup>

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. 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.

### B. California's Authorization Request

In its July 18, 2008 letter to EPA, CARB notified EPA of additional regulations and amendments to its nonroad CI emissions program and asked EPA to confirm that these regulations and amendments are within-the-scope of previous authorizations. EPA can make such a confirmation if certain conditions are present. Specifically, if California acts to amend a previously authorized standard or accompanying enforcement procedure, the amendment may be considered as falling within-the-scope of a previously granted authorization provided that it: (1) Does not undermine California's

<sup>6</sup> 59 FR 36969 (July 20, 1994). These regulations were subsequently moved to 40 CFR part 1074 and modified slightly. See 73 FR 59379 (October 8, 2008).

<sup>7</sup> See 59 FR 36969 (July 20, 1994).

determination that its standards, in the aggregate, are as protective of public health and welfare as applicable Federal standards, (2) does not affect consistency with section 209 of the Act, and (3) raises no new issues affecting EPA's previous authorization.<sup>8</sup>

California's request, as noted above, concerns its emissions program for nonroad CI engines which are inclusively categorized by three engine power classes. Since EPA's previous authorizations regarding California's nonroad CI program, California has amended its standards for two of the classes and established and amended standards for the third class. These new standards and the amendments for each class were adopted over the course of two distinct CARB rulemakings: one in 2000 (hereinafter the “2000 Rulemaking”) and another in 2004–05 (hereinafter the “2004–05 Rulemaking”). The 2000 Rulemaking adopted by CARB generally harmonized California's emission standards and test procedures to the federal standards for the same nonroad CI engines that were promulgated in 1998 (Tier 1 through Tier 3). Similarly, the 2004–05 Rulemaking generally harmonized California's Tier 4 standards to the federal Tier 4 standards for these same nonroad CI engines that EPA adopted in 2004. All of CARB's standards for nonroad CI engines appear in Title 13 of the California Code of Regulations (CCR) sections 2420–2427. The federal emission standards for nonroad CI engines appear in 40 CFR parts 89 and 1039.

The first category of engines includes nonroad CI engines under 19 kW. The 2000 Rulemaking merely re-codified California's previously promulgated standards for this engine category, which EPA had previously found to be within-the-scope of its SORE authorization.<sup>9</sup> These standards were later amended in the 2004–05 Rulemaking to increase the stringency for this category of engines by promulgating Tier 4 standards, starting in the 2008 model year. These numerical standards are identical to current Federal standards: California's Tiers 1, 2, and 4 align to EPA's Tiers 1, 2, and 4.

The second category of engines includes those nonroad CI engines greater than 19 kW but less than 130 kW. This category of standards was first established by the 2000 Rulemaking and was subsequently amended in the

<sup>8</sup> Decision Document accompanying waiver determination announced in 51 FR 12391 (April 10, 1986).

<sup>9</sup> 65 FR 69767 (November 20, 2000).

2004–05 Rulemaking. The standards began with model year 2000, requiring the engines to meet Tier 1 standards; Tier 2 standards are required for model years 2003 and 2004; and Tier 3 standards are required for model years 2007 and 2008. All of these standards for this engine size category are numerically identical to federal standards, with California's Tiers 1 through 3 matching EPA's Tiers 1 through 3.<sup>10</sup> Finally, California's Tier 4 standards are required of all model year engines including and later than the 2009 model year. California's Tier 4 standards largely align to EPA's Tier 4 standards for this category with the slight difference that California maintains separate NMHC and NO<sub>x</sub> standards while for some engines EPA has a combined NMHC+NO<sub>x</sub> standard.

The third category of engines includes those nonroad CI engines greater than 130 kW. This category of standards was amended, including increases in numerical stringency, in both the 2000 Rulemaking and 2004–05 Rulemaking. As with the above-described categories, the standards for this category align with federal standards: Tier 2 standards are required for model years 2001–2006, Tier 3 standards are required for model year 2006–2010, and Tier 4 standards are required for model years beginning with and beyond 2011. All tiers of California standards numerically match the corresponding federal standards for the same engine size.<sup>11</sup>

At the heart of both CARB's 2000 and 2004–05 Rulemakings were adoption of the above-noted emission standards. In each proceeding, though, additional amendments to California's regulations were made, largely to harmonize with Federal compliance and enforcement procedures. In its 2000 Rulemaking, CARB adopted requirements mirroring federal requirements for maintenance intervals, recordkeeping, warranties, test procedures, certification test fuel, and engine useful life.<sup>12</sup> At that time, CARB also provided for implementation flexibility for post-manufacture marinizers and optional reduced-emission standard labeling requirements for "Blue Sky Series" CI engines. In its 2004–05 Rulemaking, CARB, in addition to its adoption of emission standards, continued to harmonize its compliance and enforcement procedures to the corresponding federal compliance and enforcement procedures. Specifically,

CARB adopted federal modifications that EPA had adopted in our Final Rule for Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel and EPA's Final Rule for Test Procedures for Testing Highway and Nonroad Engines Omnibus Technical Amendments.<sup>13</sup> CARB adopted federal procedures for not-to-exceed limits, incentives for early introduction of engines with advanced after-treatment, new test procedures and test cycles, and enhanced in-use compliance provisions and flexibilities. California's 2004–05 Rulemaking does include some additional requirements "that are intended to provide additional safeguards for a more identifiable and enforceable deployment of flexibility allowances in California."<sup>14</sup> Those supplemental requirements include additional labeling content requirements beyond that required by the federal program, a required CARB Executive Order for engines certified under the transitional flexibility program, and the maintenance of California's own in-use warranty/recall program.

#### C. EPA's Consideration of CARB's Request

Because EPA believed it possible that CARB's amendments did in fact raise "new issues" as they impose new standards for the category of nonroad CI engines between 19 kW and 130 kW and raise the stringency of standards for the smaller and larger categories of nonroad CI engines, EPA offered the opportunity for a public hearing and requested public comments on these new standards and testing procedures.<sup>15</sup> EPA received no request for a public hearing, nor was any comment received on the CARB standards and procedures at issue. Therefore, EPA has made this determination based on the information submitted by CARB in its request.

#### D. Standard and Burden of Proof in Clean Air Act Section 209 Proceedings

In *Motor and Equip. Mfrs. Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) (hereinafter "*MEMA I*"), the United States Court of Appeals stated that the Administrator's role in a section 209 proceeding is to:

[C]onsider 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 \* \* \* have shown that the factual circumstances exist in which Congress intended a denial \* \* \*.<sup>16</sup>

The court in *MEMA I* considered the standards of proof pursuant to section 209 for the two findings necessary to grant a waiver for an "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."<sup>17</sup>

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."<sup>18</sup> 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."<sup>19</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all section 209 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 explicitly consider the section 209 standards of proof concerning an authorization request for nonroad emission standards and testing procedures, there is nothing in the opinion that suggests the court's analysis would not apply with equal force in such determinations. EPA's past section 209 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."<sup>20</sup>

Furthermore, Congress intended that EPA's review of California's decision-making be narrow in scope.<sup>21</sup> This has

<sup>16</sup> *Motor and Equip. Mfrs. Assoc. v. EPA* (MEMA I), 627 F.2d 1095, 1122 (D.C. Cir. 1979).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., 40 FR 23, 102–103 (May 28, 1975).

<sup>21</sup> See, e.g., MEMA I, 627 F.2d at 1110–11, citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 301–02 (1977).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See CARB's Request at 10; EPA–HQ–OAR–2008–0670–0002; see also CARB's Exhibit 4, EPA–HQ–OAR–2008–0670–0012 and EPA–HQ–OAR–2008–0670–0013, and CARB's Exhibit 5, EPA–HQ–OAR–2008–0670–0014.

<sup>13</sup> 69 FR 38958 (June 29, 2004), 70 FR 40421 (July 13, 2005).

<sup>14</sup> See CARB's Request at 14, EPA–HQ–OAR–2008–0670–0002; see also CARB Exhibit 12, EPA–HQ–OAR–2008–0670–0023, and CARB Exhibit 13, EPA–HQ–OAR–2008–0670–0025.

<sup>15</sup> 73 FR 58583 (October 7, 2008).

led EPA in the past to reject arguments that are not specified within the statute as grounds for denying a waiver or authorization:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.<sup>22</sup>

Thus, EPA's consideration of all the evidence submitted concerning this authorization decision is circumscribed by its relevance to those questions which the Administrator is directed to consider by section 209.

Finally, opponents of the waiver bear the burden of showing whether California's waiver request is inconsistent with section 202(a). As found in *MEMA I*, this obligation rests firmly with opponents in a section 209 proceeding; the court held that:

The language of the statute and its legislative history indicate that California's regulations, and California's determinations that they 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.<sup>23</sup>

The Administrator's burden, on the other hand, is to determine that she has made a reasonable and fair evaluation of the information in the record when coming to the waiver decision. As the court in *MEMA I* stated, "[h]ere, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if [s]he seeks to overcome that evidence with unsupported assertions of [her] own, [s]he runs the risk of having [her] waiver decision set aside as arbitrary and capricious."<sup>24</sup> Therefore, the Administrator's burden is to act "reasonably."<sup>25</sup>

<sup>22</sup> 36 FR 17458 (August 31, 1971). Note that the "more stringent" standard expressed here in 1971, was superseded by the 1977 amendments to section 209, which established that California's standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

<sup>23</sup> *MEMA I* at 1121.

<sup>24</sup> *Id.* at 1126.

<sup>25</sup> *Id.*

### III. Discussion

#### A. California's Protectiveness Determination

Section 209(e)(2)(i) of the Act instructs that EPA cannot grant an authorization if the agency 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. CARB's Board made a protectiveness determination in Resolution 00-3, dated January 27, 2000, finding that sections 2111, 2112, 2137, 2139, 2140, 2141, 2400, 2401, 2403, 2420-27 and Appendix A to article 2.1, chapter 2, division 3 of Title 13, California Code of Regulations, as amended, (the 2000 Rulemaking) will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.<sup>26</sup> A similar protectiveness determination was made in Resolution 04-43, dated October 21, 2005, with regard to amended sections 2420-2427 and new section 2425.1 and the three amended test procedures incorporated by reference therein to Title 13 of the California Code of Regulations (the 2004-5 Rulemaking).<sup>27</sup> CARB's protectiveness determinations in both rulemakings were, therefore, based on comparisons to the Federal standards which demonstrate that CARB's standards and test procedures align with the Federal program.

In addition, EPA did not receive any comments stating that CARB's nonroad CI requirements are not, in the aggregate, as stringent as applicable Federal standards.

Therefore, based on the record before me, I cannot find that CARB's nonroad CI regulations and amendments, as noted, would cause the California nonroad emission standards, in the aggregate, to be less protective of public health and welfare than applicable Federal standards.

<sup>26</sup> *Be It Further Resolved* that the Board hereby determines that the regulations adopted herein will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards." CARB Resolution 00-3 at 6 (January 27, 2000), CARB's Exhibit 2, EPA-HQ-OAR-2008-0004.

<sup>27</sup> *Be It Further Resolved* that the Board hereby determines that the regulations approved herein will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards." CARB Resolution 04-43 at 6 (October 21, 2005), CARB's Exhibit 9, EPA-HQ-OAR-2008-0670-0021.

#### B. Need for California Standards To Meet Compelling and Extraordinary Conditions

Section 209(e)(2)(ii) of the Act instructs that EPA cannot grant an authorization if the agency finds that California "does not need such California 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.<sup>28</sup> As to the need for the particular standards that are the subject of this decision, California is entrusted with the power to select "the best means to protect the health of its citizens and the public welfare."<sup>29</sup> CARB has repeatedly demonstrated the existence of compelling and extraordinary conditions in California.<sup>30</sup>

EPA has not received any adverse comments to suggest that California no longer suffers from serious and unique air pollution problems. In its authorization request letter, CARB concluded that "there can be no doubt of the continuing existence of compelling and extraordinary conditions justifying California's need for its own nonroad vehicle and engine emissions control program."<sup>31</sup> EPA has repeatedly declined to find fault in California's demonstrations of "compelling and extraordinary conditions" when waiving preemption for motor vehicle emission standards and authorizing nonroad emission standards.<sup>32</sup> Moreover, because EPA has

<sup>28</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

<sup>29</sup> H.R. Rep. No. 95-294, 95th Cong., 1st Sess., 301-02 (1977)(cited in *MEMA I*, 627 F.2d at 1110).

<sup>30</sup> CARB expressed its needs for its own emission control program in both of the rulemakings at issue here. (*Be It Further Resolved* that the Board hereby finds that separate California emission standards and test procedures are necessary to meet compelling and extraordinary conditions." CARB Resolution 00-3 at 6 (January 27, 2000), CARB's Exhibit 2; CARB Resolution 04-43 at 6 (October 21, 2005), CARB's Exhibit 9, EPA-HQ-OAR-2008-0670-0021.)

<sup>31</sup> CARB's Request Letter at 32, EPA-HQ-OAR-2008-0670-0002.

<sup>32</sup> See, e.g., 74 FR 3030, 3033 (January 16, 2009); "California State Nonroad Engine and Vehicle Pollution Control Standards; Decision of the Administrator (Authorization of In-Use Emission Standards for Transport Refrigeration Unit Engines)," EPA-HQ-OAR-2005-0123-0049, at 19, available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648082352c> ("EPA has agreed with CARB, in earlier nonroad engine standards requests, that California's continuing extraordinary conditions justify separate California programs."); 71 FR 75536 (December 15, 2006).

not received adverse public comment challenging California's need for its own mobile source pollution control program or asserting any change from California's previous demonstrations, I cannot deny the authorization based on a lack of compelling and extraordinary conditions.

### C. Consistency With Section 209 of the Clean Air Act

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 delineated above in Section II.A., EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C). First, California's nonroad CI engine emission standards are consistent with section 209(a) because they do not apply to new motor vehicles or engines. Second, California's nonroad CI engine emission standards are consistent with section 209(e)(1) because they do not affect new farming or construction vehicles or their engines below 175 hp, or new locomotives or their engines.<sup>33</sup> Third, the requirement that California's standards be consistent with section 209(b)(1)(C) of the Act effectively requires consistency with section 202(a) of the Act.

California standards are inconsistent with section 202(a) of the Act 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 also be inconsistent with section 202(a) if the Federal and California test procedures were not consistent.

The scope of EPA's review of whether California's action is consistent with section 202(a) is narrow. The determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the Federal test procedure.<sup>34</sup> EPA did not receive any comments suggesting that CARB's standards are inconsistent with section 202(a); therefore, I cannot deny

California's authorization based on the standard of review for consistency with section 209.

### 1. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.<sup>35</sup> Section 202(a)(2) states, in part, that any regulation promulgated under its authority "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a) thus requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect. The latter scenario also requires the Administrator to decide whether the cost of developing and applying the technology within that time is feasible. Previous EPA waivers are in accord with this position.<sup>36</sup>

For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a) because adequate technology existed as well as adequate lead time to implement that technology.<sup>37</sup> Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.<sup>38</sup>

As CARB notes, all three categories of the nonroad CI regulations have been written to align and harmonize California standards with Federal standards and testing procedures. Notably, because California's standards align to Federal standards, these are the same numerical standards that EPA, in the course of its own rulemaking under Clean Air Act authority, has already determined to be technologically feasible.

EPA did not receive any comments suggesting that CARB's standards and testing procedures are technologically infeasible. Consequently, based on the record before me, I cannot deny California's authorization based on technological infeasibility.

### 2. Consistency of Certification Procedures

California's standards and accompanying enforcement procedures would also be inconsistent with section 202(a) if the California test procedures were to impose certification requirements inconsistent with the Federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the California and Federal testing requirements using the same test vehicle or engine.<sup>39</sup>

CARB makes clear that its nonroad CI certification procedures, for all three power categories, align with Federal certification procedures so that a manufacturer can use the same test engine to certify for both emissions programs.

EPA received no comments suggesting that CARB's nonroad CI requirements pose a testing procedure consistency problem. Therefore, based on the record before me, I cannot find that CARB's testing procedures are inconsistent with section 202(a). I cannot, then, deny CARB's request based on this criterion.

### D. Within-the-Scope Authorizations

CARB suggests in its request letter that since the new requirements for two of the categories are amendments to previously authorized California standards and that all three categories of regulations align California requirements to Federal requirements, this request should be found as within-the-scope of previous EPA authorizations. Typically, if California acts to amend a previously authorized standard or accompanying enforcement procedure, the amendment may be considered within-the-scope of a previously granted authorization provided that it: (1) Does not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards, (2) does not affect consistency with section 209 of the Act, and (3) raises no new issues affecting EPA's previous authorization.<sup>40</sup>

Only one sub-set of the standards for which CARB requests a within-the-scope confirmation meets EPA's above-noted third criterion for within-the-scope confirmation. Because the smallest category of nonroad CI engines were merely re-codified as a result of

<sup>33</sup> See CARB's "Staff Report: Initial Statement of Reasons for Rulemaking," for a general list of off-road diesel engines that are excepted from this regulation (page 25) as well as a specific list of preempted applications (Appendix A at page 104). CARB's Exhibit 11, EPA-HQ-OAR-2008-0670-0028.

<sup>34</sup> MEMA I, 627, F.2d at 1126.

<sup>35</sup> H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

<sup>36</sup> See, e.g., 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

<sup>37</sup> 41 FR 44209 (October 7, 1976).

<sup>38</sup> H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

<sup>39</sup> See, e.g., 43 FR 32182 (July 25, 1978).

<sup>40</sup> See, e.g., 51 FR 12391 (April 10, 1986) and 65 FR 69673, 69674 (November 20, 2000). The first within-the-scope determination stated that a CARB request made subsequent to an EPA waiver, "exists within the meaning and intent of the waiver granted." 37 FR 14831 (July 25, 1972).

the 2000 Rulemaking, that sub-set of standards from the 2000 rulemaking does meet the third criterion for a within-the-scope confirmation. Indeed, the mere re-codification of previously authorized standards that does not increase numerical stringency does not raise any new issues that affect EPA's prior authorization.

Even though the first two within-the-scope criteria have already been established above for all three engine categories, the third criterion prevents EPA from considering this entire request as within-the-scope of EPA's prior authorizations. First, since the middle category of engines has not been previously authorized, it very clearly presents a "new issue" that has not previously been subject to an authorization request.<sup>41</sup> Additionally, CARB increased the stringency of its own standards for the smallest category of nonroad CI engines in its 2004–05 Rulemaking and for the largest category of nonroad CI engines in both its 2000 and 2004–05 Rulemakings. EPA has stated in prior waiver and authorization determinations that increases in numerical stringency of standards are "new issues" for which a full waiver or authorization is required.<sup>42</sup> EPA, therefore, believes it appropriate to go beyond an examination of whether the new requirements affect the prior consistency with section 202(a) finding and, in this context, requires a new analysis of whether the new requirements standing on their own are consistent with section 209. As detailed already, above in Section III, EPA finds that CARB has demonstrated that it meets the requirements for a full section 209(e) authorization for all three categories of nonroad CI engines. EPA, therefore, believes a full authorization is appropriate for the new middle category of standards and the more stringent standards for the smallest and largest categories.<sup>43</sup>

As an alternative to the within-the-scope confirmation, California proposes

that EPA adopt and apply a new "harmonization construct," under which EPA would limit its review of California's standards and presumptively authorize California to enforce more stringent California standards if those standards align with—but do not surpass—EPA's Federal emission standards. Although EPA has considered CARB's proposed harmonization construct, we did not receive any comment on this authorization request, which leaves us with no public input on the appropriateness of adopting such a construct. Lacking public input on this authorization request, the Agency does not believe it appropriate to adopt such a construct at this time, without further consideration. While EPA is not adopting this proposed construct at this time, we may consider and apply it in future waivers if appropriate.

#### IV. Decision

EPA's analysis finds that the criteria for granting a full authorization have been met for these regulations and amendments. All three engine categories require a full authorization because "new issues" are presented by new or more stringent standards in each category. For the smallest category of engines (those less than 19kW), numerical emission standards were raised in CARB's 2004–05 Rulemaking. These standards require and have met the criteria for a full authorization. CARB's amendments to this category's standards in its 2000 Rulemaking did not increase the standards' stringency and, thus, EPA can confirm that those standards fall within-the-scope of EPA's previous authorization for those standards. CARB is newly regulating the middle category of engines (those between 19 kW and 130 kW). EPA determined that this entire category presents new issues for which it must conduct a full authorization evaluation. Upon application of that evaluation, EPA has determined that CARB has met the requirements for a full authorization. For the largest category of engines (those greater than 130 kW), CARB has raised emission standards in both of its rulemakings. The increased stringency raised new issues for EPA to consider and required EPA to apply a full authorization analysis. Upon evaluation, EPA has determined that CARB has met the criteria for a full authorization for these standards.

The Administrator has delegated the authority to grant California a section 209(e) authorization to enforce its own emission standards for nonroad engines to the Assistant Administrator for 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 an authorization pursuant to section 209(e) of the Act. Therefore, I grant authorization to the State of California with respect to its new nonroad CI engine requirements as set forth 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 26, 2010. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

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: February 5, 2010.

**Gina McCarthy,**

*Assistant Administrator, Office of Air and Radiation.*

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<sup>41</sup> See 50 FR 20126 at 20127 (May 14, 1985) ("[B]y extending California's standards and test procedures to vehicles not previously covered, these amendments do raise significant new issues not considered in prior waiver decisions.")

<sup>42</sup> See, e.g., 71 FR 44027 at 44028 (August 3, 2006) ("EPA believed it possible that CARB's amendments do in fact raise 'new issues' as they impose new more stringent standards \* \* \*") and 51 FR 6308 at 6309 (February 21, 1986) ("[T]hese amendments do raise significant new issues not considered in prior waiver decisions. In effect, California's amendments establish new standards \* \* \*").

<sup>43</sup> To the extent that the 2000 rulemaking's amendments to the smallest category are construed as not within-the-scope of EPA's prior authorization, then a full authorization is appropriate and granted.