

The Environmental Protection Agency's Acting Assistant Administrator of the Office of Air and Radiation, Janet McCabe, signed the following notice on December 22, 2016 and we are submitting it for publication in the Federal Register. While we have taken steps to ensure the accuracy of this Internet version of the notice, it is not the official version. Please refer to the official version in a forthcoming Federal Register publication, which will appear on the Government Printing Office's FDSys website (www.gpo.gov/fdsys/search/home.action) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2016-0179. Once the official version of this document is published in the Federal Register, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2016-0179; FRL]

California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Emissions from 2014 and Subsequent Model Year Medium- and Heavy-Duty Engines and Vehicles; Notice of Decision

AGENCY: ENVIRONMENTAL PROTECTION AGENCY

ACTION: Notice of Decision.

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's ("CARB's") request for a waiver of Clean Air Act preemption for its greenhouse gas ("GHG") emission regulation for the new 2014 and subsequent model year on-road medium- and heavy-duty engines and vehicles ("California Phase 1 GHG Regulation") adopted in 2011. This regulation establishes requirements applicable to new motor vehicles with a gross vehicle weight rating exceeding 8,500 pounds and engines that power such motor vehicles, except for medium-duty passenger vehicles that are subject to California's Low Emission Vehicle Program. This regulation generally aligns California's GHG emission standards and test procedures with the federal GHG emission standards and test procedures that EPA adopted in 2011. A deemed-to-comply provision is included in CARB's regulation whereby manufacturers may demonstrate compliance with California's Phase 1 GHG Regulation by complying with EPA's Phase 1 regulation. This decision is issued under the authority of the Clean Air Act ("CAA" or "the Act").

This document is a prepublication version, signed by the Environmental Protection Agency's Acting Assistant Administrator of the Office of Air and Radiation, Janet McCabe, on December 22, 2016. We have taken steps to ensure the accuracy of this version, but it is not the official version.

DATES: Petitions for review must be filed by [**insert date 60 days after publication in the FEDERAL REGISTER**].

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2016-0179. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is <http://www.epa.gov/oar/docket.html>. The 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 at <http://www.regulations.gov>. After opening the www.regulations.gov website, enter EPA-HQ-OAR-2016-0179 in the "Enter Keyword or ID" fill-in box to view documents in the record. 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 webpage that contains general information on its review of California waiver and authorization 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, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave, NW. Telephone: (202) 343-9256. Email: dickinson.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

California's Phase 1 GHG Regulation complements CARB's existing Tractor-Trailer GHG regulation that was initially adopted in December 2008 and subsequently amended in 2010 and 2012. EPA granted California a waiver for the Tractor-Trailer GHG regulation in 2014.¹ The Tractor-Trailer GHG regulation requires new 2011 and subsequent model year ("MY") sleeper-cab tractors that haul 53-foot or longer box-type trailers on California highways, and 53-foot and longer box-type trailers operating on California highways to be equipped with U.S. EPA SmartWay approved aerodynamic technologies and low-rolling resistance tires. California's Phase 1 GHG Regulation establishes emission standards for tractors that are also subject to the requirements of CARB's Tractor-Trailer GHG regulation. CARB amended the Tractor-Trailer GHG regulation in conjunction with its adoption of the Phase 1 GHG Regulation to make California's GHG requirements for new medium- and heavy-duty engines and vehicles consistent with corresponding requirements of EPA's Phase 1 GHG regulation.² The California Phase 1 GHG Regulation establishes GHG emission standards and associated

¹ 79 FR 46256 (August 7, 2014).

² 76 FR 57106 (September 15, 2011).

test procedures for new 2014 and subsequent MY diesel-fueled medium- and heavy-duty engines and for new 2016 and subsequent MY gasoline-fueled medium- and heavy-duty engines used in combination tractors and vocational vehicles that are identical to the corresponding GHG emission standards and associated test procedures for diesel and gasoline-fueled heavy-duty engines in EPA's Phase 1 GHG regulation. The California Phase 1 GHG Regulation also contains "deemed to comply" provisions that allow engine manufacturers to demonstrate that 2014 through 2022 model year medium- and heavy-duty engines comply with California's GHG emission standards by showing compliance with EPA's Phase 1 regulation, i.e., submitting to CARB the engine family's Certificate of Conformity issued by EPA.³

By letter dated January 29, 2016⁴, CARB submitted to EPA a request for a waiver of the preemption found at section 209(a) of Clean Air Act, 42 USC 7543(a), for the California Phase 1 GHG Regulation. CARB's submission provides analysis and evidence to support its finding that the California Phase 1 GHG Regulation satisfies the CAA section 209(b) criteria and that a waiver of preemption should be granted.

II. Principles Governing this Review

A. Scope of Review

Section 209(a) of the CAA provides:

³ See "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Diesel-Engines and Vehicles", Part 1036, Subpart B, section 1036.108, and "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto-Cycle Engines and Vehicles", Part 1036, Subpart B, section 1036.108. See also "California Greenhouse Gas Exhaust Emission Standards and Test Procedures for 2014 and Subsequent Model Heavy-Duty Vehicles", Part 1037, Subpart B, section 1037.101(b)(2).

⁴ CARB, "In the Matter of California's Request for Waiver Pursuant to Clean Air Act Section 209(b) for California's Greenhouse Gas Regulation for Medium- and heavy-Duty Engines and Vehicles," January 29, 2016 ("California Waiver Request Support Document") See www.regulations.gov website, docket number EPA-HQ-OAR-2016-0179-0003.

“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.”⁵

Section 209(b)(1) of the Act requires the Administrator, after an opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that its state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.⁶ However, no such waiver shall be granted if the Administrator finds that: (A) the protectiveness determination of the state is arbitrary and capricious; (B) the state does not need such state standards to meet compelling and extraordinary conditions; or (C) such state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.⁷

Key principles governing this review are that EPA should limit its inquiry to the specific findings identified in section 209(b)(1) of the Clean Air Act, and that EPA will give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended the

⁵ CAA § 209(a). 42 U.S.C. § 7543(a).

⁶ CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1). California is the only state that meets section 209(b)(1)'s requirement for obtaining a waiver. *See* S. Rep. No. 90-403 at 632 (1967).

⁷ CAA § 209(b)(1). 42 U.S.C. § 7543(b)(1).

Agency's review of California's decision-making to be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

"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 California air quality not commensurate with its costs 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."⁸

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.⁹ "[T]he statute does not provide for any probing substantive review of the California standards by federal officials." *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1300 (D.C. Cir. 1979). Thus, EPA's consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that may be considered under section 209(b)(1).

B. Burden and Standard of Proof

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

"[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

⁸ "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (Aug. 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 must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

⁹ See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I*").

the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.”¹⁰

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.’”¹¹ Therefore, the Administrator's burden is to act “reasonably.”¹²

With regard to the standard of proof, the court in *MEMA I* explained 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.”¹³

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure.” Those findings involve: (1) whether the enforcement procedures impact California's prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that “the standard of proof must take account of the nature of the risk of

¹⁰ *MEMA I*, note 19, at 1121.

¹¹ *Id.* at 1126.

¹² *Id.* at 1126.

¹³ *Id.* at 1122.

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.”¹⁴

With regard to the protectiveness finding, the court upheld the Administrator's position that, to deny a waiver, there must be “clear and compelling evidence” to show that proposed enforcement procedures undermine the protectiveness of California's standards.¹⁵ 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.¹⁶

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 explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to a waiver request for 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.”¹⁷

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See, e.g.*, “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

C. Deference to California

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on specifically listed criteria was to ensure that the federal government did not second-guess state policy choices. As the Agency explained in one prior waiver decision:

“It is worth noting ... I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator.... Since a balancing of risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California’s judgments on this score.”¹⁸

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on “ambiguous and controversial matters of public policy” to California’s judgment.¹⁹ This interpretation is supported by relevant discussion in the House Committee Report for the 1977 amendments to the CAA. Congress had the opportunity through the 1977 amendments to restrict the preexisting waiver provision, but elected instead to expand California’s flexibility to adopt a complete program of motor vehicle emission controls. The report explains that the amendment is intended to ratify and strengthen the preexisting California waiver provision and to affirm the underlying intent of that provision, that is, to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.²⁰

¹⁸ 40 FR 23102, 23103-04 (May 28, 1975).

¹⁹ 40 FR 23102, 23104 (May 28, 1975); 58 FR 4166 (January 13, 1993).

²⁰ *MEMA I*, 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977)).

D. EPA's Administrative Process in Consideration of California's Request

On August 9, 2016, EPA published a notice of opportunity for public hearing and comment on California's waiver request. In that notice, EPA requested comments on CARB's request for a waiver for the California Phase 1 GHG Regulation under the following three criteria: whether (a) California's determination that its motor vehicle emissions standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) California needs such State standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.

EPA received no comments and no requests for a public hearing. Consequently, EPA did not hold a public hearing.

III. Discussion

A. Whether California's Protectiveness Determination was Arbitrary and Capricious

As stated in the background, section 209(b)(1)(A) of the Act sets forth the first of the three criteria governing a new waiver request – whether California was arbitrary and capricious in its determination that its motor vehicle emissions standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. Section 209(b)(1)(A) of the CAA requires EPA to deny a waiver if the Administrator finds that California's protectiveness determination was arbitrary and capricious. However, a finding that California's determination was arbitrary and

capricious must be based upon clear and convincing evidence that California's finding was unreasonable.²¹

CARB did make a protectiveness determination in adopting the California Phase 1 GHG Regulation, and found that the California Phase 1 GHG Regulation would not cause California motor vehicle emissions standards, in the aggregate, to be less protective of the public health and welfare than applicable federal standards.²² CARB notes that its rulemaking action established California GHG emission standards for medium- and heavy-duty vehicles that are identical to the corresponding GHG emission standards for heavy-duty engines and vehicles in EPA's Phase 1 GHG regulation, and the regulation further contains "deemed to comply" provisions that allow manufacturers to demonstrate 2014 through 2022 model year medium- and heavy-duty engines and vehicles comply with California GHG emission standards by providing CARB the same emissions data and related information required to certify the engine or vehicle to EPA's Phase 1 GHG regulations' requirements.²³ In addition, CARB notes that minor differences remain between the EPA and CARB programs that provide further assurances that California's program is, in the aggregate, at least as protective as the federal program as applied to the

²¹ *MEMA I*, 627 F.2d at 1122, 1124 ("Once California has come forward with a finding that the procedures it seeks to adopt will not undermine the protectiveness of its standards, parties opposing the waiver request must show that this finding is unreasonable."); *see also* 78 FR 2112, at 2121 (Jan. 9, 2013).

²² California Waiver Request Support Document at 30-31, and Attachment 11 (CARB Resolution 13-50, dated December 12, 2013, at EPA-HQ-OAR-2016-0179-0012). The CARB Board expressly declared in Resolution 13-50 that "BE IT FURTHER RESOLVED that the Board hereby determines that the regulations adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of the public health and welfare than applicable federal standards.

²³ *Id.* "Phase 1 Certified Tractor" means a tractor that has been certified in accordance with either the Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium - and Heavy-Duty Engines and Vehicles, as adopted by the US EPA (76 Fed. Reg. 57106 (September 15, 2011)); or the Greenhouse Gas Emission Requirements for New 2014 and Subsequent Model Heavy-Duty Vehicles, as adopted by the California Air Resources Board, sections 95660 to 95664, Subarticle 12, title 17, California Code of Regulations 95302.

categories of affected medium- and heavy-duty engines and vehicles.²⁴ EPA received no comments and EPA is not otherwise aware of evidence suggesting that CARB's protectiveness determination was unreasonable.

As it is clear that California's standards are at least as protective of public health and welfare as applicable federal standards, and that CARB's deemed to comply provision together with the unique aspects of the California Phase 1 GHG Regulation make California's standards even more protective, EPA finds that California's protectiveness determination is not arbitrary and capricious.

B. Whether the Standards Are Necessary to Meet Compelling and Extraordinary Conditions

Section 209(b)(1)(B) instructs that EPA cannot grant a waiver if the Agency finds that California "does not need such State standards to meet compelling and extraordinary conditions." EPA's inquiry under this second criterion has traditionally been to determine whether California needs its own motor vehicle emission control program (i.e. set of standards) to meet compelling and extraordinary conditions, and not whether the specific standards (the California Phase 1 GHG Regulation) that are the subject of the waiver request are necessary to meet such conditions.²⁵ In recent waiver actions, EPA again examined the language of section 209(b)(1)(B) and reiterated this longstanding traditional

²⁴ *Id.* For example, CARB explains that California's Phase 1 GHG Regulation does not fully incorporate the federal definition of "urban bus" in order to preserve California's existing requirement that urban buses be powered by heavy heavy-duty diesel engines (HHD) for which an EPA waiver has already been granted (78 FR 44112 (July 23, 2013)), and that the useful life period for HHD diesel engines exceeds the federal useful life period for light heavy-duty and medium heavy-duty diesel engines.

²⁵ *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles," 74 FR 32744 (July 8, 2009), at 32761; *see also* "California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision," 49 FR 18887 (May 3, 1984), at 18889-18890.

interpretation as the appropriate approach for analyzing the need for “such State standards” to meet “compelling and extraordinary conditions.”²⁶

In conjunction with the California Phase 1 GHG Regulation, CARB determined in Resolution 13-50 that California continues to need its own motor vehicle program to meet serious ongoing air pollution problems.²⁷ CARB asserted that “The geographical and climatic conditions and the tremendous growth in vehicle population and use that moved Congress to authorize California to establish vehicle standards in 1967 still exist today. EPA has long confirmed CARB’s judgment, on behalf of the State of California, on this matter.”²⁸ In enacting the California Global Warming Solutions Act of 2006, the Legislature found and declared that:

“Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of

²⁶ See 78 FR 2112, at 2125-26 (Jan. 9, 2013) (“EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant.”; see also EPA’s July 9, 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section 209(b)(1)(B) as requiring a review of the specific need for California’s new motor vehicle greenhouse gas emission standards as opposed to the traditional interpretation (need for the motor vehicle emission program as a whole) applied to local or regional air pollution problems. See also 79 FR 46256, 46261 (August 7, 2014).

²⁷ California Waiver Request Support Document, at 31, referencing Resolution 13-50, dated December 12, 2013 (see EPA-HQ-OAR-2016-0179-0012). Resolution 13-50 also states “WHEREAS, heavy-duty trucks, buses, and motor homes emitted 23 percent of greenhouse gas (GHG) emissions from on-road vehicles and 8 percent of GHG emissions from all sources in California in 2010. Resolution 13-50 also states “WHEREAS, in recognition of the devastating impacts of climate change emissions on California, Governor Schwarzenegger, in June 2005, enacted Executive Order S-3-05 which established the following GHG emission targets: By 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; and by 2050, reduce GHG emissions 80 percent below 1990 levels. In addition, the South Coast and San Joaquin Valley air basins continue to experience some of the worst air quality in the nation, and many areas in California continue to be in nonattainment for the national ambient air quality standards for particulate matter and ozone (81 FR 78149, 78153, November 7, 2016). To address this issue, for example, California’s heavy-duty program also includes an optional low NOx provision, and CARB states “Because the proposed regulation for Optional Low NOx emissions standards is optional, the emission benefits from that proposal will depend on the level of participation by engine manufacturers. Staff estimated NOx emission benefits for two different scenarios based on low and high participation rates from manufacturers and estimated NOx emission benefits of 0.6 to 1.2 tons per day (TPD) statewide in 2020, and 3.3 to 6.9 TPD in 2035.” CARB Initial Statement of Reasons, December 12, 2013, EPA-HQ-OAR-2016-0179-0003.

²⁸ California Waiver Request Support Document, at 33 (referencing 70 FR 50322, 50323 (August 26, 2005); 74 FR 32744, 32762-763 (July 9, 2009); 79 FR 46256, 46262 (August 7, 2014).

global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to the marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other health-related problems.”²⁹

There has been no evidence submitted to indicate that California's compelling and extraordinary conditions do not continue to exist. California, particularly in the South Coast and San Joaquin Valley air basins, continues to experience some of the worst air quality in the nation, and many areas in California continue to be in non-attainment with national ambient air quality standards for fine particulate matter and ozone.³⁰ As California has previously stated, “nothing in [California's unique geographic and climatic] conditions has changed to warrant a change in this determination.”³¹ EPA agrees that the fundamental conditions that cause California's serious air pollution problems continue to exist.³² Therefore, EPA affirms California's need for its new motor vehicle emissions program as a whole, to meet compelling and extraordinary conditions. In addition, EPA notes the continued adverse impacts of California's changing climate

²⁹ *Id.* at 33. The Global Warming Solutions Act also sets for the California Legislature's finding and declaration that “Continuing to reduce greenhouse gas emissions is critical for the protection of all areas of the state, but especially for the state's most disadvantaged communities, as those communities are affected first, and, most frequently, by the adverse impacts of climate change, including an increased frequency of extreme weather events, such as drought, heat, and flooding. The state's most disadvantaged communities also are disproportionately impacted by the deleterious effects of climate change on public health.” In addition, on April 29, 2015, California Governor Edmund Brown issued Executive Order B-30-15 which states in part “WHEREAS climate change poses an ever-growing threat to the well-being, public health, natural resources, economy, and the environment of California, including loss of snowpack, drought, sea level rise, more frequent and intense wildfires, heat waves, more severe smog, and harm to natural and working lands, and these effects are already being felt in the state.”

³⁰ 74 FR 32744, 32762-63 (July 8, 2009).

³¹ 74 FR 32744, 32762 (July 8, 2009); 76 FR 77515, 77518 (December 13, 2011).

³² In addition to the variety of human health impacts associated with high air temperatures (e.g., heat stroke and dehydration, and effects on people's cardiovascular, respiratory, and nervous systems), warming can also increase the formation of ground-level ozone, a component of smog that can contribute to respiratory problems. *See* “What Climate Change Means for California,” August 2016, EPA 430-F-16-007 at <https://www.epa.gov/sites/production/files/2016-09/documents/climate-change-ca.pdf>.

(e.g. the increase in wildfires, increased threats to coastal developments and ecosystems, etc).³³

Based on the record before us, including EPA's prior waiver decisions, EPA is unable to identify any change in circumstances or evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist. Therefore, EPA cannot find that California does not need its state standards, including greenhouse gas emission standards, to meet compelling and extraordinary conditions in California.

C. Consistency with Section 202(a)

For the third and final criterion, EPA evaluates the program for consistency with section 202(a) of the CAA. Under section 209(b)(1)(C) of the CAA, EPA must deny California's waiver request if EPA finds that California's standards and accompanying enforcement procedures are not consistent with section 202(a). Section 202(a) requires that regulations "shall take effect after such period as the Administrator finds necessary to permit the development and application of the relevant technology, considering the cost of compliance within that time."

EPA has previously stated 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 the federal test procedure. Infeasibility would be shown here by demonstrating that there is inadequate lead time to permit the development of technology

³³ *Id.*

necessary to meet the California Phase 1 GHG Regulation, giving appropriate consideration to the cost of compliance within that time.³⁴ California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures conflicted, i.e., if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.³⁵

Regarding test procedure conflict, CARB notes that it is not aware of any instances in which a manufacturer is precluded from conducting one set of tests on a heavy-duty engine or a heavy-duty vehicle to determine compliance with both California and federal GHG requirements. The regulation's "deemed to comply" provisions ensure that engine and vehicle manufacturers can use federal test results to demonstrate compliance with California's GHG emission standards through the 2022 model year. CARB also notes that no test procedure inconsistencies exist for those manufactures that elect not to utilize the deemed to comply provisions, or for 2023 and subsequent model year engines and vehicles because the California GHG emission standards and associated test procedures for new medium- and heavy-duty engines and new medium- and heavy-duty vehicles are identical to corresponding federal GHG emission standards and test procedures.³⁶ For the reasons set forth above, and because there is no evidence in the record or other information that EPA is aware of, EPA cannot find that CARB's Phase I GHG Regulation is inconsistent with section 202(a) based upon test procedure inconsistency

³⁴ See, e.g., 38 F.R 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).

³⁵ See, e.g., 43 FR 32182 (July 25, 1978).

³⁶ California Waiver Support Document at 44.

In addition, EPA did not receive any comments arguing that the California Phase 1 GHG Regulation was technologically infeasible or that the cost of compliance would be excessive, such that California's standards might be inconsistent with section 202(a).³⁷ In EPA's review of CARB's Phase 1 GHG Regulation, we likewise cannot identify any requirements that appear technologically infeasible or excessively expensive for manufacturers to implement within the timeframes provided.³⁸ EPA therefore cannot find that the California Phase 1 GHG Regulation does not provide adequate lead time or is otherwise not technically feasible.

We therefore cannot find that the California Phase 1 GHG Regulation that we analyzed under the waiver criteria is inconsistent with section 202(a).

Having found that the California Phase 1 GHG Regulation satisfies each of the criteria for a waiver, and having received no evidence to contradict this finding, we cannot deny a waiver for the regulation.

IV. Decision

The Administrator has delegated the authority to grant California section 209(b) waivers to the Assistant Administrator for Air and Radiation. After evaluating CARB's California Phase 1 GHG Regulation and CARB's submissions for EPA review, EPA is hereby granting a waiver for the California Phase 1 GHG Regulation.

³⁷ See, e.g., 78 FR 2134 (Jan. 9, 2013), 47 FR 7306, 7309 (Feb. 18, 1982), 43 FR 25735 (Jun. 17, 1978), and 46 FR 26371, 26373 (May 12, 1981).

³⁸ California Waiver Support Document at 34-43. For example, both CARB and EPA identified a host of technologies suitable for compliance with medium- and heavy-duty diesel engine CO₂ standards, and for engines in combination tractors and vocational vehicles. In addition, CARB and EPA identified a variety of compliance strategy technologies for heavy-duty gasoline engine CO₂ standards. EPA and CARB also identified a number of commercially available technologies that will enable 2014 through 2018 MY heavy-duty pick-up truck and van ("PUV") GHG emission standards.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(b) waiver has been granted under section 177 of the Act if certain criteria are met, this decision would also affect those states and those persons in such states. For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect 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 **[insert date 60 days after publication in the FEDERAL REGISTER]**. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

V. Statutory and Executive Order Reviews

As with past waiver and authorization 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).

This document is a prepublication version, signed by the Environmental Protection Agency's Acting Assistant Administrator of the Office of Air and Radiation, Janet McCabe, on December 22, 2016. We have taken steps to ensure the accuracy of this version, but it is not the official version.

Dated: _____

Janet G. McCabe, Acting Assistant Administrator,

Office of Air and Radiation.